

Headnotes

to the judgment of the Second Senate of 28 February 2012

– 2 BvE 8/11 –

- 1. In principle, the German Bundestag exercises its function as a body of representation in its entirety and through the participation of all its Members, not through individual Members, a group of Members or the parliamentary majority. The German Bundestag's right to decide on the budget and its overall budgetary responsibility are, in principle, exercised through debate and decision-making in the plenary sitting.**
- 2. The principle of representative democracy, which is laid down in sentence 2 of Article 38.1 of the Basic Law (Grundgesetz – GG), guarantees every Member of Parliament not only freedom in the exercise of his or her mandate, but also equal status as a representative of the entire people. To be justified, differentiations regarding the status of a Member of Parliament therefore require a special reason which is legitimised by the constitution and which is of a weight that can outbalance the equality of Members of Parliament.**
- 3. To the extent that the transfer of competencies to decide to a decision-making committee intends to exclude Members of Parliament from participating in the overall budgetary responsibility, this is only admissible to protect other legal interests of constitutional rank, and if the principle of proportionality is strictly observed.**



IN THE NAME OF THE PEOPLE

**In the proceedings
on
the application for a declaration**

that § 3.3 and § 5.7 of the Act on the Assumption of Guarantees in Connection with a European Stabilisation Mechanism (*Gesetz zur Übernahme von Gewährleistungen im Rahmen eines europäischen Stabilisierungsmechanismus – Stabilisierungsmechanismusgesetz* – Euro Stabilisation Mechanism Act – StabMechG) as amended by the Amending Act (*Änderungsgesetz*) of 9 October 2011 (Federal Law Gazette (*Bundesgesetzblatt* – BGBl) I p. 1992) violate the rights of the applicants in their constitutional position as members of a legislative body under Article 38.1 sentence 2 in conjunction with Article 20.1 and 20 2, Article 77.1 sentence 1, Article 110.2 sentence 1, Article 115 and Article 23 of the Basic Law

Applicants: 1. Prof. Dr. D...,
2. Mr. S ...

- authorised representatives:

Prof. Dr. Christoph Moench, Prof. Dr. Michael Uechtritz, Dr. Marc Ruttloff, Dr. Thomas Krappel,
Gleiss Lutz Rechtsanwälte,
Friedrichstraße 71, 10117 Berlin –

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

- authorised representative: Prof. Dr. Marcel Kaufmann,
Freshfields Bruckhaus Deringer LLP,
Potsdamer Platz 1, 10785 Berlin –

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

- authorised representative: Prof. Dr. Ulrich Häde,
Lennéstraße 15, 15234 Frankfurt (Oder) –
the Federal Constitutional Court – Second Senate – sitting with the justices

President Voßkuhle,
Lübbe-Wolff,
Gerhardt,
Landau,
Huber, and
Hermanns

on the basis of the oral hearing of 29 November 2011 by

Judgment

holds as follows:

1. § 3.3 of the Act on the Assumption of Guarantees in Connection with a European Stabilisation Mechanism (Gesetz zur Übernahme von Gewährleistungen im Rahmen eines europäischen Stabilisierungsmechanismus – Stabilisierungsmechanismusgesetz – Euro Stabilisation Mechanism Act) of 22 May 2010 (Federal Law Gazette I page 627) as amended by the Act Amending the Act on the Assumption of Guarantees in Connection with a European Stabilisation Mechanism (Gesetz zur Änderung des Gesetzes zur Übernahme von Gewährleistungen im Rahmen eines europäischen Stabilisierungsmechanismus – StabMechÄndG) of 9 October 2011 (Federal Law Gazette I page 1992) violates the rights of the applicants under Article 38.1 sentence 2 of the Basic Law to the extent that it is applied not only to purchases of government bonds made by the European Financial Stability Facility on the secondary market.
2. Apart from this, the application is rejected as unfounded.
3. The Federal Republic of Germany is ordered to reimburse the applicants their expenses.

Grounds:

A.

The dispute between supreme federal bodies (*Organstreit*) relates to the legal position of the *Bundestag* members with regard to the overall budgetary responsibility of the German *Bundestag* in connection with the European Stabilisation Mechanism.

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I.

The applicants are members of the German *Bundestag*. They submit that their status as *Bundestag* members under Article 38.1 sentence 2 of the Basic Law is violated by a federal statute which allocates the exercise of rights of participation and information of the German *Bundestag* to a body consisting of members of the budget committee.

1. In reaction to the sovereign debt crisis in the European Monetary Union, the Member States of the euro currency area initially granted coordinated bilateral financial aid to Greece and following this created what is known as the rescue package, under which a special purpose vehicle organised under private law, the European Financial Stability Facility (EFSF), was founded. This special purpose vehicle is given guarantees by Member States of the euro currency area in order to raise the funds on the capital markets which it holds ready for over-indebted Member States.

2. In the Act on the Assumption of Guarantees in Connection with a European Stabilisation Mechanism (*Gesetz zur Übernahme von Gewährleistungen im Rahmen eines europäischen Stabilisierungsmechanismus – Stabilisierungsmechanismusgesetz – Euro Stabilisation Mechanism Act – StabMechG*) of 22 May 2010 (Federal Law Gazette I page 627), the federal legislature created on a national level the requirements for financial aid to be given by the European Financial Stability Facility.

The provisions of the Euro Stabilisation Mechanism Act in this version were as follows:

§ 1

Guarantee authorisation

(1) 1The Federal Ministry of Finance is authorised to give guarantees up to a total amount of 123 billion euros for loans which are raised by a special purpose vehicle founded or commissioned by the Member States of the euro currency area to finance emergency measures to preserve the solvency of a Member State of the euro currency area, provided these emergency measures for the preservation of the solvency of the affected Member State are necessary to ensure financial stability in the monetary union. 2The condition is that the affected Member State has agreed an economic and financial policy programme with the International Monetary Fund and the European Commission with the cooperation of the European Central Bank and that this is approved by the states of the euro currency area. 3Prior to this, the risk to the solvency of a Member State of the euro currency area must be unanimously established by the states of the euro currency area, without the participation of the Member State involved, together with the International Monetary Fund and the European Central Bank. 4Guarantees under sentence 1 may only be given by 30 June 2013 at the latest.

(2) The giving of guarantees under subsection 1 is subject to the condition that the states of the euro currency area, without the participation of the Member State in-

volved and with the cooperation of the European Central Bank and in consultation with the International Monetary Fund, mutually agree that emergency measures under the Council Regulation to create a European Financial Stabilisation Mechanism are not or not in full sufficient to avert the risk to the solvency of the Member State of the euro currency area in question.

(3) 1A guarantee is to be applied against the maximum amount thus authorised in the amount in which the Federal Government can be called upon under the guarantee. 2Interest and costs are not to be charged on the amount authorised. 10

(4) 1Before giving the guarantees under subsection 1, the Federal Government will endeavour to reach agreement with the German *Bundestag* budget committee. 11
2The budget committee has the right to submit an opinion. 3If for compelling reasons a guarantee has to be given before agreement has been reached, the budget committee must be subsequently informed without delay; the absolute necessity of giving the guarantee before agreement is reached must be justified in detail. 4In addition, the German *Bundestag's* budget committee is to be informed quarterly on the guarantees given and their correct use.

(5) Before the guarantees are given by the Federal Ministry of Finance, the agreement on the special purpose vehicle must be submitted to the German *Bundestag* budget committee. 12

(6) The guarantee limits under subsection 1 may, if the requirements of § 37.1 sentence 2 of the Federal Budget Code are satisfied, with the consent of the German *Bundestag* budget committee be exceeded by up to 20 per cent of the sum stated in subsection 1. 13

§ 2 14

Entry into force 15

This Act shall enter into force on the day after it is promulgated. 16

For the further details, reference is made to the judgment of the Second Senate of the Federal Constitutional Court of 7 September 2011 – 2 BvR 987/10, 2 BvR 1485/10, 2 BvR 1099/10 –, *Neue Juristische Wochenschrift* – NJW 2011, pp. 2946 ff. 17

3. Following this, the continuingly tense situation on the financial markets induced the Member States of the euro currency area to provide the European Financial Stability Facility with additional, more flexible instruments, in order to enable more effective assistance to the over-indebted Member States. The heads of state and government therefore, at a special summit of the European Council on 21 July 2011, decided to commit the agreed maximum lending capacity of the European Financial Stability Facility of 440 billion euros in full. In future, the European Financial Stability Facility is also to be able *inter alia* to undertake purchases of government bonds both on the primary and on the secondary market (*Bundestag* printed paper – *Bundestag-drucksache* – BTDrucks 17/6916, pp. 1, 4). On 5 September 2011 the parliamentary 18

groups forming the government presented a draft bill to amend the Euro Stabilisation Mechanism Act (Draft of an Act Amending the Act on the Assumption of Guarantees in Connection with a European Stabilisation Mechanism (*Entwurf eines Gesetzes zur Änderung des Gesetzes zur Übernahme von Gewährleistungen im Rahmen eines europäischen Stabilisierungsmechanismus*), BTDrucks 17/6916, p. 1).

4. On 21 September 2011 the budget committee passed a resolution to recommend the German *Bundestag* to pass the amendment to the Euro Stabilisation Mechanism Act which is the subject of these proceedings (Budget Committee (8th Committee) Recommendation for a Resolution on the Draft of an Act Amending the Act on the Assumption of Guarantees in Connection with a European Stabilisation Mechanism – *Beschlussempfehlung des Haushaltsausschusses <8. Ausschuss> zum Entwurf eines Gesetzes zur Änderung des Gesetzes zur Übernahme von Gewährleistungen im Rahmen eines europäischen Stabilisierungsmechanismus*, see BTDrucks 17/7067). It recommended that the full participation of the German *Bundestag* must be guaranteed (BTDrucks 17/7067, p. 2). In cases of particular urgency and confidentiality, the rights of the German *Bundestag* should be exercised by several members of the budget committee to be chosen by the German *Bundestag* (hereinafter special committee (*Sondergremium*)).

5. In Article 1 of the Act Amending the Act on the Assumption of Guarantees in Connection with a European Stabilisation Mechanism (*Gesetz zur Änderung des Gesetzes zur Übernahme von Gewährleistungen im Rahmen eines europäischen Stabilisierungsmechanismus – StabMechÄndG*) of 9 October 2011 (BGBl I p. 1992), the German *Bundestag* amended the Euro Stabilisation Mechanism Act in accordance with the Budget Committee's recommendation for a resolution. Following the entry into force of the Amendment Act on 14 October 2011, the Euro Stabilisation Mechanism Act now has the following wording:

§ 1

Guarantee authorisation

(1) 1The Federal Ministry of Finance is authorised to give guarantees up to the total amount of 211.0459 billion euros for financing transactions which the European Financial Stability Facility enters into to conduct emergency measures granted subject to subsections 2 and 3 in favour of a Member State of the euro currency area. 2Emergency measures within the meaning of sentence 1 are loans made by the European Financial Stability Facility to the Member State affected, including loans which the Member State uses to recapitalise financial institutions, precautionary measures and purchases of government bonds of this Member State on the primary market or secondary market. 3Guarantees under sentence 1 may only be given by 30 June 2013 at the latest. 4On this date, the authorisation for the part of the guarantee limits not used shall expire. 5A guarantee is to be applied against the maximum amount thus authorised in the amount in which the Federal Government can be called upon under the guarantee. 6Interest and costs are not to be charged on the

amount authorised.

(2) 1Emergency measures within the meaning of subsection 1 may be undertaken on the application of a Member State of the euro currency area to preserve its solvency if this is essential in order to preserve the stability of the euro currency area as a whole. 2Before the granting of emergency measures by the Member States of the euro currency area, it is to be established that the financial stability of the euro currency area is endangered, without the participation of the Member State affected, together with the European Central Bank and if possible by mutual agreement with the International Monetary Fund. 3Precautionary measures, loans to recapitalise financial institutions and the purchase of government bonds on the secondary market shall be carried out subject to these requirements in order to prevent the dangers of contagion. 4The purchase of government bonds of a Member State of the euro currency area on the secondary market also requires the European Central Bank to establish that there are extraordinary circumstances on the financial market. 24

(3) 1Emergency measures are subject to strict conditions which the Member State involved must in principle have agreed with the European Commission with the cooperation of the European Central Bank and if possible with the International Monetary Fund in an economic-policy and fiscal-policy programme before the grant of the emergency measure, and which are unanimously approved by the Member States of the euro currency area. 2If, because of the nature of the emergency measure, it is not possible to agree all necessary conditions before the commencement of the emergency measure, this agreement must be obtained subsequently without delay and before the end of the emergency measure. 25

(4) Before the guarantees are given by the Federal Ministry of Finance, the agreement on the special purpose vehicle must be submitted to the German *Bundestag* budget committee. 26

(5) The guarantee limits under subsection 1 may, if the requirements of § 37.1 sentence 2 of the Federal Budget Code are satisfied, with the consent of the German *Bundestag* budget committee be exceeded by up to 20 per cent of the sum stated in subsection 1. 27

§ 2 28

Budgetary responsibility and responsibility for stability 29

(1) In matters of the European Financial Stability Facility, the German *Bundestag*, in order to carry out emergency measures in favour of a Member State of the euro currency area, shall exercise its budgetary responsibility and its responsibility for the further development of the stability of the monetary union in particular in accordance with the following provisions. 30

(2) 1The German *Bundestag* shall consult and pass resolutions on items under this statute within a reasonable period of time. 2In doing so, it shall take into account the 31

time limits applying to the passing of a resolution on the level of the euro currency area.

§ 3 32

Requirement of parliamentary approval for decisions in the European Financial Stability Facility 33

(1) 1In matters of the European Financial Stability Facility, in the case of a proposed resolution which affects the overall budgetary responsibility of the German *Bundestag*, the Federal Government may through its representative only vote in favour or abstain from voting on a resolution when the German *Bundestag* has passed a resolution in favour of it. 2Without such a resolution of the German *Bundestag*, the German representative must vote against the proposed resolution. 34

(2) The overall budgetary responsibility is affected in particular 35

1. when an agreement is entered into on an emergency measure of the European Financial Stability Facility on the application of a Member State of the euro currency area, 36

2. in the case of a material change of an agreement on an emergency measure and in the case of a change which has effects on the amount of the guarantee limits. 37

3. in the case of changes to the Framework Agreement of the European Financial Stability Facility and 38

4. in the case of the transfer of rights and obligations from the European Financial Stability Facility to the European Stability Mechanism. 39

(3) 1In cases of particular urgency or confidentiality, the rights of participation of the German *Bundestag* set out in subsection 1 shall be exercised by members of the budget committee who are elected by the German *Bundestag* for one parliamentary term. 2The number of the members to be appointed is the smallest possible number for which every parliamentary group may appoint at least one member and the relative strengths of the parliamentary groups are preserved. 3In the case of emergency measures to prevent the dangers of contagion under § 1.2 sentence 3, the particular urgency or confidentiality is routinely present. 4In all other cases, the Federal Government may assert the special urgency or confidentiality of a matter. 5In the cases of sentences 3 and 4, the above-named members of the budget committee may without delay vote against the assumption of particular urgency or confidentiality by a majority. 6In the case of a vote against, the German *Bundestag* shall exercise the rights of participation set out in subsection 1; in the case of votes against in cases of sentence 3 these rights shall be exercised by the budget committee. 7In the cases of subsection 2 numbers 3 and 4 and in the case of the first application of a Member State of the euro currency area for an emergency measure which is not a case of § 1.2 sentence 3, the German *Bundestag* shall always exercise its rights of participation. 40

§ 4	41
Participation of the budget committee of the German <i>Bundestag</i>	42
(1) 1In all matters of the European Financial Stability Facility which impinge on the budgetary responsibility of the German <i>Bundestag</i> and in which a decision of the German <i>Bundestag</i> under § 3 is not provided for, the budget committee shall participate. 2It has the right to submit an opinion. 3The budget committee of the German <i>Bundestag</i> shall supervise the preparation and enforcement of the agreements on emergency measures.	43
(2) 1The following require the prior approval of the budget committee of the German <i>Bundestag</i> :	44
1. the adoption or alteration of the guidelines of the Board of Directors of the European Financial Stability Facility by the Federal Government and	45
2. the approval by the Federal Government of decisions on the employment of further instruments on the basis of an existing agreement on an emergency measure of the European Financial Stability Facility or to the alteration of the conditions of an emergency measure, provided these are not subject to the requirement of parliamentary approval under § 3.	46
2In these cases, the Federal Government may through its representative only vote in favour or abstain from voting on a resolution proposal on matters of the European Financial Stability Facility when the budget committee has passed a resolution in favour of it. 3The Federal Government may also make an application to this effect in the budget committee. 4Without such a resolution of the budget committee, the German representative must vote against the proposed resolution. 5In cases of particular urgency or confidentiality, the provision in § 3.3 shall apply with the necessary modifications.	47
(3) 1In the cases not covered by subsection 2 which affect the budgetary responsibility of the German <i>Bundestag</i> , the Federal Government shall involve the budget committee and take account of its opinions. 2This shall apply in particular to resolutions which under the Framework Agreement of the European Financial Stability Facility may only be passed unanimously and to the appointment of the German board member for the Board of Directors of the European Financial Stability Facility.	48
(4) The plenary sitting of the German <i>Bundestag</i> may, by a resolution passed by a simple majority, at any time assume to itself and exercise by ordinary resolution the powers of the budget committee.	49

§ 5	50
Information by the Federal Government	51
(1) 1The Federal Government shall inform the German <i>Bundestag</i> in matters of this	52

statute comprehensively, at the earliest possible date, continuously and as a general rule in writing. 2The Federal Government shall inform the *Bundesrat* in writing. 3Details shall be subject to an agreement between the Federal and *Länder* (state) governments.

(2) The Federal Government shall communicate to the German *Bundestag* all documents available to it which are conducive to the exercise of the cooperation of the German *Bundestag* under §§ 3 and 4. 53

(3) The German *Bundestag* shall take account of the particular need for protection of ongoing deliberations by treating them confidentially. 54

(4) In the case of an application by a Member State for emergency measures of the European Financial Stability Facility, the Federal Government shall within seven days after the application is made communicate to the German *Bundestag* an assessment of the contents and scope of the aid to be granted and an estimate of the financial consequences. 55

(5) In addition, the German *Bundestag*'s budget committee is to be informed quarterly on the guarantees given and their correct use. 56

(6) The ongoing information by the Federal Government shall also contain particulars on the consideration given in each case in the course of the debates to the opinion of the German *Bundestag* and of the budget committee submitted under this statute. 57

(7) The rights of information under subsections 1 to 6 may in cases of particular confidentiality under § 3 subsection 3 be restricted to the members of the budget committee involved, for as long as the reasons for the particular confidentiality exist. 58

§ 6 59

Entry into force 60

This Act shall enter into force on the day after it is promulgated. 61

6. In its 135th session, on 26 October 2011, the German *Bundestag* unanimously elected the members of the special committee on the basis of a nomination made by all parliamentary groups (BTDrucks 17/7454) (see stenographic record, minutes of plenary proceedings – 17/135, p. 15976 A). The applicants were neither proposed as members of the special committee nor were they elected. 62

7. On the same day, the heads of state and government of the euro currency area agreed to draw up a number of guidelines for the further work of the European Financial Stability Facility; these were adopted by its Board of Directors after the approval of the budget committee of the German *Bundestag* on 29 November 2011. They contain conditional and procedural requirements for the precautionary programmes, the recapitalisation of financial institutions and the activity of the European Financial Stability Facility on the primary and secondary markets. The EFSF Guideline on Precau- 63

tionary Programmes contains provisions on three types of precautionary credit lines, as long as and as far as the Member State in question satisfies particular criteria for access in advance, compliance with which shall be reviewed by the European Commission in cooperation with the European Central Bank. Under the EFSF Guideline on Recapitalisation of Financial Institutions <FIs> via loans to non-programme countries, the European Financial Stability Facility is only to intervene in Member States which do not already participate in the precautionary programmes after recapitalisation of the financial institutions affected by the private sector and by the national governments has completely or partially failed (no. 2). The EFSF Guideline on Primary Market Purchases is intended to be a complement to loans under a macroeconomic adjustment programme or to the grant of a precautionary credit line and is intended to replace these in part (nos. 1, 5). Finally, under the EFSF Guideline on interventions in the secondary market, purchases of bonds already issued on the secondary market by the European Financial Stability Facility are to be possible at short notice if this is necessary to dampen exceptional circumstances which are established by the European Central Bank to be a danger to the financial stability of the euro currency area (nos. 2.1, 3.1) and the Commission has within one to two days prepared a memorandum of understanding on appropriate political reform efforts (no. 3.1). With the exception of the EFSF Guideline on interventions in the secondary market, all guidelines provide both for an application by the Member State in question and a comprehensive assessment of the economic situation of the Member State in question (German *Bundestag, Haushaltsausschuss 17. Wahlperiode*, Committee printed paper (*Ausschussdrucksache*) 17/4230).

II.

The applicants submit that there is a violation of their status as *Bundestag* members under Article 38.1 sentence 2 of the Basic Law by § 3.3 and § 5.7 of the Euro Stabilisation Mechanism Act. 64

1. Article 38.1 sentence 2 of the Basic Law, they state, guarantees to each member the subjective functional right to participate in connection with parliamentary activity in debates and consultations and to cooperate in decisions and votes. The essential condition for this is a comprehensive right to be given information on the individual items for consultation. These principles have a particular importance in the area of fundamental budget decisions by reason of the paramount role in the constitutional structure of the German *Bundestag*'s right to decide on the budget. In addition there are the particular rights of participation in matters of the European Union, which are constitutionally laid down by Article 38.1 in conjunction with Article 23.1 in conjunction with Article 45 of the Basic Law. 65

Conversely, it may be inferred from Article 45 of the Basic Law, which expressly permits the EU Affairs Committee to exercise the rights of the plenary session of the German *Bundestag*, that other committees of the German *Bundestag* may not be authorised in such a manner. Committees whose decisions have effect for the German 66

Bundestag must be established by the Basic Law itself. A non-constitutional (ordinary) statute such as the Euro Stabilisation Mechanism Act cannot suffice for this.

Admittedly, the German *Bundestag* may delegate individual duties and powers of the plenary session to parliamentary bodies. But in doing this, under Article 38.1 of the Basic Law, it may not generally divest itself of continuing influence where fundamental parliamentary rights and powers are affected. In the case of preparatory measures, delegation is constitutionally unobjectionable. But in delegating, the sub-units of the German *Bundestag* must constitute a microcosm of the plenary session, in accordance with the principle of the mirror image (*Spiegelbildlichkeit*). In addition, the fundamental possibility of participation must also be open to independent members.

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2. The delegation of parliamentary budgetary responsibility to the special committee in the cases defined under § 3 of the Euro Stabilisation Mechanism Act does not comply with these criteria and is therefore unconstitutional.

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a) It is true that in its judgment of 7 September 2011 the Second Senate relaxed the prohibition of the creation by non-constitutional statutes of committees passing resolutions in that, by way of an interpretation in conformity with the Basic Law, it made the consent of the budget committee under § 1.4 of the Euro Stabilisation Mechanism Act old a mandatory condition for the Federal Government to give a guarantee. But the Second Senate prefaced the relevant remarks with general statements which refer to an essential consent “of the *Bundestag*”. This suggests the conclusion that the Senate here did not intend to make a final statement on the question as to whether – contrary to the currently prevailing opinion in the literature – powers of decision (going beyond preparatory acts) may be delegated by the plenary session to subsidiary bodies. Instead, the statements resulted from the particular combination of circumstances contained in § 1 of the Euro Stabilisation Mechanism Act old. There, the essential decisions were determined directly by the statutory provision and the material parameters of the guarantee authorisation were definitively provided for by the statutory wording of § 1 of the Euro Stabilisation Mechanism Act old. As a result, the exception implied by the Senate from the prohibition of delegation described was justified against the background that all the determinants of concrete budgetary significance had already been directly defined by the statutory enabling provision.

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b) At all events, however, there is a prohibition of delegation to the specific special committee outlined by § 3.3 of the Euro Stabilisation Mechanism Act. At most, the conclusion may be derived from the Senate’s decision that the budget committee has a special role which results from its expert responsibility for the complete federal budget. But the competence accorded it by the Federal Constitutional Court cannot be undermined and circumvented by a “mini-committee”.

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In contrast to the previous authorisation, § 1.1 of the Euro Stabilisation Mechanism Act is now so broadly drafted that delegation to a “mini-committee” constitutes an undetermined budgetary authorisation; this has been found impermissible by the Federal Constitutional Court.

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A sub-delegation by the budget committee to the new special committee is also impossible, since a guarantee of the sufficient democratic legitimation of decisions on the budgetary responsibility which is part of the core competence of the German *Bundestag* can at most be guaranteed by the budget committee, which at present has forty-one members, but not by a “mini-committee” such as is envisaged by the Euro Stabilisation Mechanism Act. 72

3. Nor is the restriction of the parliamentary rights under Article 38.1 of the Basic Law justified by the fundamentally legitimate purposes of urgency and confidentiality. Parliamentary measures to protect confidentiality under the *Bundestag* Rules on Document Security (*Geheimschutzordnung des Deutschen Bundestages* – GHSO BT) would also have been possible as less burdensome means. In addition, urgent decisions do not require a “mini-committee” to deal with them. Decisions made at short notice may without any difficulty also be made by the plenary session or at least by the budget committee. 73

The composition of the special committee does not satisfy the requirements of the principle of the mirror image, which follows from the principle of free and equal status laid down in Article 38.1 of the Basic Law. § 3.3 sentence 2 of the Euro Stabilisation Mechanism Act provides that the number of members to be appointed should be the smallest possible number which permits every parliamentary group to appoint at least one member. This consciously avoids reflecting the relative strengths of the parliamentary groups in the plenary session or even approaching them. But this deviation is justified neither by reasons of confidentiality nor by reasons of urgency. At the same time this distribution of seats ignores the parliamentary participation rights of independent members or of their groups. 74

The provisions on the composition of the special committee violate further democratic principles. They are too indefinite, since it remains unclear how the relative strengths of the parliamentary groups are to be preserved. In addition it is possible that the committee could make decisions of far-reaching budgetary significance with only five members present and four members absent. 75

4. The provision in § 3.3 sentence 3 of the Euro Stabilisation Mechanism Act that particular urgency or confidentiality is normally present in the case of emergency measures to prevent dangers of contagion results in this particular urgency or confidentiality being assumed to exist as a general rule for the majority of conceivable measures, and consequently – contrary to the actual wording and meaning of § 3.3 of the Euro Stabilisation Mechanism Act – the “mini-committee” is likely to be responsible as a general rule instead of only in exceptional cases. Such a legal presumption violates the status rights of the members under Article 38.1 of the Basic Law. 76

In addition, the authorisation of the Federal Government under § 3.3 sentence 4 of the Euro Stabilisation Mechanism Act to be able to assert particular urgency or confidentiality “in all other cases” is too indefinite. The right in this connection of the members of the special committee under § 3.3 sentence 5 of the Euro Stabilisation Mech- 77

anism Act to object to such a decision of the Federal Government is inadequately defined, since it is a pure majority right and the minority members who as a general rule are part of the opposition therefore have no legal possibility of exerting influence in a decision of the plenary session or at least of the budget committee. It is therefore constitutionally necessary that the right to object should be defined as a minority right.

5. Finally, § 5.7 of the Euro Stabilisation Mechanism Act is also unconstitutional, since in cases of particular confidentiality it provides for information on matters relating to the statute to be given only to the special committee, but not – as laid down in § 5.1 to § 5.6 of the Euro Stabilisation Mechanism Act – to the German *Bundestag* and the budget committee. As a result of this, subsequent review by the German *Bundestag* is made impossible or at least more difficult in a manner which violates the status of its members under Article 38.1 of the Basic Law. Members of the *Bundestag* have a right to the information which enables them to make an expert assessment of the budget in the exercise of their partial responsibility for the budgetary sovereignty of the German *Bundestag*.

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III.

The respondent regards the application as unfounded.

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1. It states that in passing the provisions in dispute it went appreciably beyond the procedural requirements of the Second Senate in its judgment of 7 September 2011 in that it subjected all the decisions of the Federal Government in connection with the European Financial Stability Facility which affect parliament's overall budgetary responsibility to a mandatory requirement of parliamentary approval. Consequently, particularly urgent or confidential decisions are also subject to a final right of decision of the German *Bundestag* which is exercised by the special committee under § 3.3 of the Euro Stabilisation Mechanism Act.

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2. The applicants ignore the fact that their participation rights under Article 38.1 of the Basic Law are lawfully restricted by the right of self-organisation of the German *Bundestag* under Article 40.1 sentence 2 of the Basic Law. This right of self-organisation has particular weight in the present case. By establishing the participation mechanism of the Euro Stabilisation Mechanism Act, parliament responds to the challenge of having to comply with its budgetary responsibility in a system of intergovernmental governing by creating a mandatory requirement of approval while at the same time having to take account of the rules inherent to the decisions to be made. It has legislative discretion in handling this balance of tensions.

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3. A constitutional authorisation for delegating powers to the special committee is not necessary. In parliamentary practice there are also a large number of examples of the delegation of powers of decision on the basis of non-constitutional statutes, examples which have also been approved by the Federal Constitutional Court. In the judgment of 7 September 2011 in particular, the Second Senate expressly approved the delegation under non-constitutional law of powers of the plenary session to the

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budget committee in exercising the budgetary responsibility within the European Financial Stability Facility. In addition, the special committee itself, with regard to its composition and its appointment by the plenary session, in every respect satisfies the requirements of representativeness and parliamentary legitimation which are to be imposed on such a committee from the point of view of the principle of democracy.

4. The adverse effect on the applicants' rights is justified by objective reasons of paramount importance. The means available are not sufficient to take account of the particular confidentiality or urgency of decisions on emergency measures in the European Financial Stability Facility in such a way that the plenary session or the budget committee is also involved. The effectiveness of the emergency measures to prevent dangers of contagion depends crucially on their introduction and performance and the underlying financial data of the Member States and if necessary of third parties being treated with absolute confidentiality. Breaches of confidence and delayed decisions threaten not only the effectiveness of the EFSF mechanisms, but at the same time also elementary fiscal interests of the Federal Republic of Germany. By reason of the tight global and European interconnection of financial institutions and markets, dangers of contagion may be realised within a few days or even hours. This has been sufficiently shown by interest rate hikes on government bonds, announcements by rating agencies or unexpected and unfavourable political developments in the previous course of the sovereign debt crisis. The European Financial Stability Facility must therefore react promptly and if necessary even preventively, which requires not only confidentiality but also rapid decision-making. In assessing these factors, the German *Bundestag* has scope for judgment – in principle accepted by the Federal Constitutional Court – which permits it to react to the mere abstract risk of breaches of confidence or delayed decisions by creating as small a committee as possible to represent it and make decisions.

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5. The powers of decision of the special committee are ultimately limited to the necessary degree. Parliamentary involvement in the EFSF measures is carried out under a general parliamentary authorisation to give guarantees under § 1.1 of the Euro Stabilisation Mechanism Act. This authorisation lays down in detail the amount of the guarantees, the permissible emergency measures on the level of the European Financial Stability Facility and their substantive-law and procedural requirements. In addition to this, the statute proceeds on the basis of a graduated participation mechanism, in which essential decisions for the further development of the European Financial Stability Facility and its legal basis are reserved to the plenary session. The special committee is only competent for a group of particularly urgent and confidential emergency measures to prevent dangers of contagion, whose elements are defined. In this connection, it has the perpetual power to review the requirements for it to act and if appropriate to return the item in question to the budget committee or the plenary session. It was not necessary to lay down minority rights in the Euro Stabilisation Mechanism Act, since the constitution only protects the participation of the minority but does not give it the power to substitute its decision for the majority decision. As in

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the case of other subsidiary bodies and committees, a participation of the minority going beyond the participatory rights of the organisation of proceedings is not appropriate. A comparison with committees of enquiry, which have a special role, is not appropriate, since these committees, which are set up on the application of one-quarter of the members for a specific occasion, are appointed neither for a long period of time nor for the ongoing treatment of constantly new questions or for the introduction of emergency measures.

IV.

1. The Federal Government declared its intervention in the *Organstreit* proceedings on the side of the German *Bundestag* in a pleading of 11 November 2011. According to the Federal Government, the connection required under § 65.1 of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* – BVerfGG) is satisfied, since the decision to be expected will also be important for the delimitation of the competencies of the Federal Government. This decision will determine which committee the Federal Government must request to give the prior approval necessary under § 3.1 of the Euro Stabilisation Mechanism Act of a resolution on emergency measures of the European Financial Stability Facility. In addition, § 3.3 of the Euro Stabilisation Mechanism Act gives the Federal Government the power to assert the particular urgency or confidentiality of a matter, and it links to this the competence of the special committee provided for therein.

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Over and above this, the legal interests of the Federal Government and of the German *Bundestag* coincide in that both seek the rejection of the application.

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2. The Federal Government also regards the application as unfounded. The violation of their rights as members of the German *Bundestag* asserted by the applicants does not exist, nor is it to be feared that it will exist.

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The introduction of the European Financial Stability Facility and the extension of its competencies with regard to the purchase of government bonds on the primary and secondary markets must be seen against the background of the drastically escalating market development. On the one hand, the interest rates and yields on the bonds of South European states have appreciably risen, and thus the refinancing costs for these states have massively increased; in this process, the distance from the interest rates of bonds issued by other states (the spread), particularly to those of the Federal Republic of Germany, has become larger and larger as the sign of a non-uniform economic development. On the other hand, short-term political events also led to a yield increase of Italian government bonds by almost one per cent within only one day. In order to forestall such short-term events, which in particular if they are cumulative lead to massive interference with the ability of a state to satisfy refinancing requirements and can create dangers of contagion for other states, a rescue package which is capable of acting and which can effectively intervene with the relevant instruments is necessary at the earliest possible date.

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a) The German *Bundestag* created the special committee under § 3.3 of the Euro Stabilisation Mechanism Act in constitutionally unobjectionable exercise of its margin of appreciation. For in this way the German *Bundestag* can exercise its rights of participation even if it is not possible for the plenary session to deal with the matter for the mandatory reasons of particular urgency or confidentiality. The capabilities of working and functioning of the German *Bundestag* enjoy constitutional status and may therefore in the individual case be relied on as an objective justification for limiting the rights of the individual member guaranteed by the Basic Law. Against this background, the challenged conduct of the German *Bundestag* does not appear inappropriate, but, on the contrary, necessary. The fact that the status rights of the members to equal participation in the parliamentary work of the German *Bundestag* are not absolutely guaranteed but may be limited in the interest of parliament's capability of working of has repeatedly been determined by the Federal Constitutional Court. In its judgment of 7 September 2011 it also accepted the provision of § 1.4 sentence 3 of the Euro Stabilisation Mechanism Act as constitutional; this provides that decisions which in principle should have been made with the participation of the *Bundestag* or of its budget committee may for mandatory reasons also be made without their participation and all that is necessary is subsequently informing the budget committee.

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The restrictions of the right of the members to participation which are associated with the challenged provisions are justified by the mandatory reasons of particular urgency or confidentiality and are also supported by the constitutional principles of the openness of the Basic Law to international and European law. In addition, it follows from the principle of division of powers that the Federal Government must remain capable of acting in genuinely executive areas such as foreign policy.

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In order to effectively counter the very rapid expansion of a crisis (contagion effect), it is necessary to make resolutions promptly and confidentially. This is only possible in the case of decisions made in a small committee. When the documents for measures under § 3.2 of the Euro Stabilisation Mechanism Act are classified, as is required, as "CONFIDENTIAL" or "SECRET" under 2a of the *Bundestag* Rules on Document Security by reason of the entailed restrictions on transmission, copying, discussion of the contents on the telephone etc., the necessary promptness of decision is not realisable in a large committee.

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b) Nor does the budget committee have constitutional priority over other subsidiary bodies of the plenary session. The special committee under § 3.3 of the Euro Stabilisation Mechanism Act is elected directly by the plenary session of the *Bundestag*. Its democratic legitimation is therefore at least as great as that of the budget committee. In addition, as a general rule it only acts in place of the budget committee if mandatory reasons of particular urgency or confidentiality are actually present and these do not permit the budget committee to deal with it. This applies in particular for § 3.3 sentence 3 of the Euro Stabilisation Mechanism Act, which provides that particular urgency or confidentiality is normally present in the case of emergency measures to prevent dangers of contagion. This – rebuttable – legal presumption is based on the

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consideration that the emergency measures in question are indeed particularly urgent or confidential. If this does not apply in the individual case, the Federal Government will not entrust the special committee with such measures.

The emergency measures to prevent dangers of contagion in which under § 3.3 sentence 3 of the Euro Stabilisation Mechanism Act the particular urgency and confidentiality are normally present are the additional instruments decided on by the heads of state and government of the euro currency area on 21 July 2011, that is, the precautionary grant of credit lines, loans to recapitalise financial institutions and the purchase of government bonds on the secondary market. In the case of such measures it appears scarcely possible to preserve confidentiality if the plenary session with more than 600 members or even only the forty-one-member budget committee were to deal with them. 93

c) § 3.3 of the Euro Stabilisation Mechanism Act has replaced § 1.4 sentence 3 of the Euro Stabilisation Mechanism Act old, which the Federal Constitutional Court accepted as constitutional. In this way, in cases where there are mandatory reasons for this, the federal legislature replaced the originally intended subsequent information of the budget committee by a reservation of approval to the special committee. Finally, the other changes of the Euro Stabilisation Mechanism Act, in particular the expansion of the European Financial Stability Facility, have made no material alterations to the definiteness of the authorisations originally established by the Federal Constitutional Court. 94

V.

In an order of 27 October 2011, the Second Senate issued a temporary injunction (*Europäische Grundrechte-Zeitschrift* – EuGRZ 2011, p. 668), according to which the participation rights of the German *Bundestag* defined in § 3.1 of the Euro Stabilisation Mechanism Act may not be exercised by the special committee provided for in § 3.3 of the Euro Stabilisation Mechanism Act until there is a decision in the principal proceedings. 95

VI.

In the oral hearing of 29 November 2011 the parties explained and enlarged upon their legal viewpoints. 96

B.

The application is admissible. In particular, the applicants are entitled to make the application. In their application, the applicants assert rights of their own, that is, rights arising from their status as members of the German *Bundestag* under Article 38.1 sentence 2 of the Basic Law. The applicants have submitted with sufficient substantiation the possibility that rights granted them by the Basic Law are violated as a result of the delegation of parliamentary budget responsibility to the special committee in cases of particular urgency or confidentiality provided for under § 3.3 of the Euro Sta- 97

bilisation Mechanism Act and as a result of the duty of information of the Federal Government being restricted to this special committee under § 5.7 of the Euro Stabilisation Mechanism Act. The six-month time limit for applications under § 64.3 of the Federal Constitutional Court Act is complied with, since the Euro Stabilisation Mechanism Act, which contains the challenged provisions, was promulgated on 13 October 2011 and entered into force on 14 October 2011, and the application was received by the Federal Constitutional Court on 27 October 2011.

C.

The Federal Government was entitled to intervene in the *Organstreit* proceedings on the side of the German *Bundestag*. The procedural requirements for intervening in proceedings under § 65.1 of the Federal Constitutional Court Act are satisfied. 98

The Federal Government, as a constitutional body capable of being a party to *Organstreit* proceedings (Article 93.1 no. 1 of the Basic Law, § 63.1 of the Federal Constitutional Court Act), is entitled to intervene in the proceedings. The decision on the application made in the *Organstreit* proceedings is also of importance for the duties of the Federal Government to the applicants, because this determines which body (plenary session, budget committee, special committee) and thus which members the Federal Government must apply to for the prior approval necessary under § 3.1 of the Euro Stabilisation Mechanism Act. The delimitation of the competencies of the plenary session, the budget committee and the special committee, which is disputed between the main parties, also applies in the same way to the legal relationship to the Federal Government (see Decisions of the Federal Constitutional Court – *Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 20, 18 <23-24>). The legal interests of the main parties and the intervener are also parallel, since the Federal Government, just like the German *Bundestag*, seeks the rejection of the application and thus the confirmation of § 3.3 and § 5.7 of the Euro Stabilisation Mechanism Act. The purpose of the Federal Government’s intervention in the proceedings is therefore solely to support the German *Bundestag*. 99

D.

The application is well-founded insofar as § 3.3 of the Euro Stabilisation Mechanism Act excludes the applicants in a constitutionally unjustified extent from participation in the budgetary responsibility of the German *Bundestag*, in violation of Article 38.1 sentence 2 of the Basic Law. 100

I.

1. The German *Bundestag* is the body directly representing the people. It consists of the members, elected as representatives of the people as a whole; collectively, the members constitute parliament. The representative status of the members guaranteed by Article 38.1 sentence 2 of the Basic Law (see BVerfGE 4, 144 <149>; 80, 188 <217>) is the basis of the representative position of the *Bundestag*, which as a “spe- 101

cific body” (Article 20.2 of the Basic Law) exercises the public authority emanating from the people (see BVerfGE 44, 308 <316>; 56, 396 <405>; 80, 188 <217>).

a) In principle, the German *Bundestag* exercises its function as a body of representation in its entirety and through the participation of all its members (see BVerfGE 44, 308 <316>; 56, 396 <405>; 80, 188 <218>), not through individual members, a group of members of the parliamentary majority. 102

The exercise of the function as a body of representation by the German *Bundestag* as a whole requires that all members have the same rights of participation (see BVerfGE 44, 308 <316>; 56, 396 <405>), and they therefore also in principle have the same rights and duties. As a result, every member is qualified to take part in the work of the *Bundestag* and its debates and decisions. 103

b) The competencies of the members include above all the right to speak (see BVerfGE 10, 4 <12>; 60, 374 <379>; 80, 188 <218>), the right to vote, the right of initiative, participating in the exercise of the right to ask questions and the right to information (see BVerfGE 13, 123 <125>; 57, 1 <5>; 67, 100 <129>; 70, 324 <355>), the right to participate in the elections held by parliament and the right to form a parliamentary group together with other members (see BVerfGE 43, 142 <149>; 70, 324 <354>). 104

2. With regard to the adoption of the budget, the German *Bundestag* has a more important constitutional role than the other constitutional bodies involved. In the decision on the budget, it makes a fundamental economic decision for the central area of politics (see BVerfGE 45, 1 <32>; 70, 324 <355>). Decisions on public-sector receipts and expenditure are made by the *Bundestag* with responsibility to the people. Parliament’s right to decide on the budget is one of the fundamental principles of the ability of a constitutional state to democratically shape itself (see BVerfGE 123, 267 <359>; BVerfG, judgment of the Second Senate of 7 September 2011, loc. cit., p. 2946 <2950>, marginal no. 122). It is a central element of the democratic development of informed opinion (see BVerfGE 70, 324 <355-356>; 79, 311 <329>; BVerfG, judgment of the Second Senate of 7 September 2011, loc. cit., p. 2946 <2950>, marginal no. 122) and does not only serve as an instrument of comprehensive parliamentary supervision of government. On the contrary, the budget adopted by parliament brings the fundamental principle of equality of the citizens up to date in the imposition of public charges as an essential manifestation of constitutional democracy (see BVerfGE 70, 324 <355-356>; 79, 311 <329>; BVerfG, judgment of the Second Senate of 7 September 2011, loc. cit., p. 2946 <2950>, marginal no. 122). 105

a) Article 110.2 of the Basic Law provides that the competence to prepare the budget lies solely with the legislature. This particular position is also expressed by the fact that the *Bundestag* and *Bundesrat* are entitled and obliged under Article 114 of the Basic Law to monitor the Federal Government’s execution of the budget (see BVerfGE 45, 1 <32>; 92, 130 <137>; BVerfG, judgment of the Second Senate of 7 September 2011, loc. cit., p. 2946 <2950>, marginal no. 122). 106

b) The budget, which under Article 110.2 sentence 1 of the Basic Law is adopted by the Budget Act, is not merely an economic plan, but at the same time a sovereign act of government in the form of a statute (see BVerfGE 45, 1 <32>; 70, 324 <355>; 79, 311 <328>; BVerfG, judgment of the Second Senate of 7 September 2011, loc. cit., p. 2946 <2950>, marginal no. 123). It is subject to a time-limit and task-related. The state functions are presented in the budget as expenses which must be covered by revenue under the principle of compensation (see BVerfGE 79, 311 <329>; 119, 96 <119>). The extent and structure of the budget thus reflect overall government policy. At the same time, the revenue achievable restricts the latitude to exercise state functions resulting in expenditure (see Article 110.1 sentence 2 of the Basic Law). The budget is therefore the place of conceptual political decisions on the correlation of economic burdens and privileges granted by the state. For this reason, the parliamentary discussion of the budget – including the degree of indebtedness – is seen as a political general debate (BVerfGE 123, 267 <361>); BVerfG, judgment of the Second Senate of 7 September 2011, loc. cit., p. 2946 <2950-2951>, marginal no. 123).

c) The public exchange of arguments and counter-arguments, public debate and public discussion are essential elements of democratic parliamentarism. The degree of publicness of exchange of opinions and search for a decision guaranteed in parliamentary proceedings facilitates possibilities of balancing conflicting interests and creates the requirements for supervision by the citizens (see BVerfGE 40, 237 <249>; 70, 324 <355>). Decisions with such repercussions must therefore in principle follow a procedure that gives the public the opportunity to develop and express its opinions, and that requires parliament to clarify in public debate the necessity and extent of the measures to be decided upon (see BVerfGE 85, 386 <403-404>; 95, 267 <307-308>; 108, 282 <312>). Against this background, the principle of the public nature of the budget follows from the general democratic principle of public access to official documents (see BVerfGE 70, 324 <358>).

3. These principles also apply to the exercise of the German *Bundestag*'s overall budgetary responsibility in a system of intergovernmental governing. They require the German *Bundestag* to be the place where decisions are made on its own responsibility on receipts and expenditure, including with regard to international and European liabilities (see BVerfG, judgment of the Second Senate of 7 September 2011, loc. cit., p. 2946 <2951>, marginal no. 124). The German *Bundestag* is therefore prohibited from transferring its budgetary responsibility to other actors in such a way that burdens taking effect in the budget whose effects are not easy to assess are assumed without the German *Bundestag*'s prior mandatory approval (BVerfG, judgment of the Second Senate of 7 September 2011, loc. cit., p. 2946 <2951>, marginal nos. 124-125). If essential budget questions relating to receipts and expenditure were decided without the mandatory approval of the German *Bundestag*, or if supranational legal duties were created without a corresponding decision by free will of the German *Bundestag*, parliament would find itself in the role of mere subsequent enforcement and could no longer exercise its overall budgetary responsibility (BVerfG,

judgment of the Second Senate of 7 September 2011, loc. cit., p. 2946 <2951>, marginal no. 124). In the EU area, therefore, the *Bundestag* must – notwithstanding participation under Article 23.2 of the Basic Law – individually approve every large-scale federal aid measure made in solidarity resulting in expenditure and, insofar as supra-national agreements are entered into which by reason of their scale may be of structural significance for parliament’s right to decide on the budget, ensure that sufficient parliamentary influence shall continue to be made on the nature and manner of dealing with the funds provided (see BVerfG, judgment of the Second Senate of 7 September 2011, loc. cit., p. 2946 <2951>, marginal no. 128).

4. In exercising the right to decide on the budget and in exercising its overall budgetary responsibility, the German *Bundestag* must make the material decisions itself. 110

a) This requirement follows from the principle of democracy and is confirmed and specified for the area of state indebtedness by the strict constitutional requirement of the specific enactment of a statute in Article 115.1 of the Basic Law. Under this provision, whose constitutional predecessors reach back to the period of the Frankfurt parliament in St. Paul’s Church in the mid-nineteenth century (Article 102 no. 2 German Constitution 1849 – *Reichsverfassung* – RV 1849; Article 73 German Constitution 1871 – *Reichsverfassung* – RV 1871; Article 87 sentence 2 Weimar Constitution – *Weimarer Reichsverfassung*, WRV 1919), not only state borrowing, but also giving guarantees of various types which may result in expenditure in future financial years, require authorisation by federal statute. In this respect, the Basic Law expressly equates the giving of a guarantee – which as liability for third-party obligations represents “potential new borrowing” (see Höfling/Rixen, in: *Bonner Kommentar*, vol. 16, Art. 115, marginal no. 64 <July 2003>; Siekmann, in: Sachs, *GG*, 6th ed. 2011, Art. 115, marginal no. 17) – to direct state borrowing. The executive is not to be able to undermine or circumvent parliament’s right to decide on the budget by way of borrowing and/or authorising guarantees (see BVerfGE 67, 256 <281>; see also Wendt, in: v. Mangoldt/Klein/Starck, *GG*, vol. 3, 6th ed. 2010, Art. 115, marginal no. 16; Heun, in: Dreier, *GG*, 2nd. ed., Suppl. 2010, Art. 115, marginal no. 18; Henneke, in: Schmidt-Bleibtreu/Hofmann/Hopfau, 12th ed. 2011, Art. 115, marginal no. 9; Siekmann, in: Sachs, *GG*, 6th ed. 2011, Art. 115, marginal no. 23). The provision of Article 115.1 of the Basic Law is thus shown to be the concretisation of the democratic requirement of parliamentary approval (Höfling/Rixen, in: *Bonner Kommentar*, vol. 16, Art. 115, marginal no. 109 <July 2003>; see also Puhl, *Budgetflucht und Haushaltsverfassung*, 1996, p. 484). It secures parliament’s right to decide on the budget for future budget years too and obliges parliament to make the decisions essential for the development of total borrowings itself and not to leave them to the executive by generally formulated authorisations. At the same time, Article 115.1 of the Basic Law guarantees the attentiveness of parliament and of the interested public in actual or potential burdens on the state budget and makes supervision – which is not least also the supervision of the Federal Constitutional Court – possible (see Isensee, in: *Festschrift für Karl Heinrich Friauf*, 1996, p. 705 <712>; Wendt, in: v. Mangoldt/

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Klein/Starck, *GG*, vol. 3, 6th ed. 2010, *Art. 115*, marginal no. 16; Pünder, in: Isensee/Kirchhof, *HStR V*, 3rd ed. 2007, § 123, marginal no. 15).

b) Under Article 115.1 sentence 1 of the Basic Law, borrowing and giving guarantees at all events require a statutory authorisation whose amount is “either determined or determinable”. The parliamentary legislature must therefore itself lay down the financial extent of the authorisation to borrow or give guarantees by a determined – or at least determinable – maximum amount (on this, see Höfling/Rixen, in: *Bonner Kommentar*, vol. 16, *Art. 115*, marginal nos. 201 ff. <July 2003>). In the case of authorisation to give guarantees whose scope and other framework conditions mean that if they are drawn on there is a risk of a serious reduction of the latitude for future budgetary decisions, the legislature may not restrict its decision to laying down the amount. The purpose of the special constitutional requirement of the specific enactment of a statute, which is to protect the overall budgetary responsibility of the German *Bundestag* against a transfer of the decisions materially influencing the actual or potential total borrowings to the executive, would otherwise fail to be achieved. Where such guarantee authorisations apply, a circumvention and undermining of parliamentary budgetary responsibility is only prevented if the legislature lays down not only the extent of the authorisation but also flanking framework conditions which guarantee that the overall budgetary responsibility of the *Bundestag* is preserved. This may be achieved by subjecting the exercise of the guarantee authorisation to statutory risk-limiting criteria and by providing that the essential decisions in connection with exercising the guarantee authorisations in turn are tied to the participation of the *Bundestag*. Here, there is a reciprocal relationship between the definiteness of the statutory requirements for exercising the guarantee authorisation and the necessity of the participation of the *Bundestag* (see BVerfG, judgment of the Second Senate of 7 September 2011, loc. cit., p. 2946 <2951>, marginal nos. 136 ff.); the preservation of the overall budgetary responsibility of the *Bundestag* requires in principle that the *Bundestag* exercises an influence that has an overall determining effect.

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5. a) The right to decide on the budget and the overall budgetary responsibility of the German *Bundestag* are as a general rule exercised by debating and passing resolutions in the plenary session (see BVerfGE 70, 324 <356>; BVerfG, judgment of the Second Senate of 7 September 2011, loc. cit., p. 2946 <2951>, marginal no. 124), by the resolution on the Budget Act, by statutes with financial effect or by a mandatory resolution of the plenary session of another kind (see also BVerfGE 90, 286 <383 ff.>). Under Article 38.1 in conjunction with Article 77.1 sentence 1 and Article 110.2 sentence 1 of the Basic Law, every member has a right to assess the draft budget of the Federal Government and the applications for amendments made in this connection. The member is to be able to state his or her ideas as to the possibilities of use of the budget funds and in this way to influence the decision on the budget (see BVerfGE 45, 1 <38>; 70, 324 <356>). In addition, the members of the German *Bundestag* are entitled and obliged to exercise their supervisory power over fundamental budgetary decisions (see BVerfG, judgment of the Second Senate of 7 September

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2011, loc. cit., p. 2946 <2951>, marginal no. 124).

b) The freedom and equality of the mandate (Article 38.1 sentence 2 of the Basic Law) are, however, not guaranteed without limits, but may be limited by other legal interests of constitutional status. Parliament's capability of functioning is such a legal interest of constitutional status (see BVerfGE 80, 188 <219>; 84, 304 <321>; 96, 264 <278>; 99, 19 <32>; 112, 118 <140>; 118, 277 <324>). 114

If the German *Bundestag* does not wish to lose its capability of working, it may and must react to the increasing complexity of needs for legislation in connection with its self-organisation and develop strategies of cooperation based on the division of duties and on the coordination of the political development of informed opinion (see BVerfGE 102, 224 <236>). This purpose is served by the autonomy of the German *Bundestag* with regard to adopting its own rules of procedure guaranteed in Article 40.1 sentence 2 of the Basic Law (see BVerfGE 70, 324 <360>). Article 40.1 sentence 2 of the Basic Law gives parliament the authority to provide for its internal affairs autonomously within the constitutional order and to organise itself in such a way that it can properly perform its duties (see BVerfGE 80, 188 <219>; 84, 304 <321>; 102, 224 <235-236>). At the same time, the self-organisation of parliament shapes the nature and manner in which the members exercise the rights arising from their constitutional status (see BVerfGE 80, 188 <219>). It secures the fundamental conditions for the organised exercise of these rights; although the members enjoy them as a direct result of their constitutional status, they are only membership rights and can only be exercised in an organised way as such. It is therefore the duty of parliament to allocate the status rights of all members to each other and to coordinate them with each other in order to facilitate a proper fulfilment of its duties (see BVerfGE 80, 188 <219>). 115

Parliament's right to govern its own affairs extends in particular to its business (see BVerfGE 44, 308 <315>; 80, 188 <218-219>) and is aimed to enable parliamentary duties to be effectively carried out. In this respect, for example, the German *Bundestag* decides on the details of the legislative procedure (see BVerfGE 1, 144 <151-152>; 80, 188 <219>), on the establishment, duties, composition and method of working of committees and other subsidiary bodies, on the procedure to exercise its rights of initiative, information and supervision, the formation of parliamentary groups and their rights, and on the exercise of the parliamentary right to speak (see BVerfGE 80, 188 <219>). In addition, the Federal Constitutional Court has recognised that the German *Bundestag*, in connection with its autonomy of rules of procedure, may lay down a minimum size for parliamentary groups in order to guarantee parliament's functioning (see BVerfGE 96, 264 <278>). The same applies to provisions in the Rules of Procedure of the German *Bundestag* (*Geschäftsordnung des Deutschen Bundestages* – GOBT), which reserve particular applications to the parliamentary groups or to five per cent of the members of the *Bundestag* (see, for example, § 20.3 sentence 1, § 20.5 sentence 2, § 25.2 sentence 1, § 26, § 42, § 44.3 sentence 1, § 45.2 sentence 1, § 76.1 of the Rules of Procedure of the German *Bundestag*), and 116

to the distinction between parliamentary groups and other groupings which is based on the consideration that they may prevent parliament's work being obstructed by a multitude of ultimately hopeless applications made by small groups (see BVerfGE 96, 264 <278-279>). The right of the individual member to participate in the overall budget responsibility is also limited by the power of the German *Bundestag* to organise its work and carry out its duties within the scope laid down by the Basic Law.

c) In deciding what rules the German *Bundestag* needs in order to organise itself and to guarantee correct business procedure, it in principle has a broad latitude. It is primarily for the *Bundestag* to specify in what way its members participate in the parliamentary development of informed opinion (see BVerfGE 80, 188 <220>). 117

d) In connection with its power of self-organisation, the German *Bundestag* may in principle also use a statute as its vehicle. Its autonomy of adopting its own rules of procedure is not constitutionally limited by a statutory provision, at least if the Federal Government is not in the process given any significant possibilities of influencing the procedure and the *Bundestag's* development of informed opinion, if neither the statute nor its repeal require the approval of the *Bundesrat*, if the core of autonomy of rules of procedure is unaffected and in addition weighty objective reasons support the choice of using a statute (see BVerfGE 70, 324 <361>). 118

6. The starting point and basis for the structure and restriction of members' rights is the principle of participation of all members in the decisions of the German *Bundestag*; this is the yardstick for the structuring of the organisation or business of parliament (see BVerfGE 80, 188 <219>). To the extent that the transfer of competencies to decide to a decision-making committee is intended to exclude members of the *Bundestag* from participating in the parliamentary decision-making, this is only admissible in order to protect other legal interests of constitutional rank, and if the principle of proportionality is strictly observed. The power of self-organisation does not, however, permit the members to be completely deprived of rights (see BVerfGE 44, 308 <316>; 80, 188 <219>; 84, 304 <321-322>). 119

a) The German *Bundestag*, in connection with its power of self-organisation and its autonomy of adopting its own rules of procedure, is in principle entitled to form subsidiary bodies in order to enable its duties to be appropriately carried out (BVerfGE 80, 188 <219>). The increasing complexity of the facts to be dealt with and the cumbersome nature of the plenary session make a division of labour virtually mandatory (see BVerfGE 44, 308 <317>). It is specifically entitled to create committees (see BVerfGE 44, 308 <318>) and to transfer to them duties to be performed by the *Bundestag*, for example the preparation of plenary session resolutions or the exercise of rights of information, supervision and enquiry (see §§ 54 ff. of the Rules of Procedure of the German *Bundestag*). 120

b) It is not by chance that it is part of the parliamentary tradition that large parts of the duties to be performed by the German *Bundestag* are dealt with outside the plenary session, above all in committees (see BVerfGE 44, 308 <317>; 80, 188 <221>; 121

84, 304 <323>). These are in principle restricted to preparing the debates and resolutions of the plenary session, that is, they work towards a final decision by the plenary session (see § 54.1 sentence 1 Rules of Procedure of the German *Bundestag*). In this way they relieve the *Bundestag* by dealing with part of the decision process in advance and at the same time exercise a substantial part of the German *Bundestag*'s duties of information, supervision and enquiry (see Article 43.1 of the Basic Law).

c) In some cases expressly provided for in the Basic Law, the German *Bundestag* may also transfer to committees powers of independent exercise in place of the plenary session (in particular Article 45, 45c, 45d, 53a of the Basic Law). Whether and to what extent the *Bundestag*, going beyond this, has a general power to transfer, by statute or under its autonomy of rules of procedure, powers of decision to subsidiaries bodies created by itself – which is answered in the negative by the majority opinion in the literature, at least for sovereign and other essential decisions (see Kretschmer, in: *Bonner Kommentar*, vol. 7, Art. 45, marginal no. 211; Berg, in: *Bonner Kommentar*, vol. 8, Art. 45a, marginal no. 61; Achterberg/Schulte, in: v. Mangoldt/Klein/Starck, vol. 2, 6th ed. 2010, Art. 45c, marginal no. 30; Morlok, *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* – VVDStRL 62 [2003], p. 37 <59>; Schmidt, *Archiv des öffentlichen Rechts* – AöR 128 [2003], p. 609 <624>; a different view is advanced in Friesenhahn, VVDStRL 16 [1957], 9 <32>) – does not need to be given a fundamental decision here.

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d) In state practice, powers of decision for the budget committee have found recognition for the sphere of the budget; the Euro Stabilisation Mechanism Act discernibly connects to these. Thus, for example, it is in accordance with state practice that although the plenary session of the German *Bundestag* establishes the budget and therefore the basic framework of the federal budget, in particular the amounts of the individual items and their purpose, the funds which in principle have been approved need in particular cases to be authorised by the *Bundestag* (see § 22 sentence 1 and sentence 3, § 36 sentence 2 Federal Budget Code (*Bundeshaushaltsordnung* – BHO), and this authorisation is normally decided not by the plenary session, but by the budget committee (see Gröpl, in: Gröpl, *BHO/LHO*, 2011, § 36, marginal no. 9). Over and above this, the Federal Constitutional Court, for example in its decision on the European Financial Stability Facility of 7 September 2011, consented in the case of a guarantee in a particular combination of circumstances, bound by statutory requirements for claiming under the guarantee, strictly conditional and subject to a short time limit, to the approval being made by the budget committee, although in principle it is reserved to the plenary session (BVerfG, judgment of the Second Senate of 7 September 2011, loc. cit., p. 2946 <2953>, marginal no. 141).

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e) The principle of representative democracy, which is laid down in Article 38.1 sentence 2 of the Basic Law, guarantees every Member of Parliament not only freedom in the exercise of his or her mandate, but also equal status as a representative of the entire people. Ultimately, this principle is based on the principle of electoral equality guaranteed by Article 38.1 sentence 1 of the Basic Law. The two special principles of

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equality, with regard to the principle of representative democracy which they embody, stand in an indissoluble reciprocal relationship in which each determines the other (see BVerfGE 102, 224 <237 ff.>; 112, 118 <134>). Notwithstanding the structural differences between the right to vote and the free mandate of the elected members, therefore, distinctions with regard to the status of a member, in order to be justified in accordance with the requirements following from the principle of electoral equality (on this, see BVerfGE 6, 84 <92>; 51, 222 <236>; 95, 408 <418>; BVerfG, Judgment of the Second Senate of 9 November 2011 – 2 BvC 4/10, 2 BvC 6/10, 2 BvC 8/10 –, *Deutsches Verwaltungsblatt* – DVBl 2011, p. 1540 <1541>, marginal no.87) need a particular reason, which is legitimised by the Basic Law and is of a weight similar to that of the equality of the members. The requirements placed on such a reason correspond to the requirements which are to be imposed on distinctions within electoral equality, because the effect of this continues on the second level of the development of the forming of informed democratic opinions, that is, in the status and work of members of the *Bundestag* (see BVerfGE 102, 224 <237 ff.>; 112, 118 <134>). Organisational measures of the German *Bundestag* which by reason of the extent of the powers delegated or by reason of the area affected by the transfer encroach particularly strongly on the fundamentally equal status rights of all members are therefore subject to strict constitutional-court supervision (see BVerfGE 94, 351 <367>). This applies in particular to the delegation of powers to decide for independent exercise, taking the place of the plenary session, to subsidiary bodies of the German *Bundestag*.

7. If the German *Bundestag*, in order to safeguard other legal interests of constitutional status, transfers to a committee created by itself under its power of self-organisation or to another subsidiary body individual tasks among those it has to fulfil for independent exercise, taking the place of the plenary session, and if there are reasons for this which have the same weight as the requirement of equal rights to participation of all members, the restriction of the status rights of the elected members and the associated unequal treatment may not extend further than is absolutely necessary (see BVerfGE 94, 351 <369>). In order that disproportionate adverse effects on status rights of members are avoided, the principle of the mirror image must be respected (a). In addition, the possibilities of information to be supplied to the members not involved may not be restricted beyond the absolutely necessary measure (b).

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a) The composition of the committees of the German *Bundestag* and of other subsidiary bodies of the plenary session must satisfy the principle of the mirror image (BVerfGE 112, 118 <133>). This follows from the freedom and equality of the mandate under Article 38.1 of the Basic Law and from the function of the *Bundestag* as a body of representation (Article 20.2 of the Basic Law). If the representation of the people is shifted to committees or to other subsidiary bodies, because the tendency of parliament's decision is determined in advance there, or the decision may even be made for the whole parliament there (BVerfGE 70, 324 <363>), these bodies must also correspond to the plenary session in their political character. This applies in partic-

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ular if they exercise substantial parts of the duties of information, supervision and enquiry of the *Bundestag* (see BVerfGE 80, 188 <222>; 112, 118 <136>).

aa) The parliamentary groups are the essential political forces in parliament. On the basis of the equality of the individual members, they are the essential point of reference for the weighting of subsidiary bodies and therefore must also be treated according to their strength (see BVerfGE 84, 304 <322-323>; 112, 118 <133>). Every committee must therefore be a microcosm of the plenary session and its composition must mirror the composition of the plenary session in its political weighting (see BVerfGE 80, 188 <222>; 84, 304 <323>; 96, 264 <282>; 112, 118 <133>). This calls for as faithful a reflection as possible of the strengths of the parliamentary groups represented in the plenary session (principle of the mirror image). § 12 sentence 1 of the Rules of Procedure of the German *Bundestag* takes account of this in providing that the composition of the committees is to be made in the proportion of strengths of the individual parliamentary groups to each other. 127

bb) The principle of the mirror image does not in itself make any definition of the permissible size of a committee or of another subsidiary body (see BVerfGE 70, 324 <363>). But the smaller the subsidiary body is, the more members of the *Bundestag* are prevented from exercising their status rights, and in this respect the less is the representative function satisfied. For this reason the requirements of objective justification of the delegation of powers to decide increase in relation to the degree to which a subsidiary body is smaller. In exceptional cases, despite formal compliance with the principle of the mirror image, this may result in a violation of Article 38.1 sentence 2 of the Basic Law because the subsidiary body is too small. 128

cc) The decision as to how specific account is to be taken of the principle of the mirror image, in particular by way of what calculation procedure, is not laid down by Article 38.1 sentence 2 of the Basic Law, but in principle falls within the power to decide of the German *Bundestag* (BVerfGE 96, 264 <283>). There is no objection to the St. Laguë/Schepers procedure, nor to recourse to the equally established d'Hondt or Hare/Niemeyer procedures (see BVerfGE 96, 264 <283>). Changing to a different calculation method may also be justified if there are objective reasons for this (see BVerfGE 96, 264 <283>). 129

dd) Curtailments of the principle of the mirror image are permissible only in cases with an exceptional constellation. If, for example, it conflicts with the majority principle, that is, the principle that in substantive decisions the parliamentary majority which forms the government must be able to assert itself even in smaller approximations of the *Bundestag*, both principles must be carefully balanced against each other (BVerfGE 112, 118 <140>). Smaller microcosms of the *Bundestag* must therefore satisfy the principle of the mirror image in their composition; deviations are possible only in narrow limits if they are capable of taking account of the political "government majority" which exists in the plenary session (BVerfGE 112, 118 <141>; see also Bavarian Constitutional Court, *Bayerischer Verfassungsgerichtshof* – BayVerfGH, 130

decision of 26 November 2009 – Vf. 32-IVa-09 –, *Bayerische Verwaltungsblätter* – BayVBl 2010, pp. 298 ff.).

b) Where the German *Bundestag* delegates rights of information and supervision to a subsidiary body (see BVerfGE 80, 188 <219>), it must ensure that here too the principle of the least possible encroachment is complied with. This applies particularly in the area of parliament's right to decide on the budget and its overall budgetary responsibility, in which individual members also in principle have wide-ranging duties of information and supervision, particularly the right to information which enables them to make their own assessment of the budget (BVerfGE 70, 324 <355>), the right to independent assessment of the draft budget of the Federal Government and proposals for amendments to this (BVerfGE 70, 324 <356>) and the right to the supervision of budget decisions (BVerfG, judgment of the Second Senate of 7 September 2011, loc. cit., p. 2946 <2951>, marginal no. 124). The information of the members not participating reduces the intensity of the limitation of their status rights entailed by the delegation and the degree of unequal treatment and in principle permits the plenary session to have the decision returned to itself (see Kretschmer, loc. cit., marginal no. 212).

II.

By these standards, the application is predominantly well-founded. § 3.3 of the Euro Stabilisation Mechanism Act violates the applicants' right under Article 38.1 sentence 2 of the Basic Law insofar as it excludes them from participation in the overall budgetary responsibility of the German *Bundestag* not only for the cases of purchases of government bonds which the European Financial Stability Facility makes on the secondary market (§ 1.1 sentence 2, 5th item, § 1.2 sentence 3, 3rd item, Euro Stabilisation Mechanism Act) (1.). § 5.7 of the Euro Stabilisation Mechanism Act permits an interpretation in conformity with the Basic Law, to the effect that the Federal Government must without delay after the reasons which justify the treatment of the matter by the special committee end inform the German *Bundestag* of these reasons and of the resolutions passed by the special committee (2.).

1. § 3.3 of the Euro Stabilisation Mechanism Act excludes the applicants in full from essential decisions which affect the overall budgetary responsibility of the German *Bundestag* (a). This exclusion is not justified by sufficiently weighty reasons oriented towards parliament's capability of functioning (b).

a) § 3.3 of the Euro Stabilisation Mechanism Act excludes the members not represented in the special committee from essential decisions affecting the overall budgetary responsibility of the German *Bundestag* in connection with the work of parliament, and in doing so constitutes unequal treatment with regard to the powers of participation resulting from the status of *Bundestag* member.

§ 3.3 of the Euro Stabilisation Mechanism Act provides that all rights of participation held by the German *Bundestag* as a whole under § 3.1 of the Euro Stabilisation

Mechanism Act are exercised by the special committee in cases of particular urgency or confidentiality (sentence 1 and 2). In the case of emergency measures to prevent dangers of contagion under § 1.2 sentence 3 of the Euro Stabilisation Mechanism Act, it is as a general rule presumed that such a case exists (sentence 3); In other respects – that is, in the case of loans made by the European Financial Stability Facility to a Member State of the Euro Group and in the cases of purchases of government bonds on the primary market – the Federal Government may assert the particular urgency or confidentiality of a matter (sentence 4). This provision has the result that the special committee passes resolutions in an area which affects the overall budgetary responsibility of the German *Bundestag* and thus is authorised to exercise duties independently and taking the place of the plenary session.

This encroaches upon the rights of the members not represented in the special committee to consult on a matter of the German *Bundestag* (BVerfGE 70, 324 <355>) and to speak on it (BVerfGE 10, 4 <12>; 60, 374 <379>; 80, 188 <218>), to exercise parliament's right of enquiry and information (BVerfGE 13, 123 <125>; 57, 1 <5>; 67, 100 <129>; 70, 324 <355>; 80, 188 <218>) and finally to vote on it (BVerfGE 70, 324 <355>; 80, 188 <218>). Restrictions are also imposed on the right to receive the information which makes it possible to objectively assess the budget (BVerfGE 70, 324 <355>), on independent assessment of the draft budget and corresponding bills of the Federal Government which affect the overall budgetary responsibility of the German *Bundestag* (BVerfGE 70, 324 <356>) and the right of supervising fundamental budgetary decisions (BVerfG, judgment of the Second Senate of 7 September 2011, loc. cit., p. 2946 <2951>, marginal no. 124).

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The applicants have not been elected members of the special committee. They are thus among the current number of 611 members of the German *Bundestag* who are unable to exercise any members' rights in the area of application of § 3.3 of the Euro Stabilisation Mechanism Act.

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b) The intended exclusion of the applicants from rights associated with their status as *Bundestag* members may admittedly in principle be justified by reasons oriented towards parliament's capability of functioning (aa). In the case to be decided here, however, these reasons are not sufficient to satisfy the requirements of differentiations with regard to the status of *Bundestag* member following from the principle of equality of members (bb). However, there is no violation of the requirements of subsidiary bodies of parliament being a mirror image of parliament if § 3.3 sentence 2 of the Euro Stabilisation Mechanism Act is interpreted in conformity with the Basic Law (cc).

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aa) The establishment of a subsidiary body for independent exercise, taking the place of the plenary session, of duties of the German *Bundestag* is subject to the right of self-organisation of parliament, which in this respect in principle enjoys a wide discretion (1). The exclusion of the members not represented in such a subsidiary body from their rights of participation may in principle also be justified with regard to the

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particular urgency or confidentiality of a matter (2).

(1) Legislating for the special committee in § 3.3 of the Euro Stabilisation Mechanism Act is a matter which forms part of the German *Bundestag*'s self-organisation. It is constitutionally unobjectionable that this is done by statute rather than by the rules of procedure, since the statute does not need the consent of the *Bundesrat*, the core area of the autonomy of adopting rules of procedure is not affected and finally, the choice of a statute as a vehicle is not only supported, but also required by good reasons – here, the requirement of the specific enactment of a statute in Article 115.1 of the Basic Law (see BVerfGE 70, 324 <361-362>). However, there must be constitutional review as to whether the principle of the participation of all members in the duties of parliament is complied with (see BVerfGE 80, 188 <220>). 140

(2) Particular importance attaches to the principle of the capability of functioning of the German *Bundestag* (see BVerfGE 96, 264 <278-279>; 112, 118 <140>), which has constitutional status, as a reason capable of legitimising an encroachment upon the members' rights guaranteed by Article 38.1 sentence 2 of the Basic Law. It can justify the fact that in cases of particular urgency or confidentiality the German *Bundestag* takes precautions for prompt action and against planned measures becoming known, if appropriate decision-making within parliament is not otherwise guaranteed. 141

(a) Ensuring that the *Bundestag* is capable of functioning in cases of particularly urgent decisions is a concern deserving of recognition and may make it appropriate for the consultation and resolution on a matter not to be conducted in the plenary session if the plenary session cannot meet soon enough and by reason of the urgency cannot appropriately consult and pass resolutions. Thus, for example, the Federal Constitutional Court has permitted in connection with the requirement of parliamentary approval for matters which concern defence that in cases of imminent danger the Federal Government may for the time being decide on the deployment of forces (BVerfGE 90, 286 <388>; 121, 135 <162-163>). 142

(b) Concerns of security protection in the interest of constitutionally protected interests as compelling reasons of the public weal are also in principle suitable to justify the restriction of members' status rights, to guarantee the capability of functioning of the German *Bundestag* (see BVerfGE 70, 324 <358-359>). An example used by the state in practice is the Parliamentary Control Panel (*Parlamentarisches Kontrollgremium*), which is composed of eleven members of the *Bundestag*, and which *inter alia* supervises the work of the intelligence service (Article 45d of the Basic Law; §§ 1, 2 of the Act on the Parliamentary Supervision of Federal Intelligence-Service Activities (*Gesetz über die parlamentarische Kontrolle nachrichtendienstlicher Tätigkeit des Bundes* – PKGrG). In addition, the Federal Constitutional Court has approved (BVerfGE 70, 324 ff.) the fact that the budgets of the federal secret services are dealt with not by the plenary session, but by a substantially smaller body which conducts its business in secret and is formed exclusively for this purpose, since the multitude of items of information which become known in the consultations can allow a picture of 143

the specific operations of the secret services to be created, like a mosaic, and this can in addition result in persons being endangered (see BVerfGE 70, 324 <364>).

bb) However, in restricting the status rights of members, the principle of proportionality must be observed and an appropriate balance must be ensured between the German *Bundestag*'s capability of functioning on the one hand and the status rights of members, which conflict with this, on the other hand. The delegation of powers to decide of the German *Bundestag* to the subsidiary body, together with the power of independent exercise of these competencies, taking the place of the plenary session, stands in a tense relationship to the principle of the public nature of the budget, which requires it to be dealt with by the plenary session, which also has constitutional status as a manifestation of the requirement of transparency which characterises democracy (see D. I. 2. c above). The accompanying extensive deprivation of members' rights requires particularly weighty reasons. If the delegation of the decision-making powers occurs in the interest of particular urgency or confidentiality, it must therefore remain restricted to a few exceptions with a limited area of application and be absolutely necessary. The creation of the special committee provided for in § 3.3 of the Euro Stabilisation Mechanism Act does not satisfy these requirements, either from the point of view of particular urgency (1) or from that of confidentiality (2). The legal presumption of § 3.3 sentences 3 and 4 of the Euro Stabilisation Mechanism Act also fails to comply with the constitutional requirements (3).

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(1) If members' rights are largely to be removed due to particular urgency in order to realise a constitutionally protected concern, the condition for this is that if the plenary session dealt with the measure it would fail its purpose for reasons of time, and that therefore the intended size of the special committee is necessary and that the measure is actually to be implemented immediately following the consultation and resolution and that it actually is implemented. On the basis of the oral hearing and the "Guidelines" submitted by the Federal Ministry of Finance, this cannot ultimately be established for any of the emergency measures listed in the catalogue of measures of the European Financial Stability Facility.

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In addition, neither in the legislative process nor in the proceedings before the Federal Constitutional Court have reasons become apparent why a subsidiary body which is "as small as possible" should be necessary in order to be able to meet particularly promptly. It is true that convening nine members requires a smaller administrative effort than convening the budget committee with forty-one members and the same number of substitutes, or indeed the plenary session with its 620 members. On the other hand, no substitutes are provided for for the members of the special committee, and therefore if only a few members were unable to participate it might be unable to form a quorum, which would be decidedly inconsistent with particular urgency. If in addition one takes account of the fact that a large number of preparatory actions and implementation measures by the requesting state and the European Financial Stability Facility are laid down for all the measures of the European Financial Stability Facility, this too as a general rule conflicts with a particular urgency. The representa-

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tive of the European Financial Stability Facility also made statements to this effect in the course of the legislative procedure (see minutes of the 62nd session of the budget committee, *Stenographisches Protokoll der 62. Sitzung des Haushaltsausschusses* of 19 September 2011, Protokoll 17/62, pp. 13-14). The extensive restriction of the status rights of the members by the delegation of *Bundestag* powers to the special committee for independent exercise, taking the place of the plenary session, can therefore not be justified by reasons of particular urgency.

Where the requirements of particular urgency which excludes the convening of the plenary session are satisfied, therefore, consideration could at best be given to referring the matter to the budget committee, as is indeed provided for in § 4 of the Euro Stabilisation Mechanism Act. With its present number of forty-one members, the budget committee is of a size that permits it to convene at short notice. In an emergency, it has a quorum with only twenty-one members (see § 67 sentence 1 of the Rules of Procedure of the German *Bundestag*) and – unlike the subsidiary body under § 3.3 of the Euro Stabilisation Mechanism Act – it has substitute committee members, which makes it easier to make prompt decisions even when individual members are unable to participate.

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(2) Where the extensive encroachment upon the status rights of the members is to be justified by reference to security protection concerns, the assessment of the German *Bundestag* that the transfer of power to decide to the special committee is necessary for security protection reasons and complies sufficiently with the principles of parliamentary democracy is justified only for some of the emergency measures listed in the catalogue of measures of the European Financial Stability Facility. The assumption of the German *Bundestag* that such an exceptional case applies where consultation and resolution is needed with regard to emergency measures within the meaning of § 3.3 sentence 3 in conjunction with § 1.2 sentence 3, 3rd item of the Euro Stabilisation Mechanism Act is constitutionally unobjectionable (a); however, such a compelling need for secrecy cannot be identified for the other emergency measures (b).

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(a) The German *Bundestag* has in principle taken sufficient precautions to preserve confidentiality for the great majority of situations in the Rules of Document Security issued by itself; every *Bundestag* member is obliged to comply with these rules and violation of them is an offence (H. H. Klein, in: Maunz/Dürig, *GG*, Art. 38, marginal no. 224 <October 2010>). But just as in the case of military secrets or other information which is to be kept confidential for reasons of state security, the Rules on Document Security may possibly offer insufficient provision if decisions are necessary on measures where not only the contents of the consultation but also the fact that there is consultation and resolutions are being passed must in itself be kept secret in order not to defeat the success of a measure at the outset.

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This applies where consultation and resolution is needed with regard to emergency measures necessary under § 3.3 sentence 3 in conjunction with § 1.2 sentence 3,

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3rd item of the Euro Stabilisation Mechanism Act, that is, the purchase of government bonds by the European Financial Stability Facility on the secondary market. In the oral hearing, the Federal Minister of Finance, Dr. Wolfgang Schäuble, and the *Bundestag* member Peter Altmaier convincingly submitted that if even the mere planning of such an emergency measure were to become known, this would be sufficient to defeat its success. For this reason it is to be assumed that preparing such an emergency measure, that is, including the consultation and a resolution of approval, must be treated as absolutely confidential. But if even the fact that the German *Bundestag* is dealing with this emergency measure must be kept secret, it is plain that measures under the Rules on Document Security are inadequate and even for it to be dealt with by a body with more than forty members is risky by reason of the associated very extensive organisational preparations.

(b) For other emergency measures, for what are known as precautionary measures and the loans to Member States of the Euro Currency Area to recapitalise financial institutions, on the other hand, such an absolute need for secrecy cannot be identified. According to the guidelines, the precautionary measures require the requesting state first to make an application for such a credit line to be extended and later to draw on it. As a general rule, neither of these will be concealed from the public either in the requesting state or in the other states. The same applies to the recapitalisation of financial institutions, for which the guidelines require two unsuccessful attempts at recapitalisation – once by the private sector and once by the requesting state. In the oral hearing too, the respondent and the intervener, the Federal Government, provided no substantiation for this.

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(3) In § 3.3 sentences 3 and 4 of the Euro Stabilisation Mechanism Act there is a provision that in the case of emergency measures to prevent dangers of contagion under § 1.2 sentence 3 of the Euro Stabilisation Mechanism Act, that is, in the case of loans to recapitalise financial institutions, the purchase of government bonds on the secondary market and what are known as precautionary measures particular urgency or confidentiality applies “as a general rule” and apart from this the Federal Government may assert particular urgency and confidentiality; this provision too – apart from the situations set out under D. II. 1. b) bb) (2) (a) – does not satisfy the requirements of carefully balancing the interest of security protection which is part of the capability of functioning of the German *Bundestag* and the status rights of the members which conflict with it.

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The legal presumption does not comply with the restriction of the possibility of delegation to narrowly defined exceptional cases. At all events, if – as here – essential duties of the plenary session are exercised exclusively and finally by the subsidiary bodies and a subject area which is particularly important for parliament is affected, a statutory legal presumption of the extensive restriction of the status rights of the members is not an appropriate balancing which is as careful as possible. Such a provision neither does justice to the specific features of the individual case, not does it adequately secure the rights of participation of the plenary session. The restriction of

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the members' status rights is additionally aggravated by the fact that the plenary session has no effective possibility of considering in advance whether the legal presumption should take effect and returning the matter to be decided to itself. As a result, compliance with the functional allocation of competencies and putting into practice the indefinite legal concepts which govern the overall budgetary responsibility ultimately lie in the hands of the special committee. Admittedly, its members may by a majority reject the assumption of particular confidentiality (§ 3.3 sentence 5 of the Euro Stabilisation Mechanism Act). But the statute does not provide for an effective supervision of this decision which puts the concepts into practice, such as could be given in the plenary session by the parliamentary opposition.

cc) § 3.3 sentence 2 of the Euro Stabilisation Mechanism Act, however, does not violate the applicants' rights under Article 38.1 sentence 2 of the Basic Law where it does not expressly require the composition of the special committee to be a mirror image of the German *Bundestag*. For such a mirror image is possible and required on the basis of an interpretation in conformity with the Basic Law. The principle of the mirror image requires the special committee under § 3.3 sentence 1 of the Euro Stabilisation Mechanism Act to mirror the composition of the plenary session in its specific structure as shaped by the parliamentary groups. 154

(1) The provision in § 3.3 sentence 2 of the Euro Stabilisation Mechanism Act expressly provides merely for all the parliamentary groups to be represented and the relative strengths of the parliamentary groups with regard to the relationship between government and opposition to be reflected. However, there is no provision which ensures that the composition of the special committee is structured in the proportion of the relative strengths of the individual parliamentary groups to each other. Admittedly, the legislature's statement of intention shows that the number of the members of the special committee and their distribution between the parliamentary groups is to be determined according to the St. Laguë/Schepers procedure (BTDrucks 17/7130, p. 10); there are no constitutional grounds for criticising this (see D. I. 7. a) cc above). But this procedure guarantees a mirror-image composition only if it is applied schematically and without modifications. § 3.3 sentence 2 of the Euro Stabilisation Mechanism Act contains no provision on this, but instead leaves it open how precisely the composition of the special committee is to be structured. 155

(2) § 3.3 sentence 2 of the Euro Stabilisation Mechanism Act is compatible with Article 38.1 sentence 2 of the Basic Law only in an interpretation which takes into account the principle of the mirror image. The provision must be interpreted in such a way that the special committee must also be a microcosm of the plenary session and its composition must mirror the political weighting of the composition of the plenary session (see BVerfGE 80, 188 <222>; 84, 304 <323>; 96, 264 <282>; 112, 118 <133>). This calls for as faithful a reflection as possible of the strengths of the parliamentary groups represented in the plenary session. 156

(3) It is true that when the German *Bundestag* appointed the members of the special 157

committee on 26 October 2011, it contravened these requirements and applied the St. Laguë/Schepers procedure in a modified form. Whereas if the procedure were applied strictly, the CDU/CSU parliamentary group would have four seats but the FDP parliamentary group only one seat, the German *Bundestag* appointed only three members of the CDS/CSU parliamentary group, the members Norbert Barthle, Bartholomäus Kalb and Michael Stübgen, but two members of the FDP parliamentary group, the members Otto Fricke and Michael Link, as members of the special committee (see stenographic record, minutes of plenary proceedings 17/135, p. 15976 A; BTDrucks 17/7454). In this way it gave the FDP parliamentary group one seat more than it could claim if the calculation procedure were applied in the standard manner, and at the same time the CDU/CSU parliamentary group received one seat too few. The principle of the mirror image is therefore not complied with in the intended composition of the special committee. However, this does not make § 3.3 sentence 2 of the Euro Stabilisation Mechanism Act and a violation of the applicants' rights following from this unconstitutional.

2. § 5.7 of the Euro Stabilisation Mechanism Act does not violate the applicants' rights under Article 38.1 sentence 2 of the Basic Law. The provision must be interpreted to the effect that the rights of information of the plenary session are suspended for only as long as the reasons justifying particular confidentiality apply; after these reasons end, the Federal Government must without delay of its own motion inform the German *Bundestag* of the fact that the special committee is dealing with the matter and of the reasons justifying this. 158

a) The principle that the status rights of the members may only be reduced to the absolutely necessary degree in the interest of parliament's capability of functioning also applies to the rights of information of the members and also with regard to time. It is also essential to inform the members subsequently without delay because otherwise the *Bundestag* would be prevented from exercising in the necessary manner its supervisory function with regard to the implementation of the statutory delegation provision, from acquiring experience with it and from forming a political will as to whether to retain it. 159

b) § 5.7 of the Euro Stabilisation Mechanism Act does not resist such an interpretation. Under this provision, the rights of information under § 5.1 to § 5.6 of the Euro Stabilisation Mechanism Act in cases of particular confidentiality under § 3.3 of the Euro Stabilisation Mechanism Act may be restricted to the participating members of the budget committee as long as the reasons for particular confidentiality persist. This provision neither obliges nor permits depriving the *Bundestag* beyond the period stated of the information that it needs to exercise its supervisory function. 160

E.

In *Organstreit* proceedings, the reimbursement of expenses is based on § 34a.3 of the Federal Constitutional Court Act (BVerfGE 96, 66 <67>). It may only be considered in exceptional cases, when particular principles of fairness apply (see BVerfGE 161

20, 119 <133-134>; 49, 70 <89>; 96, 66 <67>). This is the case here (see BVerfGE 82, 322 <351>).

F.

This decision is made unanimously.

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Voßkuhle

Lübbe-Wolff

Gerhardt

Landau

Huber

Hermanns

**Bundesverfassungsgericht, Urteil des Zweiten Senats vom 28. Februar 2012 -
2 BvE 8/11**

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