Headnotes

to the Judgment of the Second Senate of 7 November 2017

– 2 BvE 2/11 –

1. **The parliamentary right to receive information under Article 38(1) second sentence and Article 20(2) of the Basic Law (*Grundgesetz* – GG) requires that public answers be given to queries. In cases where legitimate secrecy interests arise, applying the *Bundestag* Rules on Document Security (*Geheimschutzordnung*) when responding to parliamentary queries may constitute a suitable means for striking an appropriate balance between the right to ask questions afforded members of the *Bundestag* and conflicting legal interests.**

2. **The parliamentary right to ask questions and receive information guaranteed under the Constitution is subject to limitations which, insofar as they are set out in statutory law, must be rooted in constitutional law. Contractual or statutory confidentiality obligations as such are not a suitable means for limiting the right to ask questions and receive information.**

3. **The parliamentary right to receive information is a manifestation of the Federal Government's accountability to Parliament, which derives from the principle of democracy. This right can only pertain to matters that fall within the Government's area of responsibility. Within the context of democratic legitimation, the responsibility of the Federal Government extends to all activities involving companies incorporated under private law of which the Federation is the majority or sole owner. In this regard, the Government's responsibility is not limited to exercising the oversight and intervention rights afforded it statutorily.**

4. **The Federal Government's responsibility for the *Deutsche Bahn AG* [national railway corporation] relates both to the exercise of its shareholder duties as well as regulatory supervision exercised by the federal authorities and the proper discharge of its overall mandate to ensure the availability of network and services pursuant to Article 87e(4) GG. Furthermore, the business activities of the *Deutsche Bahn AG* also fall within the Federal Government's area of responsibility. Article 87e of the Basic Law does not cancel this relationship of responsibility.**

5. **The Federal Government may not refuse to answer specific parliamentary queries on the grounds that the fundamental rights of the *Deutsche Bahn AG* are affected. As a legal person controlled entirely by the state, the *Deutsche Bahn AG* does not pursue the exercise of personal freedom on the part of individual persons, nor can it invoke fundamental rights. Finally, Article 87e GG does not grant the *Deutsche Bahn AG* any defensive rights against state influence (exercised in pursuit of common good objectives) on its management.**

6. **The *Bundestag*'s right to ask questions is subject to limitations resulting from the legitimate interests of the Federation or a *Land* (*Staatswohl*), which could be threatened if classified information were to be disclosed.**

   a.The fiscal interests of the state in protecting confidential information relating to companies in which it holds shares are recognised as legitimate state interests under the Constitution.

   b.Ensuring the proper functioning of state supervision over banks and other financial institutions, the stability of the financial market and the success of support measures adopted by the state during the financial crisis are all matters pertaining to legitimate state interests, which may set limits to the Federal Government's duty to answer parliamentary queries.

7. **The *Bundestag*'s constitutional right to ask questions and receive information and the corresponding duty of the Federal Government to give answers constitute a sufficient basis for the interference with fundamental rights that the provision of information entails. Insofar, further statutory specifications are not required.**

8. **The parliamentary right to receive information is subject to the limits of reasonableness (*Zumutbarkeit*). The Federal Government is under an obligation to provide all information at its disposal or which can be obtained through reasonable efforts. It is required to exhaust all available means of obtaining the requested information.**

9. **It follows from the Federal Government's general constitutional duty to meet the German *Bundestag*'s requests for information that it must state reasons in case it refuses to provide the requested information. The Federal Government has a specific duty to substantiate its actions in the event that it does not provide answers in a publicly accessible *Bundestag* document (*Bundestagdrucksache*), but rather makes the information available to Parliament in the form of a classified document filed at the Secret Records Office of the German *Bundestag* (*Geheimschutzstelle des Deutschen Bundestages*).**

FEDERAL CONSTITUTIONAL COURT

– 2 BvE 2/11 –

Pronounced
on 7 November 2017
Fischböck
Amtsinspektorin
as Registrar of the
Court Registry

IN THE NAME OF THE PEOPLE

**In the proceedings
on
the applications to declare that:**

1. The respondent refused, on grounds that are untenable under constitutional law, to provide the information requested by way of written questions for December nos. 316 and 317 of 20 December 2010 (nos. 34 and 35 of the *Bundestag* document, *Bundestagsdrucksache* – BTDrucks 17/4350), or did so insufficiently, and thereby violated the rights of the German *Bundestag* and applicants nos. 1 and 5 under Art. 38(1) second sentence and Art. 20(2) second sentence of the Basic Law (*Grundgesetz* – GG.

   The respondent is obliged to provide the information requested in the parliamentary queries cited above.

2. The respondent refused, on grounds that are untenable under constitutional law, to provide the information requested by way of questions nos. 1, 4, 6, 8, 11, 14 and 18 of the Minor Interpellation (*Kleine Anfrage*) of 11 November 2010 (*Bundestag* document 17/3740), or did so insufficiently, and thereby violated the rights of the German *Bundestag* and applicants nos. 1, 2 and 5 under Art. 38(1) second sentence and Art. 20(2) second sentence GG.

   The respondent is obliged to provide the information requested in the parliamentary queries cited above.

3. The respondent refused, on grounds that are untenable under constitutional law, to provide the information requested by way of questions nos. 1, 2, 3, 4, 5 and 13 of the Minor Interpellation of 11 November 2010 (*Bundestag* document 17/3757), questions nos. 16 to 19 of the Minor Interpellation of 11 November 2010 (*Bundestag* document 17/3766) as well as questions nos. 1 to 14 of the Minor Interpellation of 4 October 2010 (*Bundestag* document 17/3149), or did so insufficiently, and thereby violated the rights of the German *Bundestag* and applicants nos. 3, 4 and 5 under Art. 38(1) second sentence and Art. 20(2) second sentence GG.

   The respondent is obliged to provide the information requested in the parliamentary queries cited above.

Applicant:
1. Dr. Gerhard Schick,
   Platz der Republik 1, 11011 Berlin,

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

3. Dr. Anton Hofreiter,
   Platz der Republik 1, 11011 Berlin,

4. Winfried Hermann,
   Platz der Republik 1, 11011 Berlin,

5. the parliamentary group of the *Bundestag* BÜNDNIS 90/DIE GRÜNEN,
   represented by chairpersons Katrin Göring-Eckardt
   and Dr. Anton Hofreiter,
   Platz der Republik 1, 11011 Berlin,

- authorised representative: Prof. Dr. Christoph Möllers,
Adalbertstraße 84, 10997 Berlin -

Respondent: the Federal Government,
represented by Federal Chancellor Dr. Angela Merkel, Member of the *Bundestag*,
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,

Huber,

Hermanns,

Müller,

Kessal-Wulf,

König,

Maidowski,

Langenfeld

held on the basis of the oral hearing of 9 and 10 May 2017:

J u d g m e n t

1. **The respondent violated the rights under Art. 38(1) second sentence GG and Art. 20(2) second sentence GG**

a. **of applicants nos. 1 and 5 and the German *Bundestag* by way of the answers submitted on 27 December 2010 in response to written question no. 34 of *Bundestag* document 17/4350 insofar as the question relates to the purchase price received for the sale of the *IKB Deutsche Industriebank AG*, and in response to written question no. 35 of *Bundestag* document 17/4350,**

b. **of applicants nos. 1, 2, 5 and the German *Bundestag* by way of the answers submitted in response to questions nos. 1, 4, 6, 8, 11 and 18 of the Minor Interpellation of 11 November 2010 (*Bundestag* document 17/3740),**

c. **of applicants nos. 3 and 5 and the German *Bundestag* by way of the answers submitted in response to questions nos. 1 to 5 and 13 of the Minor Interpellation of 11 November 2010 (*Bundestag* document 17/3757), to question no. 16 of the Minor Interpellation of 11 November 2010 (*Bundestag* document 17/3766), and in response to questions 1 to 14 of the Minor Interpellation of 4 October 2010 (*Bundestag* document 17/3149).**

2. **In relation to applicant no. 4, application no. 3 is dismissed as inadmissible in its entirety; in relation to applicants nos. 3 and 5 it is dismissed to the extent that it concerns answers provided by the Federal Government in response to questions nos. 17, 18 and 19 of the Minor Interpellation of 11 November 2010 (*Bundestag* document 17/3766).**

3. **The applications are dismissed as inadmissible to the extent that they seek an order of specific performance obliging the respondent to provide the information requested in the respective parliamentary queries.**

4. **For the rest, application no. 2 is rejected in relation to applicants nos. 1, 2 and 5 with regard to question no. 14 of the Minor Interpellation of 11 November 2010 (*Bundestag* document 17/3740).**

R e a s o n s :

A.

Applicants nos. 1 to 3 are currently members of the German *Bundestag*, applicant no. 4 held a *Bundestag* seat until 26 May 2011. Applicant no. 5 is a parliamentary group of the German *Bundestag*. The applicants contend that the respondent – the Federal Government – failed to answer several parliamentary queries during the period October to December 2010, or did so insufficiently, or refused to provide public answers based on an erroneous assertion of confidentiality interests. For one part, the questions in dispute concerned discussions and agreements between the Federal Government and the *Deutsche Bahn AG* on investments into the rail network; an expert opinion on the "Stuttgart 21" [construction] project commissioned by the Federal Government; delays in train operations and their causes. For the other part, the questions concerned regulatory measures of the Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht* – BaFin) directed at various financial institutions during the years 2005 to 2008. 1

I.

1. Art. 87(1) first sentence GG in the version applicable until 22 December 1993 prescribed that federal railways be operated by federal administrative authorities with their own administrative substructures. Regarding the business side of operations, the *Deutsche Bundesbahn* (German Federal Railway) had a dual nature, namely that of a business enterprise on the one hand, and an institution bound to serve the common good on the other. As a result of this legal setting, the operation of the *Deutsche Bundesbahn* placed a significant burden on public budgets. 2

The Act Amending the Basic Law of 20 December 1993 (Federal Law Gazette, *Bundesgesetzblatt* – BGBl I p. 2089) provided the necessary constitutional basis for reforming the railway systems of the Federation and the *Laender*, allowing in particular for the transformation of the federal railways into enterprises incorporated under commercial law. The objective of this reform was to entrench in the Constitution that the former federal railways shall be operated in the form of business enterprises under private law [...] and that the Federation shall have the administrative competence for the transport operations of the former federal railways [...]. 3

[…] 4-9

2. The questions in dispute relating to financial market supervision are set against the backdrop of the financial crisis, which originated from the subprime mortgage crisis in the United States and eventually prompted European governments to provide large scale support measures to numerous large financial institutions in Europe as well. 10

a) In Germany, the Act on the Implementation of an Action Plan for Financial Market Stabilisation of 17 October 2008 (Financial Market Stabilisation Act, *Finanzmarktstabilisierungsgesetz* – FMStG [BGBl I p. 1982]) set out the necessary mechanisms in this respect. Most notably, Art. 1 FMStG enacted the Act for the Establishment of a Financial Market Stabilisation Fund (*Finanzmarktstabilisierungsfondsgesetz* – FMStFG) establishing the so-called Special Fund for Financial Market Stabilisation (*Sonderfonds Finanzmarktstabilisierung* – SoFFin Fund). The SoFFin Fund was essentially designed to finance state guarantees assumed for newly agreed refinancing liabilities and the acquisition of shares in companies operating on the financial market, as well as the acquisition of risk assets (such as securities positions and value-adjusted receivables), by the Federation. 11

[…] 12

b) Moreover, the information rights and intervention powers of the BaFin vis-à-vis the banking and financial services institutions under its supervision were strengthened in reaction to the financial crisis (§ 1(1b) of the Act on the Banking Sector [Banking Sector Act, *Kreditwesengesetz* – KWG]). 13

[…] 14-15

II.

The facts of the proceedings are as follows: 16

[Excerpt from Press Release No. 94/2017 of 7 November 2017]

In 2010, members of the German *Bundestag* as well as the parliamentary group BÜNDNIS 90/DIE GRÜNEN (hereinafter: the applicants) submitted several parliamentary queries relating to the *Deutsche Bahn AG* as well as financial market supervision. The applicants primarily requested information on discussions and agreements between the Federal Government and the *Deutsche Bahn AG* regarding investments into the rail network, on an expert opinion commissioned by the Federal Government concerning an economic feasibility assessment of the “Stuttgart 21” project, as well as on delays in train operations and their causes. Additional questions submitted by the applicants to the Federal Government related to regulatory measures of the BaFin directed at various financial institutions during the years 2005 to 2008. In the applicants’ opinion, the Federal Government did not sufficiently respond to any of the relevant queries (...).”

[End of excerpt]

[…] 17-46

III.

With the application received on 18 March 2011, applicants nos. 1 to 5 initiated *Organstreit* proceedings (dispute between constitutional organs) before the Federal Constitutional Court. They seek a declaration that the respondent refused, on grounds that are untenable under constitutional law, to provide the requested information, or did so insufficiently and thereby violated the applicants' rights and the rights of the German *Bundestag* under Art. 38(1) second sentence and Art. 20(2) second sentence GG. In addition, the applicants seek an order of specific performance obliging the Federal Government to provide the requested information. 47

IV.

[…] 48-90

V.

[…] 91-136

VI.

In the proceedings, the Court received written statements from the State Parliament of the *Land* Rhineland-Palatinate and, as third party experts, the *Deutsche Bahn AG*, the Federal Association of German Public Financial Institutions (*Bundesverband Öffentlicher Banken Deutschlands*), the *IKB Deutsche Industriebank AG*, the *Commerzbank AG*, the association "*Die Deutsche Kreditwirtschaft*", the BaFin, and the *Hypo Real Estate Holding AG* (now incorporated as GmbH). 137

[…] 138-158

VII.

[…] 159

VIII.

The Federal Constitutional Court conducted an oral hearing on 9 and 10 May 2017. [...] Pursuant to § 27a of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* – BVerfGG), the Court heard testimony from third party experts the *Deutsche Bahn AG*, the BaFin, the Federal Agency for Financial Market Stabilisation, the *Bundesbank* (Federal Central Bank), the *IKB Deutsche Industriebank AG*, the *Hypo Real Estate Holding GmbH*, the *Commerzbank AG*, Prof. Dr. Volker Wieland on behalf of the expert committee for the monitoring of macro-economic developments (*Sachverständigenrat zur Begutachtung der gesamtwirtschaftlichen Entwicklung*), and Prof. Dr. Martin Hellwig on behalf of the Max Planck Institute for Research on Collective Goods. The experts testified, in particular, on questions pertaining to potential threats arising from the parliamentary queries in dispute with regard to the 160

competitiveness of *Deutsche Bahn AG*, the functioning of financial market supervision and the success of support measures [for financial institutions] adopted by the state.

B.

161 In relation to applicant no. 4, application no. 3 is inadmissible in its entirety; in relation to applicants nos. 3 and 5 it is inadmissible to the extent that it concerns the answers submitted by the Federal Government in response to questions nos. 17, 18 and 19 of the Minor Interpellation of 11 November 2010 (Bundestag document, *Bundestagsdrucksache* – BTDrucks 17/3766, p. 2). Furthermore, all applications are inadmissible to the extent that the applicants seek, in addition to a finding of unlawfulness, an order of specific performance obliging the Federal Government to provide the requested information. For the rest, the applications are admissible.

I.

162 The legal ability of applicants nos. 1 to 4 to be a party to the proceedings derives from Art. 93(1) no. 1 GG. As members of the German *Bundestag*, Art. 38(1) second sentence GG affords them constitutional status and entitles them to defend such status in *Organstreit* proceedings as “other parties” within the meaning of Art. 93(1) no. 1 GG (established case-law since Decisions of the Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 2, 143 <166 and 167>; see also, for example, BVerfGE 112, 363 <365>; 114, 121 <146>; 124, 161 <184>; 137, 185 <223 para. 104>; 140, 115 <138 para. 55>). When he ceased to hold a seat in the German *Bundestag* on 26 May 2011, applicant no. 4 did not lose the legal ability to be a party to the proceedings. For the purposes of determining the legal ability of members of the *Bundestag* to be a party to proceedings, the decisive factor is generally their status the moment constitutional proceedings are initiated (cf. BVerfGE 4, 144 <152>; 102, 224 <231>; 108, 251 <270 and 271>; 136, 277 <299 and 300 para. 60>; 139, 194 <220 para. 96>; 140, 115 <138 para. 55>) – in the present proceedings, the decisive date is 18 March 2011.

163 As a parliamentary group of the German *Bundestag*, applicant no. 5 has the legal ability to be a party to *Organstreit* proceedings pursuant to § 63 BVerfGG. [...]

164 […]

II.

165 […]

III.

166 For the most part, the applicants have standing to assert a violation of their rights (*Antragsbefugnis*).

167 1. [...] The *Organstreit* proceedings concern [...] the scope of the constitutionally

guaranteed right [of Parliament] to ask questions and receive information as well as the general duty of the Federal Government to address and answer parliamentary queries (cf. BVerfGE 124, 161 <185>; 137, 185 <224 para. 107>; 139, 194 <221 para. 99>). […]

168 This right to ask questions and receive information extends to the individual members of the *Bundestag* in accordance with the regulations set out in the Rules of Procedure of the German *Bundestag* (*Geschäftsordnung des Deutschen Bundestages* – GO-BT) (cf. BVerfGE 124, 161 <188>; 137, 185 <230 and 231 para. 129>; 139, 194 <221 para. 99>). The members themselves can therefore invoke a subjective public right related to their status as constitutional organs, entitling them to request that their queries be answered. Due to the fact that the relevant rights of the individual members derive from the rights of Parliament (*Ableitungszusammenhang*), failure to provide sufficient answers to members simultaneously violates the rights of the German *Bundestag* (cf. BVerfG 139, 194 <221 para 99>).

169 It follows that parliamentary groups of the German *Bundestag* not only assert a violation of own rights (cf. BVerfGE 91, 246 <250 and 251>; 100, 266 <270>; 124, 161 <187>). Rather, they may also assert rights vested in the German *Bundestag* (Art. 20(2) second sentence GG) by way of vicarious standing (*Prozessstandschaft*) in accordance with § 63 BVerfGG, irrespective of whether the relevant parliamentary group was even involved in the parliamentary query at issue (cf. BVerfGE 124, 161 <187>; 139, 194 <221 para. 99>).

2. […] 170-173

IV.

174 All applications are inadmissible to the extent that they seek, in addition to a finding of unlawfulness, an order of specific performance obliging the Federal Government to provide the requested information.

175 If an application is well-founded, the Federal Constitutional Court declares pursuant to § 67 first sentence BVerfGG that the respondent's contested act or omission violates a provision of the Basic Law. In principle, the law thus affords the respondent discretion in determining how to bring the situation in compliance with the Constitution. Consequently, the Court is generally barred from making an order of specific performance (leading case-law BVerfGE 20, 119 <129>; 124, 161 <188>; 136, 277 <301 para. 64>; with regard to a special case BVerfGE 112, 118 <147 and 148>).

176 In this respect, it should be noted that a declaratory finding of unlawfulness is by no means less binding than an order of specific performance; most notably, the issuing of an execution order pursuant to § 35 BVerfGG is not dependent on the latter. [...]

V.

177 Applicants nos. 1 to 3 and 5 have a recognised legal interest in bringing proceedings

(see 1 below). Applicant no. 4 ceased to have a legal interest in bringing proceedings, as he no longer holds a seat in the German *Bundestag* following his resignation effective 26 May 2011 (see 2 below). However, the fact that the respondent partially supplemented selected answers, or changed the relevant classification level at a later stage, does not (fully or partially) cancel the interest in bringing proceedings (see 3 below).

1. […] 178

179 Given that the parties disagree on the recognition and scope of parliamentary rights to ask questions and receive information, and seek clarification in this regard, the Court affirms a legal interest in bringing proceedings on the part of applicants nos. 1 to 3 and 5. [...]

180 2. In contrast, applicant no. 4 ceased to have a legal interest in bringing proceedings.

181 a) When an applicant ceases to hold a seat in the German *Bundestag,* the legal interest in bringing *Organstreit* proceedings is cancelled, in principle, if and because the specific or a similar dispute between the parties cannot arise again; yet, this is not the case if there is another legitimate interest in clarifying the legal question raised in the relevant proceedings (cf. BVerfGE 87, 207 <209>; see also BVerfGE 102, 224 <232>; 119, 302 <307 and 308> concerning the specific situation that, in addition, the challenged legal provision had been amended in the meantime; cf. BVerfGE 136, 190 <192 et seq. para. 4 et seq.> concerning the case where the respondent ceases to hold a *Bundestag* seat).

182 b) In the case of applicant no. 4, a subjective (continued) legal interest in seeking a declaratory finding of unlawfulness (*[Fortsetzungs-]Feststellungsinteresse*) (cf. BVerfGE 119, 302 <308>) is not ascertainable. As regards the relationship between applicant no. 4 and the respondent, there is no risk that the challenged violations could be repeated (cf. BVerfGE 119, 302 <308>; 136, 190 <193 para. 7> with further references) as there is no indication that the applicant will win a seat in the *Bundestag* again any time soon.

183 Nor can applicant no. 4 assert such legal interest on the grounds that he may have suffered – noticeable – injustice. Unlike in cases involving fundamental rights violations, a “mere interest in rehabilitation” does not suffice for establishing the need for a retrospective finding of unlawfulness (cf. BVerfGE 136, 190 <192 and 193 para. 6>).

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3. […] 185-190

VI.

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VII.

[…] 192

VIII.

The Federal Government is the correct respondent. It is irrelevant that the Government has, in the meantime, been constituted anew as this has no bearing on the identity of the organ (*Organidentität*). 193

C.

To the extent of their admissibility, the applications are for the most part well-founded. 194

I.

1. Under Art. 38(1) second sentence and Art. 20(2) second sentence GG, the German *Bundestag* has the right to ask questions and receive information from the Federal Government; this right extends, in accordance with the relevant regulations set out in the Rules of Procedure of the German *Bundestag*, to the individual members of the *Bundestag*, as well as to parliamentary groups in their capacity as associations of members of the *Bundestag*, and the right generally corresponds with a duty of the Federal Government to give answers (cf. BVerfG 124, 161 <188>; established case-law). The parliamentary right to ask questions and the right of interpellation give rise to a constitutional duty incumbent upon members of the Federal Government to address and answer parliamentary queries. The answers given by the Federal Government in response to written questions and to questions submitted during Question Time in Parliament (*Fragestunde*) serve the purpose of providing the *Bundestag* and its individual members, in an expeditious and reliable manner, with the information necessary for exercising their functions. By responding to parliamentary queries, the Federal Government thus sets the necessary conditions for a proper functioning of Parliament (for a comprehensive overview cf. BVerfGE 13, 123 <125>; 57, 1 <5>; 105, 252 <270>; 105, 279 <306>; 124, 161 <187 et seq.>; 137, 185 <230 and 231 para. 129>; 139, 194 <223 para. 104>; Federal Constitutional Court, *Bundesverfassungsgericht* – BVerfG, Order of the Second Senate of 13 June 2017 – 2 BvE 1/15 –, juris, para. 85). 195

a) The parliamentary system of government is characterised, *inter alia*, by parliamentary oversight. Parliamentary oversight of government and the executive branch lends effect to the principle of separation of powers as one of the fundamental principles informing the functions and order set out under the Basic Law. The principle of separation of powers does not aim to realise an absolute separation of state functions; rather, it governs the distribution of political power, the interaction of the three branches of government and the resulting mutual checks and balances, and hence 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>; 137, 185 <231 para. 130>; 139, 194 196

<223 and 224 para. 105>; BVerfG, Order of the Second Senate of 13 June 2017 – 2 BvE 1/15 –, juris, para. 86). Especially with regard to the powerful role of the executive power – not least because Parliament lacks the means to interfere in the governmental sphere of immediate executive action and implementation of the law – the principle of separation of powers requires that the Basic Law be interpreted so as to allow for effective parliamentary oversight. Parliament cannot exercise its powers of oversight over the Federal Government if it does not partake in the Federal Government's knowledge. Therefore, the parliamentary interest in receiving information is of paramount importance insofar as it relates to uncovering possible unlawful conduct or similar forms of misconduct within government or the executive branch (cf. BVerfGE 67, 100 <130>; 110, 199 <219, 222>; 124, 78 <121>; 137, 185 <231 and 232 para. 130>; 139, 194 <223 and 224 para. 105>; BVerfG, Order of the Second Senate of 13 June 2017 – 2 BvE 1/15 –, juris, para. 86).

197 At the same time, parliamentary oversight is also a manifestation of the Federal Government's accountability to Parliament, which is derived from the principle of democracy. Furthermore, Art. 20(2) second sentence GG specifies the principle of sovereignty of the people. This provision determines that all state authority is derived from the people, and that it shall be exercised by the people through elections and other votes and through specific legislative, executive and judicial bodies. This requires that the people can effectively influence the exercise of state power by these bodies. Any act of these bodies must be attributable and accountable to the will of the people (cf. BVerfGE 83, 60 <72>; 93, 37 <66>; 130, 76 <123>; 137, 185 <232 para. 131>; 139, 194 <224 para. 106>; BVerfG, Order of the Second Senate of 13 June 2017 – 2 BvE 1/15 –, juris, para. 87).

198 The relationship of accountability between the people and state authority is established by parliamentary elections, laws enacted by Parliament setting legal standards for the executive branch, and the fact that the administration is generally bound by government instructions; yet, in addition, accountability is also achieved by way of parliamentary influence on governmental policies. The notion that "state authority derives from the people" must be tangible to both the people and state organs, and it must take effect in practice. This requires that a sufficient measure of democratic legitimation – a certain level of legitimation – be achieved (cf. BVerfGE 83, 60 <72>; 93, 37 <67>; 107, 59 <87>; 130, 76 <124>; 137, 185 <232 para. 131>; 139, 194 <224 and 225 para. 107>; BVerfG, Order of the Second Senate of 13 June 2017 – 2 BvE 1/15 –, juris, para. 87). Only the Parliament elected by the people can confer democratic legitimation upon the organs and public officials of state administration at all levels. In case officials and organs do not receive legitimation by way of direct elections, the democratic legitimacy of exercised state power generally requires that the appointment of public officials be attributable to the sovereign people and that they carry out their functions with sufficient functional-substantive legitimation. In terms of personnel, a sovereign decision is democratically legitimated if the appointment of the responsible public official can be attributed to the sovereign people in an uninterrupted

chain of legitimation; functional-substantive legitimation is conferred by the fact that public officials are bound by the law as well as by the mandates and instructions received from the government. The latter confers legitimation due to the government's accountability to Parliament (cf. BVerfGE 93, 37 <67 and 68>; 107, 59 <87 and 88>; 130, 76 <124>; 137, 185 <232 and 233 para. 131>; 139, 194 <225 para. 107>; BVerfG, Order of the Second Senate of 13 June 2017 – 2 BvE 1/15 –, juris, para. 87).

199 Keeping information secret from Parliament limits parliamentary oversight and may thus impair or disrupt the necessary relationship of democratic legitimation (cf. BVerfGE 130, 76 <128>; 137 185 <233 para. 132>; BVerfG, Order of the Second Senate of 13 June 2017 – 2 BvE 1/15 –, juris, para. 88).

200 b) The parliamentary right to information is primarily designed for receiving the requested information publicly (cf. BVerfGE 124, 161 <193>). The exchange of arguments and counter-arguments as well as public debate and discussion are essential elements of democratic parliamentarianism (cf. BVerfGE 70, 324 <355>; cf. also BVerfGE 130, 318 <344>; cf. further BVerfGE 84, 304 <329>).

201 The measure of publicity in debates and decision-making ensured by the parliamentary process not only makes the reconciliation of conflicting interests possible to an extent that could not be achieved through a less transparent process (cf. BVerfGE 70, 324 <355> with reference to BVerfGE 40, 237 <249>). The principle that Parliament be open to the public also enables the citizens to exercise oversight and thus serves to ensure that Parliament is effectively accountable to the electorate (cf. BVerfGE 125, 104 <124>; 130, 318 <344>). Accountability of Parliament vis-à-vis the electorate is one of the central mechanisms allowing the people to effectively influence the exercise of state authority (cf. BVerfGE 83, 60 <71 and 72>; 93, 37 <66>). Citizens are only capable of responsibly participating in formulating the political will of the people if the individual has sufficient knowledge of the pertinent substantive issues, as well as of the decisions, measures and solutions adopted by the constituent state organs, in order to be able to evaluate, endorse or deprecate any of the latter (cf. BVerfGE 44, 125 <147>).

202 There may be cases, however, where it becomes necessary to explore suitable means of sharing information in a manner that ensures that the parliamentary interest in information is satisfied while the legitimate secrecy interests of the government are safeguarded (cf. BVerfGE 124, 161 <193>). Similarly, the fundamental rights of persons concerned may require an assessment as to whether a public discussion is justified or whether the relevant fundamental rights require certain precautions regarding parliamentary confidentiality (cf. BVerfGE 77, 1 <47>; 124, 78 <125>).

203 aa) Accordingly, it is permissible in certain cases to delegate functions of the *Bundestag* Plenary to subsidiary bodies of Parliament (cf. BVerfGE 70, 324 <364>; 130, 318 <359 et seq.>); the scope of such exceptions must be strictly limited, however, and they may only be applied in cases of absolute necessity (cf. BVerfGE 130, 318 <360>).

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It must be taken into account that the German *Bundestag* generally exercises its representative function through all of its members collectively (BVerfGE 130, 318 <342>; already established in BVerfGE 44, 308 <316>; 56, 396 <405>; 80, 188 <218>; furthermore BVerfGE 131, 230 <235>). For that reason, each member of Parliament is called upon to participate in the deliberations and decisions of the *Bundestag* (cf. BVerfGE 130, 318 <342>). If members of the *Bundestag* are excluded from participating in parliamentary decision-making because the authority to decide has been transferred to a decision-making committee, this is only permissible in order to protect other legal interests of constitutional status and requires strict adherence to the principle of proportionality (cf. BVerfGE 131, 230 <235>). This requires a special reason that is recognised as legitimate under the Constitution and carries weight commensurate with the equality of the members of the *Bundestag* (cf. BVerfGE 131, 230 <235>; 137, 185 <241 and 242 para. 151>).

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If, based on its power to organise its own affairs, the German *Bundestag* establishes – in order to protect other legal interests of constitutional status – a committee or another subsidiary body tasked with exercising certain functions independently and *in lieu* of the *Bundestag* Plenary, and if the underlying reasons are as important as the requirement of equal participation of all *Bundestag* members, neither the resulting limitation of status rights afforded members of the *Bundestag* nor the resulting unequal treatment of such members may exceed the scope of what is absolutely necessary to that end (cf. BVerfGE 130, 318 <353>). Moreover, maintaining confidentiality in order to safeguard constitutionally protected goods constitutes a compelling reason pertaining to the interest of the state, and as such can generally serve to justify a limitation of status rights of *Bundestag* members (cf. BVerfGE 70, 324 <358 and 359>; 130, 318 <359>; cf. also BVerfGE 131, 230 <235>). […]

206

bb) Similarly, applying the *Bundestag* Rules on Document Security (*Geheimschutzordnung*) when responding to parliamentary queries may, as a less restrictive measure, constitute a suitable means for striking an appropriate balance between the right to ask questions afforded members of the *Bundestag* and conflicting legal interests.

207

The Federal Constitutional Court recognises that the *Bundestag* Rules on Document Security are, in principle, a suitable means for ensuring a balance between the government's interest in confidentiality and Parliament's interest in information (cf. BVerfGE 67, 100 <135>; 70, 324 <359>; 124, 78 <124 and 125>; 130, 318 <362>; 131, 152 <208>; 137, 185 <264 para. 199>; 143, 101 <143 para. 139>; BVerfG, Order of the Second Senate of 13 June 2017 – 2 BvE 1/15 –, juris, para. 97). These provisions on the protection of confidentiality reflect the fact that Parliament cannot exercise its legislative powers, its budget powers or its powers of parliamentary oversight if it does not partake in the Federal Government's secret knowledge (cf. BVerfGE 143, 101 <135 para 139>; BVerfG, Order of the Second Senate of 13 June 2017 – 2 BvE 1/15 –, juris, para. 98).

208 A systematic overall assessment of numerous constitutional provisions – such as Art. 42(1) second sentence, Art. 44(1) second sentence, Art. 45a(3) and Art. 53a GG – shows that the Constitution provides for the exclusion of the general public as a possible means for safeguarding confidentiality interests while still allowing for the participation of Parliament. Nonetheless, applying the *Bundestag* Rules on Document Security conflicts with Parliament's public function. The relevant exceptions contained in the Rules do not alter the fact that the public nature of deliberations in accordance with Art. 42(1) GG is generally indispensable for parliamentary decision-making. Exercising Parliament's right to receive information on the basis of the parliamentary confidentiality regime may not bring about a fundamental shift in the way Parliament operates and functions in important areas, nor eclipse its specific public function (cf. BVerfGE 137, 185 <264 para. 199>).

209 Members of the *Bundestag* are barred from introducing information obtained subject to the Rules on Document Security into the public discourse shaping political opinions. If Parliament receives information on the basis of the Rules on Document Security, the requirement of accountability between the Federal Government and Parliament is formally complied with. Nonetheless, the further relationship of responsibility linking the state to the people is disrupted. The election process ensures that the people can exercise oversight over the use of power by the political majority (BVerfGE 5, 85 <199>). Without partaking in the relevant information, the electorate cannot take into account or evaluate government action or Parliament's reaction upon receiving the information in question. Yet, these elements are essential for conferring democratic legitimation by way of elections (cf. BVerfGE 137, 185 <264 para. 200>).

210 Moreover, applying the Rules on Document Security weakens the relationship of oversight between the Federal Government and Parliament. Public transparency is essential for the exercise of parliamentary oversight. While information requested for the preparation of legislation provides Parliament with relevant expertise and thus fulfils its intended purpose even when it is not made available to the public, the same is not true with regard to information provided for the purposes of political or legal oversight. In political reality, the right to ask questions for oversight purposes is primarily a means employed by the opposition; therefore, it generally requires publicity to be effective. Without the element of publicity, parliamentary oversight lacks the means to sanction misconduct in practice (cf. BVerfGE 137, 185 <264 and 265 para. 201>).

211 2. Nevertheless, the right of the German *Bundestag* and its individual members to receive information is not absolute.

212 a) The parliamentary right to ask questions and receive information, as guaranteed under the Constitution, is subject to limitations which, insofar as they are set out in statutory law, must be rooted in constitutional law (cf. BVerfGE 124, 78 <118>; 143, 101 <135 para. 111> on the right to collect evidence afforded parliamentary committees of inquiry).

213 Contractual confidentiality obligations or statutory confidentiality obligations set out

in the Banking Sector Act and the Stock Corporation Act (*Aktiengesetz* – AktG) as such are not a suitable means for limiting the right to ask questions and receive information. The same applies to the guidelines adopted by the German *Bundestag* as part of its internal rules of procedure in relation to parliamentary queries concerning public sector companies incorporated under private law. Nevertheless, provisions of ordinary law may be relevant insofar as they may possibly achieve, within the legislature's leeway to design, a balance between the conflicting (constitutional) rights.

214 b) Due to the fact that the right of interpellation is rooted in the oversight function of Parliament, and furthermore reflects the Federal Government's accountability to Parliament which derives from the principle of democracy, the right of the *Bundestag* and its individual members to receive information does, from the outset, not extend to matters that do not fall within the Federal Government's competence. Such matters do not touch upon the Federal Government's accountability to Parliament (cf. BVerfGE 124, 161 <189, 196>; 137, 185 <233 para. 134>; 139, 194 <225 para. 107>; BVerfG, Order of the Second Senate of 13 June 2017 – 2 BvE 1/15 –, juris, para. 90).

215 aa) The Federal Government's responsibility extends to the activities of its immediate subordinate authorities and the information received by them from third parties if and to the extent that such information is relevant for decision-making or other administrative processes (cf. BVerfGE 124, 161 <196 and 197> regarding the Federal Office for the Protection of the Constitution; cf. BVerfGE 139, 194 <225 et seq. paras. 108 et seq.> regarding the Federal Police; cf. BVerfG, Order of the Second Senate of 13 June 2017 – 2 BvE 1/15 –, juris, para. 90 regarding the federal intelligence services). Therefore, the Federal Government is not only held accountable for governmental action in the strict sense but for all matters of executive responsibility. This includes all functions carried out by the Federal Government itself as well as functions for the exercise of which it is responsible, i.e. functions assigned to subordinate authorities [...].

216 a) Where the Federation is the majority or sole owner of companies incorporated under private law, the activities of such companies fall within the Federal Government's area of responsibility.

217 (1) This is due to the fact that commercial activities of the public sector require specific legitimation. In the Federal Constitutional Court's case-law, the parliamentary right to ask questions is held to be an instrument and prerequisite for effectively conferring democratic legitimation; accordingly, the concept of responsibility regarding the Federal Government must be understood in the context of democratic legitimation.

218 According to the Court's case-law, all acts of public authority that qualify as a decision require democratic legitimation. Any such act must be attributable and accountable to the will of the people (cf. BVerfGE 77, 1 <40>; 83, 60 <72>; 93, 37 <66>; 107, 59 <87>; 130, 76 <123>).

Such a relationship of democratic legitimation is also required if companies incorporated under private law of which the state is the – sole or majority – shareholder are tasked with carrying out state functions. If the state serves as majority shareholder in a company incorporated under private, the members of the respective board of directors are subjected to particular state scrutiny in respect of their management performance; this is due to the fact that the state is accountable to the people for its decision to hold the majority interest in a private-law company. It is incumbent upon Parliament to exercise oversight over the Federal Government's budget and economic policies, including activities of the state in the capacity as shareholder of private sector companies (cf. BVerfGE 98, 145 <162 and 163>). 219

(2) If the Federal Government makes use of entities incorporated under private law in order to discharge its functions, governmental responsibility is not limited to exercising the oversight and intervention rights afforded it statutorily. [...] 220

The responsible ministry officials, which form part of an uninterrupted chain of legitimation, can only confer democratic legitimation upon companies owned fully or partly by the state if the officials have the power to influence the relevant company's activities. Thus, the requirement that state activities be based on democratic legitimation (Art. 20(2) first sentence GG) obliges the state to reserve sufficient intervention rights in relation to the relevant company [...]. 221

However, in securing the necessary intervention rights, the state is not restricted to any specific approach. Democratic legitimation can be achieved by way of personnel and organisation structures, i.e. in the form of an uninterrupted chain of legitimation linking the people to the organ in charge of the relevant state matters; alternatively, legitimation can be achieved at a functional-substantive level by way of subjecting the relevant organs to strict observance of the laws enacted by Parliament or to sanctioned democratic accountability, including corresponding oversight mechanisms, in relation to the exercise of the respective functions. Overall, a sufficient measure of democratic legitimation – a certain level of legitimation – must be achieved (cf. BVerfGE 83, 60 <72>; 93, 37 <67>; 107, 59 <87>; 130, 76 <124>; 137, 185 <232 and 233>; 139, 194 <224 and 255 para. 107). 222

In respect of stock corporations of which the Federation is the sole shareholder, the measure of democratic legitimation depends on the selection, appointment and removal of board members representing the state (organisational-personnel legitimation) as well as the reporting obligations incumbent upon the relevant representatives and their obligation to observe instructions (functional-substantive legitimation). 223

The members of the board of directors are appointed by the supervisory board. Supervisory board members, in turn, are either elected in the shareholders' meeting composed of federal representatives or directly appointed by the Federation (§ 101(2) AktG); accordingly, the Federal Government has full control over the selection of board members. When applying the criteria developed in relation to self-governing public entities (*funktionale Selbstverwaltung*), it follows that members of the board of 224

directors in state-controlled stock corporations receive full democratic legitimation due to the fact that – in accordance with the “principle of double majority” – they are appointed by the members of the supervisory board (cf. BVerfGE 107, 59 <88>) the majority of which is, in turn, appointed in the shareholders’ meeting by the Federation in its capacity as sole shareholder. [...]

225 Moreover, the Federation is afforded review and supervisory powers, albeit limited in scope, in relation to the supervisory board (§ 111 AktG) whose members it controls [...]. At the same time, members of the supervisory board indeed have a duty to act in the best interest of the corporation and, in principle, may not receive binding instructions. Thus, the decision to carry out certain public functions through companies incorporated under private law can result in a lack of sufficient oversight, control and legitimation. This does not mean, however, that the applicable company law ought to be adapted to the need of the state to exercise effective control in its capacity as shareholder; rather, it is incumbent upon the state to choose a suitable legal form for entities tasked with carrying out state functions in order to guarantee that the state retains the necessary level of control. If the statutory intervention rights set out under the applicable company law do not sufficiently ensure that the Federal Government can account to Parliament for the business operations of a Federation-owned stock corporation, the Federal Government’s responsibility is by no means limited to exercising its statutory rights as shareholder, nor to exercising the overall responsibility for ensuring the availability of certain services (*Gewährleistungsverantwortung*) that potentially rests with the state.

226 Whether or not the relationship of legitimation would still satisfy the requirements deriving from the principle of democracy in this case is not relevant to the current proceedings. After all, even if the chain of legitimation were found to be deficient, this would – similar to acts exceeding legal competences – have no bearing on the Federal Government’s accountability to Parliament and, consequently, its duty to give answers.

227 c) Further limitations of the right to request information derive from the principle of separation of powers (cf. BVerfGE 67, 100 <139>; 110, 199 <214>; 124, 78 <120>; 131, 152 <206>; 137, 185 <233 paras. 135 et seq.>; 143, 101 <136 para. 117>; BVerfG, Order of the Second Senate of 13 June 2017 – 2 BvE 1/15 –, juris, para. 91).

228 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 allocation 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>). The constitutional system of the Basic Law does not prescribe or implement the separation of powers in an absolute manner.

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 and 280>; established case-law). Therefore, the principle of separation of powers provides both basis and limitation of Parliament's right to receive information vis-à-vis the Federal Government (cf. BVerfGE 110, 199 <219>; 124, 78 <122>; 137, 185 <233 para. 135>; 143, 101 <136 and 137 para. 118>; BVerfG, Order of the Second Senate of 13 June 2017 – 2 BvE 1/15 –, juris, para. 91).

229 Government's responsibility towards Parliament and the people necessarily requires a core area reserved for autonomous executive decision-making, which encompasses a sphere relating to initiative, deliberation and action that is generally not open to investigation. First of all, this includes the internal deliberation and decision-making process of the Federal Government itself [...] (cf. BVerfGE 67, 100 <139>; 110, 199 <214, 222>; 124, 78 <120>; 137, 185 <234 para. 136>; 143, 101 <137 para. 119>; BVerfG, Order of the Second Senate of 13 June 2017 – 2 BvE 1/15 –, juris, para. 92). […] Therefore, the Federal Government is generally not required to meet parliamentary information requests where the relevant information could result in a co-governing by third parties of decisions that fall within the exclusive competence of the Federal Government. Such a risk regularly arises when the information in question concerns the preparatory stages of governmental decision-making as long as the decision itself has not yet been taken. Thus, the *Bundestag*'s oversight competence extends, in principle, only to completed matters; it does not entail the authority to interfere with on-going deliberations and preparations of decisions (cf. BVerfGE 143, 101 <137 para. 120>; BVerfG, Order of the Second Senate of 13 June 2017 – 2 BvE 1/15 –, juris, para. 93).

230 […]

231 This notwithstanding, an absolute right of Parliament to request information – even if it only arose upon conclusion of the respective decision-making processes – would impact, most notably by way of restrictive advance effects, the autonomous function assigned to government under the principle of separation of powers (cf. BVerfGE 110, 199 <215>; 124, 78 <121>). [...] [There] may also be cases where a matter has been concluded already yet the Federal Government would not be required to share confidential information falling within the core of autonomous executive decision-making (cf. BVerfGE 67, 100 <139>; 110, 199 <216>; 124, 78 <121>; 137, 185 <250 para. 169>). In respect of completed matters, the limits of the parliamentary right to receive information can only be determined by taking into account the specific circumstances of each case (cf. BVerfGE 110, 199 <219>; 124, 78 <122>; 137, 185 <250 para. 169>). The requirement to balance the conflicting interests reflects the dual function of the principle of separation of powers in that it is both basis and limitation of parliamentary oversight (BVerfGE 110, 199 <219>; 124, 78 <122>; 137, 185 <250 para. 169>).

232 Once the relevant matter is concluded, the Federal Government's autonomy in decision-making no longer constitutes a significant functional interest; rather, it is mostly the interest in ensuring that internal decision-making processes of the Government remain free and unprejudiced that carries weight in this regard. In that respect, information relating to the preparatory stage of government decisions, which could provide insights into the process of internal deliberations and decision-making, requires greater protection the closer the information relates to the actual executive decision (cf. BVerfGE 110, 199 <221>; 124, 78 <122 and 123>; 137, 185 <250 para. 170>).

233 d) The right of members of the *Bundestag* to ask questions and the Federal Government's duty to give answers are furthermore limited by the obligation to observe fundamental rights incumbent upon both organs pursuant to Art. 1(3) GG (cf. BVerfGE 67, 100 <142>; 76, 363 <387>; 77, 1 <46>; 124, 78 <125>; 137, 185 <243 para. 153>; BVerfG, Order of the Second Senate of 13 June 2017 – 2 BvE 1/15 –, juris, para. 100).

234 aa) If the state discloses business and trade secrets, or demands such disclosure, the scope of protection under Art. 12(1) GG is affected (cf. BVerfGE 115, 205 <230>; 128, 1 <56>; 137, 185 <243 para. 154>). Pursuant to Art. 19(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 both legal and natural persons alike (BVerfGE 50, 290 <363>; 115, 205 <229>; 137, 185 <243 para. 154>; established case-law).

235 The freedom of Art. 12(1) GG protects the occupation-related conduct of individuals or companies in the market. […] If a state measure impacting on competition impairs a legal person in its occupational sphere of activity this constitutes a restriction of the legal person's freedom under Art. 12(1) GG (cf. BVerfGE 86, 28 <37>; 115, 205 <230>; 137, 185 <243 and 244 para. 154>). […]

236 bb) The fundamental right to informational self-determination guarantees each individual the authority to decide, in principle, if and to what extent he or she wishes to disclose personal matters (cf. BVerfGE 65, 1 <43>; 78, 77 <84>; 84, 192 <194>; 96, 171 <181>; 103, 21 <32 and 33>; 113, 29 <46>; 115, 320 <341>; 128, 1 <42>). In particular, the holders of this right are entitled to protection against the unrestricted collection, storage, use and sharing of personal data that is individualised or can otherwise be attributed to the individual concerned (cf. BVerfGE 65, 1 <43>; 67, 100 <143>; 84, 239 <279>; 103, 21 <33>; 115, 320 <341>; 128, 1 <42>). The Federal Government interferes with the right to informational self-determination, inter alia, if it shares information on the remuneration of banking staff in a manner that allows for the "determination" or "identification" of the staff members concerned (cf. BVerfGE 128, 1 <46>; Chamber Decisions of the Federal Constitutional Court, *Kammerentscheidungen des Bundesverfassungsgerichts* – BVerfGK 13, 336 <340>).

237 Insofar as the right to informational self-determination is rooted in Art. 2(1) GG, it

may also be invoked by legal persons in accordance with Art. 19(3) GG (cf. BVerfGE 118, 168 <202 and 203>; 128, 1 <43>). […] [In this regard] it must be established that the information-related measure [...] poses a threat to the legal person concerned with regard to the exercise of its specific freedoms (cf. BVerfGE 118, 168 <204>).

238 cc) Domestic legal persons incorporated under public law as well as such legal persons incorporated under private law that are under full or majority control of the state may not invoke substantive fundamental rights.

239 (1) Domestic legal persons incorporated under public law cannot invoke substantive fundamental rights (cf. BVerfGE 4, 27 <30>; 15, 256 <262>; 21, 362 <368 et seq.>; 35, 263 <271>; 45, 63 <78>; 61, 82 <100 and 101>; most recently BVerfGE 143, 246 <313 para. 187>). The Federal Constitutional Court has based this lack of legal ability with regard to fundamental rights on a number of different reasons, some of which are mutually complementary. The Court held, inter alia, that the state is bound by fundamental rights pursuant to Art. 1(3) of the Basic Law and therefore cannot be obliged by, as well as entitled to fundamental rights at the same time (cf. BVerfGE 15, 256 <262>; 21, 362 <369 and 370>); from the perspective of the human person and the citizen as the original holders of fundamental rights, even public entities that are organisationally independent invariably constitute but a specific manifestation of the uniform authority of the state (cf. BVerfGE 4, 27 <30>; 21, 362 <370>). [According to this case-law,] legal persons can justifiably be viewed as holders of fundamental rights, and as a consequence afforded the protection of certain substantive fundamental rights, only in the event that the formation and operation of the legal person concerned is an expression of the free development of private, natural persons; this is the case, in particular, where the extension of fundamental rights to legal persons appears reasonable and necessary in consideration of the human beings that are behind the legal person (cf. BVerfGE 21, 362 <369>; 61, 82 <101>; 68, 193 <206>). The Court has held that in carrying out their functions, legal persons incorporated under public law do not face the same vulnerability to threats by the state that typically merit fundamental rights protection (*grundrechtstypische Gefährdungslage*) as would be the case for individual holders of fundamental rights (cf. BVerfGE 45, 63 <79>; 61, 82 <102>; BVerfGE, 143, 246 <313 para. 188>).

240 Exceptions apply, however, to those legal persons incorporated under public law that are directly linked to a particular sphere of human life protected by specific fundamental rights, or that inherently form part of such sphere because of their particular nature; relevant examples include broadcasting corporations, universities and their faculties (cf. BVerfGE 31, 314 <321 and 322>; 74, 297 <317 and 318>; 93, 85 <93>; 107, 299 <309 and 310>), or churches and other ideological communities governed by public law (cf. BVerfGE 19, 129 <132>; 30, 112 <119 and 120>; 42, 312 <321 and 322>; 70, 138 <160 and 161>).

241 (2) Based on essentially the same considerations, the Federal Constitutional Court has also denied legal persons incorporated under private law of which the state is the

sole shareholder the legal ability to hold substantive fundamental rights, and enjoined them to observe fundamental rights instead; this was, in part, based on the reasoning that otherwise the question of whether public entities were vested with the legal ability to hold fundamental rights would, to no insignificant extent, depend on the respective form of organisation (cf. BVerfGE 45, 63 <79 and 80>; 68, 193 <212 and 213>; BVerfGE 143, 246 <314 para. 190>). These considerations apply *mutatis mutandis* to so-called mixed-ownership companies if the state holds more than 50% of shares in the respective legal person incorporated under private law (cf. BVerfGE 143, 246 <314 para. 190>; on the corresponding question whether such entities are bound by fundamental rights, BVerfGE 128, 226 <244, 246 and 247>).

242 (a) It is well established that in cases where the state is the sole owner of public sector companies incorporated under private law, not only the public entity owning the relevant company is bound by fundamental rights but so is the company itself. This is commensurate with the nature of the company as an independent operational unit; it also ensures that public authority is effectively bound by fundamental rights regardless of whether, to what extent, and in what form sole or joined shareholders are statutorily afforded influence over the management of business operations; in addition, observance of fundamental rights is assured regardless of how – regarding companies with several public sector shareholders – the different shareholders coordinate their respective intervention rights. Activities carried out by public sector companies still qualify as the exercise of state functions, irrespective of the intervention rights regime applicable under company law, and the relevant companies themselves remain bound by fundamental rights (cf. BVerfGE 128, 226 <245 and 246>).

243 (b) This also holds true with regard to mixed-sector companies with both private and public shareholders if the company is controlled by the state (cf. BVerfGE 128, 226 <246>). […] The criterion of state control, which is determined on the basis of majority ratios in terms of company shares, does not refer to specific rights to influence management decisions but rather to the overall responsibility for the respective company. [...] When conducting [...] [their] business operations, state-controlled companies are directly bound by fundamental rights and, conversely, are not entitled themselves to invoke fundamental rights vis-à-vis citizens (cf. BVerfGE 128, 226 <246 and 247>; cf. also BVerfGE 143, 246 <320 para. 204>).

244 dd) The *Bundestag*'s constitutional right to ask questions and receive information and the corresponding duty of the Federal Government to give answers constitute a sufficient basis for the interference with fundamental rights that the provision of information entails. According to the Federal Constitutional Court's case-law, the allocation of functions to the Federal Government also authorises the provision of function-relevant information. Insofar, further statutory specifications are not required.

245 If the legislature, however, has put in place ordinary statutory regulations in order to solve the conflict between the right of the German *Bundestag* and its individual members to ask questions and receive information, on the one hand, and the protection of

the affected companies' fundamental rights on the other, the balancing of interests must take into account the legislature's margin of assessment and leeway to design. Alternatively, if the legislature defers this decision to bodies tasked with implementing the law, acts of such bodies that interfere with fundamental rights are subject to constitutional review as to whether both the assumptions and balancing rules applied as well as the balancing of interests in the specific case satisfy constitutional requirements. This includes a review as to whether the decision-making bodies remain within the margin of appreciation afforded them and whether they achieve an optimal balance in accordance with the principle of practical concordance (*praktische Konkordanz*) in the specific dispute (cf. BVerfGE 137, 185 <258 para. 185> with reference to BVerfGE 115, 205 <233 and 234>).

246 e) The *Bundestag*'s right to receive information is furthermore limited by legitimate state interests (*Staatswohl*) of the Federation and the *Laender* that could be threatened if classified information were to be disclosed (cf. BVerfGE 67, 100 <134 et seq.>; 124, 78 <123>; 137, 185 <240 Rn. 149>; BVerfG, Order of the Second Senate of 13 June 2017 – 2 BvE 1/15 –, juris, para. 95).

247 When determining the constitutional limits to the parliamentary right to ask questions and receive information, consideration must be given to the importance attached to this right within the constitutional order. This is also relevant when interpreting and applying the concept of jeopardised state interests (cf. BVerfGE 124, 78 <123>; 137, 185 <204 para. 149>). In this context, it must be noted that in its Rules on Document Security, the *Bundestag* has set out detailed provisions for the protection of official secrets in the exercise of parliamentary functions (cf. BVerfGE 67, 100 <135>; 77, 1 <48>; cf. furthermore BVerfGE 70, 324 <359>). 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). These provisions on the protection of confidentiality reflect the fact that Parliament cannot exercise its legislative powers, its budget powers or its powers of parliamentary oversight if it does not partake in the Federal Government's secret knowledge (cf. BVerfGE 67, 100 <135>; 70, 324 <359>; 137, 185 <240 and 241 para. 149>; 143, 101 <143 para 139>; BVerfG, Order of the Second Senate of 13 June 2017 – 2 BvE 1/15 –, juris, paras. 97 and 98). Moreover, it must be taken into account that within the parliamentary system of government established by the Basic Law, the Federal Government is not the sole guardian of state interests; rather, the *Bundestag* and the Federal Government are jointly entrusted with safeguarding the legitimate interests of the state (cf. BVerfGE 67, 100 <136>; 124, 78 <124>; 137, 185 <241 para 149>). Parliament and its organs may not be subjected to the same treatment as external parties belonging to circles from which information needs to be kept secret in order to protect legitimate state interests (cf. BVerfGE 124, 78 <124>; 137, 185 <241 para. 149>). Thus, the Federal Government can generally not invoke state interests of the Federation vis-à-vis the *Bundestag* if effective safeguards for preventing the disclosure of official secrets have been put in place on both sides. This does not disregard the fact

that compliance with provisions for the protection of official secrets does not necessarily rule out the possibility of secrets being disclosed; yet, this risk applies to all three state powers alike (BVerfGE 67, 100 <136>; 137, 185 <241 para. 149>; 143, 101 <143 para. 138>; BVerfG, Order of the Second Senate of 13 June 2017 – 2 BvE 1/15 –, juris, para. 98).

248 It remains, however, that 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>). The Federal Government is therefore not obliged to hand over to the *Bundestag* classified documents containing official secrets if the *Bundestag* does not guarantee confidentiality to the extent considered necessary by the Federal Government (cf. BVerfGE 67, 100 <137>; 137, 185 <241 para. 150>).

249 f) Lastly, the parliamentary right to receive information is subject to the limits of reasonableness (*Zumutbarkeit*). The Federal Government is under an obligation to provide all information at its disposal or which can be obtained through reasonable efforts. Certain matters may remain politically significant even if they were concluded a long time ago; in consequence, the parliamentary right to receive information extends to matters falling within the area of responsibility of previous governments. It follows that the Federal Government may be obliged to make reasonable efforts to reconstruct information (cf. BVerfGE 124, 161 <197>).

250 The information available within the Federal Government is not limited to the information contained in all government documents; rather, it also extends to the personal knowledge of the relevant government officials not recorded on file. In the individual case, the Federal Government may successfully claim that providing answers within the stipulated time limit would require unreasonable efforts on the grounds that the sources of information could only be accessed and processed with great difficulty; however, this does not justify a general limitation of the duty to give answers to matters which have been properly documented (cf. Constitutional Court of the Free State of Saxony, Order of 5 November 2009 – 133-I-08 –, juris, para. 102; Constitutional Court of the Free and Hanseatic City of Hamburg, Judgment of 21 December 2010 – HVerfG 1/10 –, juris, para. 77). Accordingly, the Federal Government is required to exhaust all available means of obtaining the requested information (cf. Constitutional Court of the *Land* North Rhine-Westphalia, Judgment of 19 August 2008 – 7/07 –, juris, para. 252).

251-252

3. […]

253 4. It follows from the Federal Government's general constitutional duty to meet the German *Bundestag*'s requests for information that it must state reasons in case it refuses to provide the requested information (cf. BVerfGE 124, 161 <193>; 137, 185 <244 para. 156>) or refuses to provide the information in public.

254 a) The Federal Government must – not least in light of the principle of mutual respect between constitutional organs – allow the *Bundestag* to effectively exercise its oversight function over government conduct. This requires that a refusal to provide information be substantiated in detail with reasons that are appropriate to the issues at stake, thereby allowing the *Bundestag* to assess and determine whether to accept this refusal or what further steps to take for the purpose of enforcing, either in full or at least in part, its request for information. To that end, the *Bundestag* must be able to review whether the balancing of the affected interests, which resulted in the refusal to provide information, was conducted in a plausible and comprehensible manner. The requirement to substantiate the refusal to give answers is set aside only in the event that the need for confidentiality is evident (cf. BVerfGE 124, 161 <193>; 137, 185 <244 para. 156>; 139, 194 <231 and 232 para. 121>; 143, 101 <144 para. 143>; BVerfG, Order of the Second Senate of 13 June 2017 – 2 BvE 1/15 –, juris, para. 107).

255 Furnishing more detailed reasons is required if the Federal Government is set on refusing to provide information pertaining to matters that fall within its area of responsibility, for instance, on the grounds that the relevant matters belong to the core of autonomous executive decision-making or that, in rare exceptional cases, legitimate interests of the state rule out sharing the requested information. In such cases, the author of the query requires further details for the purposes of reviewing whether the underlying balancing of interests was plausible; in this regard, the balancing involves the parliamentary right to information, on the one hand, and the affected interests which led to the refusal to provide information on the other (cf. BVerfGE 139, 194 <232 para. 123>).

256 In any case, the Federal Government cannot simply invoke just any of the constitutional grounds limiting the parliamentary right of inquiry by way of blanket justification. The elements of a right to refuse the information request must be substantiated and cannot be established by way of mere boilerplate statements. Stating reasons for the decision to refuse the information request is indispensable, not least in terms of providing a basis for judicial review (before the Federal Constitutional Court); otherwise, such review would largely be placed at the disposal of the Federal Government (cf. BVerfGE 124, 78 <128>).

257 b) The Federal Government has a specific duty to substantiate its actions in the event that it does not provide answers in a publicly accessible *Bundestag* document pursuant to § 104 in conjunction with § 75(3) and § 76(1) GO-BT, but instead makes the information available to the *Bundestag* in the form of classified documents filed at the Secret Records Office of the German *Bundestag* (*Geheimschutzstelle des Deutschen Bundestages*). This is due to the fact that the parliamentary right to information is primarily designed for receiving the requested information publicly.

258 The reasons for refusing to provide information publicly must be stated in as detailed and plausible a manner as the affected secrecy interests allow. It is incumbent upon

the Federal Government to state, in a comprehensive manner, its reasons for classifying the requested information as confidential and why it believes that the requested information should not be disclosed to the public even in the event that, as the case may be, several years have passed or the matter in question has already been concluded (cf. BVerfGE 124, 78 <128 and 129>).

259 c) Furnishing additional reasons at a later state is not permissible as it would defeat the purpose pursued by the substantiation requirement. This is meant to ensure that the authors of parliamentary queries learn about the reasons for the refusal to give answers, allowing them to analyse the reasoning and to assess the prospects of success regarding recourse to the Federal Constitutional Court. If [the Federal Government] initially refused, without stating adequate reasons, to provide complete information, any supplementary arguments submitted only in the course of the *Organstreit* proceedings will not suffice to remedy the violation of rights that the initial refusal entails (cf. BVerfGE 124, 78 <147>; BVerfG, Order of the Second Senate of 13 June 2017 – 2 BvE 1/15 –, juris, para. 108).

II.

260 To the extent of its admissibility, application no. 3 is well-founded in its entirety.

261 1. The matters in question fall within the Federal Government's area of responsibility relating to the *Deutsche Bahn AG.*

262 a) This responsibility extends, from the outset, both to the exercise of shareholder duties for which the Federal Government is competent as well as to the regulatory supervision exercised by the federal authorities and the proper discharge out of the Federal Government's responsibility to ensure the availability rail network and services pursuant to Article 87e(4) GG. In order to assess whether the Federation ensures that interests of the public, including transport needs in particular, are sufficiently taken into account with regard to the maintenance and development of the rail network of the federal railways as well as the transport services available on the network, Parliament must receive the information relevant to precisely these transport needs and services. It must be able to evaluate if and how it can – and in some cases may even be obliged to – intervene in the event that the state permanently fails to fully or properly discharge its overall responsibility for rail network and services because of structural deficits; this concerns, most notably, the case that the state lacks necessary means of control.

263 b) Furthermore, the business activities of the *Deutsche Bahn AG* also fall within the Federal Government's area of responsibility. [...]

264 Business activities of public sector companies generally require legitimation. [...]

265 This is also true for the business operations of the *Deutsche Bahn AG*. In subsections 3 and 4, Art. 87e GG prescribes a particular privatisation regime for the federal railways and sets out the functions retained by the state: specifically, this provision

calls for a corporatisation of organisational structures (*Organisationsprivatisierung*) with the Federation serving as (at present) the sole shareholder. This provision does not, however, interrupt the relationship of responsibility.

Art. 87e GG does not give rise to an exemption from the requirement of democratic legitimation; an interpretation to the contrary would be untenable, even if the wording of this provision and its drafting history were understood to suggest that the relevant constitutional amendment did not merely pursue the corporatisation of organisational structures (*Organisationsprivatisierung*) but, in addition, aimed to privatise the exercise of certain functions (*Aufgabenprivatisierung*). The latter would entail that the operation of train services would no longer be a direct administrative mandate bound to the common good and incumbent upon the Federation, [...] but rather a private sector undertaking carried out by a company incorporated under private law with the goal of generating profits, subject to market rules but not bound by the common good [...]. 266

For as long as the Federation retains the overall responsibility for ensuring the availability of rail network and services, and as long as it chooses to discharge such responsibility not only by way of regulatory means but also continues to exercise at least a certain degree of influence over the company's business strategy by virtue of statutory intervention rights and personnel relations deriving from its status as sole shareholder, the Federation cannot be exempt from any and all responsibility in respect of the management of the *Deutsche Bahn AG*. Moreover, the Federation's overall responsibility pursuant to Art. 87e(4) first sentence GG cannot always be strictly delineated from the generally profit-oriented management of business operations pursuant to Art. 87e(3) first sentence GG, nor can the former be properly reviewed without information on the latter. 267

It remains that all acts of public authority require democratic legitimation and are subject to democratic accountability; given how interconnected the Federation and the *Deutsche Bahn AG* currently are, the Federal Government may thus be held accountable with regard to the *Deutsche Bahn AG* in the context of parliamentary queries. 268

2. The Federal Government may not refuse to answer specific parliamentary queries on the grounds that the fundamental rights of the *Deutsche Bahn AG* (see a. below) or freedoms equivalent to fundamental rights afforded the *Deutsche Bahn AG* (see b. below) are affected. 269

b) The *Deutsche Bahn AG* may not invoke fundamental rights, specifically the protection of its business and trade secrets (Art. 12(1) or Art. 14(1) GG), given that its company shares are exclusively held by the state. As a legal person controlled entirely by the state, the *Deutsche Bahn AG* does not serve the exercise of personal freedom on the part of individual persons. 270

[…] 271-272

The fact that, in terms of future possibilities, ownership of the *Deutsche Bahn AG* 273

might at some point fall to private shareholders, i.e. natural persons holding fundamental rights, does not have any premature bearing on the present legal situation.

274 It is not discernible that denying *Deutsche Bahn AG* the legal ability to hold fundamental rights would result in relevant competitive disadvantages for the company. After all, the statutory framework on market competition set out in ordinary law is generally applied and interpreted in an equal manner with regard to all companies. If potential disadvantages were indeed to derive from constitutional requirements – in this case the parliamentary right to ask questions and receive information –, this would be a consequence of the Federation's current status as sole shareholder.

275 b) Art. 87e GG does also not confer upon the *Deutsche Bahn AG* independent rights vis-à-vis state authorities; the latter cannot invoke defensive rights against state influence (exercised in pursuit of common good objectives) on its management.

276-279 […]

280 Art. 87e GG was primarily conceived as providing an exemption from restrictions imposed by the principles pertaining to the organisational order of the state (Art. 87(1) first sentence GG, old version) (cf. BTDrucks 12/5015, p. 7); there is no indication that the provision was also intended to confer subjective rights upon the *Deutsche Bahn AG*. Even if this kind of right were included in the relevant provision, such guarantee would in any case remain incomplete given that a possibility to seek its enforcement before the Federal Constitutional Court was not created.

281 3. The (fiscal) interest of the state in protecting confidential information relating to companies (partially) owned by the state is recognised under constitutional law as a legitimate interest of the state.

282 The protection of business and trade secrets under ordinary law cannot directly limit the constitutionally entrenched right of Parliament to ask questions and receive information vis-à-vis the Federal Government; however, it may indirectly give rise to limitations insofar as the relevant statutory regulations serve the protection of public interests that are also recognised as legitimate interests under constitutional law. Disclosing business and trade secrets of state-owned companies could impact the value of company shares held by the state as well as the business performance [...].

283 It furthermore affects the public interest in using public funds as effectively as possible given that the disclosure of cost structures and budgets may impact tenders submitted by contractors [...].

284 As Art. 87e GG exemplifies, the Basic Law endorses the notion that the state may compete in the market as an entrepreneur or serve as shareholder of private companies. It appears that this is informed by the assumption that the state may make use of market forces for the purposes of discharging its functions or even surrender certain tasks completely to the market place. If companies that are (partially) owned by the state were subjected to a high level of transparency, these positive effects (which

are not uncontested) would potentially be impaired or removed. Nevertheless, it can be safely assumed that this transparency would not prevent the state from discharging its functions at all. It can be concluded that the interests at stake are primarily fiscal in nature; while fiscal interests are by no means insignificant, they do not carry as much weight as threats to the security, let alone the existence, of the Federation or the *Laender*.

285 4. With regard to answering the questions in dispute pertaining to the *Deutsche Bahn AG*, the respondent failed to adequately assess the scope of its duty to give answers and thereby violated the rights of the applicants and the German *Bundestag* under Art. 38(1) second sentence and Art. 20(2) second sentence GG.

286 c) The respondent failed to comply with its duty to give answers in relation to the Minor Interpellation “Fulda Round Tables of the *Deutsche Bahn AG* and Financing Agreements regarding Projects under the Rail Requirement Plan” (BTDrucks 17/3757).

287 aa) By refusing to answer questions nos. 1 to 3 of the Minor Interpellation, which concerned the total costs budgeted for projects under the Rail Requirement Plan (*Bedarfsplanprojekte*) in the “Fulda Round Tables”, claiming that it were impossible to produce a compilation of the relevant information, the respondent curtailed the right to ask questions of applicants nos. 3 and 5 in a manner that is not permissible under the Constitution. The respondent may not refuse an answer on the grounds that no annual and standardised lists were compiled for “Fulda Round Tables” that have taken place in the past.

288

(1) [...]

289 [...] [The] objection that lists which do exist were not standardised or not available in the necessary format cannot, by itself, justify a complete refusal to provide the requested information; after all, such submission neither asserts a legal or factual impossibility to comply nor does it invoke recognised grounds of refusal. Moreover, it is for the author of the query to decide whether the existing lists can be used as a basis for assessing the upcoming prioritisation of projects under the Rail Requirement Plan.

290

(2) [...]

291 bb) The respondent also unlawfully refused to answer questions nos. 4 and 5 of the Minor Interpellation “Fulda Round Tables of the *Deutsche Bahn AG* and Financing Agreements regarding Projects under the Rail Requirement Plan” (BTDrucks 17/3757).

292 The respondent refused to answer these questions on the grounds that the volume of federal funds paid towards eligible project costs varied from project to project. It was submitted that no statistics were available to the Federal Government in this regard […].

[…] 293

In its submission furnished belatedly on 7 January 2011, the respondent claims that compiling the requested information would result in an unreasonable burden as the stipulated timeframe for answering minor interpellations would be greatly exceeded and significant personnel resources would be tied up whereas it were not even clear whether the results would indeed allow the recipients to draw the intended conclusions; these arguments, however, do not measure up to the importance attached to the parliamentary right to request information. In principle, the Federal Government is even obliged to reconstruct information within reasonable limits (cf. BVerfGE 124, 161 <197 and 198>). [...] [The] Federal Government [would have to] at least specify the required efforts, which it claims would constitute an unreasonable burden, so that the author of the query can assess whether this claim is plausible and whether the conclusion of unreasonableness is correct. 294

cc) The respondent furthermore failed to fulfil its duty to give answers in relation to question no. 13 of the Minor Interpellation “Fulda Round Tables of the *Deutsche Bahn AG* and Financing Agreements regarding Projects under the Rail Requirement Plan” concerning the profit forecasts for the years 2011 to 2014 (BTDrucks 17/3757) insofar as the respondent submitted that the relevant figures were covered by the confidentiality obligation set out in §§ 116, 395 AktG. 295

The mere reference to statutory confidentiality obligations under the law on stock corporations does not provide a sufficient basis for refusing to give answers. [...] 296

b) The respondent also refused, on grounds untenable under constitutional law, to answer question no. 16 of the Minor Interpellation on the economic feasibility assessment of the “Stuttgart 21” project (BTDrucks 17/3766). The respondent claimed that the data retrieved by the relevant public accountant qualifies as professional documentation and that, in consequence, the confidentiality obligation incumbent upon public accountants pursuant to § 43 of the Public Accountants Act (*Wirtschaftsprüferordnung* – WiPrO) as well as the confidentiality agreement concluded with the *Deutsche Bahn AG* would apply; yet, these do not constitute sufficient reasons for refusing to give answers entirely. 297

[…] 298

Even from the perspective of ordinary law, it is not ascertainable on what basis the confidentially obligation, which only binds the public accountant, would bar the respondent from disclosing which data the public accountants had requested from the *Deutsche Bahn AG*. [...] 299

Similarly, the respondent’s refusal to give answers was not justified insofar as it was based on the contractual confidentiality agreement concluded between the *Deutsche Bahn AG* and the public accountant firm. The respondent already failed to substantiate that the *Deutsche Bahn AG* did indeed assume a contractual obligation vis-à-vis the public accountants to maintain confidentiality with regard to their expert assess- 300

ment and its results. [...]

[…] 301

c) As regards questions nos. 1 to 14 of the Minor Interpellation “Delays in Train Operations” (BTDrucks 17/3149), the respondent was not entitled to refuse an answer on the grounds that virtually all requested information concerned matters relating to the business operations of the *Deutsche Bahn AG,* and were therefore not available to the respondent. 302

The business operations of the *Deutsche Bahn AG* fall within the Federal Government’s area of responsibility given that the latter manages the 100% shareholder interest held by the Federation. Besides, the issue of significant delays in the train operations of the *Deutsche Bahn AG* touches on the overall responsibility for rail network and services incumbent upon the Federation pursuant to Art. 87e(4) first sentence GG; the Federation must ensure that general public interests, including transport needs in particular, are duly taken into account with regard to maintaining and developing the rail network of the federal railways as well as the transport services (excluding local passenger services) available on the network. 303

The only conceivable grounds which could justify the Federal Government’s refusal to give answers are reasons of impossibility. Generally, the Federal Government is only obliged to provide the information that it actually disposes of. In addition, in order to procure the requested information, it is also obliged to exploit all statutory and factual means of intervention available in relation to the relevant public sector company incorporated under private law. When refusing to give answers, the Federal Government must specify what kinds of efforts were made in order to obtain the relevant information. Contrastingly, the reasons stated by the Federal Government and challenged in the present proceedings show that the Federal Government already failed to adequately assess the scope of its own responsibility. Furthermore it did not make any efforts to gather relevant information on train delays and their causes. 304

III.

To the extent of their admissibility applications nos. 1 and 2 are for the most part well-founded. 305

1. The Federal Government’s area of responsibility extends to financial market supervision as well as financial institutions it controls. 306

a) Based on the principle of administrative hierarchy, no doubts arise as to the Federal Government’s responsibility regarding information that is available to its subordinate authorities. 307

In Germany, supervision of the banking sector is jointly exercised by the BaFin and the *Bundesbank* (§ 7 Banking Sector Act). Pursuant to § 1(1) of the Act on the Federal Financial Supervisory Authority (Federal Financial Supervisory Authority, *Finanzdienstleistungsaufsichtsgesetz* – FinDAG), the BaFin was established under the au- 308

thority of the Federal Ministry of Finance, which exercises legal and technical supervision over the BaFin in accordance with § 2 FinDAG.

309 In contrast, the *Bundesbank* is not a subordinate authority attached to a federal ministry – and therefore does not operate within the Federal Government's area of responsibility –; pursuant to § 2 first sentence of the Act on the *Bundesbank* (*Gesetz über die Deutsche Bundesbank* – BundesbankG), the *Bundesbank* is a direct federal legal person (*bundesunmittelbare juristische Person*) under public law and, pursuant to § 12 first sentence BundesbankG, exercises its functions independently of instructions from the Federal Government.

310 b) The Federal Government's area of responsibility also extends to financial institutions it controls.

311 The questions in dispute concern, in part, financial institutions that were nationalised as part of restructuring measures taken during the financial crisis. For instance, as of 13 October 2009, all shares of the *Hypo Real Estate Holding AG* (now GmbH) are held by the SoFFin Fund; as evident from the declaration of compliance with the Public Corporate Governance of the Federation, issued by the board of directors and the supervisory board of the *Hypo Real Estate Holding AG* on 31 March 2016, the Federation holds 100% of shares. In August 2008, before the *IKB Deutsche Industriebank* was sold to investor Lone Star following an increase of capital, 90.8% of IKB shares were held by the state-owned *KfW* bank [...]. Contrastingly, the Federation held only 25% plus one share in the *Commerzbank AG* in 2011, the time period relevant in the current proceedings [...]; currently, the Federation accounts for only about 15% of *Commerzbank* shares [...].

312 2. Ensuring the proper functioning of state supervision over financial institutions, the stability of the financial market and the success of support measures adopted by the state during the financial crisis are all matters pertaining to legitimate interests of the state. These may limit the Federal Government's duty to give answers to parliamentary queries.

313 a) The Basic Law as such does not contain express provisions from which it derives that the functioning of state supervision over the banking sector and the financial market constitute protected legal interests of constitutional status. Yet, due to the significance of the financial market, difficulties experienced in this sector also impact the real economy; therefore, it is evident that state supervision over financial institutions operating in this market as well as state regulation of their activities serve important functions in the fundamental interest of the state. State supervision serves to address market specific risks and forms an essential element of the market framework in which the targeted companies operate. Thus, the state's supervisory function serves to protect the general public interest in a functioning macro economy (cf. BVerfGE 124, 235 <246 and 247>). The supervision of banking and financial services institutions serves, in particular, the objective of counteracting irregularities in the financial services and banking sector, which potentially jeopardise the security of financial as-

sets entrusted to the relevant institutions, impair the proper execution of banking transactions and financial services or have serious adverse effects on the macro economy (§ 6(2) KWG).

314 To establish the need for confidentiality, it is not necessary to demonstrate that the oversight and supervision exercised by the BaFin would be jeopardised in a specific case. Rather, it is sufficient to establish, by way of fact-based evidence, the specific risk that providing the German *Bundestag* with the requested information would generally have a detrimental impact on the exercise of oversight and supervisory functions by the BaFin. Yet, the mere assertion that it would become more difficult for the BaFin to exercise its functions does not suffice in this regard. Nor can it simply be assumed, in the absence of specific fact-based evidence, that disclosing the requested information would lead to a decline in the willingness to cooperate on the part of companies subjected to state supervision [...]. If the mere [...] consideration were accepted as sufficient that, in discharging its mandate, the BaFin was reliant on the voluntary participation of the financial institutions it is tasked to supervise and that any decline in such cooperation would consequently impede market supervision, this would ultimately exclude access to any information submitted to the BaFin under the Banking Sector Act in its capacity as supervisory and oversight authority; essentially, this would amount to establishing an exemption for all matters related to market supervision (cf. Federal Administrative Court, Order of 23 June 2011 – 20 F 21.10 –, juris, paras. 19 et seq.; Supreme Administrative Court of the Land Hesse, Order of 2 March 2010 – 6 A 1684/08 –, juris, paras. 9 et seq., 15). If the statutory powers of the BaFin were found to be insufficient for adequately fulfilling its supervisory mandate, and if the BaFin were thus indeed entirely dependent on the voluntary and non-obligatory disclosure of information by the financial institutions it is tasked to supervise, it would in any case be incumbent upon the legislature to remedy this deficit.

315 Lastly, in assessing whether and to what extent adverse effects are indeed to be expected, it should be noted that, in fact, various foreign jurisdictions subject their domestic supervisory authorities to parliamentary oversight and corresponding reporting obligations – without impairing proper functioning of these authorities –, thereby creating extensive transparency.

316 For instance, the United States Federal Reserve System (Fed) and its central executive organ, the Board of Governors of the Federal Reserve System (FRB), are legally independent and may not receive instructions. Yet, the Fed describes its own status as that of an independent government agency that is accountable to both the public and Congress. This relationship of accountability to Congress is established by way of extensive reporting obligations (https://www.federalreserve.gov/faqs/about_12798.htm [last accessed on 12 July 2017] […]). In legal scholarship, it is even submitted that the FRB, whose members are appointed by the President “by and with the advice and consent of the Senate”, is an “independent agency of Congress” [original quote: “independent agency des Kongress”] (cf. Schäfer, Bankenaufsichtsrecht in Deutschland, dem Vereinigten Königreich und den vereinigten Staaten, 2011, p. 110;

cf. also Heun, Die Zentralbank in den USA: das Federal Reserve System, in: Staatswissenschaften und Staatspraxis 9 [1998], pp. 241 <245, 259 and 260>).

317 Similarly, the Financial Services Authority (FSA) of the United Kingdom is accountable to the Treasury and thus, indirectly, also accountable to Parliament. In this regard, regular activity reports are submitted to the Treasury which must then lay the reports before Parliament. The FSA is called on a regular basis to give evidence before the Treasury Select Committee (http://www.fsa.gov.uk/about/who/accountability/parliament [last accessed on 12 July 2017]).

318 b) It is inherent in the nature of the financial market that the effects of detrimental developments of the type which market supervision aims to prevent are not limited to the relevant financial institution but also impact, most notably, the market as such. The financial market system can be characterised as a network of mutual dependencies that hinges to considerable extent on the confidence of market participants in the existence of sufficient oversight mechanisms [...]. The explanatory memorandum attached to the Federal Government's draft proposal for the Banking Sector Act (cf. BT-Drucks 3/1114, pp. 19 and 20) emphasises that hardly any other economic sector is as dependent on ensuring unequivocal public confidence in its safety and the soundness of its trading practices in general. If problems experienced by one institution cause losses for its depositors, this may easily impair trust in other institutions as well. Past experience shows that due to the central role of the financial market for the macro economy, serious problems encountered in the financial sector tend to spread to other economic branches (cf. BVerfGE 124, 235 <246 and 248>).

319 aa) It is true that the Federal Government is afforded a margin of assessment and prognosis regarding the resolution of the financial crisis and the supervisory measures adopted in this context, as well as regarding the extent to which impairments would result from disclosing the requested information, especially concerning the asserted irrational reactions on the highly vulnerable markets. Yet, this implies by no means that transparency and democratic oversight were invariably superseded during the financial crisis nor can it automatically be assumed that these arguments remain valid even after considerable time has passed.

320 bb) In this respect, it must be taken into account that transparency is a means for ensuring market discipline.

321 Even back in 1998, the Basel Committee on Banking Supervision concluded in its report on the role of information in effective market discipline and effective banking supervision that transparency promotes safety and soundness in the banking sector. The Committee submitted that disclosing timely and reliable information on a regular basis is of pivotal importance for the market given that transparency promotes confidence, creates better access to capital markets and reduces market uncertainties [...].

322 With regard to banking supervision, the German legislature imposes an obligation

on financial institutions under § 26a KWG to regularly disclose qualitative and quantitative information on their equity structure and requirements, risks arising from their business activities, risk management procedures, credit risk mitigation techniques and securitisation transactions as well as on remuneration and debt liabilities. § 26a KWG supplements the transparency requirements set out in Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (CRR) [...]. This disclosure requirement allows for an assessment of the integrity and viability of the individual companies and their business strategies.

b) The success of support measures adopted by the state during the financial crisis is a matter pertaining to legitimate interests of the state. 323

During the 2007/2008 financial crisis, the Federation approved financial assistance for financial institutions in order to stabilise the banking and finance system and protect it against threats to its very existence. This goal would essentially be undermined if the disclosure of sensitive information were to subject one of these financial institutions to economic disadvantages or, worse, bring it to the brink of collapse. Therefore, the success of support measures adopted by the state and worth billions of euros in taxpayer money would be jeopardised. In addition, this would contravene the requirement that public funds be used economically and efficiently. 324

d) In contrast, the fiscal interest in preserving the value of state-held shares in financial institutions cannot, by itself and in isolation, be recognised as a separate legitimate state interest. When participating in the market, the state is not generally entitled to protection regarding the value of its company shares; there is no room for such an entitlement given that it would negate the principles of free market and competition. Nevertheless, constitutional law recognises a public interest in protecting business and trade secrets with regard to such financial institutions whose shares were acquired by the state, in full or in part, for the purposes of implementing support measures. 325

3. Regarding its response to the questions in dispute pertaining to financial market supervision, the Federal Government failed to adequately assess the scope of its duty to give answers and thereby violated the applicants’ rights under Art. 38(1) second sentence and Art. 20(2) second sentence GG. 326

a) The respondent failed to comply with its duty to give answers as far as its responses to the parliamentary queries relating to *IKB Deutsche Industriebank*/financial market supervision (BTDrucks 17/4350) are concerned. 327

aa) The respondent unlawfully refused to answer the part of question no. 34 of BT-Drucks 17/4350 that concerned the purchase price received for the sale of the *IKB Deutsche Kreditbank*. 328

For the purpose of refusing an answer, it does not suffice to argue that it was contractually agreed to keep the purchase price confidential, that all confidential docu- 329

ments relating to state support provided to *IKB Deutsche Industriebank* and the sale of the latter, including the sales contract, were available for inspection at the Secret Records Office of the German *Bundestag* from September 2008 to October 2009, or that the Ministry of Finance had delivered a report on this matter in a closed session before the Budget and Finance Committee of the German *Bundestag*.

The fact that the requested information had already been provided in a secret setting in a different forum and at a different time does not cancel the duty to answer the question. Thus, it would have been necessary to specify why an answer was refused at the end of 2010 when the request was received by the respondent. In this regard, a mere reference to contractual confidentiality agreements (that were not furnished in the current proceedings) is not sufficient. 330

bb) The respondent was not entitled to refuse, without stating adequate reasons, an answer to question no. 35 of BTDrucks 17/4350 concerning the decision to withhold approval for the reacquisition of own debt instruments. 331

The refusal cannot be justified by way of mere reference to statutory confidentiality obligations under § 9 Banking Sector Act. Nor can it be successfully argued that the requested information has already been provided in a secret setting in a different forum and at a different time, or that it was possible to file the relevant information as classified documents at the Secret Records Office pursuant to a decision of the German *Bundestag*. 332

As a provision of ordinary law, § 9 KWG is not capable of limiting the German *Bundestag*'s right to ask questions and receive information under constitutional law. Rather, this provision must be interpreted – not least in light of Art. 38 GG – in a manner that does not oppose the sharing of information if higher-ranking public interests so require. The parliamentary right to ask question may constitute such an interest. It is incumbent upon the Federal Government to assess, by weighing the interests in the individual case in order to strike a careful balance in line with the principle of practical concordance, whether the parliamentary right to ask questions outweighs the protection afforded to business and trade secrets of private and public banks on the basis both fundamental right guarantees and legitimate state interests. In this regard, the Federal Government must include the relevant considerations in the reasons provided for its refusal to give answers in order to allow the authors of parliamentary queries to decide, based on the submitted reasons, whether their constitutionally entrenched right to ask questions has been sufficiently considered and weighed. A mere general reference to a prohibition of disclosure based on Art. 12 GG does not suffice in this regard. Moreover, some of the financial institutions concerned may have been nationalised as part of support measures adopted by the state and therefore lack the legal ability to hold fundamental rights. 333

Insofar as the Federal Government submits that the requested information could be provided if the *Bundestag* adopted a decision prescribing the application of the Rules on Document Security, it concedes implicitly that it was not entitled to refuse an an- 334

swer entirely. The Federal Government errs in its assessment given that is not incumbent upon the author of a parliamentary query to seek a decision of the *Bundestag* in order to allow the Federal Government to give its answers on the basis of the Rules on Document Security. Pursuant to § 3(2) first sentence of the Rules on Document Security of the German *Bundestag*, it is incumbent upon the entity sharing information, in this case the Federal Government, to determine the applicable level of confidentiality. Where reasons of constitutional law require that Parliament treat certain answers as confidential, the Federal Government must file them with the Secret Records Office of the German *Bundestag* and specify the applicable classification [...].

335 b) Similarly, the respondent failed to satisfy its duty to give answers with regard to questions nos. 1, 4, 6, 8, 11 and 18 of the Minor Interpellation "Exercise of Parliamentary Oversight in Respect of the Financial Market" (BTDrucks 17/3740).

336 aa) In the preliminary remarks to its answer regarding the Minor Interpellation "Exercise of Parliamentary Oversight in Respect of the Financial Market" (BTDrucks 17/3740), the respondent initially stated correctly that it recognises the duty to respect the rights of fundamental rights holders affected by parliamentary queries when answering the relevant questions; the respondent submitted that this concerned, most notably, the protection afforded to business and trade secrets of the affected financial institutions under Art. 12 (and 14) GG. The respondent relied on the definition of business and trade secrets developed by the Federal Constitutional Court in this regard, and essentially considered as the decisive factor whether disclosing the relevant information could potentially have adverse effects on the competitive position of the company. Based thereon, the respondent concluded that these conditions were met in the present case given that, in principle, information on supervisory measures or assessments of the BaFin concerning selected financial institutions were virtually always capable of adversely affecting the competitive position of the company concerned. In this respect, however, the respondent's conclusion is too general. Whether or not there is a legitimate secrecy interest depends on the specific information requested.

337 This also applies to the reasoning submitted in relation to the proper functioning of financial market supervision as a legitimate interest of the state. The general assertion that information on oversight measures or on assessments and evaluations carried out by the supervisory authority regarding selected institutions may not be disclosed as such disclosure would impair the proper functioning of banking supervision, cannot – at least not in this generalised form – justify a refusal to give answers; this line of argumentation would completely exempt the activities of the BaFin from parliamentary oversight. Therefore, it is necessary to substantiate in a specific and comprehensible manner the existence of a risk that the proper functioning of financial market supervision would be impaired; this also holds true for establishing the risk that confidence in the market would erode.

338 [...] If even the mere fact that market supervision measures were adopted, as well as the frequency of such measures, was excluded from the scope of parliamentary oversight, this would ultimately exempt all relevant matters pertaining to market supervision from oversight. As a result, financial market supervision would no longer be based on substantive-functional democratic legitimation. While the relevant chain of legitimation would still exist between the BaFin and the Federal Government, it would be interrupted in relation to the *Bundestag*. In light of the importance attached to the administrative mandate in question with regard to the general public, the remaining legitimation which in such cases is provided through personnel and institutional structures would fall short of the required level of legitimation.

339 In this respect, it should also be noted that at the time the parliamentary queries were submitted, several years had already passed since the supervisory measures in question had been carried out and even back then it had been no secret that the relevant institutions were struggling and, in some cases, required rather considerable bail-out measures financed by the state. Moreover, [...] [the Federal Government's] line of argumentation would exempt financial market supervision from parliamentary oversight not only for the duration of the financial crisis but also for the years to follow; as a consequence, it would be impossible to evaluate possible shortcomings of the past and, based thereon, develop solutions in order to prevent crises in the future.

340 bb) The respondent unlawfully refused to answer question no. 1 of the Minor Interpellation "Exercise of Parliamentary Oversight in Respect of the Financial Market" (BTDrucks 17/3740) concerning participation of BaFin representatives in supervisory board meetings of financial institutions which (later) received financial assistance from the SoFFin Fund in the years 2005 to 2008.

341 The reasons submitted by the Federal Government do not provide a sufficient basis for refusing to provide the requested information on the BaFin's participation in the relevant board meetings, nor for only providing information in secret.

342 (1) [...] In this respect, the reasons stated for the [Federal Government's] refusal to give answers are limited to the argument that disclosing detailed information would lead to the risk that confidence in the affected institution would irreversible be lost and trigger related reactions on the market, most notably on the part of creditors.

343 In its response, the Federal Government did not clarify how this consideration fits into the framework of recognised grounds for refusing to give answers, namely whether it should be regarded as a matter pertaining to the protection of fundamental rights afforded (private) financial institutions or as a matter pertaining to legitimate interests of the state.

344 The question submitted by the applicants seeks to obtain information on how many board meetings of specific financial institutions BaFin staff participated in during a specific period time. It may well be that the relevant financial institutions have an interest in keeping this information confidential. This information does not, however,

constitute technical or corporate know-how of the financial institution concerned and thus does not qualify as business and trade secrets. Activities carried out by administrative authorities [...] do not qualify as business and trade secrets simply because the affected companies have an interest in keeping them confidential.

345 Therefore, the only grounds that could possibly justify a refusal to provide information would be the state interest in preventing an irreversible loss of confidence in the respective financial institution and the triggering of related market reactions. If the disclosure of information on state supervision in the banking sector were to cause a loss of confidence and trigger related market reactions, the prevention of such reactions and the corresponding risks for the entire banking sector would constitute a recognised interest of the state; this is due to both the adverse effects on the functioning of state supervision as well as the fiscal interests of the state affected by the support measures [in the banking sector]. In view of the constitutional status and the importance attached to the parliamentary right to ask questions in the context of democratic oversight over the conduct of the Federal Government and its subordinate authorities, it is nonetheless necessary to substantiate precisely which specific circumstances would give rise to what kind of foreseeable and likely market reaction.

346 In the present case, a specific explanation would have been required not least because the relevant questions only concerned market supervision measures in the years 2005 to 2008, i.e. during the period prior to the unfolding of the financial crisis. It is common knowledge that in the following years [...] the banks to which the relevant questions refer did struggle and required – in some cases considerable – support by the state [...]. It would have been necessary to substantiate why the disclosure of information on market supervision exercised by the BaFin and the *Bundesbank* in relation to financial institutions prior to the financial crisis would, at the end of 2010/beginning of 2011, still be capable of eroding market confidence.

347

(2) [...]

348 cc) When refusing to answer publicly question no. 4 of the Minor Interpellation concerning the supervisory board discussions the BaFin and the *Bundesbank* respectively held with financial institutions in the years 2005 to 2008, the respondent similarly failed to correctly assess the scope of its duty to state reasons.

349 The abstract reference to the possible existence of a risk that disclosing the number of supervisory board discussions held with individual institutes prompted by specific indications would detrimentally impact the competitive position of the affected financial institutions does not, by itself, justify the refusal to give answers publicly. Scheduling such discussions is part of the supervision exercised by the state, rather than a business or trade secret of the respective financial institution. [...]

350 Moreover, the competitive position of the individual financial institution cannot be qualified as a legitimate interest of the state (*Staatswohl*). Insofar as the respondent refers to the functioning of financial market supervision and fiscal state interests in the

effectiveness of implemented support measures and in preventing the need for similar support in the future, the reasons stated [by the respondent] do not provide a sufficient basis for refusing to give answers. [...]

dd) The respondent also failed to state adequate reasons for refusing to answer question no. 6 of the Minor Interpellation regarding special audits conducted by the BaFin. Without further information, the submitted arguments do not plausibly establish why it was only possible to answers in a classified, but not in a public manner. 351

[…] 352-353

ee) The respondent failed to sufficiently substantiate why it was necessary to classify as confidential its answer to question no. 8 of the Minor Interpellation concerning the supervisory regime applied to off-balance sheet vehicles as confidential. 354

[…] 355

Once again, the arguments submitted by the respondent are limited to the mere assumption, without further substantiation or evidence, that public knowledge of the level of regulatory oversight exercised by the BaFin vis-à-vis selected financial institutions could lead to an irreversible loss of confidence vis-à-vis the institution concerned and trigger related reactions on the market. Yet, the respondent fails to specify, with regard to the circumstances of the individual case, why such a risk would arise and what kind of market reactions were to be expected. Ultimately, the respondent's position appears to be that information on the level of oversight exercised by the BaFin were generally exempt from parliamentary oversight. However, neither the Constitution nor ordinary law provide for such a sector-specific blanket exemption. 356

[…] 357

ff) The respondent did not sufficiently substantiate why it refused to answer publicly question no. 11 regarding measures of the BaFin and the *Bundesbank* respectively directed against the *HSH Nordbank*, and thereby failed to satisfy its constitutional duty. 358

The relevant question concerns internal reviews and risk management of the *HSH Nordban*k and thus touches on company-related circumstances and matters that are not generally disclosed to the public; rather this information is only accessible to a limited group of people and the *HSH Nordbank* may potentially have a legitimate interest in keeping it undisclosed. [...] The *HSH Nordbank* is a *Landesbank* [here: joint state bank of the *Laender* Hamburg and Schleswig-Holstein] [...] in which the state held considerable majority interests during the period in dispute. Consequently, the *HSH Nordbank* does not have the legal ability to hold fundamental rights; this also applies with regard to the time period in question. 359

A legitimate interest of the state in keeping the business and trade secrets of the *HSH Nordbank* confidential may derive, on the one hand, from the fiscal interest of the shareholders at *Laender* level. On the other hand, the fiscal interests of the Fed- 360

eration may potentially be affected if an irrevocable loss of confidence were indeed to occur and the resulting market reactions would throw the financial institution into a crisis of such extent that it would exceed the capacities of the *Laender* Hamburg and Schleswig-Holstein and trigger knock-on effects in the entire finance sector. Nevertheless, the respondent would have been required to further substantiate these issues when it refused to give its answers publicly. [...]

gg) The respondent unlawfully classified as confidential its answer to question no. 18 regarding salary and bonus payments exceeding EUR 500,000 and paid out in financial institutions that had received financial assistance from the SoFFin Fund. 361

The Government's area of responsibility extends to all state activities in the executive branch of the Federation for which democratic legitimation is required and invoked; consequently, this includes economic activities of the public sector carried out by companies incorporated under private law with the state serving as sole or majority shareholder. At least with regard to financial institutions of which the Federation is the majority shareholder – including in cases where shares are held indirectly through the SoFFin Fund –, it follows that the respondent was not entitled to refuse an answer on the grounds that it lacked responsibility. [...] 362

Remuneration agreements evidently qualify as business secrets. [...] 363

Insofar as the fundamental right to informational self-determination of staff is affected, the applicants did not insist that the requested data include identification by name. Still, it appears plausible that experts would be capable of matching the information to individual persons. [...] 364

Nevertheless, the parliamentary interest in receiving a public answer, which serves the objective of exercising oversight in relation to the remuneration policy of financial institutions backed by the SoFFin Fund, outweighs the interest in keeping this information confidential. This is due to the fact that the use of public funds provided to these financial institutions is at issue. In this respect, consideration must be given to the assessment at the legislative level that in relation to financial institutions supported by the state on the basis of § 7 FMStFG, remuneration of board members and managing directors exceeding EUR 500,000 per year is generally considered inappropriate pursuant to § 5(2) no. 4a FMStFV as long as the relevant stabilisation measure is in place. […] In view of this, the disclosure of anonymised information on salaries exceeding EUR 500,000 paid to staff of financial institutions that received state support is a consequence of approving measures for financial market stabilisation that are subject to review. […] In view of the already existing regulatory requirements, the potential increase of transparency resulting from disclosure is relatively moderate; in this regard, potential adverse effects must be tolerated. [...] 365

c) As regards the respondent's answer to question no. 14 of the Minor Interpellation "Exercise of Parliamentary Oversight in Respect of the Financial Market" (BT-Drucks 17/3740) concerning the 3x4 matrix-based risk assessment of financial insti- 366

tutions which (later) received financial support from the SoFFin Fund in the years 2005 to 2008, the respondent was entitled to provide the requested information by way of filing it as classified documents with the Secret Records Office of the German *Bundestag*.

Irrespective of the question whether business and trade secrets could potentially be affected with regard to the 3x4 risk matrix (*Zwölf-Felder-Matrix*), disclosing the risk assessment carried out by the BaFin or the respondent respectively in relation to a private financial institution impairs the fundamental right protected under Art. 12(1) GG. The freedom of Art. 12(1) GG protects the occupation-related sphere of activity of individuals or companies in the market. If a state measure impacting on competition restricts a legal person in its occupation-related sphere of activity this constitutes an impairment of that person's freedom under Art. 12(1) GG (cf. BVerfGE 86, 28 <37>; 115, 205 <230>; 137, 185 <243 and 244 para. 154>). Informing the public by only disclosing the matrix-based risk assessments of certain institutions could potentially lead the market to consider, for lack of more detailed information, any rating below the highest score to be negative. 367

Insofar as nationalised or partly nationalised credit institutions are affected, such as the HRE, these institutions lack the legal capacity to hold fundamental rights; nonetheless, their business and trade secrets are protected as a legitimate interest of the state. 368

Conversely, this conflicts with the parliamentary interest in exercising oversight over the supervisory activities of the BaFin. In this regard, it must be taken into account that the motion of interpellation in dispute is limited to the years 2005 to 2008, i.e. the period (immediately) preceding the beginning of the financial crisis. It is evident that the authors of the query seek to determine whether the use of the 3x4 matrix allowed the BaFin to adequately assess and identify the risk that in the years to follow became reality. This oversight interest carries considerable weight as it pertains to analysing the financial crisis and its causes as well as to the possibility of preventing future crises by means of market supervision mechanisms that, if necessary, ought to be strengthened. 369

The respondent's assumption that disclosing a risk assessment of credit institutions dating back to 2007 and 2008 would, even at the end of 2010/beginning of 2011, be capable of triggering market reactions which could adversely affect the institution concerned and, in the worst case, even cause a new financial crisis, cannot be readily refuted. In this respect, there is a legitimate state interest in preventing new risks for these institutions and, in consequence, for the entire financial market; this also applies to the nationalised financial institutions which lack the legal ability to hold fundamental rights. 370

In view of this, applying the Rules on Document Security of the German *Bundestag* provides the means to strike an appropriate balance between, on the one hand, the constitutionally recognised secrecy interests of the credit institutions and the respon- 371

dent, and the parliamentary interest in receiving information and exercising oversight on the other.

D.

[…] 372

Voßkuhle	Huber	Hermanns
Müller	Kessal-Wulf	König
Maidowski		Langenfeld

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