H e a d n o t e s

to the Judgment of the Second Senate of 22 September 2015

– 2 BvE 1/11 –

The principle that committees must reflect the composition of the plenary session (*Grundsatz der Spiegelbildlichkeit*) does not apply to working groups of the Mediation Committee, regardless of whether they were established by formal Committee decision or informally.

FEDERAL CONSTITUTIONAL COURT

- 2 BvE 1/11 -

Pronounced

on 22 September 2015

Kunert

Amtsinspektor

as Registrar of the Court Registry

IN THE NAME OF THE PEOPLE

In the proceedings
on
the application to declare

1. that the respondents violated the applicants' rights under Art. 38(1) second sentence in conjunction with Art. 21(1), Art. 20(2) of the Basic Law (*Grundgesetz* – GG) and Art. 77(2) GG by refusing to appoint Katja Kipping, Member of the German *Bundestag* and belonging to applicant no. 3, as a member of the working group established by the Mediation Committee (*Vermittlungsausschuss*) to deal with the mediation proceedings concerning the Act on Determining Standard Benefits and Amending the Second and the Twelfth Book of the Code of Social Law (*Gesetz zur Ermittlung von Regelbedarfen und zur Änderung des Zweiten und Zwölften Buches Sozialgesetzbuch*) and to give her the opportunity to participate in that working group,

2. that the respondents violated the applicants' rights under Art. 38(1) second sentence in conjunction with Art. 21(1), Art. 20(2) GG and Art. 77(2) GG by refusing to appoint applicant no. 1 as a member of the informal discussion group established by the Mediation Committee to deal with the mediation proceedings concerning the Act on Determining Standard Benefits and Amending the Second and the Twelfth Book of the Code of Social Law and to give her the opportunity to participate in such informal discussion group,

Applicants: 1. Dagmar Enkelmann,
- Rosa Luxemburg Foundation (*Rosa-Luxemburg-Stiftung*) -,
Franz-Mehring-Platz 1, 10243 Berlin,

2. Ulrich Maurer,
Gartenstraße 57, 12557 Berlin,

3. THE LEFT (DIE LINKE) parliamentary group in the German *Bundestag*, Platz der Republik 1, 11011 Berlin

- authorised representatives: Rechtsanwälte Weißleder & Ewer,
Walkerdamm 4-6, 24103 Kiel -

Respondents: 1. Joint committee composed of members of the *Bundestag* and the *Bundesrat* pursuant to Art. 77(2) GG (Mediation Committee), represented by its chairperson,
Office of the Mediation Committee, 11055 Berlin,

2. German *Bundestag*,
represented by its President,
Platz der Republik 1, 11011 Berlin,

3. *Bundesrat*,
represented by its President,
Leipziger Straße 3-4, 10117 Berlin

- authorised representatives: 1. Prof. Dr. Heinrich Amadeus Wolff,
Universitätsstraße 30, 95447 Bayreuth
- authorised representative for respondent no. 1 -

2. Prof. Dr. Frank Schorkopf,
Ehrengard-Schramm-Weg 5, 37085 Göttingen
- authorised representative for respondent no. 2 -

3. Prof. Dr. Matthias Rossi,
Richard-Wagner-Straße 16, 86199 Augsburg
- authorised representative for respondent no. 3 -

the Federal Constitutional Court – Second Senate –

with the participation of Justices

President Voßkuhle,

Landau,

Huber,

Hermanns,

Kessal-Wulf,

König,

held on the basis of the oral hearing of 19 May 2015:

Judgment:

Application no. 1 directed against respondent no. 1 is rejected. In all other respects, the applications are dismissed.

Reasons:

A.

Organstreit proceedings (dispute between constitutional organs) were initiated to challenge the applicants' exclusion from participating in a working group and an informal discussion group that were established in the context of the mediation proceedings concerning the Act on Determining Standard Benefits and Amending the Second and the Twelfth Book of the Code of Social Law. 1

I.

The *Bundesrat* participates in the Federation's legislation. This right of participation is specified in Art. 77 GG, which in section 2 provides for the establishment of what is known as the Mediation Committee. The provision reads as follows: 2

> Within three weeks after receiving an adopted bill, the *Bundesrat* may demand that a committee for joint consideration of bills, composed of Members of the *Bundestag* and of the *Bundesrat*, be convened. The composition and proceedings of this committee shall be regulated by rules of procedure adopted by the *Bundestag* and requiring the consent of the *Bundesrat*. The members of the *Bundesrat* on this committee shall not be bound by instructions. When the consent of the *Bundesrat* is required for a bill to become law, the *Bundestag* and the Federal Government may likewise demand that such a committee be convened. Should the committee propose any amendment to the adopted bill, the *Bundestag* shall vote on it a second time.

Pursuant to § 1 of the Joint Rules of Procedure of the *Bundestag* and the *Bundesrat* for the Committee under Article 77 of the Basic Law (Mediation Committee) (*Gemeinsame Geschäftsordnung des Bundestages und des Bundesrates für den Ausschuss nach Artikel 77 des Grundgesetzes [Vermittlungsausschuss]*), last amended by the Notification of 30 April 2003 (Federal Law Gazette, *Bundesgesetzblatt* – BGBl I p. 677) (hereinafter, the "Mediation Committee RoP"), the *Bundestag* and *Bundesrat* shall each send 16 of their members, who shall form the permanent Mediation Committee. If a demand is made to convene the Mediation Committee, its executive secretary calls a meeting on behalf of the chairperson of the Mediation Committee. The 3

Committee's meetings are not open to the public. Pursuant to § 3 third sentence of the Mediation Committee RoP, the substitute members may only attend meetings when deputizing for a member. Pursuant to § 5 of the Mediation Committee RoP, only the members of the Federal Government shall have the right and, upon the decision of the Committee, the obligation to attend meetings. Pursuant to § 6 of the Mediation Committee RoP, other persons may be permitted to attend meetings only by decision of the committee. […] Pursuant to § 9 of the Mediation Committee RoP, the Committee may set up subcommittees. Although the creation of working groups is not provided for in the Rules of Procedure, the Mediation Committee commonly forms them (cf. Bergkemper, Das Vermittlungsverfahren gemäß Art. 77 II GG, 2008, pp. 215 et seq.).

The Rules of Procedure of the German *Bundestag*, as published in the Notification of 2 July 1980 (BGBl I p. 1237), last amended by Decision of 23 April 2014 (BGBl I p. 534) (hereinafter, the "*Bundestag* RoP"), governs the delegation of members of the German *Bundestag* to the Mediation Committee as follows: 4

> § 12: Distribution of posts among parliamentary groups
>
> The composition of the Council of Elders and of the committees as well as the appointment of the chairpersons of the various committees shall be in proportion to the strengths of the parliamentary groups. The same principle applies to elections to be held by the *Bundestag*.
>
> § 57: Number of committee members
>
> (1) The *Bundestag* shall determine the system governing the composition of committees pursuant to § 12 as well as the number of members. Every Member of the *Bundestag* shall in principle serve on a committee.
>
> (2) The parliamentary groups shall appoint committee members and their substitutes. The President shall appoint non-attached Members of the *Bundestag* as committee members who participate in the deliberations without having the right to vote.
>
> (3) The President shall inform the *Bundestag* of the names of the members first appointed and of any subsequent changes.
>
> (4) To assist the committee members, one staff member from each parliamentary group may be permitted to attend the committee meetings.

II.

1. Applicants no. 1 and no. 2 were members of the 17th German *Bundestag* and of the Mediation Committee, as well as of applicant no. 3, a parliamentary group of the 5

German *Bundestag*. They are not members of the current 18th German *Bundestag*; applicant no. 3 as such, however, is represented in it.

[…] 6-17

[*Excerpt from Press Release No. 12/2015, 4 March 2015*]

By decision of 17 December 2010, the *Bundesrat* refused to give its consent to the Act (on Determining Standard Benefits and Amending the Second and the Twelfth Book of the Code of Social Law). On the same day, the Federal Government, which was composed of a coalition between the CDU/CSU and the FDP, demanded that the Mediation Committee be convened. At that time, the *Bundestag*'s 16 seats on the Mediation Committee were allocated to its parliamentary groups as follows: seven to the CDU/CSU, four to the SPD, two to the FDP, two to THE LEFT (DIE LINKE), and one to ALLIANCE 90/THE GREENS (BÜNDNIS 90/DIE GRÜNEN), (i.e. 7:4:2:2:1). At an informal meeting of the members of the Mediation Committee, which was held immediately after the *Bundesrat* met in plenary session, a decision was taken to create a working group. The working group was charged with exploring and elaborating initial possibilities for compromise. It was composed of 18 participants. Representatives of the German *Bundestag* consisted of three members of the CDU/CSU, three members of the SPD, one member of the GREENS, and one member of the FDP, (i.e. 3:3:1:1). THE LEFT parliamentary group was not considered in the composition of the working group. A motion to that effect [to admit its member of Parliament, Katja Kipping] was rejected by a majority of the members of the Mediation Committee.

On 3 January 2011, concurrently with the initiation of these *Organstreit* proceedings, the applicants raised an urgent motion to allow participation in the working group. In response, the Mediation Committee agreed to allow THE LEFT parliamentary group to send a representative to the working group. The applicants thereupon withdrew the urgent motion.

The working group met for the final time on 19 January 2011. It determined that it had not been possible to draft a proposal that was capable of obtaining a majority. On the same day, the Mediation Committee met for the first time. It was unable to reach agreement on a recommendation for a resolution. In light of the considerable need for discussion, the deliberations were postponed. Representatives of the so-called A side and the so-called B side agreed to meet for informal discussions. Contrary to their clearly expressed will, members of THE LEFT parliamentary group were not represented in this informal discussion group. It has not been determined with certainty who participated in the discussions. At its second meeting on 9 February 2011, the Mediation Committee approved the B side's compromise proposal with the votes of the representatives of the B side. The Mediation Committee's recommendation for a resolution was approved by a majority of the German *Bundestag* but not by a majority of the *Bundesrat*.

By resolution of 11 February 2011, the *Bundesrat* again called in the Mediation

Committee. This was followed by negotiations between various politicians from the Federation and the *Laender* (federal states). An elaborated proposal was sent to the members of the Mediation Committee on 22 February 2011. On the same day, the Mediation Committee adopted a recommendation for a resolution, which was accepted by the German *Bundestag* and approved by the *Bundesrat*.

[*End of excerpt*]

III.

[…] 18-26

IV.

[…] 27-47

V.

[…] 48

VI.

[…] 49-52

[Excerpt from Press Release No. 70/2015, 22 March 2015]

Pursuant to § 18(1) no. 2 of the Federal Constitutional Court Act (Bundesverfassungsgerichtsgesetz – BVerfGG), Justice Müller is debarred from exercising his duties in the present proceedings. He has already been involved in the same case due to his office or profession. As Minister-President of the Saarland and as a member of the Mediation Committee he participated in the mediation proceedings at issue and contributed to the challenged decisions. His involvement cannot be regarded as mere participation in the legislative process within the meaning of § 18(3) no. 1 BVerfGG, which would not debar him from exercising his duties. This provision does not apply if the proceedings before the Federal Constitutional Court are not directed against a law enacted with the participation of the Justice, but – as in the case at hand – against specific events during the legislative process in which the Justice participated.

[End of excerpt]

B.

Insofar as a decision has yet to be rendered on them, the applications are admissible only with respect to application no. 1 and only to the extent that this application is directed against respondent no. 1. In all other respects, the applications are inadmissible. 53

I.

[…] 54

II.

1. At the time that the applications were filed, applicants no. 1 and no. 2 were Members of the 17th German *Bundestag* and therefore have the capacity of being a party to *Organstreit* proceedings before the Federal Constitutional Court within the meaning of Art. 93(1) no. 1 GG and § 63 BVerfGG. […] 55

2. As a parliamentary group, applicant no. 3 likewise has the capacity of being a party to the proceedings. […] 56

3. The respondents likewise have the capacity of being a party to the proceedings (*Parteifähigkeit*). […] 57

III.

The applications relate to justiciable matters (*taugliche Antragsgegenstände*). However, only respondent no. 1 is a suitable respondent, and only with regard to application no. 1. 58

1. Pursuant to § 64(1) BVerfGG, the application shall only be admissible if the applicant asserts that an act or omission of the respondent violated or directly threatened the rights and obligations awarded to the applicant or to the applicant's organ by the Basic Law. The term "act" is to be interpreted broadly. […] 59

2. […] 60

a) The individual or institution against whom or which the application is to be directed depends on who caused and is legally responsible for the challenged act or omission (cf. Decisions of the Federal Constitutional Court (*Entscheidungen des Bundesverfassungsgerichts* – BVerfGE) 62, 1 <33>; 67, 100 <126>; 118, 277 <322>) i.e. who, expressed in common procedural terms, is capable of being sued (*passivlegitimiert*). […] 61

The order of 17 December 2010 which established the working group for the Act on Determining Standard Benefits and Amending the Second and the Twelfth Book of the Code of Social Law and which excluded, with regard to its composition, members of Parliament affiliated with applicant no. 3, is an act attributable to respondent no. 1. The decision was taken at an informal meeting of the members of the Mediation Committee that took place on invitation of the chairperson of the Mediation Committee. Its object was to establish a working group of the Mediation Committee. Thus, the act can be attributed to the Mediation Committee both personally and substantively. The fact that the decision was not taken at a formal Committee meeting but during an informal meeting of its members does not preclude attribution. The same holds true for the fact that a person who was not a member of the Committee also took part in the meeting without a decision on this having been taken pursuant to § 6 of the Mediation Committee RoP. […] Rather, given the composition of the members of the informal meeting, its object, the invitation of the chairperson, and the use of the premises of the *Bundesrat*, the decisive factor is that the circumstances as a whole are such as to 62

allow attributing both the meeting and the decision to the Mediation Committee. […]

In as far as application no. 1 of applicants no. 1 to no. 3 is directed against respondents no. 2 and no. 3, it is inadmissible. The creation of an informal working group of the Mediation Committee cannot be attributed to them. While the Mediation Committee is a joint body of the German *Bundestag* and the *Bundesrat*, their members delegated to the Mediation Committee are not bound by instructions these organs have given. […] 63

b) Moreover, the refusal attributable to respondent no. 1 to allow a member of respondent no. 3 to be a member of and participate in the informal working group is, as an act, legally relevant, because it is capable of interfering with the legal position of applicants no. 1 to no. 3. 64

[…] 65-66

3. With application no. 2, the applicants seek a finding that the respondents violated their rights by refusing to appoint applicant no. 1 as a member of the informal discussion group and to permit her to participate therein. This application is inadmissible. 67

[…] In any case, the challenged initiation of informal discussions is not an act that is attributable to one of the respondents. 68

Admittedly, it has not been determined with certainty who participated in the discussions. Even the submissions of the applicants indicate that the discussions were not attended by all of the members of the Mediation Committee, whereas non-members did attend. According to the respondents' undisputed submissions, the Mediation Committee neither decided to take up these discussions, nor did it initiate or organise them. The same holds true with regard to the German *Bundestag* as respondent no. 2 and the *Bundesrat* as respondent no. 3. In addition, the applicants have not explained how the respondents could have influenced who participated in the discussion rounds or how they could have prevented those discussion rounds from taking place. Nor are such possibilities apparent. 69

While it may be accurate that the informal group's first round of discussions was held in the *Bundesrat* premises following a meeting of the Mediation Committee, it cannot be assumed that a refusal to allow use of these rooms, for which there was no reason to do so, would have prevented these discussions from taking place. Accordingly, there was no legally relevant omission on the part of the respondents that could constitute a possible justiciable matter. 70

The mere fact that members of the Mediation Committee participated in the discussions and that *Bundesrat* premises were supposedly used for the first meeting does not suffice to make the discussions sufficiently similar to procedures of the respondents in terms of form and organisation that would justify attributing the discussions to one of them. […] 71

[…] 72

IV.

Accordingly, as far as there is a justiciable matter and as far as the applications are directed against the suitable respondent, the applicants have standing to bring suit (*Antragsbefugnis*). 73

1. […] 74

2. Applicants no. 1 and no. 2 have standing to bring suit with respect to application no. 1 to the extent that it is directed against respondent no. 1. It cannot be precluded from the outset that the Mediation Committee violated the rights of applicants no. 1 and no. 2 under Art. 38(1) second sentence and Art. 77(2) GG, which are designed to guarantee that they can participate effectively in the policy formulation process, by excluding them, or representatives designated by them, from participating in the working group. […] 75

3. Applicant no. 3 also has standing to bring suit with respect to application no. 1 to the extent that it is directed against respondent no. 1. 76

a) According to the case-law of the Federal Constitutional Court, every committee of the *Bundestag* must generally reflect in a scaled-down manner the composition of the plenary session (cf. BVerfGE 80, 188 <222>; 84, 304 <323>). This principle according to which committees must reflect the composition of the plenary session (*Grundsatz der Spiegelbildlichkeit*) – and which parliamentary groups may invoke (cf. BVerfGE 112, 118 <132 et seq.>; 130, 318 <354>; 135, 317 <396, para. 154>) – also applies to the appointment of members of the *Bundestag* to the Mediation Committee (BVerfGE 112, 118 <133>). 77

b) […] It is not precluded from the outset that the principle also applies to the composition of subcommittees and working groups of the Mediation Committee. The present proceedings are intended to resolve this very issue. 78

V.

The applicants' recognised legal interest in bringing an action persists with respect to application no. 1. 79

1. […] 80

The recognised legal interest in bringing an action does not lapse […] merely because the challenged violation of rights lies in the past and has already come to an end, i.e. no longer has any effect (cf. BVerfGE 1, 372 <379>; 10, 4 <11>; 41, 291 <303>; 49, 70 <77>; 121, 135 <152>; 131, 152 <193>). […] 81

2. […] 82

a) […] 83

b) […] Because the respondents expressly deny that they are under a legal duty to 84

observe the principle that committees must reflect the composition of the plenary session when appointing members to working groups of the Mediation Committee and informal discussion groups, it is always possible that a parliamentary group will not be taken into account in accordance with its strength, if at all.

c) Finally, for applicants no. 1 and no. 2, their recognised legal interest in bringing an action did not lapse merely because they ceased being members of the German *Bundestag* when the 17th electoral term ended. 85

[…] 86

In the present proceedings, there is an objective interest in resolving the constitutional issue concerning the reach of the principle that committees must reflect the composition of the plenary session and the right derived from Art. 38(1) second sentence and Art. 77(2) GG guaranteeing that members of the German *Bundestag* represented in the Mediation Committee are able to participate effectively in the policy formulation process. Because applicants no. 1 and no. 2 were excluded from participating in the working group on account of their political views, a situation like the present one can recur at any time, irrespective of the individuals acting or affected. The arising question of whether a parliamentary or committee majority may exclude parts of the opposition from working groups of the Mediation Committee and, if so, whether special objective reasons are required in order to do so, is of relevance not only with regard to these proceedings but also beyond this case. […] 87

VI.

[…] 88

VII.

[…] 89

C.

The applicants' admissible application no. 1 directed against respondent no. 1 is unfounded. When it refused to appoint Katja Kipping, a member of Parliament representing applicant no. 3, as a member of the Mediation Committee's working group and to permit her participation therein, the Mediation Committee did not violate the applicants' rights under Art. 38(1) second sentence and Art. 77(2) GG. 90

I.

1. Pursuant to Art. 38(1) second sentence GG, members of the German *Bundestag* are representatives of the whole people. This rule stems from the principle of representative democracy. The German *Bundestag* is the body directly representing the people, and, as a "specific body" within the meaning of Art. 20(2) GG, it exercises the public authority emanating from the people (cf. BVerfGE 44, 308 <316>; 56, 396 <405>; 80, 188 <217>; 130, 318 <342>). In the system of parliamentary democracy 91

enshrined in the Basic Law, the people are represented in Parliament by members of Parliament (cf. BVerfGE 44, 308 <316>; 56, 396 <405>; 80, 188 <217>; 130, 318 <342>). As a rule, the people are properly represented in parliamentary decisions only by Parliament as a whole, i.e. by the entirety of its members (cf. BVerfGE 44, 308 <316>; 56, 396 <405>; 80, 188 <218>; 130, 318 <342>). This does not mean that members of Parliament are able to represent the people only in plenary sessions. Traditionally, most parliamentary work is performed outside of plenary sessions. On the one hand, this is the result of life having grown increasingly complex over the years, necessitating the division of labour. On the other hand, it stems from the fact that because of the cumbersome way in which plenary sessions operate, detailed work is possible to only a very limited extent (BVerfGE 44, 308 <317>; see also BVerfGE 130, 318 <351>). However, this requires that the final decision on a parliamentary endeavour is reserved for the plenary session, that in terms of its nature and importance, participation of members of Parliament in preparing parliamentary decisions outside of the plenary session is essentially to be considered equivalent to participation in the plenary session, and that the parliamentary decision-making process remains institutionally embedded in the parliamentary sphere (BVerfGE 44, 308 <317>). Art. 38(1) second sentence GG therefore presupposes equal rights of participation for all members of the German *Bundestag* (cf. BVerfGE 56, 396 <405>; 80, 188 <218>; 84, 304 <321>; 130, 318 <342>) and includes the right to equal participation in the process of parliamentary policy formulation (BVerfGE 96, 264 <278>).

92 The right of participation of members of Parliament concerns not only the act of decision-making itself but also their right to discuss decisions before they are made, i.e. to “deliberate” within the meaning of Art. 42(1) first sentence GG. Public deliberation of arguments and counter-arguments is an essential element of democratic parliamentarianism. Within the parliamentary procedures, it is precisely the degree of public discussion and public endeavour to find a decision that opens possibilities of reconciling conflicting interests which would not have arisen if a less transparent procedure had been used (BVerfGE 70, 324 <355>). […]

93 2. In principle, the right of participation of all members of Parliament also extends to committees of the German *Bundestag*. In accordance with the parliamentary tradition in Germany, they perform a large part of the work of the *Bundestag*. Also, through their preparatory work for decisions to be adopted by the plenary session, they relieve the *Bundestag* by dealing with parts of the decision process in advance. Moreover, they exercise a substantial part of Parliament’s duties of information, supervision and enquiry. As a result, they are included in the representation of the people by Parliament (cf. BVerfGE 80, 188 <221 and 222>). Therefore, each committee must generally be a scaled-down version of the plenary session and, in its composition, must mirror the composition of the plenary session (BVerfGE 80, 188 <222>; 84, 304 <323>; 96, 264 <282>; 112, 118 <133>; 130, 318 <354>; 131, 230 <235>; 135, 317 <396, para. 153>). This means that a parliamentary group’s strength in the plenary session has to be approximated as precisely as possible (principle that committees

must reflect the composition of the plenary session; BVerfGE 130, 318 <354>; 131, 230 <235>).

The principle that committees must reflect the composition of the plenary session also applies to subcommittees (cf. BVerfGE 84, 304 <328>), but not to bodies and functions that are merely of an organisational nature and are thus not subject to the principle of equal participation in the duties assigned to the *Bundestag* under the Basic Law (BVerfGE 96, 264 <280>). […] 94

A parliamentary group's right to be treated equally to the other parliamentary groups is satisfied if the committee is composed in accordance with the principle that committees must reflect the composition of the plenary session. Assignment of a certain duty to a committee may violate rights derived from Art. 38(1) GG as regards members of Parliament not represented in the committee, but not the rights of parliamentary groups (cf. BVerfGE 135, 317 <396 and 397, paras. 154 and 155>). 95

3. In accordance with Art. 42(2) GG, members of committees are elected by majority. The *Bundestag*'s Rules of Procedure do not provide for an exception permissible under Art. 42(2) second sentence GG. For this reason, the number of candidates that each parliamentary group may nominate must be determined, prior to the election, pursuant to a specific proportional procedure. None of these procedures can achieve complete equality. Therefore, the decision about the counting system to be used generally falls within the ambit of the *Bundestag*'s autonomous decision-making power (BVerfGE 96, 264 <283>; 130, 318 <354 and 355>). If the *Bundestag* decides to use a procedure that, in contrast to a different procedure, does not award a parliamentary group a seat on the relevant committee, this is unobjectionable under constitutional law (cf. BVerfGE 96, 264 <282 and 283>; concerning the Mediation Committee specifically and the committees of the *Bundestag* in general, BVerfGE 130, 318 <354 and 355>). […] 96

4. The principle that committees must reflect the composition of the plenary session does not in itself make any definition of the permissible size of a committee or of another subsidiary body. But the smaller the subsidiary body is, the more members of the Parliament 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 that committees must reflect the composition of the plenary session, this may result in a violation of Art. 38(1) second sentence GG because the subsidiary body is too small (BVerfGE 130, 318 <354>). 97

Moreover, from the principle of democracy follow the requirement of protection of parliamentary minorities, as well as the right to constitutional formation and exercise of opposition (BVerfGE 2, 1 <13>; 44, 308 <321>; 70, 324 <363>). Such protection is also intended to enable the minority to make its position known during the policy formulation process in Parliament. As a matter of fact, that is to be taken into account by 98

shifting representation to committees when decisions are in fact made there (cf. BVerfGE 44, 308 <319>; 70, 324 <363>; 130, 318 <352 and 353>; 131, 230 <235>). To the extent that the transfer of competencies to decide to a committee excludes members of Parliament from participating in the parliamentary decision-making, this is admissible only in order to protect other legal interests of constitutional rank, and if the principle of proportionality is strictly observed (cf. e.g., BVerfGE 130, 318 <352, 358 and 359>; 131, 230 <235>).

5. The principle that committees must reflect the composition of the plenary session also applies when electing members of the *Bundestag* to serve as members of the Mediation Committee (cf. BVerfGE 96, 264 <282>; 112, 118 <133>). While, as a joint committee of two constitutional organs, the Mediation Committee is not comparable to a *Bundestag* committee as such, its relevance in the context of the legislative process equals that of *Bundestag* committees. Making preparations to adopt a law is one of the essential duties of the German *Bundestag*. The Mediation Committee plays a pronounced and, to a certain extent, independent role in the legislative process (BVerfGE 112, 118 <138>). 99

6. Deviations from the principle that committees must reflect the composition of the plenary session are permissible only in cases with an exceptional constellation, such as where this is the only way to comply with the majority principle enshrined in Art. 42(2) first sentence GG, i.e. the principle that in substantive decisions the parliamentary majority which forms the government must be able to assert itself even in scaled-down versions of the *Bundestag* (BVerfGE 112, 118 <140>; 130, 318 <355>). In the event of a conflict, both principles must be carefully balanced against each other. The role and duty of the Mediation Committee do not require that the Committee's composition be consistent with the majority principle to such an extent that principle that committees must reflect the composition of the plenary session would have to give way to it. The Mediation Committee is established in order to negotiate compromises between the legislative bodies. This succeeds when the political opinions relevant to a specific law can be balanced against one another (BVerfGE 112, 118 <141 and 142>). The Mediation Committee's work is not necessarily intended to culminate in a decision on the matter in every case. It is not designed to be a body that adopts constitutive resolutions that reflect a political majority (BVerfGE 112, 118 <144>). Therefore, the proportional procedure must be chosen in such a way that the composition reflects the relative strengths of the parliamentary groups as far as possible also when reflecting the Chancellor's majority (*Kanzlermehrheit*) [translator's note: i.e. the majority of the number of members of the *Bundestag* specified by law] (cf. BVerfGE 112, 118 <145>). 100

II.

However, the principle that committees must reflect the composition of the plenary session does not apply to working groups of the Mediation Committee, regardless of whether they were established by formal Committee decision or informally. 101

1. In general, regulating the details of organisation and the course of business of such working groups is included in the power to autonomously adopt rules of procedure (*Geschäftsordnungsautonomie*) for the Mediation Committee, which under Art. 77(2) second sentence GG pertains jointly to the *Bundestag* and the *Bundesrat*. § 9 of the Mediation Committee RoP merely provides that the Committee may establish sub-committees. By contrast, § 1, § 3second and third sentence, § 6and § 7(3) of the Mediation Committee RoP deal with the composition of the Mediation Committee itself, the attendance of substitutes and other persons at meetings, and the quorum needed for a compromise proposal. § 9 of the Mediation Committee RoP was created in connection with the broad leeway associated with the power to autonomously adopt rules of procedure. Accordingly, the standard for its constitutional review is limited to determining whether mandatory constitutional requirements concerning the composition of the Mediation Committee and the rights of participation of the members of Parliament represented in it have been complied with in these bodies (for *Bundestag* committees, cf. BVerfGE 80, 188 <220>). 102

2. Such mandatory requirements cannot be derived from Art. 38(1) second sentence and Art. 77(2) GG. Neither does the right of the members of the German *Bundestag* to, in general, equal participation in parliamentary policy formulation extend to working groups of the Mediation Committee, nor are such groups involved in Parliament's representation of the people in a way that would require their composition to reflect the parliamentary groups' strength in the plenary session as exactly as possible. 103

a) In fact, the working groups established by the Mediation Committee are not of a purely organisational nature. Rather, they have the task of contributing, through intensive substantive work, towards finding a compromise for a legislative endeavour that is capable of securing a majority. Without doubt, compromise proposals developed by working groups to a certain degree predetermine decision-making in the Mediation Committee with regard to content. Nonetheless, this is a feature of the specific *modus operandi* in the Mediation Committee that is comparable neither to the deliberative procedure in the *Bundestag* nor to the decision-making process in the *Bundesrat*. 104

b) It is the purpose and objective of mediation proceedings to achieve political compromise between the two legislative bodies, not to once again openly deliberate the legislative proposal on which these bodies have taken differing positions. To achieve this objective, a balancing of interests is to be attempted at a higher political level, paying regard to overriding aspects (BVerfGE 112, 118 <137>). Consequently, mediation proceedings do not serve the function of public parliamentary negotiations and decision-making within the meaning of Art. 42 secs. 1 and 2 GG, to which the right of equal participation of all members of the German *Bundestag* derived from Art. 38(1) second sentence GG primarily relates. Rather, to achieve an efficient legislative process, the Basic Law allows delegating deliberation of proposals to a committee that is, by composition and procedure, particularly suitable to work out a compromise 105

(BVerfGE 72, 175 <188>). To fulfil this task assigned to it, this committee possesses – within the limits of its rules of procedure jointly given to it by the *Bundestag* and the *Bundesrat* – broad leeway for autonomously designing its procedure. This entails the power to prepare decision-making by establishing formal and informal bodies that are, depending on the relevant topic, composed in accordance with other criteria than the principle that committees must reflect the composition of the plenary session. The Mediation Committee is not a decision-making organ (cf. BVerfGE 72, 175 <188>; 101, 297 <306>; 120, 56 <74>). However, it has the competence, inherent in any mediation activity, to prepare and negotiate a compromise and thus, in effect, to structure it (BVerfGE 120, 56 <74>). It does not have a right to propose laws, and it does not have to explain its deliberations and recommendations to Parliament in public. Rather, in the interest of its efficiency, it meets privately and confidentially (BVerfGE 101, 297 <306>; 120, 56 <74>; 125, 104 <122 et seq.>).

The fact that, as conceived in the Basic Law, mediation proceedings do not aim to have the broadest possible participation of all parliamentary forces is also reflected in the way that the Mediation Committee is composed pursuant to Art. 77(2) first sentence GG. One half of the Committee is composed of members of the German *Bundestag* and the other half of members of the *Bundesrat*, i.e. of representatives of the *Laender* governments, not of members of their parliaments. 106

c) The search for consensus also determines the course of business in practice […]. […] The flexible composition and the informal character of such working groups, whose meetings are not minuted, open up the deliberation process and allow introducing new aspects […]. This adds to the probability of reaching an agreement. 107

This is not altered by the fact that the deliberations in the working groups may, and indeed do, predetermine, to a certain extent, the definitive decision that the Mediation Committee will propose. Such predetermination is precisely the reason why working groups are established in the first place, since their task consists of developing a mutual compromise. However, it does not vest working groups with a role that replaces the Mediation Committee, which still must make a definitive decision about the proposal or proposals emanating from the working group or working groups. In addition, unlike the *Bundestag* with respect to a compromise proposal of the Committee under Art. 77(2) fifth sentence GG, its role in that respect is not to ratify. Rather, it is free to adopt the results of the working groups, to reject them completely, or to modify them. In this process, all members of the Mediation Committee, including those who were not represented in the working groups, may submit their own proposals. Indeed, given that they are not bound by instructions, the members of the Mediation Committee are even free to reject a compromise proposal that experts from their own party or parliamentary group helped to develop in working groups. Indeed, owing to the *de facto* discipline in parliamentary groups, this generally does not happen, and members of smaller parliamentary groups will usually not succeed in securing a majority for their proposed amendments on account of the majority principle prevailing on the Mediation Committee. This, however, is not a particularity of the mediation proceed- 108

ings but a feature that is also inherent in parliamentary deliberations and decision-making in the German *Bundestag* and its committees.

3. Since the principle that committees must reflect the composition of the plenary session is not applicable to working groups of the Mediation Committee, then, contrary to the position of the applicants, respondents no. 2 and no. 3 are also not obligated to ensure that this principle is put into effect by amending the Rules of Procedure of the Mediation Committee. In particular, they are under no obligation to establish a rule preventing any deliberations concerning the subject matter of the mediation proceedings in other, even more informal bodies or meetings, irrespective of whether it would be at all possible to effectively adopt such a rule. 109

III.

The applicants are critical of the fact that they were not informed at all about the content of the information given to the working group by the Federal Minister of Labour and Social Affairs and that they were informed too late about the results of the informal discussion group, i.e. just shortly before the final meeting of the Mediation Committee. However, this claim is likewise unfounded. 110

1. For members of Parliament to be actually able to fulfil their duties, their level of information is of paramount importance. Only when they have been informed about the parliamentary project as comprehensively as possible and can therefore adapt themselves to it will they be capable of making full use of their opportunities to exert political influence (BVerfGE 44, 308 <320>). In the legislative process, a member of Parliament has not only the right to cast a vote in the *Bundestag* (to “decide”, cf. Art. 42(2) GG) but also the right to discuss decisions before they are made (to “deliberate”, cf. Art. 42(1) GG). However, the purpose of a deliberation would be defeated if only insufficient information, if any, were provided about its subject matter. Therefore, as a rule, members of Parliament require comprehensive information in order to fulfil their duties. That applies in particular to parliamentary minorities (BVerfGE 70, 324 <355>). Accordingly, the rights of a member of Parliament are violated when such member is not provided with the required information with sufficient timeliness so as to enable him or her to become thoroughly familiar with that information and form an opinion about the matter prior to the deliberation or vote. The same applies to the Mediation Committee’s work. Therefore, the Mediation Committee is obligated to provide its members not represented in a working group established by it, sufficiently in advance of a Committee meeting, with the documents that were available to the working group at its meetings and formed the basis for its deliberations there. 111

2. Thus, the rights of applicants no. 1 and no. 2 may have been violated as a result of the fact that certain documents were not sent to them at all and that the compromise proposal elaborated in informal bodies was sent to them by email only about 90 minutes prior to the start of the Mediation Committee’s meeting on 22 February 2011. Such a violation of their rights, however, would have been caused solely by a failure of respondent no. 1 to inform them, not by the exclusion of the applicants from the 112

working group and the discussion group (cf. BVerfGE 96, 264 <284>). However, the applicants did not make the lacking provision of information as such the subject of their applications in the *Organstreit* proceedings.

IV.

[…] 113

Voßkuhle	Landau	Huber
Hermanns	Kessal-Wulf	König
	Maidowski	

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