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IJPL SYMPOSIUM 2012

THE EURO CRISIS JURISPRUDENCE OF THE FEDERAL CONSTITUTIONAL COURT

*Peter M. Huber**

Abstract

On September 12th 2012 the Federal Constitutional Court (FCC) decided on several constitutional complaints and applications demanding a temporary injunction against the Federal law approving the Treaty on the ESM (TESM), the Federal laws implementing that treaty into the national legal order and the Federal law approving the treaty on the so called Fiscal Compact (TFCP). These demands had been put forward by the vastest amount of plaintiffs in the 62 years old history of the FCC – 76 MPs, several professors of economics, the parliamentary group of the Left and more than 41.000 citizens. The decision of September 12th had already been the fourth significant decision of the FCC dealing with the Sovereign Debt Crisis since 2011, and it won't be the last.

These decisions belong to a long line of jurisprudence which started to deal with European integration already in the early 1970s. There may have been some change in tone over the past 40 years; the cornerstones of the FCC's approach, however, remain unchanged. At the base of this long line of case law is a concept which conceives the EU as an association of sovereign states (*Staatenverbund*) in which the Member States are "masters of the treaties" and, as far as Germany is concerned, cannot be deprived of this role but for an act of the constituent power *i.e.* a referendum according to art. 146 Basic Law.

* BVR Prof. Dr. Peter M. Huber, Karlsruhe/München.

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I. National legislation as basis of European integration

Against this background EU-law has to be applied because and insofar as Parliament has approved it by ratification (*Rechtsanwendungsbefehl*). Therefore the Federal Act Approving the EEC Treaty and its subsequent amendments are the basis of Germany's membership in the EU, and the conceptual basis of the precedence EU-law takes over national law. If EU membership is based on national legislation, it seems to be inevitable that especially national constitutional law may also set limits to European integration. Looking at this in more detail there are two limits to European integration derived from national constitutional law: the constitutional identity on the one hand (1.) and the program of integration i. e. the principle of conferral on the other (2.).

1. *Constitutional identity as a limit to integration*

a) *Eternity clause of art. 79 (3) GG*

The constitutional identity of the Federal Republic of Germany, which according to art. 23 (1) third sentence of the Basic Law is not open to European integration is determined by and only by the so-called eternity clause of art. 79 (3) Basic Law. Codifying the jurisprudence of the FCC¹ the Basic Law states that “[...] the establishment of the European Union as well as changes in its treaty foundations [...] that amend or supplement this Basic Law or make such amendments or supplements possible, [...] shall be subject to paragraphs (2) and (3) of art. 79”². Insofar, the division of the federation into ‘Länder’, their participation in the legislative process, or the principles laid down in artt. 1 and 20’ are off limits even for legislation concerning European integration. In other words, the limits the legislator has to abide by when amending the constitution apply to the advancement of European Integration as well.

b) *Content of the guarantees*

In the Lisbon Judgment, the Federal Constitutional Court tried to further sort this out and elaborated that the Basic Law also guarantees the sovereign statehood of the Federal Republic of Germany.³ Consequently, Parliament, Federal Council, and the Government, the so-called *pouvoirs constitués*, do not possess the power to abolish the sovereign nation state over the heads of the German people; this would require an act of the constituent power, the *pouvoir constituant* (art. 79 (3), 146 Basic Law)⁴. It further stated that, in spite of all the utopias surrounding the term ‘multi-level-constitutionalism’, the European Union remains an association of sovereign states based on public international law. In the future, it will therefore continue to be steered by the

¹ BVerfGE 37, 271 ff. – Solange I; 73, 339 ff. – Solange II; 75, 223 ff. – 6. UStRiL; 80, 74 ff. – e. A. Fernsehrichtlinie; 89, 155 ff. – Maastricht; 123, 267 ff. – Lissabon.

² Für einen eher spielerischen Umgang mit diesen Grenzen J. Schwarze, Ist das Grundgesetz ein Hindernis auf dem Weg nach Europa?, JZ 1999, 637 (640).

³ BVerfGE 123, 267 (346 ff.) – Lissabon; früher schon P.M. Huber, Maastricht – ein Staatsstreich?, 1993, S. 22 ff.

⁴ BVerfGE 123, 267 (348 f.) – Lissabon; erstmals wohl P.M. Huber, Bundesverfassungsgericht und Europäischer Gerichtshof als Hüter der gemeinschaftsrechtlichen Kompetenzordnung, AöR 116 (1991), 210 (250); ders., in: Sachs (Hrsg.), GG, 1. Aufl. 1996, art. 146 Rn. 19; H. Dreier, in: ders. (Hrsg.), GG, Band III, 1. Aufl. 2000, art. 146 Rn. 16.

Member States, who, as former judgments had put it, are and will continue to be the ‘Masters of the Treaties’⁵, and that the principle of democracy (art. 20 (1) and (2) Basic Law) entails a special responsibility for parliament when it comes to integration; it demands that national parliaments have to take an active part in European matters. These requirements, laid down in art. 23 (2) to (6) Basic Law resemble what art. 12 TEU and the Protocols on the Role of National Parliaments in the EU and on the Application of the Principles of Subsidiarity and Proportionality require under an EU perspective⁶.

aa) As far as the distribution of competences between the EU and the Member States is concerned, this means that the latter have to retain the right to unilaterally withdraw from the union, which is now expressly established in art. 50 TEU, that the EU cannot be granted the ‘Kompetenz-Kompetenz’, but rather that the allocation of competences is to be based on the principle of conferral⁷ and that the ‘majority of functions and powers’ must remain with the Member States⁸. The Lisbon Judgment tried to substantiate this – admittedly intangible – phrase by listing examples of areas of policy – citizenship, the civil and the military monopoly on the use of force, revenue and expenditure including external financing and all elements of encroachment that are decisive for the realization of fundamental rights.

bb) Because of the ongoing Euro-crisis the Court has had the opportunity to further shape the budgetary dimension of the constitutional identity. In its decisions concerning the aid measures for Greece and the Euro rescue package⁹ as well as the ESM¹⁰ it has identified the budget autonomy of the German parliament as a fundamental part of the constitutional identity and declared the *Bundestag’s* overall fiscal autonomy to be inalienable. It stated verbatim: “Against this background, the German Bundestag must not transfer its budget autonomy to other participants by granting indefinite authorisations concerning

⁵ BVerfGE 75, 223 (242) – 6. USt.-RiL; 89, 155 (190) – Maastricht; P.M. Huber, *Recht der Europäischen Integration*, 2002, § 5 Rn. 13 ff.

⁶ Siehe dazu BVerfG, NVwZ 2012, 954 Rn. 98 – Informationsrechte.

⁷ Früher schon BVerfGE 75, 223 (242) – 6. USt.-RiL.

⁸ BVerfGE 89, 155 (186) – Maastricht.

⁹ BVerfGE 129, 124 (179 ff.) – Griechenlandhilfe und Euro-Rettungsschirm.

¹⁰ BVerfG, NJW 2012, 3145 ff. – ESM-Vertrag, Fiskalpakt.

fiscal policy. In particular, it may not – not even by statute – subject itself to mechanisms of financial importance which – be it because of the general concept or the result of an overall evaluation of individual measures – could lead to incalculable burdens on the budget (expenditure or loss of revenue) without the essential prior approval. Prohibiting the Bundestag from relinquishing its budget autonomy in this way is not an inadmissible restriction of the legislator’s budgetary competence, but is in fact aimed at its protection”¹¹.

2. The principle of Conferral and the ultra-vires-problem

If national legislation is the basis of EU-law, the EU can only possess such competences that have been conferred upon it by the Member States (principle of conferral). Activities of the EU and its organs are therefore democratically legitimate only insofar as they keep within the scope of the programme of integration approved by national parliaments – as far as Germany is concerned by Bundestag and Bundesrat. This applies to all organs of the EU, to the European Parliament, the Council, the Commission, the ECJ and also to the European Central Bank. It is the ground on which several plaintiffs have challenged the ECB’s OMT-Decision of sept. 6th 2012 before the Federal Constitutional Court.

The limit of competences conferred on EU institutions, i.e. the scope of the programme of integration, is inevitably a recurring source of conflict. This becomes a constitutional law issue of some explosiveness especially when the ECJ, who inter alia possesses the competence to adjudicate on whether the EU institutions keep within their competences (art. 19 (1) second sentence TEU), approves acts that exceed the conferred competences and thus acts ultra vires itself.

This was enunciated explicitly for the first time in the Maastricht Judgment¹² and has since been confirmed in the Lisbon Judgment¹³ and outlined in more detail in the Honeywell ruling¹⁴.

¹¹ BVerfGE 129, 124 (179 ff.) – Griechenlandhilfe und Euro-Rettungsschirm.

¹² BVerfGE 89, 155 (188, 195, 210) – Maastricht.

¹³ BVerfGE 123, 267 (398 ff.) – Lissabon.

¹⁴ BVerfGE 126, 286 ff. – Honeywell; dazu A. Proelß, Zur verfassungsgerichtlichen Kontrolle der Kompetenzmäßigkeit von Maßnahmen

It has gained a large following among other Member States' constitutional or Supreme Courts. In 2012 the Czech Constitutional Court, for the first time, even considered an ECJ judgment to be *ultra vires*¹⁵.

Although this case has remained an exception so far – the FCC has namely rejected *ultra vires* claims by the majority¹⁶ with regard to the ECJ's Mangold line of case in 2010,– this does not mean that the court's reserve control is ineffective. The mere fact that the majority of national (constitutional) courts claims to apply the standards of national law to determine whether the ECJ had acted *ultra vires* has been incentive enough for the ECJ to avoid such conflicts. It has thus – with a somewhat clumsy reasoning – upheld the Irish Constitution's prohibition of abortion, and did only classify the prohibition of women's armed military service, which was included in the German Basic Law until 2000 (art. 12a (4) third sentence), as an infringement of Directive 76/207/EEC after the Advocate General had realized that this prohibition is not a provision in the sense of art. 79 (3) Basic Law. The Omega case may be another example¹⁷. It will however be interesting to see how things will develop after the Akerberg/Franson judgment of 26th February 2013¹⁸.

II. The key role of the democratic principle

Until the 1990s the main constitutional concern in Germany was that European integration would endanger the level of protection the fundamental rights as they are laid down in the Basic law. This has become a lesser concern in the past 20 years whereas the democratic issue has turned out to be the key question of European integration – at least under a German perspective.

der Europäischen Union: Der ausbrechende Rechtsakt“ in der Praxis des BVerfG, EuR 46 (2011), 241 ff.

¹⁵ Tschech. VerfG Pl. ÚS 5/12 – Slovak Pensions.

¹⁶ BVerfGE 126, 286 (308 ff.); see Dissenting opinion of Landau S. 318 ff.

¹⁷ ECJ, Rs. C-36/02, *Omega*, Slg. 2004, I-9609 Rn. 39.

¹⁸ ECJ Rs. C 617/10 – Akerberg/Fransson Slg. 0000.

1. Basics

Behind this line of adjudication seems to be a uniquely German concept – critics might say exaggeration – of democracy. Its origins can be traced back to the KPD-judgement of 1954¹⁹ but it did not emerge clearly until after reunification. The other Member States’ democratic principles if they are theoretically recognized at all, are less intense and doctrinally elaborated.²⁰ Europe’s ‘most democratic’ state, Switzerland, does not even recognise any *principle* of democracy²¹. Democracy does not extend past the application of the procedures provided for the forming of the political will.

The German concept substantially amounts to the proposition that the principle of democracy and the sovereignty of the people (art. 20 (1) and (2) Basic Law) are based on the individual right to political self-determination which itself is based on human dignity (art. 1 (1) Basic Law) and, just as all fundamental rights, has a tendency to strive for an expansion of the range of opportunities that it involves²². Therefore, democracy in Germany is not merely an abstract principle that is given effect to by elections of some kind; it means taking the individual seriously as a voter and as a citizen, in fact aiming to free him from being a subject who is controlled and patronized by the state, the European Union or other political institutions. It is aimed at optimizing the possibilities for political participation and at maintaining the political value of the right to vote in national elections (as elections to the European Parliament do not amount to a comparable level of participation for the individual).

¹⁹ BVerfGE 5, 85 (204 f.) – KPD-Urteil.

²⁰ P.M. Huber in: Streinz (Hrsg.), EUV/AEUV, 2. Aufl. 2011, art. 10 EUV Rn. 9 ff.

²¹ K.P. Sommermann, Demokratiekonzepte im Vergleich, in: Bauer/Huber/ders. (Hrsg.), Demokratie in Europa (Hrsg.), S. 191 ff.

²² Grundlegend BVerfGE 107, 59 (91 f.) – Wasserverbände NRW; 123, 267 (342 ff.) – Lissabon; P.M. Huber, Demokratie in Europa – Zusammenfassung und Ausblick, in: Bauer/ders./Sommermann (Hrsg.), Demokratie in Europa (Hrsg.), 2005, S. 491 (495 f.); S. Unger, Das Verfassungsprinzip der Demokratie, 2008, *passim*.

2. *Practical Consequences*

Democratic legitimation – seen from the point of view of the Basic law – is realized primarily through decisions of parliament (“Wesentlichkeitsdoktrin”) and through the involvement of the Bundestag in the decision making process of the EU. The national Parliament is considered the center of democracy and an essential part of our constitutional identity²³. If the *Bundestag* therefore loses competences, the right to vote guaranteed in art. 38 par 1 1 GG loses substance. The capacity of the individual to political self-determination is diminished and he or she must be therefore entitled to make a constitutional complaint arguing that the treaty or the measure at stake would go too far and violate the constitutional identity of the Basic Law. This concept of democracy, laid down in art. 20 (1 and 2) of the Basic law, is part of the constitutional identity and therefore unalienable for the ordinary legislator as well as for the constitution amending legislator or the legislator in European affairs.

III. *Euro crisis – jurisprudence*

1. *Decision of September 7th 2011*

In a more specific way the democratic principle as it is laid down in art. 20 par 1 and 2 of the Basic law entails the requirement that the Bundestag remains the place where decisions on the amount of loans and guaranties which Germany may give for other countries, their duration and their conditions have to be decided on in order to make a public debate and accountability possible.

The Federal Constitutional Court’s judgement concerning the aid measures for Greece and Germany’s participation in the EFSF²⁴ (7th September 2011) is the most important case so far in which these questions have arisen in practice. The Federal Constitutional Court has not only made clear that the limits to integration cannot be skirted by switching to treaties of international public law, but stated moreover, that the individual has a right that said limits are obeyed. This continued expansion

²³ Siehe P.M. Huber, § 26 Rn. 83 ff.

²⁴ BVerfGE 129, 124 ff. – Griechenlandhilfe und Euro-Rettungsschirm.

of the standing is defended against scholarly criticism as follows: “The citizen’s right to democracy which is ultimately based on human dignity [...] would be ineffective if the parliament relinquished core parts of political self-determination and thus permanently deprived the citizen of the possibility of democratic participation. The Basic Law has declared the connection between the right to vote and the government in art. 79 (3) and art. 20 (1) and (2) Basic Law to be inviolable [...]. The legislator has made clear when revising art. 23 Basic Law that the obligation to develop the European Union is tied to the adherence to structural requirements of constitutional law (art. 23 (1) first sentence Basic Law) and that art. 79 (3) has set an absolute limit in order to protect the constitutional identity (art. 23 (1) third sentence) which is transgressed not just when there is an impending seizure of power by totalitarian forces. The citizen must have a recourse of constitutional law against a transfer of competences by the parliament that is in breach of art. 79 (3) Basic Law. The Basic Law does not provide for a more extensive right to complain. Art. 38 (1) Basic Law becomes important in situations in which there is a danger of the competences of the present or future bundestag being undermined in a way that would make the realization of the citizen’s political will legally or practically impossible. The applicant is only entitled to make an application if he can substantiate that his right to elect the Bundestag may be devalued. There may be a right to lodge a constitutional complaint via art. 38 (1) Basic Law as well, if, what is alleged in this case, the authorizations to give guarantees, can have a substantial detrimental effect on budget autonomy, either by their nature or by their amount!”²⁵.

At the centre of this decision, which is primarily based on art. 20 (1) and (2) as well as art. 79 (3) GG, is the proposition that the Bundestag must not transfer its budget autonomy to other entities or subject itself to mechanisms of financial importance which, “be it because of the general concept or the result of an overall evaluation of individual measures, could lead to incalculable burdens on the budget (expenditure or loss of revenue) without the essential prior approval”²⁶. Against this

²⁵ BVerfGE 129, 124 (169 f.) – Griechenlandhilfe und Euro-Rettungsschirm.

²⁶ BVerfGE 129, 124 (179 f.) – Griechenlandhilfe und Euro-Rettungsschirm.

background, the Court has stated that the legislature is prohibited from establishing permanent mechanisms under the law of international agreements which result in an assumption of liability for other states' voluntary decisions, especially if they have consequences whose impact is difficult to calculate. Sufficient parliamentary influence must also be ensured with regard to the manner in which the funds that are made available are dealt with²⁷. With regard to the possibility of having to make payments in a guarantee event, the legislature has a considerable margin of appreciation. The Federal Constitutional Court has to respect this as well as the legislature's assessment of the future sustainability of the federal budget and of the economic performance of the Federal Republic of Germany²⁸.

The Senate could uphold the statutes in question – the Monetary Union and Financial Stability²⁹ Act and the EFSF Act³⁰ – mostly because the possible liabilities arising from those Acts were sufficiently definite – because of a limit regarding the sum, a time limit, a strict conditionality and the requirement of unanimity³¹. Against this background, it seemed sufficient to put the budget commission in charge of the control of the execution of namely the EFSF Act. However, that approval of the budget committee had to be obtained *prior* to giving guarantees which could only be ensured by interpreting § 1 (4) first sentence of the EFSF Act in conformity with the constitution and by pushing the boundaries of interpretation³².

2. Decision of February 28th 2012

After the FCC had allowed to transfer the responsibility for details of state guarantees and aids on the budget committee the legislator planned to organise the parliamentary supervision of the sovereign debt crisis as whole in a special committee of nine elected Members of Parliament.

²⁷ BVerfGE 129, 124 (180 f.) – Griechenlandhilfe und Euro-Rettungsschirm, unter Hinweis auf BVerfGE 123, 267 (356 ff.) – Lissabon.

²⁸ BVerfG, a. a. O.

²⁹ BGBl. I 2010, 537.

³⁰ BGBl. I 2010, 627.

³¹ BVerfGE 129, 124, (184 ff.) – Griechenlandhilfe und Euro-Rettungsschirm.

³² BVerfGE 129, 124, (186) – Griechenlandhilfe und Euro-Rettungsschirm.

This has prompted the Federal Constitutional Court to issue a temporary injunction against the entering into force of the amendment of § 3 (3) StabMechG³³ and has led to an essential decision regarding the internal organisation of the Bundestag³⁴. At the core of this decision is the principle that the Bundestag complies with its function as a body of representation in its entirety, i.e. by participation of all its members, and not by single members of parliament, a group of members, or the majority of parliament. This holds true especially when it comes to the budget.

The German Bundestag's right to decide on the budget and its overall budgetary responsibility are, in principle, exercised through deliberation and decision-making in the plenary sitting "[...], through deciding on the Budget Act, statutes with financial importance or any other constitutive decision of the plenum [...]. Every member of parliament has the right to assess the draft budget of the federal government and the proposed amendments (art. 38 (1) in conjunction with art. 77 (1) first sentence and art. 110 (2) first sentence Basic Law). A member of parliament shall be able to present his views on how the budgetary funds should be spent and thereby influence the decision on a budget [...]. Moreover, the members of the German Bundestag have the right and the obligation to comply with their function to control fundamental decisions on budgetary politics [...]"³⁵.

However, this is not an absolute guarantee. A restriction of the member of parliament's equal participation (art. 38 par 1 S. 2 GG) can be justified by other legal interests of constitutional rank, as the parliament's ability to function. This amounts to a gradual guideline which is based on the idea of essentiality and directed by the principle of proportionality – in the words of the Federal Constitutional Court.

"If members of parliament are excluded from participating in parliamentary decision-making by a transfer of decision-making competences to an executive committee, this is admissible only in order to protect other legal interests of constitutional rank and only if the principle of proportionality is strictly observed.

³³ BVerfGE 129, 284 ff. – e. A. EFSE.

³⁴ BVerfG, NVwZ 2012, 495 ff. – Sondergremium.

³⁵ BVerfG, NVwZ 2012, 495 ff. – Sondergremium, Rn. 110.

The competence to internal organization does not permit to completely deprive a member of parliament of his rights”³⁶.

3. Decision of June 19th 2012

In its judgment pronounced of June 19th 2012, the FCC considered well-founded the applications made by the Alliance 90/The Greens parliamentary group with which it asserted that the *Bundestag*'s rights to be informed by the Federal Government have been infringed in connection with the European Stability Mechanism (ESM) and the Euro Plus Pact (EPP).

According to art. 23 par 2 sentence 2 of the Basic law, the Federal Government shall keep the *Bundestag* informed, comprehensively and at the earliest possible time, “in matters concerning the European Union”. The first application was aimed at the European Stability Mechanism (ESM). The applicant applied for a declaration that the Federal Government infringed the *Bundestag*'s rights under art. 23 par 2 GG by omitting to inform immediately before and after the European Council of 4 February 2011 comprehensively, at the earliest possible time and continuously, about the configuration of the ESM, and that it in particular omitted to send the Draft Treaty establishing the ESM to the *Bundestag* on 6 April 2011 at the latest.

The second application concerned what is known as the Euro Plus Pact, which was presented to the public for the first time at the European Council of 4 February 2011. This agreement is intended to reduce the risk of currency crises in the euro area. In this context, the parliamentary group applied for a declaration that the Federal Government infringed the *Bundestag*'s rights under art. 23.2 GG by omitting to inform the *Bundestag* before the European Council of 4 February 2011 about the Federal Chancellor's initiative for an enhanced economic coordination.

Against this backdrop, the FCC had to clarify whether the rights of participation and the rights to be informed under art. 23 par 2 of the Basic law can also apply to intergovernmental instruments of the nature described which are dealt with by the Federal Government in the context of European integration and which are related to the European Union. The Senate ruled that

³⁶ BVerfG, NVwZ 2012, 495 ff. – Sondergremium, Rn. 119.

the Federal Government infringed the *Bundestag's* rights to be informed under art. 23.2 sentence 2 of the Basic law with regard to the ESM and with regard to the agreement on the Euro Plus Pact.

Art. 23 of the Basic law confers to the *Bundestag* far-reaching rights of participation and rights to be informed in matters concerning the European Union. The strong involvement of Parliament in the process of European integration serves as a compensation for the competence shifts in favour of the governments that result from Europeanisation. The Federal Government's duty, to keep the *Bundestag* informed comprehensively and at the earliest possible time intends to make it possible for Parliament to exercise its right to participate in matters concerning the European Union. The information must make it possible to influence the Government's opinion-forming early and effectively; information must be provided in such a way that Parliament's role is not reduced to merely exercising indirect influence. Apart from this, the interpretation and application of art. 23.2 must take into account that the provision also serves the publicity of parliamentary work, a requirement which is derived from the democratic principle laid down in art. 20.2 of the Basic law. The more complex a matter is, the deeper it intervenes in the legislative's area of competences and the closer it gets to formal decision-making or to a formal agreement, the more intensive the required information has to be.

The indication "at the earliest possible time" in art. 23.2 sentence 2 means that the *Bundestag* must receive the Federal Government's information at the latest at a point in time that enables it to deal with the matter in a substantiated manner and to prepare a statement before the Federal Government makes declarations which have an effect on third parties, in particular binding declarations concerning legislative acts of the European Union and intergovernmental agreements. Boundaries of the duty to inform result from the principle of the separation of powers. As long as the Federal Government's internal formation of opinion has not come to an end, Parliament has no right to be informed. If, however, the Federal Government's opinion-forming has reached a stadium in which it can communicate interim or partial results to the public or would like to set out on a process of concertation with third parties with a position of its own, a project no longer

falls within the core area of the Federal Government's own executive responsibility that is shielded from the *Bundestag*.

With regard to the establishment of the ESM the Government had infringed the *Bundestag*'s rights to be informed under art. 23 par 2 sentence 2 of the Basic law.

The establishment and configuration of the ESM were a matter concerning the European Union because in an overall perspective, the characteristics which define it show substantial connections with the integration program of the European Treaties. Though its being intertwined with supranational elements and its hybrid nature it has to be considered a matter concerning the European Union. The establishment of the ESM is to be safeguarded by amending the TFEU, furthermore, the treaty to be concluded for its establishment assigns to the institutions of the EU, in particular to the European Commission and the ECJ new responsibilities concerning the identification, realization and monitoring of the financing program for Member States in need of assistance. The ESM is to serve to complement and safeguard the economic and monetary policy, which has been assigned to the EU as an exclusive responsibility.

The Federal Government infringed the rights of the *Bundestag* under art. 23.2 sentence 2 of the Basic Law by omitting to submit a text of the European Commission on the establishment of the ESM, which was available to the Federal Government on 21 February 2011 at the latest, and the Draft Treaty Establishing the European Stability Mechanism (ESM) of 6 April 2011. Oral and written information, in particular sending the Draft Treaty Establishing the European Stability Mechanism, which had already been discussed in the extended Eurogroup on 17 or 18 May 2011 came too late and did therefore not compensate the infringement. The duty to inform could not be exercised "in an overall package" with regard to processes of the nature existing. The Federal Government was obliged to supply the *Bundestag* not merely with the text of a treaty when deliberations had already been concluded, or after the treaty has been adopted, but had to submit it at the earliest possible time.

The Federal Government also infringed the *Bundestag*'s rights under art. 23.2 sentence 2 by not informing it comprehensively and at the earliest possible time on the Euro Plus Pact.

4. Decision of September 12th 2012

On September 12th 2012 the Federal Constitutional Court pronounced its judgment regarding several applications for a temporary injunction. The main objective of the applications was to prohibit the Federal President from signing the statutes approving the Treaty establishing the European Stability Mechanism (TESM) and the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TFCG) passed by the Bundestag and the Bundesrat on 29 June 2012 until the decision in the principal proceedings. The Second Senate of the Federal Constitutional Court refused the applications with two provisos. The TESC could only be ratified if it was ensured at the same time under international law that:

1. the limitation of liability set out under art. 8 (5) sentence 1 of the ESM Treaty (TESM) limits the amount of all payment obligations arising to the Federal Republic of Germany from this Treaty to its share in the authorized capital stock of the ESM (EUR 190 024 800 000) and that no provision of this Treaty may be interpreted in a way that establishes higher payment obligations for the Federal Republic of Germany without the agreement of the German representative;

2. the provisions of the ESM Treaty concerning the inviolability of the documents of the ESM (Art. 32 (5), art. 34 and art. 35 (1) TESC) and the professional secrecy of all persons working for the ESM (art. 34 TESC) do not stand in the way of the comprehensive information of the Bundestag and of the Bundesrat.

The Federal Republic of Germany was obliged to express to the other members of the ESM that she does not wish to be bound by the TESC as a whole if the reservations made by it should prove to be ineffective.

a) Extent of review/Admissibility of the main action

Diverging from the usual extent of review in temporary injunction proceedings, the Senate did not restrict its review to a mere weighing of the consequences. Instead, it performed a summary review of the challenged Acts of assent and of the accompanying laws under the aspect of whether the violations of their rights which the applicants admissibly assert can indeed be proven. This was necessary because with the ratification of the

Treaties Germany was to enter commitments under international law whose cancellation would not be easily possible in the event that violations of the constitution should be found out in the principal proceedings. The principal proceedings were held admissible to the extent that the applicants, relying on art. 38 of the Basic law, assert a violation of the overall budgetary responsibility of the Bundestag, which is entrenched in constitutional law through the principle of democracy (art. 20 (1) and 2, art. 79 (3) of the Basic law).

b) Standard of review

As the Senate already held in its decision regarding the aid for Greece and the EFSF of 7 September 2011, art. 38 of the Basic law in conjunction with the principle of democracy (art. 20 (1) and (2), art. 79 (3)) demands that the decision on public revenue and public expenditure must remain with the Bundestag. As elected representatives of the people, the Members of Parliament must retain control of fundamental budgetary decisions even in a system of intergovernmental governance. In this respect, the Bundestag is not allowed to establishing mechanisms of considerable financial importance which may result in incalculable burdens with budget significance being incurred without its mandatory approval. On the contrary: The Bundestag must individually approve every large-scale federal aid measure on the international or European Union level made in solidarity resulting in expenditure. Sufficient parliamentary influence must also be ensured on the manner of dealing with the funds provided.

c) Subsumption

Measured against these standards, the applications proved to be unfounded for the most part.

aa) The Act of approval to the insertion of art. 136 (3) TFEU did not impair the principle of democracy. It was provided for by the European Council decision of 25 March 2011 and contains the authorization to establish a permanent mechanism for mutual aid between the Member States of the euro currency area. Different from the ECJ the FCC was convinced that the establishment of the ESM changes the design of the economic and monetary union in a way that it moves away from the principle of the independence of

national budgets which has characterized the monetary union so far. This may be wise or not. It is important, that it does not result in a loss of national budget autonomy because through the challenged Act of assent, the Bundestag does not transfer budget competences to bodies of the EU or to institutions created in connection with the EU.

bb) The approval of the TESM essentially takes account of the requirements set out under constitutional law with regard to the safeguarding of the overall budgetary responsibility of the German Bundestag.

However, the FCC thought it to be necessary to ensure in the framework of the ratification procedure under international law that the provisions of the TESM may only be interpreted or applied in a way that the liability of the Federal Republic of Germany cannot be increased beyond its share in the authorized capital stock of the ESM of 190 bn € without the approval of the Bundestag and that the information of the Bundestag and the Bundesrat according to the constitutional requirements is ensured. Admittedly, it can be assumed that the express limitation of the liability of the ESM Members to their respective portions of the authorized capital stock, which is provided for in art. 8 (5) sentence 1 TESM, bindingly limits the Federal Republic of Germany's budget commitments undertaken in connection with the activities of the ESM to EUR 190 024 800 000. However, it cannot be ruled out that the TESM will be interpreted in a sense that in the case of a revised increased capital call, the ESM Members cannot rely on the liability ceiling.

Such a reservation in the ratification procedure was also required with regard to the provisions of the TESM on the inviolability of the documents (art. 32 (5), art. 35 (1) TESM) and on the professional secrecy of the legal representatives of the ESM and of all persons working for the ESM (art. 34 TESM). Also in this respect one could argue that these provisions are above all intended to prevent a flow of information to unauthorized third parties but not to national parliaments that must bear political responsibility for the commitments based on the TESM *vis-à-vis* their citizens also during further treaty implementation. However, again the provisions do not explicitly address the information of the national parliaments by the ESM and constitutional law as regards the parliament's rights of participation and its rights to be

informed is quite different in the Member States. It therefore is not unconceivable that those prescriptions could have stopped the Bundestag from monitoring the ESM.

On the other hand the amount of the payment obligations of a total nominal value of EUR 190 024 800 000 did not exceed the limit of the burden on the budget to such an extent that the budget autonomy would run void. This even applies if Germany's overall commitment undertaken with regard to the stabilization of the Eurozone of approximately 310 bn € is taken into consideration. As had already been pointed out in the decision of 7 September 2011 legislature has a broad scope of assessment in this respect, which entails the assessment of the future soundness of the Federal budget and the economic performance capacity of the Federal Republic of Germany.

IV. ECB-Case

The Applicants to the FCC who object to euro rescue measures taken by the European Central Bank, in particular to the acquisition of government bonds on the secondary market, arguing that the measures go beyond the authorization by the program of integration laid down in the TFEU, did not ask for a temporary injunction. To what extent the decision taken by the Governing Council of the European Central Bank on 6 September 2012 on a programme concerning the purchase of government bonds of financially weak Member States (OMT-program) complies with the legal requirements of the treaty was therefore not a matter for decision in the proceedings for the issue of a temporary injunctions.

Their constitutional complaints and application are consequently reviewed in the principal proceedings. The oral hearing in this case has taken place in June 2013. So, the next question which will have to be answered is whether the ECB's policy to buy government bonds of distinguished members of the Eurozone under specific conditions is in accordance with the TFEU and its constitutional foundations in the Basic Law.

V. Outlook

The Basic Law sets substantial requirements for the division of competences between the EU and the Member States and, as a necessary consequence, for the democratic legitimation and control of EU decisions as well.

As far as Germany is concerned, this has to be put into effect primarily through the Bundestag. These requirements are also valid for other supranational organizations such as the ESM. In a more specific way the democratic principle as it is laid down in art. 20 par 1 and 2 of the Basic law entails the requirement that the Bundestag remains the place where decisions on the amount of loans and guaranties which Germany may give for other countries, their duration and their conditions have to be decided on in order to make a public debate and accountability possible.

During the ongoing crisis, this may slow down responses to the financial markets' actual or perceived demands and may, as the president of the IMF, Christine Lagarde, has stated in an interview, mean that democracy is indeed proving to be an impediment to overcoming the crisis. Yet, this is a price we must be willing to pay for the sake of our and our children's freedom and self determination.