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Headnotes

to the judgment of the Second Senate of 19 June 2012

– 2 BvE 4/11 –

European Union matters within the meaning of Art. 23 sec. 2 GG (*Grundgesetz* – GG) include Treaty amendments and corresponding amendments at primary-law level (Art. 23 sec. 1 GG), as well as legislative acts of the European Union (Art. 23 sec. 3 GG). European Union matters also include agreements under international law if they supplement, or stand in another particular proximity to, the law of the European Union. This is determined on the basis of an overall consideration of the circumstances, including the contents, objectives and effects of the legislation.

The [Federal Government's] obligation to inform [the German *Bundestag*], contained in Art. 23 sec. 2 sentence 2 GG, is linked to the right of the German *Bundestag* , entrenched in Art. 23 sec. 2 sentence 1 GG, to participate in European Union matters. The requirement of comprehensive information is intended to enable the German *Bundestag* to exercise its rights of participation. Accordingly, the provision of information must be the more intensive, the more complex a matter is, the more deeply it intervenes in the sphere of competences of the legislature, and the more it resembles a formal resolution or agreement. This gives rise to requirements as to the quality, quantity and timeliness of the information.

Art. 23 sec. 2 sentence 2 GG refers to the "earliest possible date"; this is to be interpreted to the effect that the *Bundestag* must receive the information from the Federal Government at the latest at a time which enables the *Bundestag* to consider the matter in depth and to prepare an opinion before the Federal Government makes declarations with outward effect, in particular binding declarations on legislative acts of the European Union and intergovernmental agreements.

Limits to the obligation to inform follow from the principle of the separation of powers. Within the system of functions of the Basic Law, the government has a core area of specifically executive responsibility; this includes an area of initiative, consultation and action which is generally confidential. As long as the internal development of informed opinion of the Federal Government has not been completed, parliament has no right to information.

Pronounced

on 19 June 2012

Rieger

Government Official

as Registrar

of the Court Registry

FEDERAL CONSTITUTIONAL COURT

– 2 BvE	4/11 –

IN THE NAME OF THE PEOPLE

In the proceedings
on
the application to find as follows:

	1.	The Federal Government violated the rights of the German *Bundestag* under Art. 23 sec. 2 of the Basic Law by failing to inform the *Bundestag* directly before and after the meeting of the European Council on 4 February 2011 comprehensively, at the earliest possible date and at regular intervals about the structuring of the European Stability Mechanism, and in particular by failing to send the draft of the Treaty Establishing the European Stability Mechanism on 6 April 2011 at the latest.
	2.	The Federal Government violated the rights of the German *Bundestag* under Art. 23 sec. 2 of the Basic Law in failing
	a)	to inform the *Bundestag* before the meeting of the European Council on 4 February 2011 of the initiative of the Federal Chancellor for a closer economic policy coordination of the members of the euro currency area and
	b)	to inform the *Bundestag* comprehensively and at the earliest possible date in the period from 4 February 2011 to 11 March 2011 of the Euro Plus Pact.

Applicant:	BÜNDNIS 90/DIE GRÜNEN parliamentary group in the German *Bundestag* , represented by the chairpersons Renate Künast and Jürgen Trittin and the managing executive committee, Platz der Republik 1, 11011 Berlin

– Authorised representatives:

1. Prof. Dr. Andreas von Arnauld,
Lange Reihe 103, 20099 Hamburg

2. Prof. Dr. Ulrich Hufeld,
Stratenbarg 40a, 22393 Hamburg –

Respondent:	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 –

with the participation of Justices

President Voßkuhle,

Lübbe-Wolff,

Gerhardt,

Landau,

Huber,

Hermanns

on the basis of the oral hearing of 30 November 2011 by

Judgment

holds as follows:

1. The respondent violated the German *Bundestag 's* right of information under Art. 23 sec. 2 sentence 2 of the Basic Law by failing to forward a text by the European Commission on the establishment of the European Stability Mechanism which was in its possession on 21 February 2011, as well as the draft of the Treaty on the European Stability Mechanism of 6 April 2011.

2. The respondent further violated the German *Bundestag 's* right of information under Art. 23 sec. 2 sentence 2 of the Basic Law by failing to inform it in advance of the initiative publicly presented on 4 February 2011 to agree on a Competitiveness Pact and to forward to it the unofficial document of the Presidents of the European Commission and the European Council of 25 February 2011 entitled “Enhanced Economic Policy Coordination in the Euro Area – Main Features and Concepts”.

Excerpt From the Reasons:

A.

The *Organstreit* proceedings (proceedings on a dispute between supreme constitutional bodies) concern the obligation of the Federal Government under Art. 23 sec. 2 sentence 2 of the Basic Law (*Grundgesetz* – GG) to inform the German *Bundestag* on European Union matters in connection with the European Stability Mechanism (ESM) and the Euro Plus Pact.

I.

1. As a reaction to the sovereign debt crisis in the area of the European Monetary Union, the Member States of the euro currency area first granted Greece coordinated bilateral financial aid and then established what is known as the euro rescue package, whose core is a special purpose vehicle under private law, the European Financial Stability Facility (EFSF; on this, cf. 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 et seq.). Its measures are subject to a time-limit and are intended to serve only as temporary support for Member States affected.

2. Since the end of 2010, the Member States of the European Union have attempted to create a permanent crisis management mechanism. For this purpose, a permanent European Stabilisation or Stability Mechanism is to be established.

First ideas for such a crisis management mechanism were developed in the working group on the reform of the rules and regulations of the European Economic and Monetary Union chaired by the President of the European Council set up in March 2010 (van Rompuy task force). At the meeting of the European Council of 28/29 October 2010, the heads of state and government of the Member States agreed to establish a “permanent crisis mechanism to safeguard the financial stability of the euro area as a whole” (EUCO 25/1/10 REV 1, Conclusions, p. 2). On 28 November 2010, the finance ministers of the Member States of the euro currency area agreed on the general characteristics of the future crisis mechanism. On 10 December 2010, in order to prepare for the [meeting of] the European Council of 16/17 December 2010, its President submitted a proposal for an amendment of the treaties. In its meeting of 16/17 December 2010, the European Council agreed on a first version of the envisaged treaty amendment, which was to add a new paragraph 3 to Art. 136 TFEU, approved the general elements of the European Stability Mechanism, which had been agreed by the finance ministers of the Member States of the euro currency area on 28 November 2010, and commissioned the finance ministers and the European Commission to put the provisions into more concrete terms (EUCO 30/1/10 REV 1, pp. 1-2 and Annex I). The European Stability Mechanism was to be laid down in primary law and to replace the European Financial Stability Facility and the European Financial Stabilisation Mechanism (EFSM), both of which were subject to time-limits. On 20 December 2010, the Federal Chancellery sent the German *Bundestag* a written report on the meeting of the European Council.

a) In its edition of 23 December 2010, the newspaper *Süddeutsche Zeitung* reported on a non-paper in its possession of the Federal Government on the concept of the European Stability Mechanism which was said to be intended to prepare the next meeting of the finance ministers of the Member States of the euro currency area in mid-January. *Inter alia* it was reported that the planned European Stability Mechanism was to be a separate institution alongside the European Central Bank and was to offer “assistance in need” to the Member States of the euro currency area from a position that was largely politically independent. It was in principle to be “refinanceable without limit”; the Member States would have to provide guarantees for this purpose on a proportional basis. Assistance was to be granted only subject to strict conditions and in return for valuable securities such as gold reserves or shares in state enterprises (*Süddeutsche*

Zeitung , 23 December 2010, “Neuer Vorstoß zur Rettung des Euro” <“New Attempt to Save the Euro”> <p. 1> and “Doppelter Schutz für den Euro” <“Double Protection for the Euro”> <p. 17>).

On 17 January 2011, the German *Bundestag* , with a view to the meeting of the European Council planned for 4 February 2011, requested from the Federal Ministry of Finance documents relating to putting the elements of the European Stability Mechanism into concrete terms. Thereupon, the Federal Ministry of Finance stated that it would send documents of this nature as soon as they were available. In addition it stated that the unofficial document referred to in the *Süddeutsche Zeitung* of 23 December 2010 was not an agreed policy document of the Federal Government for the bodies of the European Union, but a compilation of working-level internal papers. Consequently, it stated, there was no requirement to provide them.

On 19 January 2011, the German *Bundestag* , referring to a report in the business newspaper *Handelsblatt* (*Handelsblatt* , 19 January 2011 <p. 13>, “EU-Kommission will klammen Ländern großzügiger helfen” <“EU Commission Wants to Give More Generous Assistance to Needy Countries”>), requested the Federal Ministry of Finance to supply a seven-page paper of the European Commission containing observations on the European Stability Mechanism, which it said had been in the possession of the ECOFIN Council of 18 January 2011. This was refused by a head of division in the Federal Ministry of Finance in an email of the same date on the grounds that no paper on the European Stability Mechanism had been submitted to the ECOFIN Council; press reports that the European Commission had presented a seven-page paper could not be confirmed. In addition, the head of division stated, the development of the European Stability Mechanism was “the preparation of an international instrument of the Member States of the euro currency area, not a project of the European Union”. The Federal Government would report at regular intervals, as previously, “on the work on the permanent ESM”.

Also on 19 January 2011, an official of the Federal Ministry of Finance reported orally both to the Finance Committee of the German *Bundestag* (Minutes no. 17/39 of the 39th meeting of the Finance Committee of 19 January 2011, pp. 23 et seq.) and also to the Committee on the Affairs of the European Union on the results of the meetings of the Eurogroup of 17 January 2011 and of the ECOFIN Council of 18 January 2011. The official stated that in particular questions on the structure of the European Stability Mechanism had been discussed, but no resolutions had been passed. The Federal Government was acting here on the basis of the mandate of the European Council of December 2010. The German *Bundestag* would be involved as soon as the Federal Government had reached a position. There was no duty to submit papers which had not yet been agreed. Admittedly, there were “papers and reflections of the EU Commission” on the European Financial Stability Facility and on the European Stability Mechanism; however, these complied with the requirements of the European Council (Minutes no. 17/29 of the 29th meeting of the Committee on the Affairs of the European Union of 19 January 2011, pp. 15 et seq.). On the same day, the Parliamentary Permanent Secretary in the Federal Ministry of Finance reported to the Budget Committee of the German *Bundestag* on the meetings of the Eurogroup and the ECOFIN Council and emphasised that the Federal Government had entered the negotiations with an open mind. The preparations of the European Council in February/March 2011 and the negotiations on the structure of what was known as the comprehensive package were still in full swing (Minutes no. 17/43 of the 43rd meeting of the Budget Committee of 19 January 2011, pp. 42 et seq.).

On 24 January 2011 there was a further meeting of the Eurogroup. The Federal Minister of Finance reported on this to the Committee on the Affairs of the European Union on 26 January 2011. *Inter alia* he stated that the Federal Government believed that there would be a final overall decision in March 2011 with regard to the European Stability Mechanism and the other measures to save the euro which were under discussion. Several members pointed out that the European Commission had allegedly given the Eurogroup a non-paper with contents and plans on the comprehensive package. They stated that it would assist the discussion in the German *Bundestag* if this non-paper were provided. The Federal Minister of Finance refused the request on the grounds that oral information was sufficient for meetings of the finance ministers of the Eurogroup. Open communication with the German *Bundestag* was of great importance, but it met its limits in the power to act of the Federal Government (Minutes no. 17/30 of the 30th meeting of the Committee on the Affairs of the European Union of 26 January 2011, pp. 12-13).

On 2 February 2011, the President of the European Council, at short notice, put the topic “economic and monetary union” on the agenda for the meeting of the European Council on 4 February 2011 (cf. Minutes no. 17/31 of the 31st Session of the Committee on the Affairs of the European Union of 9 February 2011, p. 14). On the same date, the German *Bundestag* received a written preliminary report from the Federal Chancellery. This stated that the subject of the consultations of the heads of state and government was “above all an understanding on the reinforcement of the European Financial Stability Facility, a decision on the amendment of the treaty and agreement on the structure of the future European Stabilisation Mechanism”. No decisions on the matter itself were expected to be made. On 3 February 2011, the Minister of State to the Federal Chancellery orally informed the spokespersons of the Committee on the Affairs of the European Union on the forthcoming meeting of the European Council (cf. Minutes no. 17/31 of the 31st session of the Committee on the Affairs of the European Union of 9 February 2011, p. 11). On 4 February 2011, the European Council gave notice *inter alia* of the “finalisation under the chairmanship of the President of the Eurogroup

of the operational features of the European Stability Mechanism in line with the mandate agreed upon in December" (EUCO 2/1/11 REV 1, Conclusions, Annex I, p. 12). On 7 February 2011, the German *Bundestag* received a written report on this meeting following it.

On 9 February 2011, an official of the Federal Ministry of Finance informed the Committee on the Affairs of the European Union on the current development of the euro currency area and stated that the main topics of the meetings of the Eurogroup and the ECOFIN Council on 14 and 15 February 2011 would be the existing reform programmes, any changes to the European Financial Stability Facility and the structure of the European Stability Mechanism. On enquiry he stated that with regard to the structure of a "toolbox" for the European Stability Mechanism there was as yet no final position of the Federal Government and there were no resolutions on the European level (Minutes no. 17/31 of the 31st Session of the Committee on the Affairs of the European Union of 9 February 2011, pp. 15-16). Also on 9 February 2011, the Parliamentary Permanent Secretary of the Federal Ministry of Finance, on enquiry, stated to the Budget Committee that parliament would be informed about the "comprehensive package" that was being discussed on the European level as soon as agreement had been reached (Minutes no. 17/45 of the 45th meeting of the Budget Committee of 9 February 2011, p. 59).

On 17 February 2011, the German *Bundestag* requested the Federal Government to make available to it the preparatory papers of the European Commission for the establishment of the European Stability Mechanism. In this connection it mentioned an article in the weekly magazine *Der Spiegel* in which such a paper had been referred to ("Jagd auf den Yeti" <"Hunt for the Yeti">), issue 7/2011 of 14 February 2011). The Liaison Office of the German *Bundestag* in Brussels also stated in an internal report of 21 February 2011 that consultations were taking place in the Council of the European Union on the structure of the European Stability Mechanism on the basis of a text of the European Commission. The Federal Ministry of Finance did not comply with the request of the German *Bundestag* . In its letter of reply of 22 February 2011, it stated that the competent committees of the German *Bundestag* were only to be informed orally on meetings of the Eurogroup.

In the 32nd meeting of the *Bundestag* Committee on the Affairs of the European Union of 23 February 2011, an official of the Federal Foreign Office gave information on the planned treaty amendment in connection with the establishment of the European Stability Mechanism. He stated that the legal basis for its concrete structure was not yet determined. At the meeting of the heads of state and government of the Member States of the euro currency area on 11 March 2011, the topics of the European Financial Stability Facility and the European Stability Mechanism would probably also be discussed. But it was probable that only the basic points would be discussed there; the final decisions could only be expected from the European Council at the end of March 2011 (Minutes no. 17/32 of the 32nd meeting of the Committee on the Affairs of the European Union of 23 February 2011, pp. 10 et seq.). The chairman of the committee and several members criticised the information given by the Federal Government as insufficient and unanimously requested to be informed in detail and at an early date. With a view to the far-reaching effects on national budgets, the German *Bundestag* should be "involved in the creation of the ESM from the beginning" (Minutes no. 17/32 of the 32nd meeting of the Committee on the Affairs of the European Union of 23 February 2011, pp. 12-13).

On 10 March 2011, the Federal Chancellor reported to the Committee on the Affairs of the European Union on the informal meeting of the heads of state and government of the euro currency area planned for the next day. She said that the topics of the meeting included the establishment of the European Stability Mechanism and the future handling of the European Financial Stability Facility. The Federal Chancellor stated that she could not yet say whether the meeting would merely prepare the meeting of the European Council on 24/25 March 2011 or whether resolutions would be passed. Furthermore, informal meetings of the Eurogroup were also not subject to the Federal Government's statutory obligation to inform the German *Bundestag* (Minutes no. 17/33 of the 33rd meeting of the Committee on the Affairs of the European Union of 10 March 2011, pp. 10 et seq.). In response to the objection of one member that on the basis of the Federal Government's information practice, parliament had no adequate possibility of understanding the decisions on the topics relating to the stabilisation of the euro, the Federal Chancellor stated that the present situation was unique by reason of daily changes in the circumstances and facts, with the result that the Federal Government could only give parliament information with a "finite half-life" and with regard to the European Council on 24/25 March 2011 could only state potential results. The Federal Government informed the German *Bundestag* on the meetings of the Eurogroup, she said. However, specific internal consultations which were of particular market relevance needed to be treated in a more nuanced way (Minutes no. 17/33 of the 33rd meeting of the Committee on the Affairs of the European Union of 10 March 2011, pp. 15-16).

On 16 March 2011, the Parliamentary Permanent Secretary in the Federal Ministry of Finance stated in the Finance Committee of the German *Bundestag* that at the current state of negotiations the future European Stability Mechanism was to be established on the basis of international law and this treaty was to be ratified by the German *Bundestag* in compliance with the provisions of the Basic Law (Minutes no. 17/45 of the 45th meeting of the Finance Committee of 16 March 2011, p. 27). On the same day, the Federal Minister of Finance informed the Budget Committee of the expected amount of the effective credit volume of the European Stability Mechanism. However, he said that this would

only be finally laid down in connection with the decision on the form of the European Stability Mechanism (Minutes no. 17/49 of the 49th meeting of the Budget Committee of 16 March 2011, pp. 20-21). Also on 16 March 2011, an official of the Federal Ministry of Finance informed the Committee on the Affairs of the European Union on the discussions of the Eurogroup and the ECOFIN Council on the amount of the guarantee volume of the European Financial Stability Facility and the European Stability Mechanism. The official said that the finance ministers had in particular agreed not to present the decisions on the reinforcement of the two institutions to the national parliaments "bit by bit", but as one package (Minutes no. 17/34 of the 34th meeting of the Committee on the Affairs of the European Union of 16 March 2011, pp. 5 et seq.).

On 17 March 2011, the German *Bundestag* accepted the application of the parliamentary groups of CDU/CSU and FDP to obtain a mutual understanding of the German *Bundestag* and the Federal Government to the supplementation of Art. 136 TFEU (BTDrucks <*Bundestag* printed papers> 17/4880) (Minutes of Plenary Proceedings no. 17/96 of the 96th session of the German *Bundestag* of 17 March 2011, p. 11015 C).

At its meeting on 21 March 2011, the Eurogroup agreed on the basic principles of the European Stability Mechanism. In the report of the Liaison Office of the German *Bundestag* in Brussels of the same date on the status of the discussion following the extraordinary European Council meeting of 11 March 2011 and on the meeting of the ECOFIN Council of 14/15 March 2011, it was stated that the Member States had already agreed on some important aspects of the European Stability Mechanism. But a large number of questions – such as the conditionality of the grant of financial aid, the institutional form and structure of the organisation, the involvement of the International Monetary Fund or the participation of the non-euro countries – were not yet being discussed at this time and in the opinion of observers would only be decided on 24/25 March 2011 by the heads of state and government (*Bericht aus Brüssel* 06/2011 of 21 March 2011, pp. 3-4).

On 23 March 2011, the Federal Chancellery gave the German *Bundestag* a written preliminary report on the meeting of the European Council on 24/25 March 2011. In this it announced several resolutions in the "comprehensive package" for the permanent stabilisation of the euro currency area, including the "finalisation of the work on structuring the future Stability Mechanism (ESM)". On the same day, an official of the Federal Ministry of Finance informed the Committee on the Affairs of the European Union on the latest developments in the euro currency area and provided a term sheet on the principles of the European Stability Mechanism in English as a room document. He said that the fact that no German translation was supplied was on the one hand the result of the short notice, but on the other hand was also for the purpose of a better understanding, since the English text had "advantages over a German translation" (Minutes no. 17/35 of the 35th meeting of the Committee on the Affairs of the European Union of 23 March 2011, p. 9). On enquiry, the official explained that the Federal Government saw the provision of information to the Committee as "oral information" under § 5 sec. 4 of the Act on Cooperation between the Federal Government and the German *Bundestag* in European Union Matters (*Gesetz über die Zusammenarbeit von Bundesregierung und Deutschem Bundestag in Angelegenheiten der Europäischen Union* – EUZBBG) of 12 March 1993 (Federal Law Gazette <*Bundesgesetzblatt* – BGBl> I p. 311), last amended by statute of 22 September 2009 (BGBl I p. 3026). The provision of the term sheet had not been made on the basis of this statute and completed the oral information (Minutes no. 17/35 of the 35th meeting of the Committee on the Affairs of the European Union of 23 March 2011, pp. 13, 16).

Also on 23 March 2011, the member of the *Bundestag* Manuel Sarrazin, in a letter to the Federal Minister of Finance, requested that documents on the structure of the European Stability Mechanism be provided. He stated that it was apparent from a letter of the President of the Eurogroup to the members of the European Parliament of 22 March 2011 that the European Parliament was to be involved in the course of the regular legislative procedure in a regulation in connection with the European Stability Mechanism. Consequently, the preparatory documents of the European Commission, which to date the Federal Government had refused to supply, were subject to the duty to supply under Art. 23 sec. 2 sentence 2 GG. Oral information on this was not sufficient.

On 24 March 2011, the Federal Chancellor, with regard to the meeting of the European Council on 24/25 March 2011, made a government policy statement in the German *Bundestag* . She said that the Federal Government had enforced on the European level an agreement that the permanent European Stability Mechanism would ensure a balanced relationship between individual responsibility and solidarity. Loans could be granted only as a last resort, and the granting of loans would be decided unanimously. In addition, the Member State in question would have to accept conditions. There was an upper limit on Germany's liability (Minutes of Plenary Proceedings no. 17/99 of the 99th session of the German *Bundestag* of 24 March 2011, p. 11255 A-B).

b) At its meeting of 24/25 March 2011, the European Council then agreed on the draft of a future Art. 136 sec. 3 TFEU, which is to be the foundation in primary law for the European Stability Mechanism and whose wording is to be as follows:

The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the

mechanism will be made subject to strict conditionality (EUCO 10/11, Conclusions, Annex II, pp. 21 et seq.).

In the Conclusions, it is stated that the amendment to the Treaty on the Functioning of the European Union is to be made in the simplified revision procedure under Art. 48 sec. 6 TEU and therefore shall not increase the competences conferred on the Union in the Treaties (see Art. 48 sec. 6 subparagraph 3 TEU). Against this background, the European Stability Mechanism is to be structured as an international institution. The European Council added to its Conclusions Annex II containing the "Term Sheet on the ESM" (EUCO 10/11, pp. 21 et seq.). In this it made it clear that its agreement on the establishment of the "permanent" European Stability Mechanism was tied to the adoption of a resolution on the draft of a new Art. 136 sec. 3 TFEU (EUCO 10/11, p. 21). On 28 March 2011, the Minister of State of the Federal Chancellery informed the spokespersons of the Committee on the Affairs of the European Union by telephone of the conclusions of the meeting of the European Council of 24/25 March 2011. At the same time, the Federal Chancellery gave the German *Bundestag* a written report on the conclusions.

On 6 April 2011, an official of the Federal Ministry of Finance reported to the Committee on the Affairs of the European Union. On the conclusions of the meeting of the European Council of 24/25 March 2011 he stated that "ambitious timing" had been agreed on for the reinforcement of European Financial Stability Facility and the Treaty on the Establishing and Financing of the European Stability Mechanism (Minutes no. 17/36 of the 36th meeting of the Committee on the Affairs of the European Union of 6 April 2011, pp. 5 et seq.). With regard to the national implementing statutes in connection with the European Financial Stability Facility he stated that the Federal Government was attempting to involve the German *Bundestag* at the earliest possible date (Minutes no. 17/36 of the 36th meeting of the Committee on the Affairs of the European Union of 6 April 2011, p. 8). On the same day, the Parliamentary Permanent Secretary in the Federal Ministry of Finance reported orally to the Budget Committee on the conclusions of the meeting of the European Council and on the progress of the negotiations on the European Stability Mechanism (Minutes no. 17/52 of the 52nd meeting of the Budget Committee of 6 April 2011, p. 9). He stated that at present the Treaty on the European Stability Mechanism was being further prepared, in order that it could be initialled before the end of July 2011. After this, the Treaty was to be ratified in the Member States. This meant that the German *Bundestag* would be involved in full as a parliament (Minutes no. 17/52 of the 52nd meeting of the Budget Committee of 6 April 2011, p. 12). He rejected the objection of a member that in the previous meeting on 23 March 2011 the Federal Government had given the Committee only an English version of the term sheet, although at the time of the meeting this had already been in existence for 48 hours (Minutes no. 17/52 of the 52nd meeting of the Budget Committee of 6 April 2011, pp. 16-17).

The German *Bundestag* obtained a Draft Treaty Establishing the European Stability Mechanism dated 6 April 2011 from informal sources. The Federal Government did not provide this text.

On 4 April 2011, in the written preliminary report on the informal meeting of the ECOFIN Council on 8/9 April 2011, the Federal Ministry of Finance informed the Finance Committee, the Budget Committee and the Committee on the Affairs of the European Union that among other subjects the Council intended to discuss how the preparation of the Treaty on the European Stability Mechanism could be completed in time. On 13 April 2011, the Federal Minister of Finance reported to the Budget Committee orally on the course of the meeting. On the subject of the planned European Stability Mechanism he stated that the details of its structure had yet to be laid down in a treaty. This treaty needed to be ratified by the national legislatures. In the course of this ratification, it would also be necessary to discuss the participation of parliament in the stability mechanism (Minutes no. 17/53 of the 53rd meeting of the Budget Committee of 13 April 2011, pp. 10 et seq.). The Federal Minister of Finance did not respond to the objection of a member that if the German *Bundestag* only had the possibility of expressing an opinion after the bill was presented, this was too late, since at this date the European agreements would already have been made (Minutes no. 17/53 of the 53rd meeting of the Budget Committee of 13 April 2011, pp. 14 et seq.). With regard to the concern that parliament should be as comprehensively involved as possible, he pointed out that if too many persons participate in a mechanism, it becomes less effective (Minutes no. 17/53 of the 53rd meeting of the Budget Committee of 13 April 2011, pp. 27 et seq.).

Also on 13 April 2011, the Parliamentary Permanent Secretary in the Federal Ministry of Finance informed the Finance Committee of the German *Bundestag* orally that the Federal Government was anxious to present all the decisions to be taken by parliament in connection with the increase of the European Financial Stability Facility funding and the establishment of the European Stability Mechanism in a comprehensive package. This would be provided to the German *Bundestag* in such good time that the legislative package could be passed before the end of the year. On the European level, a final decision was to be made before the summer recess (Minutes no. 17/49 of the 49th meeting of the Budget Committee of 13 April 2011, pp. 25-26). On 19 April 2011, the Federal Ministry of Finance also sent the three committees a written report on the conclusions of the informal meeting of the ECOFIN Council.

On 6 May 2011, the Federal Minister of Finance informed the spokespersons of the Budget Committee and the Committee on the Affairs of the European Union on the current state of progress. In a letter from its chairperson of 12 May 2011, the Committee on the Affairs of the European Union again called on the Federal Minister of Finance to

forward it the draft of the treaty being negotiated at the relevant time. It stated that only the provision of the text together with the oral information before the pending passing of a resolution on the European level guaranteed the involvement of the German *Bundestag* as required under Art. 23 GG. From the perspective of the members of the *Bundestag* , it was not acceptable to have to request the various drafts – as had in fact happened – from Austria, where the National Council had already been provided with such drafts by the Austrian Federal Government (on this, see the deliberations of the National Council EU Main Committee (*Beratungen des Hauptausschusses in Angelegenheiten der Europäischen Union des Nationalrates XXIV . GP* of 23 March 2011, stenographic minutes, page 2). On 17 May 2011, after further attempts – including one by the applicant's Parliamentary Secretary – the Federal Ministry of Finance provided the German *Bundestag* with a draft treaty in the English language and on the following day with a German translation of this.

3. Parallel to the preparations for a Treaty on the European Stability Mechanism and to the amendment of Art. 136 TFEU, on the initiative of the Federal Chancellor and the French President, guidelines for an increased economic policy coordination of the Member States of the euro currency area were developed; these were first collected together under the title Competitiveness Pact and finally passed as the "Euro Plus Pact". Their aim was to confront the problems which in the view of the initiators result from the asymmetrical construction of the European Economic and Monetary Union, namely complete communitarisation of currency policy simultaneously with responsibility of the Member States for economic policy.

a) In the meeting of the Committee on the Affairs of the European Union of 26 January 2011, the Minister of State of the Federal Chancellery, in response to a question in this connection, stated that there would be discussion of the euro at the upcoming meeting of the European Council, but resolutions were not to be expected (Minutes no. 17/30 of the 30th meeting of the Committee on the Affairs of the European Union of 26 January 2011, p. 9). In the same meeting, the Federal Minister of Finance stated his position on the future course of action (on this, cf. A.I.2.).

On 31 January 2011, the weekly magazine *Der Spiegel* printed an article entitled "Agenda für Europa" ("Agenda for Europe"); this article reported on a conversation between the Federal Chancellor and the President of the European Commission on a Competitiveness Pact which she intended to present to the next European Council together with the French President "confidentially and informally at lunch", but which would not appear on the agenda. The aim was said to be protecting the euro currency area better against crises in the future. In a paper, measures were named including the harmonisation of taxes, the adjustment of the retirement age and the introduction of a brake on debt (*Der Spiege l* , "Agenda für Europa", issue 5/2011 of 31 January 2011). A draft version of this pact could be downloaded from the website www.euractiv.de. On 1 February 2011, the German *Bundestag* asked the Federal Ministry of Economics and Technology, referring to the report in *Der Spiegel* and in several daily newspapers, to supply it with the "papers and information on the basis of which the Federal Government" intended to "introduce its initiative". In an email of 2 February 2011, the Federal Ministry of Economics and Technology informed the German *Bundestag* that the newspaper articles listed referred to a "process of consultation in the Federal Government" which had "not yet been concluded". In the government press conference on the same date, the government spokesman announced that at the meeting of the European Council on 4 February 2011 questions of economic policy coordination in the euro currency area would in fact also be discussed, and he added: "On this, the Federal Government will take a position which results from consultation" (cf. the transcript of the government press conference of 2 February 2011, which can be downloaded from the internet (in German) at http://www.bundesregierung.de/Content/DE/Mitschrift/Pressekonferenzen /2011/02/2011-2-02-regpk.html). In its preliminary report for the European Council of 2 February 2011, the Federal Government stated that the Federal Chancellor would advocate a "strong signal" for improving coordination of economic policy in the euro currency area, in order to increase competitiveness as a whole and to strengthen coherence in the euro currency area. It did not provide the German *Bundestag* with further documents.

On 3 February 2011, the Minister of State of the Federal Chancellery informed the spokespersons of the Committee on the Affairs of the European Union by telephone that notwithstanding the press reporting on the planned initiative for a Competitiveness Pact, there was as yet no agreed position of the Federal Government on the subject and consequently no agreed position would be taken at the European Council (cf. Minutes no. 17/31 of the 31st meeting of the Committee on the Affairs of the European Union of 9 February 2011, p. 11).

On 4 February 2011, in a joint press conference with the French President, the Federal Chancellor stated that she wished to inform their partners in Europe of details of the German-French initiative. At separate press conferences, both the Federal Chancellor and the French President then announced that at lunch they had presented their ideas for a Competitiveness Pact to the other Members of the European Council and had requested the President of the European Council to conduct consultations with the Member States of the euro currency area on the basis of these ideas. The Conclusions of the European Council of 4 February 2011 refer to the goal of a "new quality of economic policy coordination in the euro area to improve competitiveness"; the President of the European Council will undertake consultations with the heads of state or government of the euro area Member States and report back, identifying concrete ways forward in line with the Treaty (EUCO 2/1/11 REV 1, Annex I, p. 13).

From 5 February 2011, the Federal Government, in bilateral consultations with the heads of state and government of the Member States of the euro currency area and the President of the European Council, attempted to have the initiative prepared in more detail. In response to written questions from the member of the *Bundestag* Mr Sarrazin on the contents and current state of the negotiations, it referred to the meeting of the European Council of 4 February 2011 and the Conclusions, and to oral reports. It provided no written documentation. In the meeting of the Committee on the Affairs of the European Union on 9 February 2011, the Minister of State of the Federal Chancellery stated that on 4 February 2011 the European Council had not passed any binding resolutions with regard to the Competitiveness Pact. He said that there was still no agreed position within the Federal Government nor a joint paper; the points were still being discussed. But individual elements of the economic policy coordination had been discussed even before 4 February 2011 at the German-Spanish consultations and at the meeting of the heads of state and government in the "Weimar Triangle" format, for example the retirement age, the basis of assessment for corporate income tax, wage indexation and including a brake on debt in the national constitutions. No "Competitiveness Pact" had been given to the press by the Federal Government. The published documents bore the wording "blanket restriction", and this alone showed that this was not a paper agreed by the Federal Government (Minutes no. 17/31 of the 31st meeting of the Committee on the Affairs of the European Union of 9 February 2011, pp. 13 et seq.).

On 25 February 2011, a non-paper dated the same day was leaked to the German *Bundestag* ; this non-paper from the Presidents of the European Commission and the European Council was headed "Enhanced Economic Policy Coordination in the Euro Area – Main Features and Concepts" and described fundamental contents of the planned Competitiveness Pact. After there had also been reports in the press of such a paper, on 3 March 2011 the German *Bundestag* requested this by email from the Federal Ministry of Economics and Technology, referring to the obligation to inform under § 5 sec. 3 EUZBBG. On 9 March 2011 the German *Bundestag* received a telegram from the Federal Foreign Office which indicated that at an informal meeting of the heads of state and government of the Member States of the euro currency area on 11 March 2011 an agreement was intended to be reached on the "Competitiveness Pact", in order that this could be finally approved at the meeting of the European Council on 24/25 March 2011.

Also on 9 March 2011, the President of the German *Bundestag* contacted the Federal Chancellor and complained that the information on the "Competitiveness Pact" either did not comply at all or did not adequately comply with the provisions of the Act on Cooperation between the Federal Government and the German *Bundestag* in European Union Matters. The preliminary report of 2 February 2011, which was only two pages in length, had been extremely vague, he said, and at the same time the media had already published detailed reports on the specific initiative. The request of the *Bundestag* Administration of 1 February 2011 for relevant documents and information to be sent had not been answered or at most answered very incompletely. He said he requested her to supply the missing information in the specific case. In a letter in reply of 10 March 2011, the Federal Chancellor answered that the Federal Government was satisfying its statutory obligations as best as possible in the specific case, too.

On the same date, the Federal Chancellor attended the 33rd meeting of the Committee on the Affairs of the European Union. There she reported that the Competitiveness Pact would also be a subject of the informal meeting of the heads of state and government of the euro currency area on 11 March 2011, in addition to the European Stability Mechanism. She said that the Pact had been further developed since 11 February 2011, but not in as much detail as she wanted. The subjects of competitiveness, employment, budgets and financial stability were the cornerstones. The areas of policy named were in the area of responsibility of the Member States and were to be monitored by the European Commission in the future. Official documents, not press reports, were the yardstick for the information of the *Bundestag* . There had not been such a document for the "Competitiveness Pact", either within the Federal Government or jointly with France. No official documents had been withheld from the German *Bundestag* (cf. Minutes no. 17/33 of the 33rd meeting of the Committee on the Affairs of the European Union of 10 March 2011, pp. 11 et seq.).

b) On the morning of 11 March 2011, the Federal Chancellery sent the *Bundestag* the draft of a "Competitiveness Pact" by email. On the same day, the heads of state and government of the Member States of the euro currency area, in the Conclusions to their meeting on the agreement, which was now called the „Pact for the Euro", stated as follows:

The Pact for the Euro, which establishes a stronger economic policy coordination for competitiveness and convergence (attached), has been endorsed. This Pact will be presented to the European Council of 24/25 March 2011 with a view for non-euro area Member States to indicate whether they intend to participate in the Pact. At the same time Euro area Member States shall indicate first measures they pledge to implement under the Pact for the next year (Conclusions of the heads of state and government of the Member States of the euro currency area of 11 March 2011, p. 1).

On the evidence of the wording of the treaty and of the Conclusions, the "Pact for the Euro" is intended to strengthen the economic pillar of the monetary union, to attain a new quality of economic policy coordination between the Member States of the euro currency area, to improve its competitiveness and in this way to achieve a greater degree of convergence. The main emphasis is above all to be on the areas of policy which are in the responsibility of the Member States and which are of decisive importance for the increase of competitiveness and the avoidance of imbalance. The Member States which do not belong to the euro currency area were expressly invited to participate on a voluntary basis

(cf. Conclusions of the heads of state and government of the Member States of the euro currency area of 11 March 2011, Annex I, pp. 6 et seq.). The effort envisaged is to observe four guiding rules: It will be in line with and strengthen the existing economic policy governance in the EU, be consistent with and build on existing instruments – the EU 2020 strategy, European Semester, Integrated Guidelines, Stability and Growth Pact and new macroeconomic surveillance framework. In this process, there is to be a strong central role for the Commission in the monitoring of the implementation of the commitments. The effort is to cover those areas of policy which are of essential importance for the promotion of competitiveness and convergence. It is to concentrate on actions where the competence lies with the Member States; in these policy areas common objectives will be agreed upon at the heads of state or government level, but participating Member States are to pursue these objectives independently. In addition, each year, concrete national commitments will be undertaken by each head of state or government and, in doing so, benchmark against the best performers, within Europe and vis-à-vis other strategic partners. The implementation of these commitments and progress towards the common policy objectives will be monitored on a yearly basis, on the basis of a report by the Commission. Finally, euro area Member States are fully committed to the completion of the Single Market. In the Pact for the Euro, the Member States in the euro currency area agree to undertake every effort that is necessary to realise the goals of fostering competitiveness, fostering employment, contributing further to the sustainability of public finances and reinforcing financial stability. Objects of coordination are stated, including wage setting arrangements and wages settlements in the public sector, the improvement of education systems, making bankruptcy law and commercial law more conducive to businesses, labour market reforms to promote “flexicurity” and pension systems adjustments. In this connection, particular attention is also to be directed to the coordination of tax policy (cf. Conclusions of the heads of state and government of the Member States of the euro currency area of 11 March 2011, Annex I, pp. 6 et seq.). The agreement was a subject dealt with by several committees of the German *Bundestag* (Committee on the Affairs of the European Union, Minutes no. 17/34 of 16 March 2011, pp. 10-11; Budget Committee, Minutes no. 17/49 of 16 March 2011, p. 49; Finance Committee, Minutes no. 17/45 of 16 March 2011, p. 60).

c) At the meeting of the European Council of 24/25 March 2011, Bulgaria, Denmark, Latvia, Lithuania, Poland and Romania acceded to the agreement, which was now known as the “Euro Plus Pact”. There was no further amendment of the substance of the Pact. On 28 March 2011, the German *Bundestag* received the Conclusions of the European Council of 24/25 March 2011 (EUCO 10/11), whose Annex 1 contained the “Euro Plus Pact”. Subsequently, the European Commission also included the Euro Plus Pact in the “new European regulatory policy” and stated that the new commitments arising from the Pact would be included in the national reform and stability programmes and be subject to the regular EU surveillance framework (Communication from the Commission of 7 June 2011 concluding the first European semester of economic policy coordination, COM (2011) 400 final, p. 9). The umbrella of the Pact also covers the express commitment of the participating states “to translating EU fiscal rules as set out in the Stability and Growth Pact into national legislation” (EUCO 10/11, p. 19).

d) In November 2011, the European Union passed five regulations and one directive – known as the “Six-Pack” –, some of which serve to implement the Euro Plus Pact, but some of which, independently of this, constitute a further development of the Stability and Growth Pact, which was already established in secondary law (Regulation (EU) No 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area, OJ L 306 of 23 November 2011, p. 1; Regulation (EU) No 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area, OJ L 306 of 23 November 2011, p. 8; Regulation (EU) No 1175/2011 of the European Parliament and of the Council of 16 November 2011 amending Council Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, OJ L 306 of 23 November 2011, p. 12; Regulation (EU) No 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances, OJ L 306 of 23 November 2011, p. 25; Council Regulation (EU) No 1177/2011 of 8 November 2011 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure, OJ L 306 of 23 November 2011, p. 33; Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States, OJ L 306 of 23 November 2011, p. 41).

II.

In its applications set out in the recitals, the applicant seeks a finding that the respondent violated the rights of the German *Bundestag* under Art. 23 sec. 2 GG by informing the *Bundestag* about the European Stability Mechanism and the Euro Plus Pact neither sufficiently nor in good time.

1. a) (...)

b) aa) [The applicant argues as follows:] The European Stability Mechanism is a European Union matter within the meaning of Art. 23 sec. 2 sentence 1 GG. The concept of European Union matters has a broad meaning and is not oriented solely to the formal integration of the basis in law in the international integrated structure. The planned Art.

136 sec. 3 TFEU and the European Stability Mechanism to be established on the basis of this article would have substantial effects on the Economic and Monetary Union. Authorising the Member States of the euro currency area to establish a permanent stability mechanism is an addition to the present character of the Economic and Monetary Union. The commitments accompanying this would have substantial effects on the national constitutional law relating to the budget and thus would affect a core area of parliamentary responsibility. The restructuring of the Economic and Monetary Union affects that list of state functions which the Federal Constitutional Court has emphasised as shaping identity and which it has reserved for parliament, which is responsible for integration (*Integrationsverantwortung*). On the basis of the history of its creation and institutionally, the European Stability Mechanism can be identified as a "European Union matter". Thus, from the beginning the plans were directed towards a stabilisation of the Economic and Monetary Union; the European Council and the European Commission, as bodies of the European Union, were decisively involved in creating its structure. The "Term Sheet on the European Stability Mechanism" in the Conclusions of the European Council of 24/25 March 2011 (EUCO 10/11, Annex II, pp. 21 et seq.) may be seen as a formation document shaping its substance. The European Council, expressly having recourse to Art. 136 sec. 3 TFEU, achieved agreement that the Member States of the euro currency area had to establish a permanent stabilisation mechanism. To this extent, the European Stability Mechanism is a creature of the European Council. The structure of the European Stability Mechanism – commitments and financing strategy, management, capital structure and instruments – is fundamentally determined by the elements agreed in the European Council. Apart from this, the Federal Government itself treated the finalisation of the work on the structure of the future stability mechanism as a matter reserved to the European Council and emphasised that the European Stability Mechanism was part of a comprehensive package, directed towards the permanent stabilisation of the euro currency area. In this way, it decisively contributed to defining the European Stability Mechanism institutionally and materially as a European Union matter and conceptually interlocking it closely within the economic and currency policy (Art. 119 et seq. TFEU) with the chapter on economic policy (Art. 120 et seq. TFEU). Even after the intended entry into force of the Treaty on the European Stability Mechanism, the close institutional connection to the European Union remained in place. The European Stability Mechanism presents itself as an international organisation without its own sovereignty, but at the same time as a hybrid combination of intergovernmental and supranational elements. In the "activation of financial aid", the European Commission is given an important role, which together with the International Monetary Fund (IMF) and in consultation with the European Central Bank (ECB) is to determine the actual financing requirements of the Member State benefiting. In cases of dispute, the European Court of Justice shall have jurisdiction under Art. 273 TFEU. The direction of the planned treaty amendment of Art. 136 sec. 3 TFEU leads back to the supranational Union. The European Stability Mechanism in this way presents itself as a stabilising addition to the Economic and Monetary Union subject to European Union law. The legislature took this into consideration in that under § 4 sec. 4 no. 1 EUZBBG the Federal Government must inform the German *Bundestag* of treaties under international law between the Federal Republic of Germany and Member States of the European Union even if these legislate for a closer cooperation in areas of policy which are also in the area of competence of the European Union. In the area of policy affected here, the European Union has sole responsibility.

bb) It follows from Art. 23 sec. 2 GG that the Federal Government should have complied with its obligation to inform under Art. 23 sec. 2 sentence 2 GG as put into concrete terms in §§ 4 et seq. EUZBBG. The Federal Government has an obligation to inform at the earliest possible date. In view of the nature of the passing of resolutions, which resembles a process, this obligation also implies an obligation to give information at regular intervals; § 4 sec. 1 sentence 1 EUZBBG makes this plain. The obligation to give the German *Bundestag* comprehensive information is intended to put the *Bundestag* in the position to exercise its rights of participation effectively, and it therefore also covers preparatory papers of the European Commission and the Council, including unofficial documents. It must normally be carried out in writing, because only this creates the reliable basis of information without which there can be no question of comprehensive information. The view that there can only be oral information on the meetings of the Eurogroup because § 5 sec. 4 EUZBBG is a *lex specialis* treating it differently from § 5 sec. 3 and 5 sec. 5 EUZBBG is incompatible with Art. 23 sec. 2 sentence 2 GG, which intends the German *Bundestag* to be comprehensively informed at the earliest possible date.

cc) The respondent violated the rights of the German *Bundestag* under Art. 23 sec. 2 GG by failing to inform it in the period before and after the meeting of the European Council of 4 February 2011 comprehensively, at the earliest possible date and at regular intervals of the structuring of the European Stability Mechanism and failing to send the draft of a Treaty on the European Stability Mechanism at the latest on 6 April 2011. In the period before the meeting of the European Council of 4 February 2011, the lead ministry, the Federal Ministry of Finance, initially promised to supply relevant papers, but it later refused this with a variety of contradictory legal arguments. Following the meeting of the European Council of 4 February 2011, the respondent did not comply with its duty to provide follow-up reporting.

The Conclusions of the European Council of 24/25 March 2011 show that in the period between 4 February 2011 and 24/25 March 2011 important decisions were made without the German *Bundestag* having the opportunity to participate in them. The "Term Sheet on the European Stability Mechanism", which was decided in this period, is its

formation document, and under § 5 sec. 5 EUZBBG the respondent should have given information on this at regular intervals and comprehensively.

Drafts of the Treaty on the European Stability Mechanism, which the German *Bundestag* was able to access informally, indicate that at the latest from 6 April 2011 text versions of the Treaty were available. But the respondent only supplied these on 17 May 2011. Since the provision of these documents had been made without recognition of a legal duty, it is to be feared that the respondent will not change its information practice on its own initiative.

2. With regard to what is known as the Euro Plus Pact, too, the Federal Government violated its duty under Art. 23 sec. 2 sentence 2 GG.

a) The Euro Plus Pact is also a European Union matter within the meaning of Art. 23 sec. 2 sentence 1 GG. The instruments work together to extend the right of supranational surveillance of Art. 121, 126 TFEU to the international duties under the Euro Plus Pact. In view of the contents and the procedures which are recognisably based on Art. 121 TFEU, there can be no doubt that the Pact is a European Union matter within the meaning of Art. 23 sec. 2 GG.

b) Under § 5 sec. 2 EUZBBG, the respondent must inform the German *Bundestag* of the respondent's initiatives by sending comprehensive documents and information at the earliest possible date. Art. 23 sec. 1 and 23 sec. 2 GG and the accompanying statutes on the rights of information and participation make it clear that European policy is not subject to the Government's prerogative in foreign affairs.

aa) The Euro Plus Pact has its origin in a German-French initiative of 4 February 2011. This initiative was introduced to the European Council by the Federal Chancellor together with the President of France without the German *Bundestag* having been informed of it in advance. In response to requests in this connection by the German *Bundestag* , the Minister of State of the Federal Chancellery, in the meeting of the Committee on the Affairs of the European Union of 9 February 2011, even after the initiative had been presented, several times stated that there was no agreed position within the Federal Government and also stated that there was no paper yet. Notwithstanding the question as to how far internal Cabinet decision processes are to be seen as part of the core area of specifically executive responsibility, the initiative of the Federal Chancellor introduced on 4 February 2011 was at all events a position of the Federal Government. Because of her authority to make guidelines, the initiative also became an initiative of the Federal Government at that date at the latest. At the same moment, the Federal Government violated its constitutional duty to inform the German *Bundestag* . The requirement of comprehensive information at the earliest possible date (Art. 23 sec. 2 sentence 2 GG) excludes the possibility of informing the German *Bundestag* only after the event. In this respect, a German initiative is only possible after a consultation between the government and the parliament. Describing the initiative as a "personal" initiative of the Federal Chancellor circumvents the obligation to inform under Art. 23 sec. 2 sentence 2 GG.

bb) The respondent also breached its duty to inform the German *Bundestag* in the further course of the negotiation process on the Pact. Between the meeting of the European Council of 4 February 2011, the meeting of the heads of state and government of the Member States of the euro currency area on 11 March 2011, and the meeting of the European Council on 24/25 March 2011, an agreement on the Euro Plus Pact was reached. At the latest on 25 February 2011, the respondent was in possession of concrete knowledge of the stage of progress and negotiations, and it should have supplied information on this on its own initiative before the meeting of the European Council.

III.

The respondent regards the first application as inadmissible and both applications as unfounded. It applies for the applications to be rejected.

1. a) [The respondent argues as follows:] The first application is time-barred (...).

b) In addition, the application is unfounded, because the planned European Stability Mechanism is an international financial institution outside the framework of the European Union and therefore it is not a European Union matter within the meaning of Art. 23 sec. 2 GG. The particular mechanisms provided for the participation of parliament under Art. 23 sec. 2 GG and for the German *Bundestag* in the Act on Cooperation between the Federal Government and the German *Bundestag* in European Union Matters cannot be applied to consultation on intergovernmental measures such as the European Stability Mechanism. The combination of consent to the transfer of only certain sovereign powers and the rights to information provided for in Art. 23 sec. 2 GG makes it possible for the German *Bundestag* to exercise its responsibility for integration (*Integrationsverantwortung*). In the case of actions under international law outside the framework of the supranational European Union, in contrast, the German *Bundestag* has a right of final decision under Art. 24 GG and/or Art. 59 sec. 2 GG, and therefore the need for comprehensive information is not equally great. In addition, Art. 23 sec. 2 GG does not break the primacy of the executive with the effect that the Federal Government, the German *Bundestag* and the *Bundesrat* work together without distinction. All three constitutional bodies participate in foreign affairs both in general and also in the context of European cooperation, each in its specific

function. In this connection too, it is the Federal Republic which still has the primary obligation to act. In connection with European Union matters it also retains an area of specifically executive responsibility.

(...) On the European level, there is agreement that the European Stability Mechanism is not an institution of the European Union, but one of the Member States of the euro currency area. This is shown by opinions of the European Commission and the European Central Bank and a resolution of the European Parliament on the planned stability mechanism.

The protective function of Art. 23 GG, which is intended to prevent the legislature from a "competence drain through *ultra vires* acts", does not apply. The German *Bundestag* , as is customary and constitutionally provided for in comparable cases of the creation of international financial institutions – for example of the International Monetary Fund – can and should exercise its competence as the national legislature without restriction. This right extends beyond a merely indirect participation within the European law-making process. The procedures for the preparation of Union legal instruments, to which the Act on Cooperation between the Federal Government and the German *Bundestag* in European Union Matters is tailored, were not used in the negotiations on the European Stability Mechanism because the work does not take place in the Council bodies, in line with its international character. At its meeting on 16/17 December 2010, the European Council asked the Finance ministers of the euro currency area to complete the work on the international agreement and also to include in this process the Member States whose currency is not the euro. This assessment is not altered in any way by the fact that the Member States, in connection with the planned amendment of Art. 136 TFEU, discussed the essential elements of the European Stability Mechanism in the European Council. From the beginning, it was the objective of the Member States of the euro currency area that the European Stability Mechanism should not be integrated into the institutional framework of the European Union. In addition, if special duties are entrusted to bodies of the European Union and the Court of Justice of the European Union is competent under a clause in an arbitration agreement, this will not make the European Stability Mechanism a European Union matter. It is true that Art. 273 TFEU does require a certain connection with the subject of the European Union treaties for the Court of Justice to act. But the Court of Justice does not decide on the dispute on the basis of European Union law, but on the basis of the treaty agreed between the parties. The structuring of the European Stability Mechanism does not fall exclusively in the area of responsibility of the European Union. Nor is it unusual for arrangements between Member States intended to be made under European Union law to be concluded as international agreements. The German *Bundestag* has always consented to the large number of double taxation treaties with other states of the European Union under Art. 59 sec. 2 GG. Nor can any special obligations to inform be derived from the particular budget relevance of the European Stability Mechanism and the principle of parliamentary budgetary responsibility.

c) At all events, the first application is unfounded because the respondent always informed the German *Bundestag* on the work on the European Stability Mechanism comprehensively and at the earliest possible date.

In March 2010, the working group on the reform of the rules and regulations of the European Economic and Monetary Union was established; the German *Bundestag* Budget Committee, Finance Committee and Committee on the Affairs of the European Union were orally informed on a regular basis in preliminary and follow-up reports on the meetings of this working group. In addition, on 23 March 2011 the Committee on the Affairs of the European Union was provided with a term sheet on the principles of the European Stability Mechanism as a room document. Thus the German *Bundestag* received a document as early as 23 March 2011 which summarised the ideas on the European Stability Mechanism discussed at the meeting of the European Council on 24/25 March 2011.

On 18 May 2011, the chairpersons of the Budget Committee and the Committee on the Affairs of the European Union received the English version and an unofficial German translation of the draft of a Treaty on the European Stability Mechanism; this was first discussed in the meeting of the extended Eurogroup on 16 May 2011. Since the process of preparing the draft treaty took place within the special format of what is called the extended Eurogroup, which meets informally and deals with sensitive material, § 5 sec. 4 EUZBBG merely provides for oral information. The respondent's behaviour complied with customs within the Eurogroup. Whether all Member States observe the confidentiality which fundamentally applies cannot be the yardstick for the Federal Government's actions. In the last instance, it was the Federal Finance Minister who removed obstacles to the sending of the draft treaty when on 16 May 2011 he achieved an agreement between the finance ministers of the Member States of the euro currency area that the draft should be conveyed to the national parliaments. It was not constitutionally required for the text, which was still in the course of preparation, to be sent at an earlier date.

2. The second application is unfounded because the Euro Plus Pact is also not a European Union matter and in addition the respondent at all events complied in full with any potential duties to inform.

a) The Euro Plus Pact is not a European Union matter within the meaning of Art. 23 sec. 2 GG because it is merely intended to supplement the coordination mechanisms provided for in European Union law (in particular Art. 121 TFEU) in areas of economic and social policy, which are completely in the competence of the Member States. The goals

to be agreed are without exception voluntary self-commitments on an intergovernmental basis. The fact that measures of this nature are also incorporated into the respective “national reform programmes” confirms their internal character. The Member States submit these programmes to the European Commission, which reviews and assesses the projects and their implementation. No direct legal consequences are associated with this. For this reason, Art. 23 sec. 2 GG cannot create obligations to inform for the Federal Government in connection with the Euro Plus Pact.

b) Notwithstanding this, the Federal Government has always informed the German *Bundestag* of the Euro Plus Pact at an early date, comprehensively and at regular intervals. (...)

The respondent had no obligation to provide information on the deliberations in the Federal Government or between the Federal Government and the French government, which were as yet not agreed on, at an earlier date than it did so. Nor is there a duty to give information on the internal forming of decisions which is not yet completed. (...)

B.

The applications are admissible. (...)

C.

The applications are well-founded.

I.

The constitutional yardstick for the information of the German *Bundestag* by the Federal Government in and about European Union matters is Art. 23 sec. 2 sentence 2 GG. In Art. 23 GG, the constitution-amending legislature structured the traditional allocation of responsibilities between the executive and the legislature in the area of sovereign decisions relating to foreign affairs (1.) for European Union matters in a way that gave the German *Bundestag* far-reaching rights of participation (2.). The Federal Government’s obligations to inform laid down in Art. 23 sec. 2 sentence 2 GG are the requirements and expression of these rights of participation and must satisfy the *Bundestag* ’s information requirements which follow from this, while preserving the core area of specifically executive responsibility in objective, temporal and formal respects (3.).

1. Connecting to the traditional concept of the state, the Basic Law left the government a broad latitude to carry out its duties under its own responsibility in the area of foreign policy (Decisions of the Federal Constitutional Court – *Entscheidungen des Bundesverfassungsgerichts* , BVerfGE 104, 151 <207>; cf. also, earlier, BVerfGE 49, 89 <125>). For reasons of functionality alone, the role of parliament is restricted in this area (cf. BVerfGE 104, 151 <207>). Admittedly, Art. 59 sec. 2 sentence 1 GG provides that the consent or participation of the respective corporate bodies competent for federal legislation is necessary for entering into agreements under international law which legislate on the political relations of the Federal Government or relate to matters of federal legislation; this consent or participation must take the form of a federal statute. But dealings with other states, representation in international organisations, international institutions and systems of mutual collective security (Art. 24 sec. 2 GG) and guaranteeing the responsibility of the whole country in the context of Germany’s external representation fall in principle within the competence of the executive, in particular of the Federal Government. The fundamental allocation of acts of foreign affairs to the area of competence of the executive is based on the assumption that institutionally and in the long term it is typically only the government which has sufficient personnel and sufficient material and organisational ability to react promptly and appropriately to changing external situations and in this way to fulfil as best possible the state’s duty to exercise foreign affairs responsibly (BVerfGE 68, 1 <87>; cf. also BVerfGE 104, 151 <207>). Interpreting the powers of consent or participation of the *Bundestag* extensively, glossing over the specific organisation of the distribution and balance of state power in the Basic Law, would unjustifiably curtail the Federal Government’s ability to act in foreign affairs and security policy and would result in a non-functional division of state power (cf. BVerfGE 90, 286 <363>; 104, 151 <207>). It cannot be based on an overarching requirement of parliamentary approval derived from the principle of democracy (cf. BVerfGE 49, 89 <124 et seq.>; 68, 1 <87>).

However, even the control over foreign affairs entrusted to the Federal Government is not outside parliamentary supervision (cf. BVerfGE 104, 151 <207>; cf. also BVerfGE 49, 89 <125>; 68, 1 <89>; 90, 286 <364>). The parliamentary system of government of the Basic Law provides the German *Bundestag* with suitable instruments for the political supervision of the Federal Government in this regard as well. The *Bundestag* may exercise its right of questioning, debating and passing resolutions and its supervisory and budgetary powers and in this way affect the decisions of the government or overthrow the government by the election of a new federal chancellor, Art. 67 sec. 1 sentence 1 GG (BVerfGE 68, 1 <109-110>; cf. also BVerfGE 104, 151 <208>).

In drafting agreements under international law, the *Bundestag* is in principle limited to subsequent ratification under Art. 59 sec. 2 GG (“ratification position”). To what extent the Federal Government has, in this context, duties to inform,

which extend into the area of preparatory treaty negotiations has not been fundamentally clarified and does not need to be decided here.

2. For the area of the European Union, Art. 23 GG has structured the polarity between external representation by the executive and parliamentary responsibility in a specific way (a) and has granted the German *Bundestag* with regard to the shift of emphasis in favour of the executive associated with Europeanisation (b) broad rights of participation (c).

a) Art. 23 GG provides for a cooperation of *Bundestag* and *Bundesrat* in the exercise of sovereign power relating to foreign affairs by the Federal Government in European Union matters (Art. 23 sec. 2 sentence 1 GG). The central, but not the sole, point of reference of the cooperation of the *Bundestag* is the obligation of the Federal Government to give the German *Bundestag* an opportunity to state its position before it cooperates in legislation (Art. 23 sec. 3 sentence 1 GG) and to take account of this opinion in the negotiations (Art. 23 sec. 3 sentence 2 GG).

b) In Art. 23 GG, the constitution-amending legislature reacted to shifts in the national system of powers associated with European integration. By reason of the transfer of sovereign powers (Art. 23 sec. 1 GG), the European Union has the competence to make law itself; this law applies directly and creates rights and duties for the citizens in many ways. When this law is passed, it is not primarily the national legislative bodies which act through the European Council and the Council, but the executives of the Member States. The political ideas on which the legislation is based are laid down with regard to the general political objectives by the European Council, which is composed of the heads of state and government of the Member States and the Presidents of the European Council and the Commission (Art. 15 TEU). Above all, the Council, which consists of the representatives of the Member States on ministerial level (cf. now Art. 16 sec. 2 TEU) and unless otherwise stipulated decides by a qualified majority (Art. 16 sec. 3 TEU), is responsible for establishing policy and – as a general rule jointly with the European Parliament – is the central legislative body (cf. Art. 16 sec. 1 TEU). This presents parliamentary democracy on the national level with particular challenges, because parliament is sometimes forced out of the role of the central deciding instance (cf. Unger, *Das Verfassungsprinzip der Demokratie* , 2008, p. 43). Integrating the national parliaments more closely in the process of integration can make up for their losses of competence vis-à-vis the respective national government.

An improved cooperation of the national parliament in the decisions of the Federal Government, which is involved in law-making in the Council, has been regarded as a condition of sufficient democratic legitimation of supranational law-making (the member of the *Bundestag* Mr Verheugen, Joint Commission on the Constitution <*Gemeinsame Verfassungskommission* > , 11th meeting on 15 October 1992, stenographic minutes, in: German *Bundestag* <ed.>, *Materialien zur Verfassungsdiskussion und zur Grundgesetzänderung in der Folge der deutschen Einigung* , vol. 1, report and minutes of meetings, 1996, p. 543 <545>). For this reason, in the deliberations of the Joint Commission on the Constitution of *Bundestag* and *Bundesrat* , comprehensive information by the Federal Government at the earliest possible date was called for, in order to give *Bundestag* and *Bundesrat* at least the opportunity to influence the participation of the Federal Government in projects of the European Union (cf. Möller/Limpert, *Zeitschrift für Parlamentsfragen* – ZParl 24 <1993>, pp. 21 <24 et seq.>).

In comparison with the general balance between the Federal Government and the German *Bundestag* in the area of foreign affairs, parliament is involved in European Union matters to a greater degree as a result of far-reaching rights of information and participation (on similar provisions in other Member States cf., for example, Art. 6 of the Danish Act on the Accession to the European Communities; Art. 88-4 of the French Constitution; Art. 23e of the Austrian Federal Constitutional Law <*Bundes-Verfassungsgesetz* >; Art. 197 <1.> letter i of the Portuguese Constitution; chapters 10 §§ 2 and 3 of the Swedish Riksdag Act <*Riksdagsordningen* >); this is also part of an institutional architecture which gives the national parliaments in the European Union a role that extends beyond the Member States and is intended in this way to use their potential for democratic legitimation for the benefit of the European Union (cf. Lang, *Die Mitwirkungsrechte des Bundesrates und des Bundestag es in Angelegenheiten der Europäischen Union gemäß Art. 23 Abs . 2 bis 7 GG* , 1997, pp. 279-280). In this connection, Art. 23 sec. 2 GG corresponds to Art. 12 TEU, which gives the national parliaments a stronger role in the institutional structure of the European Union (cf. also Protocol on the role of national parliaments in the European Union; Protocol on the application of the principles of subsidiarity and proportionality).

c) Art. 23 sec. 2 sentence 1 GG relates parliament's right of participation to European Union matters and thus at the same time establishes the subject matter of the obligation to inform under Art. 23 sec. 2 sentence 2 GG. European Union matters include treaty amendments and related amendments on the level of primary law (Art. 23 sec. 1 GG; cf. also §§ 2 et seq. of the Responsibility for Integration Act <*Gesetz über die Wahrnehmung der Integrationsverantwortung des Bundestag es und des Bundesrates in Angelegenheiten der Europäischen Union* <*Integrationsverantwortungsgesetz* – IntVG> of 22 September 2009 <BGBl I p. 3022>) and European Union legislation (Art. 23 sec. 3 GG). But this is not an exhaustive account of the area of application of the provision.

There may also be European Union matters at stake in other cases. In particular, agreements under international law, irrespective of whether they are directed towards a formal amendment of the treaty foundations of the European Union

(Art. 23 sec. 1 sentence 3 GG), are European Union matters if they supplement, or stand in another particular proximity to, the law of the European Union. It cannot be determined on the basis of a single and at the same time clear-cut characteristic when such a relationship exists (cf. also the technique of merely listing examples of projects in § 3 EUZBBG). Instead, the crucial factor is an overall consideration of the circumstances, including planned contents, objectives and effects of the legislation, which, depending on their respective weight, may be decisive individually or collectively. For example, it may suggest that a matter belongs to the European Union if the planned coordination in international law is laid down in primary law, or if provisions of secondary or tertiary law provide for the plan to be implemented, or if there is another qualified substantive connection with an area of policy laid down in the treaties – that is, with the integration programme of the European Union –, if the project is promoted by bodies of the European Union or the intervention of these bodies in the realisation of the project is provided for – including the situation where a body is acting on behalf, and under the name, of another body (*Organleihe*) – or if an agreement under international law is to be entered into solely between Member States of the European Union. A qualified substantive connection with one of the areas of policy of the European Union which are governed by primary law (cf. also § 4 sec. 4 no. 1 EUZBBG), which creates a supplementary relationship or another relationship of particular proximity to European Union law will exist in particular if the purpose of a planned treaty lies specifically in reciprocal interaction with one of these areas of policy, and all the more if the path of coordination under international law is chosen because concurrent endeavours to achieve establishment in the primary law of the European Union have not achieved the necessary majorities.

This broad understanding of Art. 23 sec. 2 sentence 1 GG is supported firstly by its wording. The formulation "European Union matters" cannot be the basis for any restriction to particular acts of the European Union. Nor does such a restriction follow from the interaction of the concept of "matters" with the concept of the "European Union". On the contrary, the wording is open: On the one hand, it may be interpreted to the effect that only such projects are meant whose author or direct subject is the European Union as an institution. However, it can also without difficulty be understood as a comprehensive reference to matters with a specific relation to the European Union and the integration programme allocated to it, without being tied to particular configurations.

This interpretation is corroborated by systematic aspects. Thus for example, Art. 23 sec. 1 sentence 1 GG refers to the development of the European Union for the purpose of establishing a united Europe; this determines the programme and objective of the whole provision. It would contradict this if large parts of the dynamic and diverse process of integration within the European Union were at the outset to be excluded from the parliamentary right of participation.

The idea of compensation, which was omnipresent in the consultations of the Joint Commission on the Constitution, also suggests a broad understanding of the provision. It is intended to guarantee that the German *Bundestag* , over and above its responsibility for the transfer of sovereign powers to the European Union under Art. 23 sec. 1 GG (cf. BVerfGE 123, 267 <351 et seq.>), also participates in its further structuring and in its workings. Art. 23 sec. 2 GG is therefore intended to give the *Bundestag* sufficient time for a decision as to whether and, if so, how it wishes to participate in the national development of informed opinion (cf. Schorkopf, in: *Bonner Kommentar , Art. 23* marginal no. 136 <August 2011>). This question arises not only with regard to participation in law-making within the meaning of Art. 288 et seq. TFEU, but also for other initiatives and proposals which are important for the development and the actions of the European Union. With regard to this, Art. 23 sec. 2 GG must also apply to the preparation of agreements under international law and political initiatives if these show substantial points of contact in the above sense with the integration programme laid down in the treaties.

Finally, the historical interpretation also suggests that the concept of "European Union matters" should be understood in a broad sense. Art. 23 sec. 2 GG entered the Basic Law in connection with the ratification of the Treaty of Maastricht, that is, with a treaty which consolidated under the roof of the European Union the supranational European Communities, which at that time were over thirty years old, with the common foreign and security policy and the common justice and home affairs policy, two areas of policy which at the time were organised intergovernmentally (cf. BVerfGE 89, 155 <158 et seq.>; Oppermann/Classen/Nettesheim, *Europarecht* , 5th ed. 2011, *§ 3* , marginal no. 2). The constitution-amending legislature of the year 1992 thus had an image of the European Union before its eyes in which the – solely supranational – European Communities and the inter-governmental areas were distinguished from one another. If, against this background, it related the rights of participation of the *Bundestag* to European Union matters, it seems probable that it did not wish to differentiate between the pillars of the European Union. Instead, Art. 23 sec. 2 GG was to "[extend] to all projects of the European Union which could be of interest for the Federal Republic of Germany or the *Bundestag* " (BTDrucks 12/6000, p. 21). This is confirmed by the gradual realisation in the course of the consultations that European integration is a dynamic process of development which demands a high degree of flexibility on the level of the Member States (BTDrucks 12/3338, p. 6; BTDrucks 12/6000, p. 20). No indications for a different interpretation follow from the ratification of the Lisbon Treaty, because it is not discernible that this was intended to narrow the scope of Art. 23 sec. 2 GG.

It is not necessary to decide here whether and how far measures in the areas of the common foreign and security policy

and the common security and defence policy are covered by Art. 23 sec. 2 GG.

3. According to Art. 23 sec. 2 sentence 2 GG, the Federal Government must inform the *Bundestag* (and the *Bundesrat*) comprehensively and at the earliest possible date. The subject, the limits and the manner of the informing of the German *Bundestag* are to be determined with regard to the purpose of the provision, which is to enable the *Bundestag* to effectively exercise its rights of participation in European Union matters while preserving the individual responsibility of the executive (a). From this follow more detailed requirements of the information (b).

a) aa) The point of contact of the obligation to inform is the right of the German *Bundestag* laid down in Art. 23 sec. 2 sentence 1 GG to participate in European Union matters. The information must primarily make it possible for the *Bundestag* to influence the Federal Government's forming of decisions at an early date and effectively. It is only on the basis of sufficient information that the *Bundestag* is in the position to follow and influence the process of European integration, discuss the pros and cons of a matter and prepare opinions. The provision of information must happen in such a way that parliament does not find itself in the role of merely following along (cf. Federal Constitutional Court, judgment of the Second Senate of 7 September 2011 – 2 BvR 987/10, 2 BvR 1485/10, 2 BvR 1099/10 –, *Neue Juristische Wochenschrift* – NJW 2011, p. 2946 <2951>, marginal no. 124; judgment of the Second Senate of 28 February 2012 – 2 BvE 8/11 –, juris marginal no. 109).

The genesis of Art. 23 sec. 2 GG confirms this interpretation. Before the new version of Art. 23 GG, the parliamentary groups represented in the German *Bundestag* unanimously called for parliamentary rights of participation to be laid down, with the objective of being able to influence the decisions on European legislation in advance on a national level (cf. members of the *Bundestag* Dr. Möller and Mr Verheugen, Joint Commission on the Constitution, 11th meeting on 15 October 1992, stenographic minutes, in: Deutscher Bundestag <ed.>, *Materialien zur Verfassungsdiskussion und zur Grundgesetzänderung in der Folge der deutschen Einigung* , vol. 1, Bericht und Sitzungsprotokolle, 1996, pp. 543 <544-545>). In view of the fact that the *Bundestag* had often been confronted with a *fait accompli* where it could do no more than only take note of it, the Joint Commission on the Constitution laid down the obligation to inform in Art. 23 sec. 2 sentence 2 GG. There was broad agreement that a sound forming of decisions and responsible participation of the *Bundestag* required comprehensive information at the earliest possible date (cf. BTDrucks 12/3896, p. 19; BTDrucks 12/6000, p. 21; cf. also Möller/Limpert, ZParl 24 <1993>, p. 21 <26>).

bb) The obligation to inform under Art. 23 sec. 2 sentence 2 GG is intended to contribute towards compensating for "asymmetrical information" between the Federal Government and the *Bundestag* insofar as this is necessary to guarantee an effective exercise of rights (Schorkopf, in: *Bonner Kommentar* , vol. 6, *Art. 23* , marginal no. 144 <August 2011>). A narrow interpretation would conflict with this purpose. The constitution-amending legislature, as the genesis of the article indicates, consciously decided in favour of a far-reaching obligation to inform.

It was originally intended that the opinions of the *Bundestag* should be binding (this was still proposed by Möller, working paper no. 67 of the Joint Commission on the Constitution of 9 July 1992); on the pressure of the Federal Government this was reduced to the – markedly weaker – duty to take the opinions into account (Art. 23 sec. 3 sentence 2 GG), and the *Bundestag* countered this by enforcing a stricter formulation of the obligation to inform (cf. member of the *Bundestag* Mr Verheugen, Joint Commission on the Constitution, 11th meeting on 15 October 1992, stenographic minutes, in: Deutscher Bundestag <ed.>, *Materialien zur Verfassungsdiskussion und zur Grundgesetzänderung in der Folge der deutschen Einigung* , vol. 1, Bericht und Sitzungsprotokolle, 1996, p. 543 <545>). If the obligations to inform of the Federal Government therefore tend to be excessive in comparison with the rights of participation of the *Bundestag* laid down in Art. 23 sec. 3 GG (cf. Uerpmann-Wittzack, in: v. Münch/Kunig, *GG* , vol. 1, 6th ed. 2012, *Art. 23* marginal no. 75), then this embodies the specific purpose of this institutional arrangement, which is to guarantee effective participation of the German *Bundestag* in European Union matters despite the lack of formal possibilities of making this binding (cf. Rath, *Entscheidungspotenziale des Deutschen Bundestag es in EU-Angelegenheiten* , 2001, pp. 43 et seq.).

It is also of importance for the interpretation and handling of Art. 23 sec. 2 sentence 2 GG that the obligation to inform serves not only to make possible the rights of participation of the German *Bundestag* under Art. 23 sec. 2 sentence 1 GG. At the same time it guarantees on a national level that the German *Bundestag* can fulfil the duties allocated to it in Art. 12 TEU and in Art. 1 and 2 of the Protocol on the role of the national parliaments in the European Union and in Art. 4 of the Protocol on the application of the principles of subsidiarity and proportionality.

cc) In addition, the interpretation and application of Art. 23 sec. 2 GG must take account of the fact that this provision also serves the public nature of the parliamentary process, which is firmly founded in the principle of democracy.

The German *Bundestag* generally makes its decisions in plenary session (cf. BVerfG, judgment of the Second Senate of 28 February 2012 – 2 BvE 8/11 –, juris marginal no. 102, 119) and in public deliberation. Public negotiation of arguments and counter-arguments, public debate and public discussion are essential elements of democratic parliamentarianism. It is precisely the degree of public discussion and public endeavour to find a decision, guaranteed under Art. 42 sec. 1 sentence 1 GG, that opens possibilities of reconciling conflicting interests which would not have

arisen if a less transparent procedure had been used (BVerfGE 70, 324 <355>; cf. also BVerfGE 40, 237 <249>). In the European context, the public parliamentary forming of decisions at the same time increases the responsiveness of European decisions to the interests and convictions of the citizens (cf. Müller-Franken, *Deutsches Verwaltungsblatt* – DVBl 2009, p. 1072 <1080>). It is only the public nature of deliberation which creates the conditions for review by the citizens (cf. BVerfGE 125, 104 <125>; most recently BVerfG, judgment of the Second Senate of 28 February 2012 – 2 BvE 8/11 –, juris marginal no. 108). This also applies where parliamentary deliberation, whether in a participatory or a supervisory role, relates to the decision process (on the supervisory function of parliament BVerfGE 67, 100 <130>; 110, 199 <218-219>; 124, 78 <121>). Parliamentary responsibility to the citizens is the essential condition for the effective influence of the people on the exercise of state power which is called for by Art. 20 sec. 2 sentence 2 GG (cf. BVerfGE 83, 60 <71-72>; 93, 37 <66>).

Decisions of substantial legal or factual importance for the latitude of future legislation must in principle be preceded by a process which gives the public an opportunity to develop and present its views and which urges parliament to resolve the necessity and scope of the measures to be adopted (cf. BVerfGE 85, 386 <403-404>; 95, 267 <307-308>; 108, 282 <312>). An example of this is the fact that the German *Bundestag* must exercise its overall budgetary responsibility according to these principles even in a system of intergovernmental government. Under its overall budgetary responsibility, the German *Bundestag* must be the place where decisions on revenue and expenditure are made on the *Bundestag* 's own authority, including decisions taking account of international and European liabilities (cf. BVerfG, judgment of the Second Senate of 7 September 2011 – 2 BvR 987/10, 2 BvR 1485/10, 2 BvR 1099/10 –, NJW 2011, p. 2946 <2951>, marginal no. 124; BVerfG, judgment of the Second Senate of 28 February 2012 – 2 BvE 8/11 –, juris marginal no. 109). In this context, the principle of the public nature of the budget applies as a manifestation of the general principle of the public nature of democracy (cf. BVerfGE 70, 324 <358>).

dd) Limits to the obligation to inform follow from the principle of the separation of powers. The system of functions of the Basic Law proceeds on the basis that the government has a core area of specifically executive responsibility which includes an area of initiative, consultation and action which is fundamentally confidential (BVerfGE 67, 100 <139>; 77, 1 <59>; 110, 199 <214>; 124, 78 <120>). Such a confidential core area is recognised by the Federal Constitutional Court in connection, for example, with the investigations of parliamentary committees of inquiry and with parliamentary rights to ask questions (cf. BVerfGE 67, 100 <139>, on the law of committees of inquiry; BVerfGE 110, 199 <215>; 124, 78 <120>, on the parliamentary right to ask questions). At all events, this core area covers the formation of decisions by the government, both with regard to the deliberations in the Cabinet and also to the preparation of Cabinet and ministry decisions, which occurs above all in internal ministry and inter-ministry decision processes (BVerfGE 67, 100 <139>; 110, 199 <214, 222>; 124, 78 <120>). As long as the internal development of informed opinion of the Federal Government has not been completed, parliament therefore has no right to information.

b) Art. 23 sec. 2 sentence 2 GG provides that the provision of information to the *Bundestag* must, with regard to the facts, be comprehensive (aa), with regard to time, occur at the earliest possible date (bb), and be structured in a manner appropriate to its purpose (cc). Although these conditions have different contents, they do not stand in isolation from one another, but are related to each other.

aa) The requirement of comprehensive information must be interpreted in accordance with its function, which is to enable the German *Bundestag* to exercise its rights of participation. Accordingly, the provision of information must be the more intensive, the more complex a matter is, the more deeply it intervenes in the sphere of competences of the legislature, and the more it resembles a formal resolution or agreement. This gives rise to requirements as to the quality, quantity and timeliness of the information, taking into account the limits which follow from the principle of the separation of powers. The provisions of §§ 4 et seq. EUZBBG contain more detailed definitions on this aspect; the Federal Government has not fundamentally questioned these.

(1) With regard to the content, the duty to give comprehensive information covers initiatives and positions of the Federal Government itself. In addition, it extends to passing on official materials and documents of the bodies and other groups and authorities of the European Union and of other Member States in European Union matters (C.I.2.c above), but is not restricted to this. As soon as and insofar as the Federal Government itself is dealing with a matter, information on informal procedures and procedures that are not (yet) documented in writing may be covered. Irrespective of formal documentation, the obligation to inform may also relate to the subject, course and results of the meetings and deliberations of bodies and groups of the European Union in which the Federal Government is represented (cf. Pernice, in: Dreier, *GG* , vol. 2, 2nd ed. 2006, *Art . 23* , marginal no. 101).

With regard to the purpose of the obligation to inform, it is irrelevant whether the Federal Government obtained the information through official channels or in another way (cf. Pernice, in: Dreier, *GG* , vol. 2, 2nd ed. 2006, *Art . 23* , marginal no. 101; Uerpmann-Wittzack, in: v. Münch/Kunig, *GG* , vol. 1, 6th ed. 2012, *Art . 23* , marginal no. 77). It is immaterial for the existence of a duty to forward documents and information whether these originate from bodies or other agencies of the European Union or from the sphere of other Member States (cf. Classen, in: v. Mangoldt/Klein

/Starck, *GG* , vol. 2, 6th ed. 2010, *Art . 23* , marginal no. 74; Pernice, in: Dreier, *GG* , vol. 2, 2nd ed. 2006, *Art. 23* marginal no. 101; Uerpmann-Wittzack, in: v. Münch/Kunig, *GG* , vol. 1, 6th ed. 2012, *Art . 23* , marginal no. 77). Nor does the fact that information may possibly be confidential (cf. for example Art. 6 of the Council's Rules of Procedure; OJ 2009 L 325 of 11 December 2009, p. 35) in principle prevent its being passed on to the *Bundestag* . In cases in which the best interests of the state may be endangered if confidential information became known to the public, the information may be sent confidentially (cf. BVerfGE 124, 78 <123-124>, on committees of inquiry). The *Bundestag* created the conditions for this when it adopted its Rules on Document Security (cf. BVerfGE 67, 100 <135>; 70, 324 <359>; 77, 1 <48>; BVerfG, judgment of the Second Senate of 28 February 2012 – 2 BvE 8/11 –, juris marginal no. 149).

(2) The quantity and detail of the information to be sent to the German *Bundestag* are to be assessed, with regard to the purpose of the information, on the one hand by the importance of a matter. Thus, for example, the *Bundestag* must have knowledge of all events which require its participation under Art. 23 sec. 2 sentence 1 GG, and at the same time receive the information which is necessary to pass a well-founded resolution. On the other hand, the required extent and the necessary depth of the information are also assessed on the basis of the relevant state of progress and negotiation.

"Flooding" the *Bundestag* with information which by reason of its volume cannot be processed either administratively or by the members is not the intention of Art. 23 sec. 2 sentence 2 GG (cf. Classen, in: v. Mangoldt/Klein/Starck, *GG* , vol. 2, 6th ed. 2010, *Art. 23* marginal no. 75). Admittedly, it is primarily the duty of parliament itself, within its autonomy of rules of procedure, to ensure that matters falling under Art. 23 sec. 2 GG are appropriately examined and assessed and to create the organisational requirements for processing the information communicated to it (cf. Streinz, in: Sachs, *GG* , 6th ed. 2011, *Art . 23* , marginal no. 107; cf. also § 4 sec. 5 EUZBBG on the limited possibility of waiving information). But Art. 23 sec. 2 GG, in the case of matters which are only of discernibly slight importance to the *Bundestag* , or of events which are still in a very early and relatively unspecific stage of progress, permits a cursory provision of information, restricted to the fundamental key points, which puts the *Bundestag* in the position to request further and more detailed information. It is also possible to take account of excessive burdening of the government which threatens its ability to function and operate, where parliament has little interest in information; this can be done in the individual case as part of a weighing of interests (cf. also BVerfGE 110, 199 <220>; cf., from the case-law of the *Land* (state) constitutional courts, for example, Constitutional Court of the *Land* Berlin (*Verfassungsgerichtshof des Landes Berlin*), judgment of 14 July 2010 – 57/08 –, DVBl 2010, p. 966; Bavarian Constitutional Court (*Bayerischer Verfassungsgerichtshof*), decision of 6 June 2011 – Vf. 49-IVa-10 –, *Neue Zeitschrift für Verwaltungsrecht, Rechtsprechungs-Report* – NVwZ-RR 2011, p. 841 <843>).

(3) The required comprehensive information – as can be seen from the systematic connection with the obligation to supply information at the earliest possible date – is not exhausted in a one-off act. On the contrary, it is a long-term, continuing obligation, which is updated on every occasion when the treatment of a matter encounters new political or legal questions on which the German *Bundestag* has not yet formed an opinion (cf. Baach, *Parlamentarische Mitwirkung in Angelegenheiten der Europäischen Union* , 2008, p. 162).

Legislation of the European Union and intergovernmental agreements are generally preceded by complex and extended processes of consultation. In this context, the Federal Government can pass on to the *Bundestag* only the information it has received itself at any given time, and therefore the obligation to give comprehensive information must not be seen as static, but as dynamic. The state of knowledge and the attitude of the Federal Government with regard to a matter are as a general rule not unchanging, but are subject to changes over the course of time. As a project becomes increasingly more specific, however, the amount of information available to the Federal Government typically increases. In this process, every increase of knowledge on the part of the Federal Government leads to an asymmetrical possession of knowledge vis-à-vis the *Bundestag* which must – if the constitutional requirement of "comprehensive" information is not to remain without effect – in principle be corrected. This duty to correct information imbalances between the Federal Government and the *Bundestag* increases with the increasing complexity and importance of a process and with the temporal proximity to a formal resolution or to the entry into an agreement.

(4) Because of the separation of powers (C.I.3.a)dd) above), the claim to information under Art. 23 sec. 2 sentence 2 GG in general does not extend to aspects which relate to the process of formation of decisions of the Federal Government prior to the taking of a concrete position. Initiatives by the Federal Government and its positioning in projects initiated by third parties in European Union matters are preceded – depending on the matter – by a more or less extensive formation of decisions, in the course of which under certain circumstances a particular point of view may develop only gradually. Until then, it is an event dependent on a variety of domestic and foreign policy and internal concerns, considerations and developments and thus still volatile, which does not yet leave the sphere of the Federal Government and of which in general, the *Bundestag* is not yet to be informed under the Constitution. However, when the Federal Government has itself put its formation of decisions into such a concrete form that it can make interim or partial results public or intends to enter into a process of consultation with third parties with a position of its own, a

project is no longer in the core area of specifically executive responsibility which is screened from the *Bundestag* . In these cases, Art. 23 sec. 2 sentence 2 GG requires that the Federal Government give the *Bundestag* substantial information on its plan.

bb) The strict time requirements for the supply of information under Art. 23 sec. 2 sentence 2 GG ("at the earliest possible date") are also intended to guarantee that the *Bundestag* is in the position to effectively exercise its rights of participation in European Union matters.

(1) In the history of the article, the strict time requirement is shown to be a conscious deviation from Art. 2 of the Act of Consent to the Treaty of Rome of 27 July 1957 (BGBl II p. 753), where only an ongoing supply of information to the *Bundestag* was laid down and supplying information at a date earlier than the passing of a resolution in the Council was only stated as a directory provision. On this basis, the *Bundestag* often only received information after a resolution had been passed in the Council, and therefore later than the *Bundesrat* and the German members of the European parliament (cf. Möller, working paper no. 84 of the Joint Commission on the Constitution of 15 October 1992). The wording that information should be supplied "in good time" or "at regular intervals", which had been discussed at times in the Joint Commission on the Constitution and in the European Union special committee, was therefore now rejected. It was said that the requirement that information be supplied at regular intervals did not sufficiently guarantee that the *Bundestag* would receive the relevant information at the earliest possible date (cf. member of the *Bundestag* Mr Verheugen, Joint Commission on the Constitution, 11th meeting on 15 October 1992, stenographic minutes, in: German *Bundestag* <ed.>, *Materialien zur Verfassungsdiskussion und zur Grundgesetzänderung in der Folge der deutschen Einigung* , vol. 1, report and meeting minutes, 1996, p. 543 <545>). The term "in good time" also appeared to the members of the Joint Commission on the Constitution too indefinite, since it opened a broad latitude for interpretation and ultimately left the date of supplying information to the discretion of the Federal Government. In order to enable the *Bundestag* to form its decisions on a well-founded basis, comprehensive information at the earliest possible date was essential (cf. Möller, working paper no. 84 of the Joint Commission on the Constitution of 15 October 1992; Möller/Limpert, loc. cit., p. 26; Schmalenbach, *Der neue Europaartikel 23 des Grundgesetzes im Lichte der Arbeit der Gemeinsamen Verfassungskommission* , 1996, pp. 144-145). With the chosen wording, "at the earliest possible date", the constitution-amending legislature therefore intended to create a temporal requirement that was as precise as possible and could be objectively determined (cf. Möller/Limpert, loc. cit., p. 26).

(2) The point of time is equally important as the scope of the information. Only if the *Bundestag* obtains knowledge of a project at an early date can it influence the decision process in European Union affairs, which is generally borne by a large number of players. In view of this, the reference to the "earliest possible date" in Art. 23 sec. 2 sentence 2 GG is to be interpreted to the effect that the *Bundestag* must receive the information from the Federal Government at the latest at a time which enables the *Bundestag* to consider the matter in depth and to prepare an opinion before the Federal Government makes declarations with outward effect, in particular binding declarations on legislative acts of the European Union and intergovernmental agreements. This excludes the possibility of the Federal Government taking concrete initiatives or taking part in the adoption of resolutions without the prior participation of the German *Bundestag* , and it requires all documents to be forwarded as soon as they are made the subject of negotiations.

(3) Official documents, reports and notices, as well as all unofficial information, must therefore be forwarded to the *Bundestag* as soon as they enter the sphere of influence of the Federal Government – possibly by way of the Permanent Mission of the Federal Republic of Germany to the European Union (cf. Pernice, in: Dreier, *GG* , vol. 2, 2nd ed. 2006, *Art . 23* , marginal no. 101; Uerpmann-Wittzack, in: v. Münch/Kunig, *GG* , vol. 1, 6th ed. 2012, *Art. 23* , marginal no. 79). The Federal Government has no discretion with regard to the date of the forwarding. Delays in forwarding are only permissible in order to enable the Federal Government to review the requirements of Art. 23 sec. 2 sentence 2 GG. With regard to meetings of the bodies and informal consultations in which the Federal Government is involved, the *Bundestag* – even if as yet there are no formal proposals or other consultation materials – must be informed in advance and in such good time that it can form an opinion on the subject of the meetings and can influence the line of negotiation and the voting of the Federal Government (cf. Uerpmann-Wittzack, in: v. Münch/Kunig, *GG* , vol. 1, 6th ed. 2012, *Art. 23* , marginal no. 77, 79; Streinz, in: Sachs, *GG* , 6th ed. 2011, *Art. 23* , marginal no. 1139. It must be informed of the course of proceedings and the interim and final results immediately following the consultations. With regard to the date of information on initiatives and positions of the Federal Government and the requirement of ongoing updating of the information status of the *Bundestag* , what was stated above applies (C.I.3.b)aa) above<3, 4>).

cc) Finally, requirements of the procedure and the form of supplying information follow from the purpose of Art. 23 sec. 2 sentence 2 GG in informing the *Bundestag* . The target of the information is generally the *Bundestag* as a whole; the information must generally be supplied in writing. Details may be decided within the scope of the constitutional requirements by statute or agreement between the German *Bundestag* and the Federal Government.

(1) The target of the information under Art. 23 sec. 2 sentence 2 GG is the *Bundestag* as a whole. This is intended to guarantee that all the members can equally and without distinction access the information supplied. However, Art. 40

sec. 1 sentence 2 GG grants parliament the power to decide its internal affairs autonomously within the constitutional order and to organise itself in such a way that it can carry out its duties appropriately (cf. BVerfG, judgment of the Second Senate of 28 February 2012 – 2 BvE 8/11 –, juris marginal no. 115 et seq., with further references). It is therefore in the first instance the task of the *Bundestag* itself to ensure that the information supplied to it is directed to an effective parliamentary formation of decisions. In particular it is responsible for deciding in what scope it will authorise the Committee on the Affairs of the European Union under Art. 45 sentence 2 GG to exercise the rights of the *Bundestag* under Art. 23 GG vis-à-vis the Federal Government. For this purpose, the *Bundestag* may make the necessary arrangements and may lay down details of the supply of information by way of an agreement with the Federal Government (cf. § 12 EUZBBG). "Unofficial" information given to individual members or to parliamentary groups and their representatives such as the spokespersons in the committees does not satisfy the *Bundestag* 's right under Art. 23 sec. 2 sentence 2 GG.

(2) In principle, the purpose of Art. 23 sec. 2 sentence 2 GG requires the Federal Government to supply information in writing. Admittedly, Art. 23 sec. 2 sentence 2 GG does not expressly require writing. In view of the requirements of clarity, consolidation and reproducibility which are to be imposed on a formal supply of information to parliament, written form, in contrast to oral information, appears to be the preferable medium to inform the *Bundestag* effectively. Against this background, in principle the oral informing of the plenary session, the Committee on the Affairs of the European Union and also the specialised committees have only a supplementary and explanatory function.

Exceptions to the principle of written form are permissible only within narrow limits and in particular with regard to the requirement of information at the earliest possible date, but in some circumstances they are also necessary. Since Art. 23 sec. 2 sentence 2 GG requires that asymmetrical information between the government and parliament be removed not only in the best manner possible, but also as soon as possible, constellations are conceivable in which the Federal Government can only guarantee comprehensive information which is also given at the earliest possible date if it is given orally (cf. Schorkopf, in: *Bonner Kommentar* , vol. 6, *Art. 23* , marginal no. 144 <August 2011>). This is the case, for example, if written documentation is not yet available on a matter and it cannot be obtained or produced in a reasonable time, but it is necessary to inform the German *Bundestag* in order that it can effectively exercise its rights of participation. A similar situation applies to the supply of documentation in foreign languages. If the obstacle is removed, the information deficit that has arisen must be corrected without delay. In this respect, too, details may be laid down by the *Bundestag* , and the details may be formulated more specifically in agreements between the *Bundestag* and the Federal Government.

II.

According to these standards, the applications are well-founded. The respondent has violated the rights of the German *Bundestag* under Art. 23 sec. 2 sentence 2 GG both with regard to the establishment of the European Stability Mechanism (1.) and with regard to the agreement of the Euro Plus Pact (2.).

1. The respondent did not inform the German *Bundestag* of the establishment of the European Stability Mechanism to the degree required under Art. 23 sec. 2 sentence 2 GG. The establishment and structuring of the European Stability Mechanism are a European Union matter within the meaning of Art. 23 sec. 2 sentence 1 GG (a). Since they relate to the overall budgetary responsibility of the German *Bundestag* and thus to one of its essential functions, it was necessary to give information in full (b). The respondent failed to send to the German *Bundestag* a text of the European Commission, which was in its possession on 21 February 2011, on the establishment of the European Stability Mechanism and the draft of a Treaty on the European Stability Mechanism of 6 April 2011, and in this way violated the rights of the *Bundestag* under Art. 23 sec. 2 sentence 2 GG (c).

a. The establishment and structuring of the European Stability Mechanism are a European Union matter within the meaning of Art. 23 sec. 2 sentence 1 GG. An overall survey of its dominant characteristics shows substantial points of contact with the integration programme of the European treaties. Its establishment is to be guaranteed by an amendment of the Treaty on the Functioning of the European Union (aa). The agreement to be entered into for its establishment gives new competences to the bodies of the European Union (bb) and serves to safeguard an area of policy which is allocated to the exclusive competence of the European Union (cc). The fact that this is to be an agreement under international law does not call into question its allocation to the integration programme laid down in the Treaty on the European Union and in the Treaty on the Functioning of the European Union (dd).

aa) The establishment of the European Stability Mechanism is to be made possible and guaranteed under European Union law by an amendment of the Treaty on the Functioning of the European Union. The insertion of Art. 136 sec. 3 TFEU which is planned in this connection must be made by a treaty amendment under Art. 48 TEU. Because of this legally founded connection with European Union law alone, this is a European Union matter.

bb) Another indication that this is a European Union matter within the meaning of Art. 23 sec. 2 sentence 1 GG is the fact that a number of bodies of the European Union are allocated new competences by the Treaty on the European Stability Mechanism. This allocation of competences was decided as long ago as at the beginning of the year 2011, as is shown in the history of the matter, going back to the year 2010, and in the following measures of concretisation (in detail, cf. A.I.2.a).

> 1. In a resolution of 20 June 2011, the representatives of the governments of the Member States agreed that the Treaty on the European Stability Mechanism should contain provisions under which both the European Commission and the European Central Bank were to carry out the duties listed in the Treaty. On the operative level, on activation of the financial aid, an important role has been given specifically to the European Commission. Together with the International Monetary Fund and in consultation with the European Central Bank, it is to determine the actual financing requirements of the Member State benefiting. Authorised by the Board of Governors, it is to negotiate a macro-economic programme of adjustment and monitor compliance with the political conditions, again – in what is known as the troika – with the International Monetary Fund and the European Central Bank, which already work together in conducting the debt sustainability analysis. Art. 13 sec. 1 of the draft of a Treaty on the European Stability Mechanism also provides that the Chair of the Board of Governors may assign duties to the European Commission. If the borrower remains a debtor of the European Stability Mechanism after the termination of the programme, the Board may order continuing surveillance. After discussion by the Board of Governors, it may, on the proposal of the Commission, resolve to carry out surveillance after the programme is completed; this may be continued as long as a specific amount of the financial aid has not yet been repaid.

The draft of a Treaty on the European Stability Mechanism in the version of 2 February 2012 also provides that resolutions on the programme are monitored both by the European Commission and also by the Council of the European Union under Art. 121 and 136 TFEU (17th recital). Finally, under Art. 273 TFEU, the European Court of Justice is to decide on the interpretation and application of the Treaty on the European Stability Mechanism.

> 2. The allocation to European Union matters is not called into question by the fact that the European Stability Mechanism only calls on the bodies of the European Union by way of *Organleihe* . Substantively, in this way further duties and powers are transferred to the bodies, albeit not in the procedure actually intended for this under Art. 48 sec. 1 TEU. The granting of competences to the bodies is therefore also in this connection governed by the principle of conferral (cf. also Art. 5 sec. 1 sentences 1 and 5 sec. 2 sentence 1 TEU) and by the prohibition on granting them competence to decide on their own competence (*Kompetenz-Kompetenz*) or on touching the core of constitutional identity (Art. 79 sec. 3 in conjunction with Art. 1 and 20 GG; cf. BVerfGE 89, 155 <188>; 123, 267 <370-371>). Failing this, the constitutional limits on the further development of European integration and the procedural safeguards provided in this connection could be circumvented. Every allocation of duties and powers to the European Union and/or its bodies is therefore substantively a transfer of sovereign powers, which is even the case if the bodies are called on to carry out a duty and are granted powers “only” by way of *Organleihe* .

This is supported, furthermore, by the possibility, which is associated with the granting of duties and powers by way of *Organleihe* and which is clearly desired by the parties to the Treaty, for the bodies to exercise these duties and powers consistently with the conferred powers from the area of the integration programme laid down in the treaties and in this way to create a structure in which the distinctions between “soft” management tools and imperative legislation and acts of supervision become blurred (cf. Schuppert, *Verwaltungsorganisation und Verwaltungsorganisationsrecht als Steuerungsfaktoren* , in: GVwR vol. I, 2nd ed. 2012, *§ 16* , marginal nos. 173a et seq., 173h et seq.). This is shown, for example, in the request to the Board of Governors to interlock its decisions in an international context with the monitoring procedure under the European Union (Art. 121, 126, 136 sec. 1 TFEU; 17th recital and Art. 13 sec. 1 of the draft of a Treaty on the European Stability Mechanism).

cc) In addition, the European Stability Mechanism is to serve to safeguard an area of policy which is allocated to the exclusive competence of the European Union. The draft of the Treaty on the European Stability Mechanism supplements the economic and currency policy.

With the addition of a paragraph 3 to Art. 136 TFEU, which subjects financial aid to strict conditions and permits the European Stability Mechanism to act only when it is indispensable to stabilise the currency area as a whole (cf. Art. 3 of the draft of a Treaty on the European Stability Mechanism), a link is made to the economic and currency policy laid down in Title VIII (Art. 119 et seq. TFEU) and it is made clear that the provisions are intended to safeguard the currency policy and in particular the stability of the euro currency area. In this way an area of policy is supplemented, which the Treaty on the Functioning of the European Union places in the exclusive competence of the European Union (Art. 3 sec. 1 letter c TFEU). The European Stability Mechanism therefore directly serves to realise the objectives of the European Union (Art. 3 sec. 4 TEU). In addition, the Treaty on the European Stability Mechanism, which is to be concluded on the basis of Art. 136 sec. 3 TFEU, shall only be open to Member States which are part of the euro

currency area and for which Art. 136 et seq. TFEU contain specific provisions. This, too, is an indication that the planned Treaty on the European Stability Mechanism is a European Union matter.

dd) The fact that the European Stability Mechanism is to be established under a separate agreement under international law outside the previous structure of European Union law does not alter this result. As set out above, the wording “European Union matters” also includes projects which are to be realised intergovernmentally if they are in a supplementary relationship or another relationship of particular proximity to European Union law. The fact that the European Stability Mechanism is to be realised by way of intergovernmental cooperation is thus no more relevant than its characterisation as an international organisation without its own sovereignty. At least because of its blending with supranational elements, the European Stability Mechanism has a hybrid nature, which makes it a European Union matter. It need not to be decided here whether the chosen form of an agreement under international law for the Treaty on the European Stability Mechanism constitutes a circumvention of European Union Law, and in particular whether the treaty is compatible with Art. 48 TEU.

b. The establishment and structuring of the European Stability Mechanism relate to the overall budgetary responsibility of the German *Bundestag* and thus to one of its essential functions. It follows from this that particularly comprehensive and detailed information is necessary.

In view of the complexity and the importance of the European Stability Mechanism for the overall budgetary responsibility of the German *Bundestag* , it is necessary for the German *Bundestag* to be involved in a manner which puts it in the position – including specifically in public debate – to critically consider the topic in detail and to clarify the necessity and scope of the measures to be adopted. Only in this way can it be guaranteed that the German *Bundestag* is the place which makes decisions on revenue and expenditure on its own responsibility, including decisions with regard to the obligations associated with the European Stability Mechanism.

In the concrete case, therefore, strict requirements with regard to quality, quantity, timeliness and usefulness of the information on the negotiations on the European Stability Mechanism follow from the requirement of comprehensive information at the earliest possible date. The information must in particular comprise the complete forwarding of the official materials and documents of all bodies and other groups and authorities of the European Union and other Member States. But the Federal Government must also send information on informal processes and processes not documented in writing, as well as information on the subject, course and results of the meetings, and deliberations of all bodies and groups of the European Union in which it is represented, plus information on bilateral and multilateral actions of Members States on the level of international law. Last but not least, Art. 23 sec. 2 sentence 2 GG requires the Federal Government to inform the German *Bundestag* about its own initiatives and positions in European Union matters relating to the European Stability Mechanism. This is the only way to prevent the German *Bundestag* from finding itself in the role of merely following along (BVerfG, judgment of the Second Senate of 28 February 2012 – 2 BvE 8/11 –, juris marginal no. 109; judgment of the Second Senate of 7 September 2011 – 2 BvR 987/10, 2 BvR 1485/10, 2 BvR 1099/10 –, NJW 2011, p. 2946 <2951>, marginal no. 124).

c. The respondent did not inform the German *Bundestag* comprehensively and at the earliest possible date on the European Stability Mechanism. It did not send the *Bundestag* a document of the European Commission, which was in its possession at the latest on 21 February 2011, on the elements of the Stability Mechanism (aa) nor a draft of the Treaty on the European Stability Mechanism of 6 April 2011 (bb). Later oral or written information does not alter the violation of Art. 23 sec. 2 sentence 2 GG (cc). No reasons which might argue against forwarding this information are evident; in particular, the respondent cannot invoke confidentiality (dd).

a. The respondent did not send the German *Bundestag* a text of the European Commission which was in its possession on 21 February 2011 on the establishment of the European Stability Mechanism; this text was the subject of the deliberations on the elements of the Stability Mechanism in the Council. The existence of this paper is confirmed by an internal report of the Liaison Office of the German *Bundestag* in Brussels of 21 February 2011. As is shown by the report of the Liaison Office, the Council – in which the Federal Republic is represented – was at this time working on structuring the European Stability Mechanism on the basis of a text of the European Commission. Since papers of the European Commission on the basis of which the elements of the European Stability Mechanism were discussed in the European Council and also in the ECOFIN Council and the Eurogroup, in particular that text of the Commission, were not made available to the German *Bundestag* , the *Bundestag* had no possibility to exercise influence on the concrete structuring of the European Stability Mechanism at an early date.

b. Furthermore, the respondent did not send to the German *Bundestag* the draft of a Treaty on the European Stability Mechanism in the form of the Draft Treaty Establishing the European Stability Mechanism (ESM).

A draft of the Treaty on the European Stability Mechanism dated 6 April 2011 was obtained by the German *Bundestag* only from informal sources, although this or at least an earlier text version of the draft Treaty was in the possession of

the Federal Government at this date. This is shown by the contents of oral information given to committees on the same date: the Parliamentary Permanent Secretary in the Federal Ministry of Finance named the Budget Committee of the *Bundestag* individual details of the contents of the Treaty, which had already been bindingly agreed on at the meeting of the European Council of 24/25 March 2011, and stated that the Treaty on the European Stability Mechanism was at that time being further prepared on the European level and was still in the negotiation stage (Minutes no. 17/52 of the 52nd meeting of the Budget Committee of 6 April 2011, pp. 12, 19). The Federal Government therefore had concrete knowledge on text versions of the draft Treaty on 6 April 2011.

c. Later oral or written information, in particular sending on 17 or 18 May 2011 the draft of the Treaty on the European Stability Mechanism, which at this date had already been discussed in the extended Eurogroup, does not alter the fact that there was a violation of Art. 23 sec. 2 sentence 2 GG. The Federal Government has an obligation to send to the *Bundestag* not merely a treaty text the deliberations on which have been completed or which has even already been decided. It must send the *Bundestag* at the earliest possible date interim results and text versions in its possession, such as the Draft Treaty Establishing the European Stability Mechanism (ESM) dated 6 April 2011. The fact that drafts are changed and therefore updates are necessary, and that such information therefore may have "a short half-life", does not justify deferring written information until a date at which the results have already been reached. In this way the *Bundestag* is placed in precisely the ratification position which is characteristic of agreements under international law, which prevents it being able to influence the contents and against which Art. 23 sec. 2 sentence 2 GG is intended to protect it. As already follows from the cumulative requirements of early and comprehensive information, in procedural matters of the above nature the obligation to inform cannot be satisfied "in one comprehensive package".

d. The fact that the two documents might have been confidential, does not remove the requirement to forward them. In particular, the Federal Government may not invoke fundamental confidentiality in the specific format of the extended Eurogroup, which meets informally. Negotiations preceding agreements under international law which are aimed at binding the Federal Republic of Germany and which are intended to be given the status of law are from the outset not confidential vis-à-vis the *Bundestag* . If, under exceptional circumstances, there were reasons for keeping individual information or documents confidential from the public, the Federal Government would have a duty to send the documents to the German *Bundestag* with an indication that they must be handled confidentially. The *Bundestag* created the conditions for this when it adopted its Rules on Document Security (cf. BVerfG, judgment of the Second Senate of 28 February 2012 – 2 BvE 8/11 –, juris marginal no. 149). No further reasons which might have argued against forwarding the information are evident.

2. In addition, the respondent did not inform the German *Bundestag* comprehensively and at the earliest possible date of the Euro Plus Pact and thus violated the rights of the *Bundestag* under Art. 23 sec. 2 sentence 2 GG. The agreement of the Euro Plus Pact is a European Union matter within the meaning of Art. 23 sec. 2 sentence 1 GG (a) which affects important functions of the German *Bundestag* which therefore has a particularly great need to be comprehensively informed at an early date (b). Since the respondent did not inform the German *Bundestag* of the initiative publicly presented on 4 February 2011 for agreement on a Competitiveness Pact and did not forward it the non-paper of the Presidents of the European Commission and of the European Council with the heading "Enhanced Economic Policy Coordination in the Euro Area – Main Features and Concepts" of 25 February 2011, the comprehensive information at the earliest possible date required under Art. 23 sec. 2 sentence 2 GG was not given (c).

a. Agreeing on the Euro Plus Pact is a European Union matter within the meaning of Art. 23 sec. 2 sentence 1 GG. An overall survey of its characteristics shows that the Pact has substantial points of contact with the integration programme laid down in the European treaties.

The very circumstance that the Euro Plus Pact or the earlier initiative to decide on a Competitiveness Pact is directed at the Member States of the European Union indicates that it is directed towards the European Union integration programme. Substantively, in view of the objectives of the Pact to achieve a qualitative improvement of economic policy and the public budget situation and to reinforce financial stability, the Pact is directed towards a policy area of the European Union laid down in the European treaties. Bodies of the European Union are involved in the realisation of the objectives of the Pact, as is already shown by the planned annual assessment by the European Commission, the Council and the Eurogroup of the reform and stability programmes undertaken by the Member States of the Euro Plus Pact to fulfil their self-commitments.

The fact that the Euro Plus Pact predominantly works with self-commitments of the participating Member States does not call into question its categorisation as a European Union matter. On the one hand, even a limited legal obligation does not prevent categorisation as a European Union matter in view of the required broad interpretation of the concept, which is not restricted to law-making. On the other hand, the Pact certainly has some binding effect. It is true that it provides no sanctions for its violation, unlike the Stability and Growth Pact reformed by the "Six-Pack" (cf. A.I.3.d above). But with the yearly benchmarking involving the European Commission, the Euro Plus Pact contains an

instrument of enforcement which in recent times even national constitutional law has relied on (cf. Art. 91d GG) and which, in addition, is directly connected to actionable obligations of the Member States (on this, cf. the case-law of the European Court of Justice on the previous Stability and Growth Pact, Court of Justice of the European Communities, Judgment of the Court (Full Court) of 13 July 2004, Case C-27/04, Commission of the European Communities v Council of the European Union, European Court reports 2004 Page I-06649, in particular paragraph 89). The associated duty to render account will affect every Federal Government and has already been recorded in the European Semester and the connected Communication from the Commission of 7 June 2011 on "Concluding the first European semester of economic policy coordination: Guidance for national policies in 2011-2012" (COM <2011> 400 final). In addition, the obligation of the Member States participating in the Pact to implement the instructions laid down in the Stability and Growth Pact contains a binding reference to secondary European Union legislation.

There is also a substantive point of contact with the European Union integration programme in the partial implementation of the Euro Plus Pact by provisions of secondary legislation. Thus, for example, Regulation (EU) No 1175/2011 of the European Parliament and of the Council of 16 November 2011 amending Council Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, which was adopted as part of the "Six-Pack", increases the "extent of review" of the European Semester, which it made part of secondary legislation, to the objectives of the Euro Plus Pact, too.

b. Since the Euro Plus Pact considerably affects the competencies of the German *Bundestag* , the Federal Government was required to inform the *Bundestag* in full of the initiatives and early stages of the negotiations. Specifically the self-commitments in areas which are under the legislative competence of the Member States, such as for example tax law and social welfare law, and in which the legislature will in future be subject to surveillance by bodies of the European Union, relate to parliamentary responsibility and are capable of restricting the legislature's options. The *Bundestag* had a strong interest in learning in advance about, discussing and participating in the decision as to whether and if so in what areas a coordination should be promised and what assessment criteria should be envisaged.

c. The respondent did not inform the German *Bundestag* comprehensively and at the earliest possible date of the Euro Plus Pact.

a. It did not inform the German *Bundestag* in advance of the initiative publicly presented on 4 February 2011 for the agreement on a Competitiveness Pact, later the Euro Plus Pact.

1. The Euro Plus Pact originated in a German-French initiative which the governments of both Member States made the subject of the meeting of the European Council of 4 February 2011 and which the Federal Chancellor, together with the French President, presented to the public at this meeting. The respondent should have informed the German *Bundestag* of this plan at the latest on 2 February 2011.

At this date it was confirmed that at the immediately forthcoming meeting of the European Council a discussion proposal for an increased economic policy coordination in the euro currency area to improve competitiveness was to be presented to the heads of state and government. This is clear not only from the statements of the government spokesman at the government press conference of 2 February 2011, according to which the Federal Government regarded economic policy coordination as one of several measures that were now to be taken and the discussion on which was to be opened at the lunch of the heads of state and government. The Minister of State of the Federal Chancellery also subsequently confirmed the objective of the Federal Government to agree at the meeting of the European Council on 4 February 2011 on a procedure to draft a Competitiveness Pact, and that the topic of the economic and monetary union had been added to the agenda on 2 February 2011 (Minutes no. 17/31 of the 31st meeting of the Committee on the Affairs of the European Union of 9 February 2011, p. 14).

If – as the respondent asserts – before 4 February 2011 there was not yet a finally agreed position on the envisaged contents of an increased economic policy coordination in the euro currency area within the Federal Government, this fact would not have released the Federal Government from its obligation to inform. In this case, the subject of the necessary information was not (yet) the agreement on a Competitiveness Pact as such, but solely the respondent's intention to initiate a process to draft it (cf. also § 5 sec. 2 sentence 1 EUZBBG). On this subject, the government spokesman had, at the press conference of 2 February 2011, announced an agreed position of the Federal Government. The forming of decisions within the Federal Government was therefore completed to the extent that it could present its initiative to the public and intended to enter a process of consultation with other governments with its own position. The respondent therefore had an obligation to inform the German *Bundestag* before the beginning of the meeting of the European Council of at least the fundamental outlines of the initiative (cf. also § 5 sec. 5 sentences 1 and 2 EUZBBG).

2. The information presented to the German *Bundestag* by the respondent was not sufficient to satisfy the obligation to inform.

First, this applies to the “Preliminary report for the European Council on 4 February 2011” of 2 February 2011. It merely states that the Federal Government advocates a strong signal from the heads of state and government of the euro area that economic policy coordination in the euro currency area should be improved in order to increase competitiveness. In contrast, it was not mentioned that for this purpose the respondent intended to present an initiative to agree on a Competitiveness Pact and what the essential contents of this initiative would be.

Nor is sufficient information on the planned project contained in the answer of the Federal Ministry of Economics and Technology of 2 February 2011 to a concrete request of the German *Bundestag* . After the respondent’s initiative had been a subject of reports in a number of news magazines as early as 31 January 2011, the German *Bundestag* on 1 February 2011 requested to be sent papers and information on the basis of which the initiative was to be presented. The Federal Ministry of Economics and Technology replied only that the newspaper articles referred to a process of consultation which was not yet completed and “the supply of information provided for in the EUZBBG can be made without delay in its further course”.

Finally, the “information of spokespersons” undertaken on 3 February 2011 by the Minister of State of the Federal Chancellery (cf. Minutes no. 17/31 of the 31st meeting of the Committee on the Affairs of the European Union of 9 February 2011, p. 11) was also inadequate to satisfy the obligation to inform. Apart from the fact that the spokespersons of the Committee on the Affairs of the European Union were not even the correct target for the information, the only content of the declaration of the Minister of State of the Federal Chancellery was “that there is not yet an agreed position of the Federal Government on the subject and therefore no agreed position will be decided on at the European Council” (cf. Minutes no. 17/31 of the 31st meeting of the Committee on the Affairs of the European Union of 9 February 2011, p. 11).

b. In addition, the respondent did not send to the German *Bundestag* an unofficial document from the Presidents of the European Commission and the European Council of 25 February 2011 entitled “Enhanced Economic Policy Coordination in the Euro Area – Main Features and Concepts”, which described essential contents of the Competitiveness Pact – later the Euro Plus Pact.

According to the submissions of the parties to these proceedings, it is to be assumed that the respondent was in possession of this unofficial document. This is already suggested by the email correspondence of that time. According to this, the German *Bundestag* expressly applied to the Federal Ministry of Economics and Technology on 3 March 2011 and to the Federal Chancellery on 4 March 2011 for information as to whether the Federal Government was in possession of a joint paper of the Presidents of the European Commission and the European Council on the German-French initiative for a Competitiveness Pact, and received no – i.e. also no negative – answer from the Federal Chancellery. In addition, in the present proceedings the respondent countered the accusation that it had violated its obligation to inform without denying the claim implicit therein that it had the paper in its possession, which in view of the working methods of the European bodies involved would indeed be unlikely.

Despite express request, the respondent did not supply the German *Bundestag* with this document (cf. also § 5 sec. 3 EUZBBG). It was only on 11 March 2011 that it forwarded the official draft of a Competitiveness Pact. At this time, the German *Bundestag* no longer had an opportunity to discuss its contents and to influence the Federal Government by an opinion, because the heads of state and government of the Member States of the euro currency area agreed on the Pact on the same date, 11 March 2011. As a result, from this date concrete self-commitments came into being, for the Federal Republic of Germany and other Member States, without the German *Bundestag* having been able to influence their contents or to prevent them.

D.

This decision was made unanimously.

Voßkuhle	Lübbe-Wolff	Gerhardt
Landau	Huber	Hermanns