

# The Europeanization of the Bundestag: From Observer to Player?

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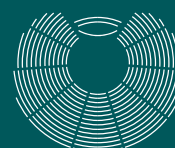
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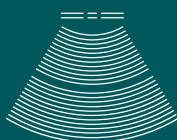
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## Summary

Never before has the role of the German Bundestag with regard to European integration been so intensively discussed as during the European financial and debt crisis. However, it is easy to overlook the fact that major changes have come about in the participation of the German Parliament in European policy. On the one hand, this is as a result of the Treaty of Lisbon, which emphasizes the role of national parliaments in Article 12 TEU and grants them additional rights in some fields. On the other hand, it is also because of German law, not least spurred on by the rulings of the Federal Constitutional Court, ranging from its rulings on the European Arrest Warrant in 2005 and the Treaty of Lisbon in 2009 to its rulings on the so-called rescue packages in 2011 and 2012. Upon closer examination of the most recent developments, it thus becomes apparent that the Bundestag's political actions can now no longer be seen as "empty" as is alleged in most of the more dated specialist literature. The changes in the law over the past few years have enabled the Bundestag to play both a monitoring and participatory role in German European policy.

On the basis of the insights in this study, we wish to put forward three propositions and seven recommended courses of action for discussion.

### Propositions:

1. The Bundestag is currently changing its role from that of an observing to a participating agent.
2. In order to understand its European policy, it is necessary to take a closer look at various subgroups of the Bundestag.
3. The discussion about the role of the Bundestag's European policy should be conducted in the context of the wider debate on the value of parliaments in multi-tiered European politics.

### Recommended courses of action:

1. The Bundestag should concentrate more on essential dossiers, central to the legitimization of German and European policy, instead of trying to cover "everything".
2. The position of the EU Committee in relation to the specialist committees should be reconsidered with a view to its being effectively strengthened – as already provided for in the Constitution (Article 45 German Constitution).
3. With regard to the ESM, it would make sense to create a mixed Stability Committee.
4. European legislation should, wherever possible, enjoy the same treatment and status as national legislation.
5. The dependence of the Bundestag's European policy on a small number of experts from the different political groupings should be reduced.
6. Article 23 of the German Constitution should be adapted to meet the requirements arising from the drive towards Europeanization brought about by the Treaty of Lisbon.
7. In the interests of greater clarity and the coherent manageability of the rights of participation of the German Bundestag and Federal Council, the hitherto enacted accompanying legislation should be converted into a uniform German Code on European Law.

## List of abbreviations

|         |  |
|---------|--|
| BVerfG  | Bundesverfassungsgericht (German Federal Constitutional Court)   |
| BVerfGE | Collection of Rulings of the Federal Constitutional Court  |
| BBV     | Agreement between the Bundestag and the Federal Government in accordance with Article 6 of the Act on the Cooperation of the Federal Government and the German Bundestag in EU Affairs |
| BLV     | Agreement between the Federal Government and the Federal States  |
| COSAC   | Conférence des Organes Spécialisés dans les Affaires Communautaires, i.e. Conference of Community and European Affairs Committees of Parliaments of the European Union                 |
| EFSF    | European Financial Stability Facility  |
| ESM     | European Stability Mechanism   |
| ESMFinG | Act on Financial Participation in the European Stability Mechanism   |
| EUZBBG  | Act on the Cooperation of the Federal Government and the German Bundestag in EU Affairs  |
| EUZBLG  | Act on Cooperation between the Federal Government and the Federal States in EU Affairs   |
| IntVG   | Act on Responsibility for Integration in EU Affairs  |
| TEU     | Treaty on European Union   |
| TFEU    | Treaty on the Functioning of the European Union  |

The Appendix also contains a collection of the most important **legal norms** together with a chronological overview of relevant **rulings** of the Federal Constitutional Court and the development of **rights of participation**.

## German Institutions

|                 |  |
|-----------------|--|
| Bundesregierung | Federal Government   |
| Bundestag       | Federal Parliament   |
| Bundesrat       | The "Federal Council" is a legislative body that represents the sixteen Bundesländer (Federal States) of Germany at the national level |
| Bundesländer    | Federal States   |

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## Preface

It is a commonly held view that national parliaments are finding themselves in a difficult position at a time of globalization and Europeanization. Parliaments such as the German Bundestag, which plays a central and significant role in balancing the institutional powers of its states, are also suffering from a net loss of power and influence, given that more and more far-reaching decisions are being taken either outside their sphere of political influence (economy, finance) or above the national level (EU).

In the course of the past few years, this belief was first perceived to be true by experts and then by the general public. The severe view taken by the Federal Constitutional Court and the impelling tone of its rulings on European policy since its verdict on the European Arrest Warrant of 2005 may well have contributed to the fact the German Parliament has recently been portrayed in the media as being out of its depth and even weak and powerless.

Researchers, known for their more reserved phraseology, have expressed it much more cautiously. The rights of the national parliaments, in particular those of the Bundestag, have constantly been extended in the course of European integration. For this reason the Bundestag must be credited with having achieved successes in the formal business of law-making. That said, the members of parliament and political groups have, in reality, not managed to make widescale and aggressive use of their competences.

If, in the past, the Bundestag's political ambitions for Europe really did not develop to the necessary extent, this begs the question: Are things now different - after three years of debt crisis, heated debate, spectacular legislation and intensive legislative reform? If the answer is yes, what has changed? In what ways does the Bundestag exercise its power in European politics? Who determines its course?

On behalf of the Bertelsmann Foundation's programme "The Future of Europe", Christian Calliess, Professor of Constitutional and European Law at the Freie Universität Berlin, and Timm Beichelt, Professor of European Studies at the European University Viadrina, have set about finding this out. In this study they analyze the status of national parliaments within the European Union, as exemplified by the German Bundestag, using the means afforded by legal and political science to examine the parliament both inter- and intra-institutionally, i.e. its relationship with both government bodies and its own internal organization.

Without wishing to anticipate its results, we can give away this much: The Bundestag has become a parliament with the will to influence and shape governance - and this includes European politics. It is not only a question of monitoring. It is also a question of participation.

Isabell Hoffmann  
Bertelsmann Foundation

# On the path to a Europeanized Bundestag: From observer to player?

## I. Introduction

Never before has the role of the German Bundestag with regard to European integration been so intensively discussed as during the European financial and debt crisis. However, it is easy to overlook the fact that major changes have come about in the participation of the German Parliament in European policy. These were motivated, on the one hand at the level of European law, by the Treaty of Lisbon, which emphasizes the role of national parliaments in Article 12 TEU and grants them additional rights in some fields. e.g. subsidiarity monitoring. On the other hand, it is also because of the rulings of the German Federal Constitutional Court, ranging from its rulings on the European Arrest Warrant on 18 July 2005 and the Treaty of Lisbon on 30 June 2009 to its rulings in the context of the so-called rescue packages in 2011 and 2012, citing responsibility for integration and for the budget as the impetus for the domestic strengthening of the Bundestag's participation rights. It would, however, be wrong to solely attribute the dynamism of the parliament's European policies to these more recent developments. The position of the Bundestag in the EU's multi-layered system has been a subject of discussion for more than 20 years, reaching its first culminating moment in 1993 with the Maastricht Ruling. Thus a considerable number of legislative and organizational reforms can be looked back upon.

In the field of foreign affairs, however, the German Basic Law (the Constitution), in an entirely classical way, first of all attributes the leading role to the government. It is also best equipped for this complex task with its ministries, in particular the Foreign Office. In Germany's parliamentary governmental system the legislature mostly "only" makes use of retrospective monitoring rights. Its scope of action in the field of foreign affairs is consequently limited. According to Article 59, para 2, s. 1 of the Basic Law, for example, treaties which regulate the political relations of the Federal Government or refer to objects of federal legislature require the (retrospective) approval of the legislature. According to the Federal Constitutional Court<sup>1</sup>, just because in Article 59, para 2 of the Basic Law, provision is made for the form of a law in special cases, this does not give the Bundestag the (general) right to intervene in the (original) competences of the executive.

All the important international treaties fall under Article 59, para 2 of the Basic Law, and thus also the European treaties, ranging from the ECSC and the EEC Treaties to the EU Treaty. Since the change to the Constitution in 1992, Article 23 para 1 is applied in parallel in the case of all treaties pertaining to the development of the EU. Consequently, every qualitative step towards European integration linked to the transferring of rights of sovereignty has taken place with the approval of the citizens represented in the Bundestag (as well as that of the Federal Council representing the federal states). Since the inclusion of the European Article, according to Article 23 para 1, s. 2 and 3 in conjunction with Article 79, para 2 of the Basic Law, in most cases a two-thirds majority is even required in parliament. Every step towards integration is therefore democratically legitimated and arrived at by definition "through democracy".

1 BVerfGE 1, 372 (394)

Moreover, every change to the Treaty can be understood as a further democratic confirmation of the process of European integration.

What is, therefore, the much discussed “democratic deficit” in the process of European integration? Why, for example, did the “Treaty establishing a Constitution for Europe” of 2003, which was rejected in the French and Dutch referendums and pruned to become no more than a reform project in the form of the Treaty of Lisbon, come in for so much criticism? Should the decisive step towards integration - not from a legal point of view but from a political one - perhaps not be seen as a contractual transfer of competence but as the actual exercise of competence, as a result of which the competence which has been transferred is expressed through European law?

In point of fact, it should not be forgotten that the more responsibilities are transferred to the EU by member states, the more the question of democracy takes a prominent place in the political and legal debate, and this for good reason. Despite the fact that it is rarely a question of the sole responsibilities of the EU but usually of shared responsibilities exercised jointly with member countries, the use of these powers by the EU nevertheless leads to the national parliaments’ losing their scope for action and influence due to the blocking effect of EU law (cf. Article 2, para 1 and 2 TFEU). Thus the principle of subsidiarity takes on an important function since it helps to point the way towards the level at which action should be taken in each case. It is therefore vital that it should be consistently observed in the everyday decision-making processes of the EU.

When the role of the Bundestag in European politics is hotly debated against this backdrop, there is also good reason for the focus also to be on the question of democracy. This is, without doubt, not least because of Germany’s post-war history. When work was being done on the German Constitution (the Basic Law) and also in the political rhetoric of the first decades after the war, the parliamentary republic was, as it were, developed as an alternative to the Weimar Republic. In the federal system, the government and, in particular, the office of chancellor were particularly strongly embedded in the Bundestag and its majorities. On the one hand, we are therefore talking about a system constituted less by a separation of powers and far more by an interleaving of the powers of the majority in the Bundestag and the government. Thus Parliament is quite naturally viewed as part of the political leadership. On the other hand, as a result of the central role of Parliament, the individual MP takes on the role of a particularly dependent being in great need of legitimization. If his or her capacity to act is curtailed, the entire democratic process can quickly come under scrutiny. For this reason it is hardly surprising that the Bundestag’s European credentials are frequently questioned as to whether they impede MPs in freely exercising their parliamentary mandate in accordance with Article 38 of the Basic Law.

The separation of tasks sketched out here is being increasingly challenged by the role of the Bundestag in European politics - in the words of the German Federal Constitutional Court: by its responsibility for integration. In consequence, the classical role of Parliament in foreign policy and the division of powers in the field of foreign affairs must be rethought. This is because in the field of European policy, as evidenced by the interlinked competences in the federal structure of the EU and



its member states, it is no longer a question of foreign policy and far more one of Europeanized domestic policy.

Against this backdrop, our study first wishes to describe and evaluate the development of the legal framework for the Bundestag's European policy. In the association of European states and constitutions this framework is defined in European and constitutional guidelines. The determining factors are, on the one hand, Articles 9 - 12 TEU, which state the principles of European democracy in concrete terms and, on the other hand, the "Europe Article" of the Basic Law, Article 23, which is complemented by various laws on co-operation and accompanying laws as well as the previously mentioned rulings by the German Federal Constitutional Court. Following this we are interested in the institutional realities in which European policy takes place in the Bundestag. On the other hand, we ask ourselves how the various players are coping with the new circumstances. In this connection more than 20 interviews have been conducted with players and cognoscenti of the Bundestag's European policy. The interviews have been anonymised and incorporated in this study. The bottom line of this part of our study is that the many legal changes of the past few years have brought about a constellation in which the Bundestag is largely able to meet its obligations as regards monitoring and participating in domestic European policy.

It is noticeable in this context that in the debate about European politics in Germany two attitudes dominate. On the one hand, European politics is seen as the domain of foreign affairs. This view of things acknowledges that thanks to Article 23 of the Basic Law and other acts, the Bundestag has considerable rights of participation at its disposal. However, the Federal Government is still seen as the most important - and also most accessible - representative of German European policy and as a consequence it is seen as a primary European legislator through its activities in the Council of the EU. This way of understanding European politics is, as it were, the traditional pattern. On the other hand however, the considerable increase in the rights of information and participation, which the Bundestag has received over the last few years, has led to a rival way of thinking which sees European politics as Europeanized domestic policy and consequently as an essentially "normal case" of parliamentary legislation. This becomes particularly noticeable in the case of legislation through EU guidelines, which, ideally, the Bundestag was involved in drafting through the government's representative in the Council of the EU (cf. Article 23, para 3 of the Basic Law) and thereafter participates in implementing domestically (cf. Article 288, para 3 TFEU). In this paradigm the Bundestag is seen as the primary legitimating body in the setting of norms which is still responsible to the sovereign (the people) when German laws are based on EU directives. From this point of view, there is hardly ever any reason to give the Federal Government

full responsibility for comprehensively pre-formulating acts of law, for in the final analysis, this would mean an infringement of the principle of the division of powers, on the basis of which the shaping of political policy is initiated and organised.

Even upon superficial examination, it can be seen that both patterns stand side by side in the debate about the role of the Bundestag. They do not constitute mutually exclusive options but are, rather, to be seen as the reflections of two traditions which were developed in their own spheres - government, parliament - without

any apparent contradictions over many decades. The problem today, however, is that these practices rooted in tradition are now at odds with each other. In this study we show how this tension can be dealt with both institutionally and strategically.

## **II. The legal framework for Europeanizing the Bundestag**

### **1. Market, Democracy and the Role of the EU**

The modern state, which in the interests of the public good is able to stipulate minimum conditions for socially and environmentally acceptable production to the companies competing in the market, emerged from an industrial society founded on free competition. In the nation state this historical symbiosis of competitive market economy and state control was basically able to function, despite its conflicts and deficits, as long as it was possible to impose the demands made on companies equally on all competitors and thus support competition. However, the ability of national supporting measures to solve the problems and deficits of a market economy were and are limited, to the extent that economic relationships are becoming internationalized and interwoven as a result of globalization.

Thus, the consequent blurring of state borders has led to tensions between the market and democracy. On the one hand, the executive holds the prerogative in the classical sense in the field of national foreign policy. Decisions are taken first and foremost by governments in a democratic process with only little feedback. On the other hand, there is usually a lack of transnational democratic mechanisms in a market with blurred borders. Thus, at a global level, the classical international organizations in particular, such as the United Nations or the World Trade Organization, do not have their own internal democratic mechanisms.

This development is reflected at a regional level in the EU's internal market. The central difference here, of course, is that the European Parliament has arisen as a parallel legislative body elected directly by the citizens of the EU (cf. Article 9 and 10 TEU in conjunction with Articles 20 and 22 TFEU). The internal European market, which was the goal of the EEC when it was founded in 1957, aims at a fusion of national markets and the comprehensive removal of all impediments to transnational movements of goods, services, capital and people (cf. Article 26, para 2 TFEU). The resulting transnational "rights of the market citizen" to these basic freedoms enlarge the freedom of those taking part in the market beyond the borders of the individual democracies. The opening of the borders has thus created an increase in personal freedom favouring mobile individuals and companies and which cannot be impinged on by democratic counter-measures. This is because the "blurring of boundaries" brought about by European law limits the states' ability to introduce supporting measures to regulate the market, e.g. in the field of environment and consumer protection. In consequence, laws enacted by national parliaments are "automatically" suspected of potentially distorting competition.

It thus becomes apparent that economic integration of the internal market requires central regulation and harmonization in the surrounding political areas. In other words: if the internal market is not to fail because of differing national standards in the fields of the environmental, health or consumer protection, accompanying European measures are required in the EU on the part of European legislators, right up to the Council of the European Union and the European Parliament (cf. Article 10, para 2 TEU).

In the final analysis, the lack of democracy in the EU can be traced back to the symbiosis of the national state and democracy, which grew historically and is still a defining characteristic of most theories of democracy today. This deficit in the theory can be seen not least in the ruling of the German Federal Constitutional Court on the Treaty of Lisbon. Despite declarations to the contrary<sup>2</sup>, in the final analysis the Court nevertheless took the view, using the German principle of democracy as a yardstick, that the EU's legislative procedure contained a democratic deficit as regards the principle of equality in elections.<sup>3</sup> However, the Court refrained from involving itself more closely with the principles of European democracy. The Treaty of Lisbon formulates some important cornerstones of the specifically European concept of democracy in Articles 9 - 12 TEU.

They do not include the significance of the EU, highly appreciated in many places, as an alternative to the uninhibited economization and de-democratisation of spheres of life caused by globalization throughout the world. Thus, thanks to the responsibilities granted to the EU by a consensus of national parliaments, it is at least possible in Europe to contain the borderless markets by using European legislation on social and environmental issues to prevent a "market without the state". This is because, in the final analysis, anyone who is against a "market without the state" must come down on the side of commonly accepted rules and therefore Europeanization. European legislation must, however, be sufficiently democratically legitimized and avoid unnecessary centralization. It is thus a question of democracy and subsidiarity.

<sup>2</sup> BVerfGE 123, 267 (368 f.).

<sup>3</sup> BVerfGE 123, 267 (370 ff.).

## 2. Democracy in Association

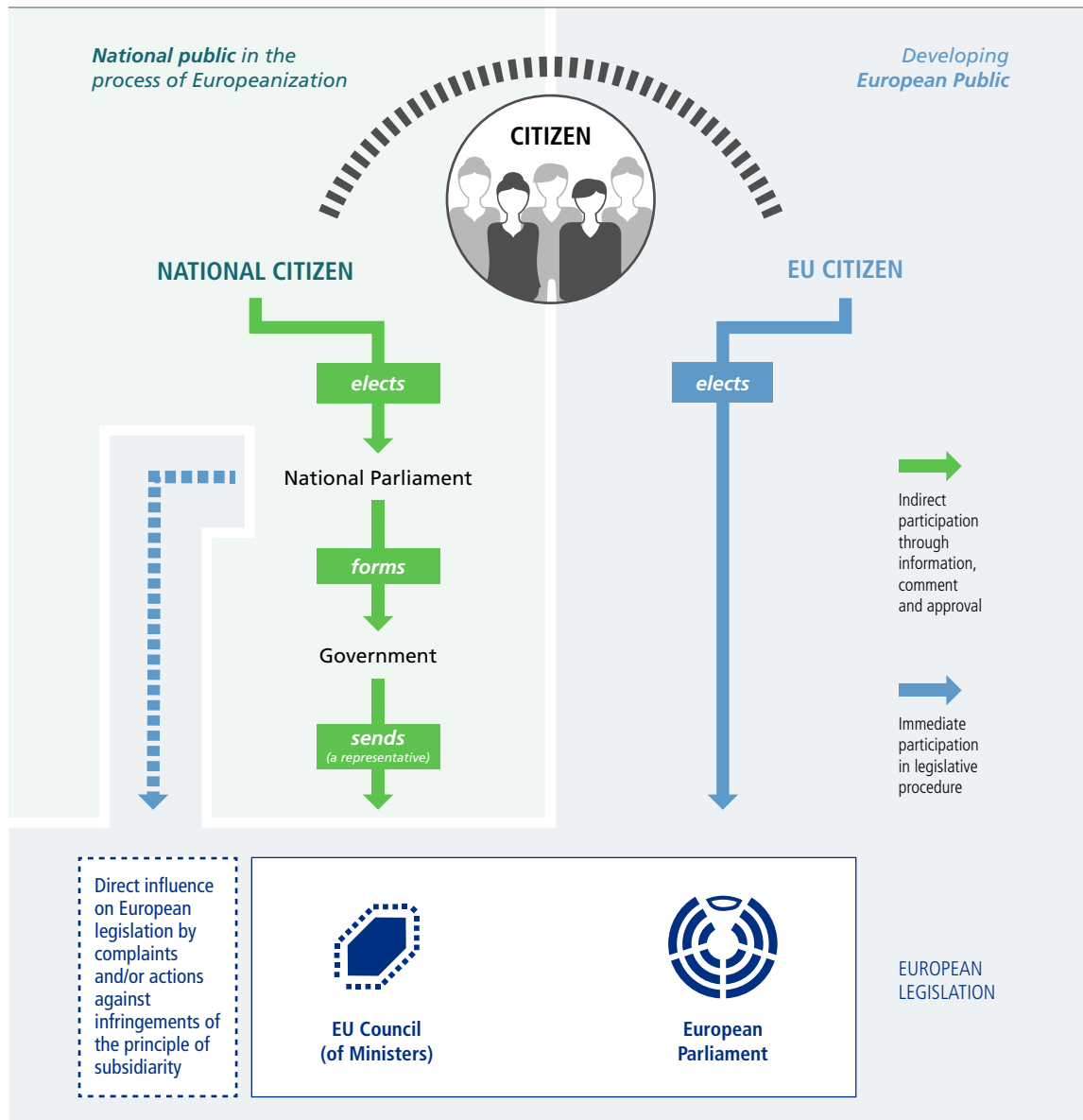
The principles of European democracy (cf. Article 2 TEU) have been expressed in concrete terms since the Treaty of Lisbon in Article 9 ff. TEU. Similarly to the constitutional systems of the member countries, Article 10 TEU places the principle of representative democracy at the centre of the principles of European democracy. Paragraph 2 concretizes representative democracy as being a concept of dual legitimization.

Dual legitimacy is the foundation for democracy in the EU (corresponding to the dual status of EU citizens, cf. Article 9 s. 2 TEU and Article 20 para 1 TEU): On the one hand, citizens in the EU are a source of legitimacy through their representation as EU citizens in the European Parliament. On the other hand, they are a source of legitimacy as national citizens represented by their national parliaments in the Council of the European Union.

In accordance with the concept of dual legitimacy, the institutional strengthening of the principles of democracy within the framework of the Treaty of Lisbon as per Article 10 para 2 TEU starts with the two pillars of democratic legitimacy. Immediate democratic legitimacy has been strengthened by the fact that the European Parliament has equal powers of decision alongside the Council in the legislative procedures for most Europeanized areas of policy. Beyond the national parliaments' participation in the decision-making processes of the legislative and monitoring procedures of the Union in the Council (in Germany the Bundestag and the Federal Council, Articles 23 para 2 - 6 Basic Law), by making objections and complaints about subsidiarity, indirect democratic legitimacy - conveyed via the national parliaments - is now enjoying a considerable increase in status, including at European level (cf. Article 12 TEU). Thus, this specifically European concept of democracy, which has been recognized by the German Federal Constitutional Court but not taken up by it, has made mutual legitimization at a compensatory level of legitimacy possible. The question always remains, however, how the decisions of the various representative bodies, national parliaments and the European Parliament can be harmonized in view of the interlinked responsibilities in the association of European states and constitutions.

In view of the fact that at best only the beginnings of an autonomous European public can be discerned, the national publics have an important role to play from the point of view of legitimacy. They are making a significant contribution to the creation of a European public. European democracy therefore requires not only institutional precautions, which include a strengthening of national parliaments, but also material precautions which can operate as effective limitations of power. These latter above all include rules for the exercise of power, first and foremost the principle of subsidiarity which only permits action at a European level if the member states are unable to cope on their own. In this respect, the Treaty of Lisbon formulates an interesting combination of institutional and material precautions.

# Principles of European Democracy: Dual Legitimacy



### 3. The legal Status of National Parliaments in the EU

In this context, the new role which has been attributed to the national parliaments at European level is of great significance. According to Article 12 TEU, the national parliaments contribute “actively to the good functioning of the Union”. They are thus European players with particular responsibility in this role as “protectors of subsidiarity”. Consequently, the focus is on Article 12 lit. b) TEU, according to which the national parliaments make sure “that the principle of subsidiarity is respected in accordance with the procedures provided for in the Protocol on the application of the principles of subsidiarity and proportionality”. In addition to this, alongside the EU institutions, the parliaments receive their own opportunity to monitor European legislation by being granted the possibility to raise a subsidiarity complaint<sup>4</sup> ex ante using the early warning system and the right to take action against infringements of the principle of subsidiarity<sup>5</sup> ex post at the European Court of Justice. By ensuring that the principle of subsidiarity is upheld, the national parliaments also protect their legislative responsibilities and thereby democracy to some extent at a national level. This way of linking the issue of competence with that of democracy (Article 12 TEU, Title II TEU is not entitled “Provisions on democratic principles” for no reason) corresponds to dual legitimacy.

### 4. The Bundestag’s Responsibility for Integration

This point – which, of course, is open to interpretation – is the defining link to the German parliament’s responsibility for integration, as called for by the Federal Constitutional Court in its ruling on the Lisbon Treaty. However, the Court does not link this responsibility sufficiently to the relevant section in the Basic Law, Article 23. As a consequence, the Court interprets the responsibility for integration in a more defensive way, almost fending it off. The constitutional requirement to establish a united Europe<sup>6</sup> in Article 23, para 1, s. 1 and the Preamble of the Basic Law is not developed enough in this context. Thus, firstly, the European dimension of the responsibility for integration already mentioned (cf. Article 12 TEU) is not sufficiently taken into account. Secondly, Article 23, para 1, s. 1 of the Basic Law makes it clear in the context of the responsibility for integration, that this must also have a constructive, participatory dimension.

The point of departure for parliamentary responsibility for integration must be Article 23 of the Basic Law, which in paragraphs 2 – 6 establishes a differentiated system of participatory rights for the Bundestag and Federal Council, which is further concretized in laws of implementation on the basis of Article 23, para 3, s. 3 for the Bundestag and Article 23, para 7 for the Federal Council. If the European Parliament is only able to make a small contribution towards legitimization, according to the principles of democracy which are binding on the European association of states and constitutions (cf. Articles 2 and 10, para 2 TEU and Article 23, para 1, s. 1 of the Basic Law) both on the basis of constitutional responsibility for

4 Article 6 Subsidiarity Protocol.

5 Article 8 Subsidiarity Protocol.

6 BVerfGE 123, 267 (346 f.).

integration and dual legitimacy as defined in European law for reasons of compensation, the Bundestag is required to provide strengthened legitimacy. Thus Article 23 in conjunction with the co-operation laws containing concrete detail shows the way. The model thereby offered should be expanded upon in view of the new challenges regarding the responsibility for integration. However, at the same time by constitutional and general consensus, it should be made into the point of departure for the democratic legitimization of the government in European decision-making at national level. In this way, it can be guaranteed that the responsibility for integration is defined as part of the European principle of democracy constituted by the concept of dual legitimacy and therefore interpreted as a responsibility not to prevent but to shape it.

The implementation of democratic principles in the association of EU states and constitutions goes hand in hand with the active monitoring and participation of national parliaments in European legislative procedures. It is therefore noticeable that the participation of the federal states in the Federal Government's decision-making process in matters pertaining to the EU, as provided for in Article 23, para 4 and 5 of the Basic Law via the Federal Council – at least from a legal point of view – continues to be greater than that of the Bundestag. Whereas according to Article 23, para 3 of the Basic Law this latter's official opinion is only to be taken into consideration, the Federal Council enjoys staggered rights of participation, depending on the given degree of relevance for the federal states. In consequence, the view of the Federal Council is to be “duly taken into account” if the focus is on the legislative powers of the federal states. The predominant view is that if no agreement can be reached with the government, the Federal Council has the right to take the final decision.

It is therefore safe to assume that one of the motives of the German Federal Constitutional Court in its ruling on the Treaty of Lisbon was to strengthen the role of the Bundestag as regards its responsibility for integration. The ruling (cf. Agreement between the German Bundestag and the Federal Government on Co-operation on Affairs of the European Union, the so-called BVV)<sup>7</sup>, which had previously been agreed on by the Bundestag and the Federal Government, was enshrined in the EUZBBG<sup>8</sup> (Act on the Co-operation of the Federal Government and the German Bundestag in EU Affairs) on the initiative of the German Federal Constitutional Court. According to § 9 of the EUZBBG the Federal Government has to base its negotiations in the Council of the EU on the view adopted by the Bundestag. Based on the BVV, § 9 para 4, s. 1 of the EUZBBG now contains a clause whereby, if the official opinion of the Bundestag cannot be adopted in the Council of the EU, a parliamentary reservation is lodged in the Council of the EU. As a consequence, the Federal Government is obliged to reach agreement with the Bundestag before a final decision is taken by the Council of the EU.

That said, this norm does not state how to proceed if agreement, which according to §9, para 4, s. 4 of the EUZBBG the Federal Government should “endeavour to achieve”, cannot be reached. Thus there is a gap to be filled by interpretation.

<sup>7</sup> Agreement between the German Bundestag and the Federal Government on Co-operation on Affairs of the European Union.

<sup>8</sup> BVerGE 123, 267 (433 f.).

It is conceivable that in such a case, the position taken by the Bundestag should be adopted as a matter of principle. Sentence 6 of the ruling could be used to justify such an implicit binding effect, whereby the right of the Federal Government to take important decisions on foreign affairs and matters of integration should remain unaffected. Along these lines, it could be argued that such a government right would be superfluous if, in the final analysis, in the event of a lack of agreement, the government's view were to prevail one way or another. The wording of the higher-ranking Article 23, para 3 of the Basic Law, which only formulates the obligation to take the view of the Federal Government into consideration, does not allow for the binding effect of an official opinion.

Therefore, if § 9 para 4 EUZBBG, in fulfilment of the responsibility for integration called for by the Federal Constitutional Court, seeks to achieve a constructive and critical dialogue between the Federal Government and the Bundestag, a procedural solution contenting itself with the need for attempts to be made to find agreement would seem to be more appropriate. If agreement cannot be reached – unlike in the Danish and Austrian parliaments – the Bundestag's official opinion is not binding on the government. In contrast to the Federal Council, in the final analysis the Bundestag still does not have the right to take the final decision as regards European legislative procedure.

By contrast, on the basis of Article 23, para 1, s. 2 and 3 of the Basic Law, the Bundestag (and also the Federal Council) has a genuine right of approval as regards dynamic Treaty provisions at European level. In concrete terms, it is about bridging clauses (cf. Article 48, para 6 TEU and related rulings in TFEU) which make implicit changes to the Treaty possible. Under the heading of the responsibility for integration, the constitutional court's requirements in this respect as regards the participation of the Bundestag were central to the ruling on the Lisbon Treaty (cf. Part C, II. 3.). If the institutions of the Union wish to make use of these bridging clauses, not only the representative of the Federal Government but also the Bundestag must always take action and agree. On occasion, the Federal Constitutional Court has gone too far as regards the responsibility for integration in its ruling on the Treaty of Lisbon – and thereby inevitably the law-makers in IntVG (the Law on the responsibility for integration) – e.g. in § 8 IntVG as regards the supplementary clause on competence of Article 352 TFEU or in the case of the sometimes excessively high demands made concerning the form and procedure regarding concrete agreement (cf. §§ 4-6 IntVG). The corresponding danger of a lack of flexibility is, of course, lessened by the fact that the IntVG's concentration on particular situations concerning dynamic changes to the Treaty make it reasonable to assume that as a kind of "Sunday law" (apart from the regulations regarding the flexibility clause and objections and complaints about subsidiarity) it will not be playing a major role in everyday European life.

That said, it is regrettable that it does not state that a subsidiarity complaint should be constitutionally anchored in Article 23 para 1a of the Basic Law. Such a provision in the Constitution regarding the competence of the Bundestag to submit official opinions, though not absolutely necessary, would have been sensible for reasons of systematic clarification, all the more so because a constructive subsidiarity complaint based on ex-ante scrutiny and an action against infringements of the subsidiarity principle based on ex-post scrutiny are closely linked.



The one-sided provision on actions against infringements of the subsidiarity principle in the Constitution arguably shifts the focus too much in the direction of ex-post scrutiny, without giving due consideration to the political potential of a subsidiarity complaint.

All in all, the new laws are unfortunately too complex and lack transparency. In particular, the IntVG is extremely hard to read as a result of its many references to regulations in EU treaties, the content of which is not defined in detail, thus confirming widely held reservations regarding the alleged lack of transparency of European decisions. The parallel existence of a multitude of laws regarding rulings on participatory rights in affairs of the Union (GG, EUZBBG, EUZBLG, IntVG, Rules of Procedure for the Bundestag and the Federal Council as well as the ongoing BBV and BLV) can only be a provisional solution on the way to a uniform “German Code on European Law”.

If today a large part of national legislation has been over-defined as a result of European requirements, the strengthening of the Bundestag brought about by its broad and constructively interpreted responsibility for integration is long overdue with regard to the implementation of the principles of democracy in the European association of states and constitutions. A pre-requisite for the effective linkage of the levels of legitimization is, however, that the Bundestag and the Federal Council make active use of their new participatory rights and are prepared to take more responsibility in European politics. This, in turn, can only succeed if they internalize the multi-tiered legislative procedures in the association of states and constitutions and the role they play in them and organise themselves accordingly. In this respect, the Bundestag (spurred on by the Federal Constitutional Court) has already taken a variety of measures. Nonetheless, as will be shown, there is still room for improvement as regards the Europeanization of the Bundestag.

## **5. The Bundestag’s Responsibility for the Budget**

In the context of the sovereign debt crisis in the Eurozone, the rights of the Bundestag were once again strengthened by the Federal Constitutional Court. One of the reasons for this was the political decision taken with the Treaty of Maastricht not to accompany a communitarised monetary policy by full competence as regards European economic and fiscal policy. Consequently, member countries can only coordinate their economic policy within the framework of the Council of the EU (Article 121 TFEU). This coordination competence is accompanied by comparatively weak participation on the part of the European Parliament, which – as in other fields – does not take part in decision-making but is only informed. In addition to this Treaty-based coordination, as a result of the financial and debt crises – with the rescue packages, the European Financial Stability Facility (EFSF), the European Stability Mechanism (ESM) and the Fiscal Pact – a purely intergovernmental form of coordination also developed, which, in the absence of any form of official European competences, exists entirely outside the Treaties. Although the political decisions about the establishment of rescue packages were taken in the institutions of the European Union, both the EFSF and the ESM, which is to take over from

it permanently in June 2013, nevertheless operate on the basis of intergovernmental agreements which in formal terms are not covered by the European Treaties.

Within the coordinating framework, the European Council has risen to become the decisive institution, with the result that negotiating processes conducted by the heads of state and the heads of government of the member countries dominate decision-making procedures. When far-reaching and binding decisions are taken in this framework, democratic legitimization is problematic. This is because when the member states coordinate their policies in the European Council, the path to legitimacy through the European Parliament is missing because this institution is not involved in the decision-making process. As defined in Article 10 para 2 TEU regarding the compensatory interlinking of legitimization, the national parliaments must compensate for this and ensure a sufficient level of legitimacy. However, as regards the European Council, especially when it acts intergovernmentally, the national parliaments are usually reduced to retrospectively implementing its decisions. On the one hand, this is because the preventative participatory rights of Article 23 of the Basic Law are not (directly) applied and on the other, the parliamentary majority making up the government will not wish to show up “their prime minister” as regards what was achieved in negotiations in the European Council. Thus, not only the basic principles of democracy but also the dual legitimacy defined in Article 10 para 2 TEU require the national parliaments, the Bundestag and the Federal Council in Germany, to make the decisive contribution towards legitimization.

This approach has been confirmed by the Federal Constitutional Court in the context of its EFSF ruling of 7 September 2011<sup>9</sup> and the constitutional debate on the ratification of the ESM Treaty and the Fiscal Pact in the summer of 2012.

In the EFSF ruling the Bundestag’s responsibility for the budget was added to its responsibility for integration stated in the Lisbon ruling. The Federal Constitutional Court states in its EFSF ruling that the constitutionally applicable criteria of Article 20 para 1, para 2 in conjunction with Article 79 para 3 of the Basic Law constitute the principle of lasting budgetary autonomy as a result of which the German Bundestag can only fulfil its responsibility for the budget through sufficiently precise budgetary powers subject to its continued influence. With regard to the measures of the EFSF (and the ESM), this means that the participatory rights of the Bundestag must be related to the concrete form of the guarantees given, i.e. corresponding to their purpose, amount, goal, the way in which they are allocated, the recipients they may be intended for and the period of time for which a guarantee<sup>10</sup> is given.

On this basis, the findings of the Federal Constitutional Court – in a convincing conclusion – take the form of a procedural conclusion whereby the Bundestag or its Committee on Budgets must in future first agree<sup>11</sup> to accepting guarantees. In concrete terms, not only must every measure of assistance given in solidarity and

<sup>9</sup> BVerfGE 129, 124.

<sup>10</sup> BVerfG, NJW 2011, 2946 (2950 f.).

<sup>11</sup> BVerfG, NJW 2011, 2946 (2953).

affecting federal expenditure on a larger scale in an international or EU context be approved individually by the Bundestag. There must also be a guarantee of sufficient parliamentary influence as regards how the monies made available are handled<sup>12</sup>. Even if the ruling with its reference (operating at the limits of interpretation in conformity with the constitution) to the Committee on Budgets at first sight seems to make a different impression, it may be assumed from other references<sup>13</sup> contained in it that the fundamental decisions as to whether and under what terms a state can receive emergency aid, as well as all other major decisions, must in future be taken in plenary session. Thus it is for the government to convince the Bundestag and in this way it is able to give its European policy increased democratic legitimacy. Only routine matters, such as the concrete payment of individual tranches, may only be discussed in the relevant committee and without recourse to discussion in plenary. From this point of view it is not surprising that the Federal Constitutional Court objected<sup>14</sup> to the too broadly defined powers of the Committee of Nine.

The EFSF ruling, of course, leaves open what constitutional guidelines its interpretation is based on. Just as in the case of the Lisbon ruling on the responsibility for integration, in which no clear constitutional point of reference beyond democratic principles is named, such a reference is also missing in the EFSF ruling on responsibility for the budget. The intention underpinning budgetary responsibility to strengthen the participatory rights of Parliament when granting emergency aid for reasons of democratic principle is worthy of approval. Budgetary responsibility which is disconnected as a norm ignores the systematically differentiating concept of Article 23 of the Basic Law. The material linkage between the ESM and Monetary Union, which, when taken with a grain of salt, can also be seen in the EFSF, speaks in favour of understanding the creation of the ESM and its activities as being a matter for the EU, as provided for in Article 23 para 2 of the Basic Law.

If European policy must now be understood as Europeanized domestic policy and increasingly less, from a democratic and power-sharing point of view, a case of foreign affairs, earlier participation on the part of the Bundestag is necessary. The guidelines introduced for this reason in the European Article of the Basic Law (cf. Article 23 paras 2 - 6) correspond to this view. On the one hand, the accompanying participation of the Bundestag and the Federal Assembly is based upon the idea of guaranteeing compensation for past and future losses of competences in the context of European integration. In view of the Bundestag's budgetary sovereignty (cf. Article 115 of the Basic Law), its right of participation becomes stronger in the context of emergency aid with budgetary relevance within the framework of the EFSF and the ESM.

On the other hand, according to Article 23 para 2, s. 2 of the Basic Law, the Bundestag and Federal Assembly have a comprehensive right of information via the Federal Government. Insofar as this right to information is to be limited through a core area of executive responsibility, this neither corresponds to the relationship

12 BVerfG, NJW 2011, 2946 (2950 f.) paras. 122-128 of the ruling.

13 BVerfG, NJW 2011, 2946 (2950 f.).

14 BVerfG, Ruling of 28/02/2012, Az 2 BvE 8/11, paras. 138 ff., 144ff. and 149 ff.

of cooperative collaboration based on the idea of compensation underlying Article 23 para 2 of the Basic Law, nor to an understanding of European policy as Europeanized domestic policy. For this reason, the core area of executive responsibility should not follow the broad guidelines of foreign affairs but instead, relatively narrow guidelines of domestic policy. Therefore, it is with good reason that the Federal Constitutional Court<sup>15</sup> emphasizes in its ruling of 19 June 2012 that the time requirement “as early as possible” stated in Article 23 para 2, s. 2 of the Basic Law is to be interpreted to mean that the Bundestag must be informed, at the latest, at a point in time when it is still able to exert influence on government initiatives with external effect<sup>16</sup>. As regards the degree of information required, a simple ratio is applicable: the more complex and relevant the material is for the competences of the German Bundestag, the more intensively the Federal Government must inform the Bundestag<sup>17</sup>.

In the context of the ratification of the ESM Treaty, the Bundestag was obliged to guarantee that these requirements would be met by enacting the corresponding accompanying laws. In concrete terms, the participation of the Bundestag is enshrined in two laws: the Treaty of 2 February 2012 on the establishment of the European Stability Mechanism (ESM Treaty) and the Treaty on financial participation in the European Stability Mechanism, the ESM Financing Treaty (ESMFinG).

The board of governors of the ESM decides on all financially relevant matters by common agreement, i.e. unanimously (Article 5 para 6, Article 4 para 3, ESM Treaty). The German representative’s voting behaviour in the relevant committees is linked to the Bundestag’s rights of participation and is bound to a previous vote in parliament. §§ 3-7 ESMFinG provide for staggered approval by the Bundestag. In view of the “essential nature” of the decisions - depending on the extent to which the responsibilities for the budget and stability are affected - approval must be given either by a plenary session of the Bundestag, the Committee on Budgets or, in absolutely exceptionally circumstances, a confidential special committee of the Committee on Budgets. The constitutional background of this gradation is the principal of public parliamentary and budget information. Only plenary sessions are publicly conducted as a matter of principle. The Committee on Budgets must first decide to meet publicly. For this reason the special committee meets in camera by its very nature. Approval is on the basis that the Bundestag is constantly informed by the government as early as possible. This also applies to the Federal Council (§ 7 para 1 ESMFinG).

15 For the scope of this claim to information, in particular with regard to the ESM and also the co-called “Euro Plus Pact”, see court proceedings between governmental bodies of the Alliance 90/The Greens parliamentary group; BVerfG, Ruling of 19/06/2012 – Az. 2 be 4/11.

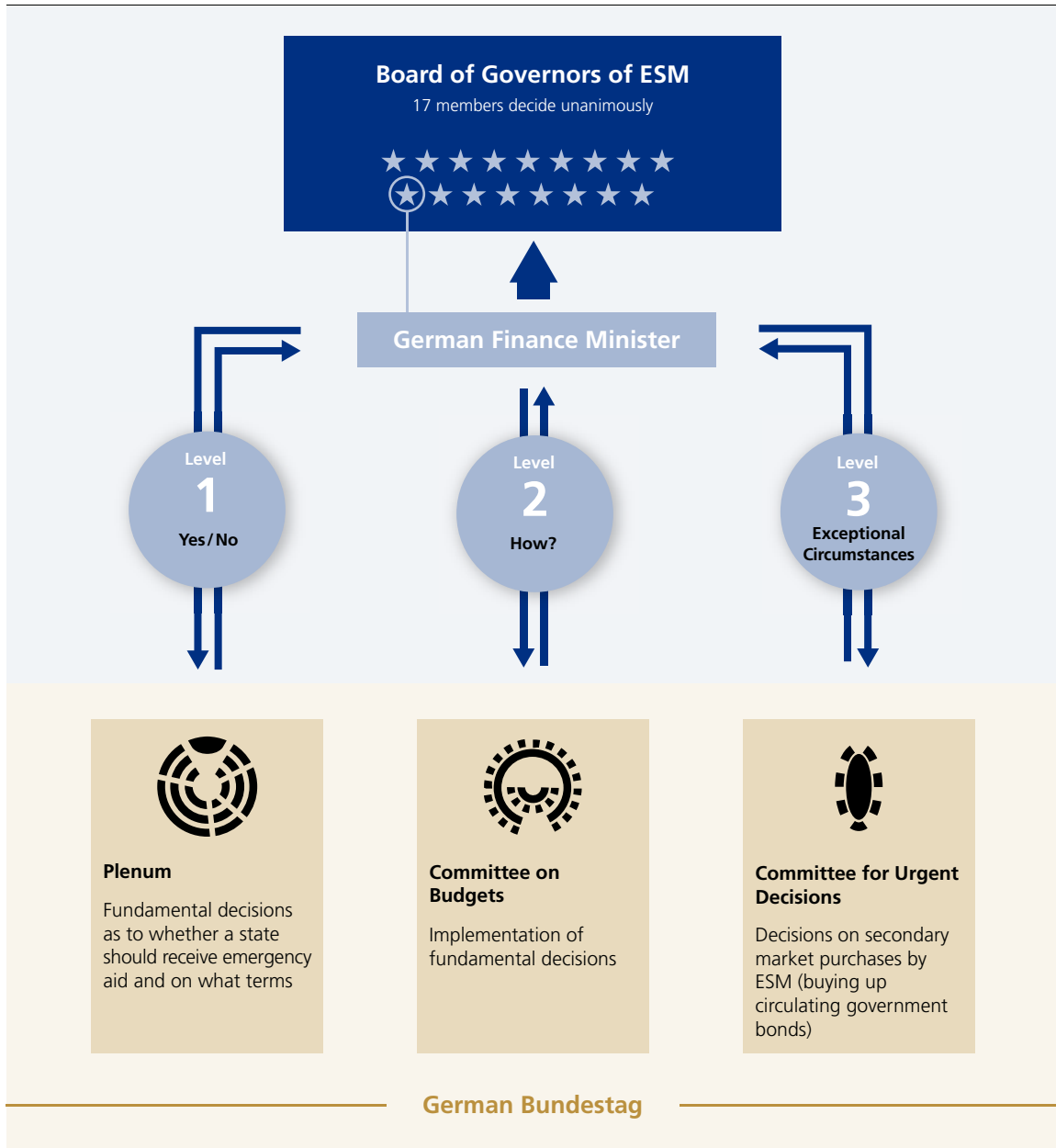
16 BVerfG, Ruling of 19/06/2012 – Az. 2 BvE 4/11, Rn. 127.

17 BVerfG, Ruling of 19/06/2012 – Az. 2 BvE 4/11, Rn. 117.

Against this background, the fundamental decisions, in particular whether a state should receive emergency aid and also all other crucial decisions, are now taken at a first level in the Bundestag in plenary session. In particular, this now concerns fundamental decisions (“yes or no decisions”) about the granting of financial aid and also about accepting the so-called “Memorandum of Understanding” from the beneficiary state defining the terms it is to fulfil (Article 13 paras 2-4 of the ESM Treaty). Thus, whenever the discussion is “about money” according to § 4 para 1 ESMFinG, responsibility falls to the plenum at a first level. At a second level, insofar as ESM decisions merely implement fundamental decisions in accordance with Article 13 para 2 of the ESM Treaty and do not contain any major deviations, i.e. are “How do we do it?” questions, the prior approval of the Committee on Budgets is sufficient. At a third level, the special committee comprising members of the Committee on Budgets elected by the Bundestag, with confidential voting procedures, only takes decisions in accordance with the corresponding ruling of the Federal Constitutional Court<sup>18</sup> in the case of secondary market purchases by the ESM, i.e. when it buys up circulating government bonds.

18 BVerfGE 123, 267.

## Three Levels of Participation in ESM Decisions



## **6. The Role of the Bundestag in Comparative Legislation of the National Parliaments**

A comparison of European legislation shows that in EU matters the Bundestag has now become a parliament with some of the strongest participatory rights in relation to the government (this is even more the case for the Federal Council as the second chamber of the parliament). In purely legal terms, the Danish and Austrian parliaments, which for reasons of efficiency both take action through their respective EU committees, have greater participatory and monitoring rights as regards European legislative procedures than the German Bundestag. However, a fundamentally binding official opinion on the part of the Austrian Parliament is used extremely cautiously in deference to Austria's capacity to act in the Council of the EU. The Danish parliament's "negative" right to take the final decision, as a result of which no particular mandate can be positively imposed upon the government, means in parliamentary practice, that as a consequence of the extensive consultations between the EU committee and the government, the government's view is very rarely rejected. In this respect, a role is certainly played by the latent threat that in the case of binding decisions by parliament, the government might be outvoted in the Council due to an inability to comprise, and would then not be able to get its interests, contained in the usual "package deals", through in the Council. Apart from this, from the point of view of comparative legislation, the Bundestag is a very strong parliament because, as a result of the legal rulings of the Federal Constitutional Court with regard to the dynamic provisions of the Treaty (cf. IntVG) and also in particular as regards financially relevant decisions taken by the Board of Governors of the ESM, it can take decisions which are binding on the government. In these fields the Bundestag has reached a unique position, which at EU level and also in other EU states has caused fears about Germany's ability to act.

### **III. The Political and Practical Dimensions of Europeanizing the Bundestag**

#### **1. Potential to Monitor and Participate**

It is widely assumed by the relevant researchers and also by the general public that, as a result of European policy, the Bundestag has suffered a continual loss of importance lasting until the present. We examined this theory from August 2012 until January 2013. Using official documents we first examined to what extent the far-reaching legal changes of the past few years have affected political practices in European parliamentary policy. Secondly, we consulted more recent scientific studies which consider the dynamics since the enactment of the Treaty of Lisbon. Thirdly, we conducted 20 interviews with players and cognoscenti of the Bundestag's European policy to make sure of the scientific findings and identify the players' subjective estimates with regard to their own potential to act.

On the basis of these three steps we put forward the proposition that the Bundestag's political actions can now no longer be seen as "empty" as is alleged in most of the more dated specialist literature. The changes in the law over the past few years have enabled the Bundestag to play both a monitoring and participatory role

in German European policy. In our comprehensive study, which will be published in spring 2013, we substantiate this proposition with detailed studies of the practices of the administration of the German Bundestag, the inner organization of the political groupings and the activities of the committees of the Bundestag. In order to arrive at results in the broad field of European politics we have, moreover, compiled four case studies which reveal considerable activity on the part of the Bundestag in the following fields: the European Citizens' Initiative in view of the EU's Passenger Transportation Act; a quota for women in corporate management; the field of sovereign debt and euro crisis policy.<sup>19</sup>

We have not only formulated the aforementioned proposition against the background of the statements which we found in research literature and obtained from players in European politics. We would also like to point out at the same time that the Bundestag's actions in European politics must always be understood in the context of a federal party state and cooperative parliamentarism. The Bundestag's power of influence must be seen in the context of the complementary position it has been given in the system in relation to the government. As a rule, their relationship is not one of competition but of mutual cooperation. In a federal party state, political action usually tends to be more executive in nature because, in the final analysis, all the parties govern through the federal state governments and the Federal Council and for this reason almost always have recourse to executive resources to formulate and enforce their positions. Cooperative parliamentarism is characterized on the one hand by uniform block behaviour by the government and the parliamentary majority and on the other hand by oppositional groupings. In other words, the theory of "emptiness" has quite probably from the very outset given too little consideration to the fact that in a system of interlinked power, the position of Parliament is limited (and for good reason) from the start. Nevertheless, we believe that, with a view to a normative strengthening of the European project, it is to be welcomed that in the last few years, the parliamentary level has enjoyed a considerable increase in importance over the administrative sphere.

Against this background, we have put together in this study a considerable amount of evidence to show that in view of these structural shifts, the Bundestag pursues what could even be called a comparatively active form of European policy. This first applies to the symbolic level. One aspect of this is the special position of the EU Committee emphasized by the Basic Law. The regular government announcements from the Chancellor, not only before and after crisis meetings but before every meeting of the European Council, are arguably of even greater symbolic significance. Since the heads of the political groupings are always actively involved in the government's announcements, politicians involved in European policy enjoy regular access to the leading members and committees of the political groupings, which increases their individual visibility. However, as is the custom in a party state, "European policy politicians" run the risk in all political groupings that, particularly in the case of very important issues, they will be eclipsed, because – as during the euro crisis – the top politicians take up the issue and pursue it using the logic of party political competition and not the logic and method of the European Community.

19 The four case studies were compiled by Linn Selle, Johanna Kardel, Daniela Kietz and a further author.



However, the Bundestag's involvement with European politics is not merely symbolic. A remarkably wide range of European policy content and instruments can be observed in its everyday parliamentary business. In a survey in 2011<sup>20</sup> the Bundestag administration listed the surprisingly high number of more than 29,000 communications to the Bundestag from all institutions at EU level. These include the 200 or so "comprehensive evaluations" on the part of the Federal Government as well as four early warning reports from the Permanent Representation in Brussels – i. e. the documents in which the Federal Government gives detailed reports on individual EU dossiers.<sup>21</sup>

Many publications describe the large number of communications as being of little significance. The two most important arguments are as follows: a) the Bundestag is unable to make sense of the large volume of information and therefore turns to informal paths of action b) for institutional reasons or through force of habit, the members of the Bundestag omit to make effective use of their access rights, which are actually well established. We now tend to view these explanations as out of date. In all the interviews we asked central players in European policy if they could give us examples of striking shortcomings as regards receiving information, processing information or the formulation of policy used for the EU. None of the players were able to quote a current dossier in which impulses originating from the EU were not being dealt with, or were being dealt with inappropriately as the law stands. From our point of view, in recent years no major problems, such as the European Arrest Warrant or the Services Directive in the past, could be identified. We attribute the still prevalent scepticism about the Bundestag's potential to act in one respect to the after-effects of the two dossiers named. We also attribute it to some degree to a mindset whereby higher significance is attributed to the Bundestag in the shaping of policy in general – and not European policy (see below). This notion can be credited with having a strong normative effect but if that is the case, the supposed deficits as regards participation are not the fault of European integration but rather that of the entire political system.

The great increase in legislative and quasi-legislative regulations, which have strengthened the Bundestag in relation to the government, still constitute an argument against the idea of a continual loss of importance. In the EUZBBG this is particularly the case at the levels of information and communication, where the Bundestag was able to compel the government to be duty-bound to provide comprehensive information. In reality, any concessions on the part of the government have so far followed extremely unwillingly, the most recent and arguably the best example of which is the ruling of the German Federal Constitutional Court of 19 June 2012. In view of the assumptions theoretically made by bureaucracies, it is hardly surprising if governments do not voluntarily share their positions of power and information with other players.

<sup>20</sup> More recent data is unfortunately not available.

<sup>21</sup> Administration of the Bundestag, 2011, First Report on the Implementation of the Acts to the Treaty of Lisbon. Berlin German Bundestag (also Committee for Affairs of the EU, Committee bulletin 17(21)1211), p. 103.

Finally, it should be pointed out that over the last few years, the Bundestag has taken important measures in the field of administration to give members of parliament sufficient information and enable them to participate. In 2005 an establishment team was set up by the administrative director of the Bundestag to support the participation of the Bundestag in affairs of the EU. In 2006 this was merged into the Department for Europe, which was to participate in “improving the Bundestag’s European capability and help reduce deficits of information and monitoring in affairs of the EU”.<sup>22</sup>

Since the beginning of 2007 the Department has been supported<sup>23</sup> by a liaison office in Brussels, which, in terms of organization, is part of it and is intended to act as a direct source of information for the Bundestag. At the beginning of 2013, Department PA1 was upgraded to “Subdivision PE (Europe)”. This now comprises a total of six departments<sup>24</sup>: the Committee Secretariat of the EU Committee (PE 1), the Department of EU Policy Matters and Affairs of the Economic and Monetary Union (PE 2), the Department of EU Analysis, Consultation and Priority-setting for EU Projects (PE 3), the EU Liaison Office (PE 4), Europe Documentation (PE 5) and the “Department for Europe” (PE 6). Departments PE 2-5 are a more detailed differentiation of the old PA 1 Department, which was closed in January 2013. Department PE 6 came about when the old WD 11 Department, i.e. the European Research Services Department, was relocated. Thus the Bundestag has taken a step which, as regards work on the government’s European policy had frequently been suggested but never realized: the grouping of all units relevant to the EU under one hierarchical roof. This, however, does not mean that the decision has been taken for members of parliament to use this administrative basis to go beyond their formal rights of information and independently generate information in the context of decision-making procedures. Nevertheless, the network for the acquisition of information relevant to the EU would seem to be sufficiently tightly knit.

Despite the fact that we have been able to identify a high level of information in the Bundestag, this still says little about its real meaning in the institutional structure. There is no apparent answer as to whether the Bundestag’s greatly increased level of information over the past few years has resulted in a relative strengthening of its power. “Parliament” vs. “Government” – this is a very exceptional constellation in a parliamentary system of interlinked powers. However, this does not mean that it never happens. It either comes about in situations without a clear parliamentary majority (which has not happened in the Federal Republic since 1953) or in situations in which the government explicitly does not cooperate with the parliamentary majority, which is actually inclined to support it. The clear disgruntlement of parts of the government’s parties as regards what was taken to be the intergovernmental nature of the ESM and the Fiscal Pact can be quoted as one of the few instances.

<sup>22</sup> As described by the Bundestag in its brochure, cf. <https://www.btg-bestellservice.de/pdf/10090000.pdf>

<sup>23</sup> The establishment of the liaison office was decided by the Bundestag on 12 May 2005 (BT-Drs. 15/5493).

<sup>24</sup> See Bundestag Administration Organization Chart of January 2013.

However, the dossiers in which the parliamentary majority acts in unity with the government would seem to be of greater everyday relevance. To comprehend the Bundestag's options in European policy it is necessary to submit the various groups within the Bundestag to more careful scrutiny.

## **2. Groups of Players within the Bundestag**

In order to understand the processes and results of German European policy it is necessary to consider the various groups within the Bundestag. First a binary code must be applied whereby politicians in the majority pull together, whilst the minority parties play their role as the opposition. However, this interpretation of roles does not lead to a fundamental form of opposition in cooperative parliamentarianism. On the contrary, in a working parliament collaborative work takes place above all in committees, which is why in both European and also other fields of politics it is not seldom for voting behaviour to be consensual.

Nevertheless, the majority/opposition relationship is noticeably more complex in European policy than in many other political fields. One reason for this is the long time it takes to process dossiers in the European political cycle. In her case study on European transport policy, Johanna Kardel identifies several factors which (can) prevent majority and opposition MPs from automatically working against each other. Above all, if a dossier is in circulation for more than ten years, all the MPs are in a situation of already having once viewed certain resolutions both from the point of view of the opposition and the government. If this is anticipated, the range of possible political solutions is narrowed and there is a strong tendency towards consensual results. Federal interlinking also compels players to act consensually. And finally, despite Germany's strong position in the Council, German players are to some extent confronted with guidelines from Brussels which are outside the sphere of influence even of the MPs in the majority. This can happen when the demands of a previous government have to be taken up by the Commission or the Presidency and have to be dealt with by a new parliamentary majority. However, a constellation can also arise whereby certain positions are propagated by the Commission in a fundamentally different way from German players. In the final analysis, this means that a gap arises or can arise between how MPs perceive their role and how their actions are in actual fact influenced. Whereas on the political stage - both inside and outside Parliament - great mention is made of the fundamental difference between government and opposition MPs, their relationship is far more consensual at working level.

Secondly, a line can be drawn within Parliament between the "Europe politicians" and the rest of parliament. To a certain extent the "Europe politicians" cut across the political groupings or the division between the administration and politics. They have deeper knowledge of political operations in Brussels and are (for the most part) integration-friendly in their attitude. Within their political groupings they thus belong to the driving forces for integration, which puts them at a varying distance from their party leaders - also depending on the term in office. In many cases but not always, the "Europe politicians" are in relevant positions, such as Spokesperson on European policy, Chairlady for European Policy,

Deputy Parliamentary Group Leader responsible for EU Affairs. However, these are not the only roles among the ranks of “Europe politicians”. We were told in one interview that we could assume there are approx. 100 MPs who now know the ropes as regards European affairs in their respective political fields. In the coming years we will see to what extent the recent real and symbolic expansion of competences has led to “Europe politicians” becoming leaders of opinion on EU topics. A further scenario might consist in parliamentarians packing European policy with national interests much more strongly than before, which would run contrary to the implicit integrationism of the “Europe politicians”. In this context, it must be noted that the integrationist impulse of German MPs in the past has always been far above average. Against the backdrop of the Federal Republic’s German tradition, any renationalization might well be interpreted as a step backwards. As far as European comparisons are concerned, this could be described as normalization.

A third distinction can be made at the players’ level as regards the executive orientation of the MPs and the political groupings. At this level, it is also impossible to categorize particular people or groups permanently because staff changes or differently defined functions can just as easily lead to new categorizations as changes brought about by elections. Nevertheless, some changes are noticeable. First of all, by their very nature, the leaders of the political groupings in government have a natural sensitivity to the needs of the executive, because the stability of the government and the continuation of the coalition are closely linked. This consequently gives an important nuance to the group of “Europe politicians” just described, because the deputy parliamentary group leaders responsible for EU affairs see themselves as being subject to coalition discipline, which is at odds with the independence which many MPs, in particular “Europe politicians”, often claim they should have.

However, our interviews have shown that opposition politicians also belong to the group of MPs orientated towards the executive. These are once again in particular the leaders of political groupings but, quite understandably, only of the political groupings hoping to form part of the government in the foreseeable future. Since the MPs in the leaderships of the political groupings are potential candidates for government office in the event of a change in government, a kind of anticipatory self-restriction can be found and only the “Die Linke” (the Left Party) parliamentary group acts in a style that is distant from the executive. The leading politicians of the mainstream parties probably well remember 2005/06 when the coalition of CDU/CSU and FDP abruptly came to power and basically, against its own interests, had to strengthen Parliament against the government because the same political players had vociferously demanded an upgrading of Parliament during the 2002-2005 parliamentary period.

### 3. Profiles of the Stances on European Policy in the German Parliament

When attempting to categorize groups it should not be forgotten that in all parties there are MPs representing ideas with a wide range of different content. When looking, as it were, at the core brands of the different parties, their content can be categorized according to the parties and their programmes. However, this does not apply to all topics and, consequently, also not as regards the EU, which often crops up as a matter cutting across divisions on all issues. It was therefore not surprising to us to find a wide range of decisions on content, as far as the role of the Bundestag or Parliament in European politics as a whole is concerned. The topics we have found are described here. Thus five core arguments can be found regarding dealing with the EU and Europeanizing German politics can be found within Parliament and in German European policy in general (see table). The first concerns the core of nation state politics both in the context of Europeanization and globalization. Here, the focus is on sovereignty of the people, which under democratic conditions means that the representatives of the people - i.e. the MPs - are to be restricted as little as possible in their freedom to take decisions on behalf of the German people. This is the position adopted by the Federal Constitutional Court in Germany but there are also some supporters of this view in Parliament.

Secondly, in the parliamentary arena, the attitude is to be found that that a “European Germany” corresponds to Germany’s reason of state. The concept of national sovereignty, which was a taboo topic in Germany right up until the 1990s, is, however, defined differently here to the first narrative. On the one hand, German interests are placed explicitly in the context of international politics, in which both Germany and Europe have to fight competition from other regions of the world. On the other hand, the emphasis shifts to the executive, meaning the field determined by the Constitution when European policy changes to (Europeanized) foreign policy. The “Union method” praised by Angela Merkel in her speech<sup>25</sup> in Bruges constitutes one expression of this guiding principle. This view of a “Europeanized Germany” is consequently especially well represented in the parliamentary parties in government. As stated above, this attitude is also to be found in the leadership of other parliamentary groupings with the exception of the “Die Linke” parliamentary group.

A third approach sees German European policy also firmly rooted in EU institutions but does not share the intergovernmental preferences of the above-mentioned position. Whereas Angela Merkel in her Brussels speech points out the limitations of the Community method and thus also of the central role of the Commission, the opposite position can be found in the Bundestag, which sees the future path of development of the EU very much in the further strengthening of the Community method. This view may not be as dominant as it was a decade or so ago. Nevertheless, it is still very much in evidence particularly among “Europe politicians” and is used as a counter-argument to Merkel’s Union method.

A fourth approach to Germany’s European policy is more closely linked to the general separation of powers. Here, the argument goes that, in general, European

25 <http://www.bundesregierung.de/Content/DE/Rede/2010/11/2010-11-02-merkel-bruegge.html>.

integration has shown greater preference to the executive rather than to elected representatives. Unlike some political theorists, parliamentarians do not advocate this state of affairs but, instead, criticize it harshly. One prominent proponent of the position that the Bundestag must be fundamentally strengthened in relation to the executive - at both German and EU level - is the President of the Bundestag, Norbert Lammert. This line of argument is also used by the plaintiffs at the Federal Constitutional Court. To a certain extent, this position is at odds with the integrationist attitude of some "Europe politicians", because they argue in favour of taking seriously the multi-tiered system created in the Treaties as a transnational arrangement of institutions. Although national parliaments thus have an important function with regard to upholding subsidiarity, they are otherwise integrated in a multi-tiered parliamentary system which does not attribute any special legitimizing role to them.

A final position to be found sees the Bundestag as one of the many institutions with which the participation of citizens in European politics can be increased. In our study, we observed this attitude above all in the negotiations about the structuring of the European Citizens' Initiative.

**Table: Narrative Cores in German European Policy**

| Narrative Core  | Points of Convergence  | Problem/Challenges   |
|---|--|--|
| Sovereignty of the people and its representatives                                   | Decisions by parliament or individual MPs  | Incorporating dual legitimacy as per Article 10 para 2 TEU   |
| Defending and strengthening German interests in Europe and the world                | Policy goals: developing the economy, strengthening global competitiveness, securing power to act in foreign affairs and security policy | Dealing with diverging or antipodal interests of other member EU member states<br>Shift towards intergovernmental decision-making formats ("Union method") |
| Creating and strengthening European political community                             | Integrating Parliament into multi-tiered European parliamentarianism   | Dealing with the politicization of European policy; extending political struggle to European policy  |
| Parliament as a political place as opposed to government as an administrative field | Rescuing politics from the "claws" of multi-tiered administration  | Limited parliamentary resources  |
| Defending participation despite Europeanization and globalization                   | Strengthening parties (and possibly civil society) in European politics  | Seemingly greater effectiveness and efficiency of the Community method   |

The tabular summary also shows that all the positions stated face specific challenges. Thus no stance can be said to constitute, as it were, a stable point of convergence for a fundamental attitude towards the EU or European integration in the future. Rather, there is good reason to assume that, in the field of European policy, several attitudes will exist side-by-side in the foreseeable future, which will only be partly compatible with each other or co-exist uncomfortably. Thus, the Bundestag basically reflects the multitude of opinions which have existed at EU level for quite some time. The Bundestag has therefore been just as unsuccessful at reaching agreement on the final form of Europe as the epistemic community in Brussels.

#### IV. Results and Conclusions

For the purposes of discussion, some of the results of our study and the further considerations linked to them are contained in the following in the form of three propositions and several recommended courses of action. The propositions are intended to enliven scientific debate. We therefore concentrate on points which in our view seem to co-exist uncomfortably with existing positions. We relate the recommended courses of action to players in European policy and, in so doing, have concentrated on aspects which are still on the agenda despite the great and varied increase in information, monitoring and participation in recent years.

**Proposition 1: The Bundestag is currently changing from a monitoring to a participating player.**

In the current jurisprudential view, if the existing theory of compensation as per Article 23 paras 2 - 6 of the Basic Law is analyzed in terms of practical political science, it can only be seen as having limited validity for many - but not all -

players in German European policy. The theory of compensation states that Article 23 of the Basic Law, which was added in 1993, grants the Bundestag rights of information and monitoring to compensate for the loss of legislative rights due to the transfer of competences to the EU. Since the Bundestag no longer has the final right of decision in EU affairs, it is only able to accept responsibility for integration if – these days in keeping EUZBGG guidelines – it is informed comprehensively and in timely fashion to enable it, if necessary, to influence decisions made by the government. The empirical study shows that certain players in the Bundestag opt for a pro-active European policy going beyond the theory of compensation.

From a legal point of view, the role of the Bundestag has developed from a monitoring to a participatory role in EU affairs. Procedural and institutional measures are of decisive importance for effective participation. They must ensure that, as regards European policy, the Bundestag organises itself in such a way as to be able to respond appropriately to its specific peculiarities. Thus, it is particularly important for the Bundestag to be comprehensively informed at an early point in time about legislation planned at EU level so that it can then position itself on the basis of expertly coordinated internal procedures, in order, in the final analysis, to be able to act quickly and efficiently in this position in the ways described, i.e. in a direct way employing an objection about subsidiarity and indirectly via its internal possibilities of participation through the German government representative in the institutions and through coordination with the European Parliament. All in all, the reform steps of the past few years would seem to us to be suited to strengthening the Bundestag in its future role as an active participant in European politics.

**Proposition 2: In order to understand its European policy, it is necessary to take a closer look at various subgroups of the Bundestag.**

When considering German European policy, a large part of the relevant literature tends to see the Bundestag as a uniform player – either in the context of the separation of powers or on the basis of the observation that German politics would seem to be a largely consensual affair. In contrast to this, our analysis makes it clear that, as far as European policy is concerned, the Bundestag has no “standard view” and should rather be seen as a differentiated structure. Within Parliament there are various groups of players, who have a complex, complementary and competitive relationship with each other and the government. In this respect, distinction should be made not only between the political groupings of government and opposition. In addition to this, the “European politicians” also constitute a group whose view of European politics differs from that of the other players in Parliament.

**Proposition 3: The discussion about the role of the Bundestag’s European policy should be conducted in the context of the wider debate on the value of parliaments in multi-tiered European politics.**

For a long time, the debate about the Bundestag’s position has concerned itself with the question as to whether Parliament should have “more” rights of participation or whether, on the contrary, a freer government can have a more effective European policy. However, from the point of view of the players in the Bundestag, there are further conflicts, e.g. as regards the disproportionate significance of the executive in politics or the status of politics at EU level in general for German



politics. It therefore seems less plausible to concentrate on having “more” or “less” Bundestag in European policy because in the case of the vast majority of dossiers, decision-making and voting are either consensual or follow the “normal” pattern of opposite stances by the coalition and the opposition. Consequently, important topics, such as the gradual shift of policy towards the multi-tiered executive, the competition for legitimacy between the national parliaments and between the national parliaments and the European Parliament, are overlooked. The normative debate about the status of representative democracy in the European Union is nevertheless still topical and necessary. It should be sought and promoted beyond the borders of nation states, because the legitimacy of the European project is closely linked to the role of national parliaments.

**Recommended course of action 1: The Bundestag should concentrate more on essential dossiers, central to the legitimization of German and European policy, instead of trying to cover “everything”.**

On the one hand, in view of the multiplicity of European activities and their complexity and, on the other hand, the limited capacity of the Bundestag, it is important for the Bundestag to concentrate on essential issues and “separate the wheat from the chaff”. In view of the fact that not every legislative measure planned at EU level is relevant for the Bundestag, there is a good chance that, by monitoring the European legislative programme using pre-defined political preferences, sensitivities and interests and particular criteria (e.g. subsidiarity, sensitivity to basic rights), important legislative initiatives can be filtered out and identified in good time. In this way - despite the rather short 8-week deadline - the Bundestag can take up position to make an objection about subsidiarity in good time and coordinate with other national parliaments. Thus, on the one hand, processes with European relevance are consistently mainstreamed in the Bundestag and on the other hand, there is more meaningful networking with other national parliaments – perhaps even beyond COSAC.

**Recommended course of action 2: The position of the EU Committee in relation to the specialist committees should be reconsidered with a view to its being effectively strengthened – as already provided for in the Basic Law (Article 45 ).**

When speaking about mainstreaming processes with European relevance in the Bundestag, the idea of strengthening the role of the EU Committee in collaboration with the special committees should once again be given some thought. Despite the fact that on European policy issues which fall within the remit of other specialist committees, the EU Committee is still able to play an advisory role, its achievements over the last few years has been perceived in varying ways. Some see it as the government’s partner when formulating and implementing European policy and praise it for the prominent position it has achieved through its work. Others criticize it for not having been able to fulfil its specific tasks and, in particular, for not using its special powers.

Article 45, s. 2 of the Basic Law contains the possibility of empowering the EU Committee to enable it to make use of plenary powers over the government. Thus, along the lines of the Danish and Austrian models, the participation of the Bundestag

could be made more efficient and effective. The potential contained in Article 45, s. 3 of the Basic Law has also not yet been exhausted as regards the everyday legislative procedures of the EU. On the one hand, one of the EU Committee's functions is to be a "committee for integration" charged with dealing with affairs of European integration. On the other hand, in cases exceeding this remit, it merely constitutes a "cross section committee" coordinating the consultative processes of the specialist committees. In consequence, there still remains a decentralized, even fragmentary approach to dealing with union documents in the Bundestag.

**Recommended course of action 3: With regard to the ESM, it would make sense to create a mixed Stability Committee.**

The way in which the Committee on Budgets has been seen to develop in the course of the Eurozone Crisis is interesting but at the same time not unproblematic. Firstly, since the ESMFinG it has received powers hitherto denied to the EU Committee despite the explicit ruling on Article 45, s. 2 of the Basic Law. Secondly, the Committee on Budgets – which technically speaking has responsibility for the budget – is now in real competition with the EU Committee. This latter's role, however, is comparatively weak, despite the fact that, as regards the rescue packages, it is a question of fundamental issues concerning Economic and Monetary Union and thus also European integration. The same applies to the role of the Committee on Legal Affairs, whose competence is also needed in the euro zone crisis. Against this background, thought should be given to setting up a mixed "Stability Committee" made up of representatives of the Committee on Budgets, the Committee for Affairs of the European Union and the Committee on Legal Affairs, supplemented by the leaders of the parliamentary groupings or parliamentary whips (these latter without voting rights) and equipping them with the appropriate powers. Our initial assessment is that this would be legally permissible, given the Bundestag's procedural autonomy, but would, however, require closer scrutiny of the concrete constitutional requirements where applicable.

**Recommended course of action 4: European legislation should, wherever possible, enjoy the same treatment and status as national legislation.**

All EU legislative projects considered to be relevant should be processed and treated in committee or plenary session in the same way as national legislative projects. European legislation should, as it were, be made into national legislation. This will also give MPs the opportunity – which they have not had until now – to raise their profile with European issues.

**Recommended course of action 5: The dependence of the Bundestag's European policy on a small number of experts from the different political groupings should be reduced.**

In the inner organization of all the Bundestag's political groupings, European policy is organised like any other normal field of policy. For environmental or health policy, for example, there is an expert on European policy for internal communications and a spokesperson for external communications. These are supplemented by the responsible top politicians in the leadership and management of the parliamentary groupings. In contrast to most fields of policy, however, European policy

is a cross section concentrating on processing information with EU relevance in a broad range of spheres and turning it into monitoring or participatory action. In consequence, if all issues with EU relevance are channelled to individual members, this can quickly lead to their becoming overburdened or dealing with individual dossiers superficially. In our view there is empirical evidence for this. Our interviews show that, in the estimate of expert observers, how much clout the individual political groupings have on European policy strongly depends on whether they have people with a “passion” for European politics and above-average commitment in the positions described.

At least in the larger political groupings in the Bundestag, dependency on individual experts and spokespersons could be reduced if more people with a coordinating function were deployed in political fields closely connected with the EU. Just as the Committee on Legal Affairs has a subcommittee with responsibility for EU affairs, experts with specialist political knowledge could be supported by further MPs with special expertise on European policy in the various fields of policy (e.g. expert on “European Transport Policy”). In this way, there would be an incentive for individual MPs to become better acquainted with the complex tectonics of European politics. Cross connections with a particular focus on specialist fields of policy could be established with other parliaments which the specialists or spokespersons could not maintain in their current position due to a lack of capacity.

**Recommended course of action 6: Article 23 of the Basic Law should be adapted to meet the requirements arising from the drive towards Europeanization brought about by the Treaty of Lisbon.**

In view of their significance, as previously described, subsidiarity objections, as defined in Article 23, para 1a of the Basic Law, could be constitutionally enshrined. The one-sided provision for an action against infringements of the subsidiarity principle in the Basic Law arguably shifts the focus too much onto ex-post scrutiny without given adequate consideration to the political potential of a subsidiarity complaint. In addition, Article 23 para 3 of the Basic Law could be changed in such a way as to make it necessary for the government to “give due consideration” to the official opinion of the Bundestag – and also of the Federal Council – in particularly sensitive areas of domestic policy, in order to give the Bundestag fundamental authority under the procedure provided for in § 9 para 4 EUZBBG as in the Austrian system (and corresponding to the Federal Council in Article 23 para 5, s. 2 of the Basic Law).

**Recommended course of action 7: In the interests of greater clarity and the coherent manageability of the rights of participation of the German Bundestag and Federal Council, the hitherto enacted accompanying legislation should be converted into a uniform German Code on European Law.**

The existence side-by-side of the multiplicity of laws to regulate the rights of participation in EU affairs (Basic Law, EUZBBG, EUZBLG, IntVG, Rules of Procedure for the Bundestag and the Federal Council as well as the ongoing BBV and BLV) can, in the long term, only be seen as a provisional solution. For this reason, the Bundestag and the Federal Council should draw up a coherent “German Code on European Law” to eliminate the current contradictions in the laws.

## V. Literature

With regard to relevant scientific literature for the topic described in this discussion paper, please refer to our detailed study.

## VI. Appendix

### German Constitutional Court Rulings since 1993 with relevance for European policy

|   |   |
|---|---|
| <p><b>Maastricht</b></p> <p>12 October 1993<br/>2 BvR 2134/92, 2 BvR 2159/92<br/>Plaintiffs: MPs et al</p>  | <ul style="list-style-type: none"> <li>• Solange II Confirmation - legislation on protection of fundamental rights</li> <li>• Democratic principle: legitimization via two channels, nevertheless currently primarily via national parliaments, EP is included; supporting role of EP which can be extended</li> <li>• Negation of EU <i>Kompetenz-Kompetenz</i></li> </ul>   |
| <p><b>European Arrest Warrant</b></p> <p>18 July 2005<br/>2 BvR 2236/04<br/>Plaintiff: German and Syrian national D.</p>  | <ul style="list-style-type: none"> <li>• The European Arrest Warrant Law is declared null and void because:</li> <li>• it interferes disproportionately with extradition autonomy (Article 16 para 2 the Basic Law)</li> <li>• it infringes legal guarantee (Article 19 para 4 the Basic Law)</li> <li>• Bundestag is responsible for implementing European law constitutionally</li> </ul>   |
| <p><b>Lisbon</b></p> <p>30 June 2009<br/>2 BvE 2/08 etc.<br/>Plaintiffs: The Left parliamentary group, several MPs</p>  | <ul style="list-style-type: none"> <li>• Compatibility of Act Approving the Treaty of Lisbon with the Basic Law</li> <li>• Partial infringement by accompanying laws against Article 38 para 1 in conjunction with Article 23 para 1 the Basic Law</li> <li>• Thereafter changes to laws (EUZBBG and IntVG)</li> </ul>  |
| <p><b>Constitutional complaint about measures to help Greece and the euro rescue package</b></p> <p>07 September 2011<br/>2 BvR 987/10 etc.<br/>Plaintiffs: Group of economists and legal scholars; 1 MP</p>                        | <ul style="list-style-type: none"> <li>• Constitutional complaint rejected</li> <li>• Monetary union, financial stability law and European Stability Mechanism law are constitutional, Article 38 para 1 not infringed, budgetary autonomy and rights of Bundestag upheld</li> <li>• Guidelines on interpretation of §1 para 4 European Stability Mechanism (government to obtain advance consent of Committee on Budgets)</li> </ul> |
| <p><b>Organ controversy, Bundestag's rights of participation/EFSS</b></p> <p>28 February 2012<br/>2 BvE 8/11 etc.<br/>Plaintiffs: 2 MPs</p>   | <ul style="list-style-type: none"> <li>• Regulations on special committee (Committee for Urgent Decisions) partly infringe MPs rights</li> </ul>  |
| <p><b>Organ controversy, ESM, Euro Plus Pact</b></p> <p>19 June 2012<br/>2 BvE 4/11<br/>Plaintiff: Alliance 90/The Greens parliamentary group</p>   | <ul style="list-style-type: none"> <li>• Violation of entitlement of Bundestag to be informed by Federal Government re. ESM and Euro Plus Pact</li> <li>• Categorized by Federal Constitutional Court as affair of the EU and thereby covered by Article 23 para 2 s. 1 the Basic Law</li> </ul>  |
| <p><b>Applications for interim measure to prevent ratification of ESM and Fiscal Pact</b></p> <p>12 September 2012<br/>2 BvR 1390/12, 2 BvR 1824/12 etc.<br/>Plaintiffs: The Left parliamentary group, further groups incl. MPs</p> | <ul style="list-style-type: none"> <li>• Applications rejected on condition that international law guarantees that</li> <li>• liability capital remains limited</li> <li>• the rights of information of Bundestag are not violated by ESM Treaty</li> </ul>   |

## (Quasi-) Legal Provisions for the Participation of the Bundestag 1948 – 2000

|  |  |   |
|--|--|---|
| <b>Act of Assent to Treaty of Rome</b>     | German Federal Law Gazette (1957)  | <b>Rights of information and disclosure</b><br>Article 2: Rights of information of Bundestag; duty of Bundestag to supply ongoing information on developments in Council; time of information   |
| <b>Articles 23 and 45 of the Basic Law</b> | Law on Amendment of the Basic Law of 21/12/1992<br>German Federal Law Gazette (1992) | <b>Article 23</b><br>(1) Participation of German Federal Republic in development of Union, transfer of sovereignty, reference to 79II and III<br>(2) Participation of Bundestag and Federal Assembly, duty of Government to provide information at earliest possible moment<br>(3) Federal Government gives Bundestag opportunity to give official opinion before participating in legislative acts, consideration of official opinions<br><br><b>Article 45</b><br>EU Committee, authorization, making use of the rights of the Bundestag as per Article 23 in relation to the Federal Government                    |
| <b>EUZBBG</b>                              | German Federal Law Gazette (1993)  | <b>EU Committee and Official Opinions</b><br>Appointing EU Committee, authorization to deliver official opinions<br><br><b>Information/Rights of information</b><br>Government provides comprehensive information at earliest possible moment on all projects in the context of the EU which could be of interest to FRG; regulation of principles of dispatch and information<br><br><b>Right to state opinion</b><br>Federal Government gives Bundestag opportunity to state official opinion before approving acts of legislation; time limit regulation, Federal Government bases negotiation on official opinion |

### Further sources:

German Federal Law Gazette (1957): Act on Treaty of 25 March 1957 establishing the European Economic Community and the European Atomic Energy Community. Bonn: BGBl. 1957 II no. 23, 753 ff.

German Federal Law Gazette (1992): Law on Amendment of German Constitution 21/12/1992. Bonn: BGBl. 1992 I no. 58, 2086-2087

German Federal Law Gazette (1993): Act on Co-operation between the Federal Government and the Federal States in Affairs of the EU of 12/03/1993. Bonn: BGBl. 1993 I no. 9, 311-312

## (Quasi-) Legal Provisions for the Participation of the Bundestag 2000 – 2012

|   |   |  |
|---|---|--|
| <b>Articles 23 and 45 the Basic Law</b> | Amended: 28/08/2006<br>German Federal Law Gazette (2006a)   | <b>Article 23</b><br>Regulation on use of rights by Federal Government   |
|   | Amended: 08/10/2008<br>German Federal Law Gazette (2008)  | <b>Article 23</b><br>Added: Right of complaint of Bundestag and Federal Assembly on violation of principle of subsidiarity<br><br><b>Article 45</b><br>Added: Use of rights in founding Treaties of the EU by committee  |
| <b>EUZBGG</b>                           | Amended by law of 17/11/2005<br>German Federal Law Gazette (2005)   | Reference to right of approval of regulation of details re. information and participation of Bundestag for BBV   |
|   | Amended by law of 22/09/2009<br>German Federal Law Gazette (2009b)  | <b>Information/Rights of information</b><br>Basically conveys BBV, above all precise regulations on GASP and GSVP are new  |
|   | Amended by law on Treaty of 2 March 2012 re. stability, coordination and control in Economic and Monetary Union<br>German Federal Law Gazette (2012b) | <b>Information/Rights of information</b><br>Extension of concept of EU projects to include, among other things, international treaties and other agreements if they are closely related to Union law and topics of discussion etc. in the context of the Fiscal Pact<br><br>Extension of duties to provide information to the Euro Group, Euroland Summit and meetings of the member countries in connection with the above-mentioned projects   |
| <b>BBV</b>                              | German Federal Law Gazette (2006a)  | <b>Information/Rights of information</b><br>Early, ongoing and written information on all projects, dispatch of documents<br><br>Transmission of report sheets and comprehensive evaluation.<br><br>Information on legislative acts and implementation, procedure at European Court of Justice about planned transition from unanimity to majority decision, accession and treaty revisions<br><br><b>Right to state opinion</b><br>At early stage of negotiations, adequate period of time; Federal Government bases its negotiations on official opinion of Bundestag.<br><br>Bundestag gives reasons if all the concerns contained in official opinion are not taken into account<br><br><b>Requirement of parliamentary approval</b><br>If, in accordance with Article 23 para 3, s. 1 German Constitution, the Bundestag makes use of its opportunity to state an official opinion, the Federal Government will enter a parliamentary reservation in the Council, if one of the main aspects of a Bundestag resolution cannot be enforced. Before the Council's final decision the Government will endeavour to reach agreement with the Bundestag. Right of Federal Government to deviate from this for important foreign or integration policy reasons. |

|   |   |   |
|---|---|---|
| <p>Law on the extension and strengthening of the rights of the Bundestag and the Federal Assembly in affairs of the European Union</p>  | <p>As of: 01/12/2009<br/>German Federal Law Gazette (2009c)</p> | <p><b>Bundestag/Federal Council Consultation</b><br/>The Bundestag and the Federal Council are to deliberate and pass resolutions in an appropriate period of time and give due consideration to the time limits at EU level.</p> <p>Simplified treaty amendment procedures and special treaty amendment procedures as per Article 48 para 6 subsection 2 and 3 TEU and Article 218 para 8 subsection 2 s. 2 or as per Article 311 para 3 TFEU: approval of Federal Republic of German by law as per Article 23 para 1 of the Basic Law</p> <p>Resolution of joint defence (Article 42 para 2 subsection 1 s. 2 TEU): representative in European Council only allowed to approve suggested resolution or abstain after the Bundestag has passed a resolution on this topic – otherwise rejection; FRG approval by law as per Article 23 para 1 of the Basic Law</p> <p>Bridging clauses / expansion of competences clauses / amendment of statutes / flexibility clause (Article 48 para 7 subsection 1 s. 1 or subsection 2 TEU, Article 81 para 3 subsection 2 TFEU, Article 83 para 1 subsection 3 or Article 86 para 4 TFEU, Article 308 para 3 TFEU, Article 352 TFEU): representative may only approve resolution or abstain after law as per Article 23 para 1 of the Basic Law is in force – otherwise rejection</p> <p>Right of rejection for bridging clauses (Article 48 para 7 subsection 3 TEU, Article 81 para 3 subsection 3 TFEU)</p> <p>Special bridging clauses (Article 31 para 3 TEU, Article 312 para 2 subsection 2 TFEU, Article 153 para 2 subsection 4, Article 192 para 2 subsection 2 or Article 133 para 1 or para. 2 TFEU): representative in only allowed to approve suggested resolution or abstain after the Bundestag has passed a resolution on this topic</p> <p>Emergency braking mechanism (Article 48 para 2 s. 1, Article 82, para 3 subsection 1, s. 1 and Article 83 para 3 subsection 1 s. 1 TFEU): representative must apply for referral to European Council if so instructed by Bundestag resolution</p> <p>Action against infringements of the subsidiarity principle: Bundestag obliged to make a complaint if requested to do so by ¼ of MPs as per Article 8 PSV; ¼ of those not supporting complaint can request that their view be included in complaint</p> <p><b>Rights of information/Information</b><br/>Basically with reference to above-mentioned regulations</p> |
| <p>Law on the giving of guarantees to maintain the Hellenic Republic's ability to pay which is required for financial stability in the monetary union (Currency-Finance-Stability Law – WFSStG)</p> | <p>07/05/2010<br/>German Federal Law Gazette (2010a)</p>        | <p>Regulations on guarantees for Greece<br/>Provision of information to Committee on Budgets</p>  |



|   |  |   |
|---|--|---|
| Law on the giving of guarantees within the framework of a European stability mechanism  | 22/05/2011<br>German Federal Law Gazette (2010b)                   | <b>Right to state opinion and be informed</b><br>Federal Government will endeavour to obtain consensus when accepting guarantees; right of Committee on Budgets to state official opinion and be informed<br>Quarterly information on guarantees and use<br>Regulations on exceeding limit of guarantees  |
|   | Amended by law of 09/10/2011<br>German Federal Law Gazette (2011)  | Bundestag's responsibility for budget and stability<br>Parliamentary reservation<br>Participation of Committee on Budgets<br>Regulations regarding provision of information   |
|   | Amended by law of 23/05/2012<br>German Federal Law Gazette (2012a) | Regulations on special committee  |
| Law on Treaty of 2 February 2012 on the establishment of a European Stability Mechanism | 13.09.2012<br>German Federal Law Gazette (2012b)                   | Federal law required to change authorized capital German representative may only vote in favour of changing the instruments of financial aid or abstain if authorized by Bundestag  |
| ESM Financing Treaty (ESMFinG)  | 13.09.2012<br>German Federal Law Gazette (2012c)                   | Bundestag's responsibility for budget and stability<br>Overall responsibility for budgetary policy and parliamentary reservation<br>Overall budgetary responsibility to be dealt with in plenary session<br>Government may only vote in favour in such cases after resolution in plenary session – otherwise rejection<br>Participation of Committee on Budgets<br>If plenary session unnecessary – Committee on Budgets<br><br>Detailed descriptions of projects requiring approval of Committee on Budgets<br><br>Right to state official opinion<br>Rights of information<br>Regulations on special committee<br>Duty of government to provide information |

Source: own compilation, supplemented by Ms Barnickel (2010: 113–115)

#### Further sources:

German Federal Law Gazette (2005): Law on the extension and strengthening of the rights of the Bundestag and the Federal Council in affairs of the European Union of 17/11/2005. Bonn: BGBl. 2005 I no. 71, 3178-3180

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Extracts from the most important cited treaties and laws  
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**Art. 2 [Basic values]**

<sup>1</sup>The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. <sup>2</sup>These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

**Art. 5 [Principles of subsidiarity and proportionality]**

[...] (3) Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

<sup>1</sup>The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. <sup>2</sup>National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol [...].

**Art. 9 [Principle of equality; European citizenship]**

<sup>1</sup>In all its activities, the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies. <sup>2</sup>Every national of a Member State shall be a citizen of the Union. <sup>3</sup>Citizenship of the Union shall be additional to national citizenship and shall not replace it.

**Art. 10 [Democratic principles]**

(1) The functioning of the Union shall be founded on representative democracy.

(2) Citizens are directly represented at Union level in the European Parliament.

Member States are represented in the European Council by their Heads of State or government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens. [...]

**Art. 11 [Citizen participation]**

(1) The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action.

(2) The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society.

(3) The European Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent.

(4) Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties.

The procedures and conditions required for such a citizens' initiative shall be determined in accordance with the first paragraph of Article 24 of the Treaty on the Functioning of the European Union.

#### Article 12 [Participation of national parliaments]

National Parliaments contribute actively to the good functioning of the Union:

- (a) through being informed by the institutions of the Union and having draft legislative acts of the Union forwarded to them in accordance with the Protocol on the role of national Parliaments in the European Union;
- (b) by seeing to it that the principle of subsidiarity is respected in accordance with the procedures provided for in the Protocol on the application of the principles of subsidiarity and proportionality;
- (c) by taking part, within the framework of the area of freedom, security and justice, in the evaluation mechanisms for the implementation of the Union policies in that area, in accordance with Article 70 of the Treaty on the Functioning of the European Union, and through being involved in the political monitoring of Europol and the evaluation of Eurojust's activities in accordance with Articles 88 and 85 of that Treaty;
- (d) by taking part in the revision procedures of the Treaties, in accordance with Article 48 of this Treaty;
- (e) by being notified of applications for accession to the Union, in accordance with Article 49 of this Treaty;

#### Article 48 [Treaty changes]

[...] (6) The government of any Member State, the European Parliament or the Commission may submit to the European Council proposals for revising all or part of the provisions of Part Three of the Treaty on the Functioning of the European Union relating to the internal policies and action of the Union.

<sup>1</sup>The European Council may adopt a decision amending all or part of the provisions of Part Three of the Treaty on the Functioning of the European Union. <sup>2</sup>The European Council shall act by unanimity after consulting the European Parliament and the Commission, and the European Central Bank in the case of institutional changes in the monetary area. <sup>3</sup>That decision shall not enter into force until it is approved by the Member States in accordance with their respective constitutional requirements.

The decision referred to in the second subparagraph shall not increase the competences conferred on the Union in the Treaties.

## Treaty on the Functioning of the European Union

### Article 2 [Types of competencies]

(1) When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts.

(2) <sup>1</sup>When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. <sup>2</sup>The Member States shall exercise their competence to the extent that the Union has not exercised its competence. <sup>3</sup>The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.

### Article 20 [European citizenship]

(1) <sup>1</sup>Citizenship of the Union is hereby established. <sup>2</sup>Every person holding the nationality of a Member State shall be a citizen of the Union. <sup>3</sup>Citizenship of the Union shall be additional to and not replace national citizenship. [...]

### Article 22 [Electoral law]

(1) <sup>1</sup>Every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that State. <sup>2</sup>This right shall be exercised subject to detailed arrangements adopted by the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State.

(2) <sup>1</sup>Without prejudice to Article 223(1) and to the provisions adopted for its implementation, every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate in elections to the European Parliament in the Member State in which he resides, under the same conditions as nationals of that State. <sup>2</sup>This right shall be exercised subject to detailed arrangements adopted by the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State.

### Article 26 [Realisation of the internal market]

[...] (2) The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties [...].

### Article 28 [Customs union]

(1) The Union shall comprise a customs union which shall cover all trade in goods and which shall involve the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect, and the adoption of a common customs tariff in their relations with third countries.

(2) The provisions of Article 30 and of Chapter 2 of this Title shall apply to products originating in Member States and to products coming from third countries which are in free circulation in Member States.

### Article 34 [Banning of import restrictions]

Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.

#### **Article 45 [Free movement of workers]**

(1) Freedom of movement for workers shall be secured within the Union. [...]

#### **Article 49 [Freedom of establishment]**

<sup>1</sup>Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. <sup>2</sup>Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.

#### **Article 56 [Freedom of services]**

Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended. [...]

#### **Article 63 [Free movement of capital and payments]**

(1) Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited. [...]

#### **Article 121 [Coordination of economic policy]**

(1) Member States shall regard their economic policies as a matter of common concern and shall coordinate them within the Council, in accordance with the provisions of Article 120.

(2) The Council shall, on a recommendation from the Commission, formulate a draft for the broad guidelines of the economic policies of the Member States and of the Union, and shall report its findings to the European Council. The European Council shall, acting on the basis of the report from the Council, discuss a conclusion on the broad guidelines of the economic policies of the Member States and of the Union.

<sup>1</sup>On the basis of this conclusion, the Council shall adopt a recommendation setting out these broad guidelines. <sup>2</sup>The Council shall inform the European Parliament of its recommendation.

(3) In order to ensure closer coordination of economic policies and sustained convergence of the economic performances of the Member States, the Council shall, on the basis of reports submitted by the Commission, monitor economic developments in each of the Member States and in the Union as well as the consistency of economic policies with the broad guidelines referred to in paragraph 2, and regularly carry out an overall assessment.

For the purpose of this multilateral surveillance, Member States shall forward information to the Commission about important measures taken by them in the field of their economic policy and such other information as they deem necessary.

(4) <sup>1</sup>Where it is established, under the procedure referred to in paragraph 3, that the economic policies of a Member State are not consistent with the broad guidelines referred to in paragraph 2 or that they risk jeopardising the proper functioning of economic and monetary union, the Commission may address a warning to the Member State concerned. <sup>2</sup>The Council, on a recommendation from the Commission, may address the necessary recommendations to the Member State concerned. <sup>3</sup>The Council may, on a proposal from the Commission, decide to make its recommendations public.

Within the scope of this paragraph, the Council shall act without taking into account the vote of the member of the Council representing the Member State concerned.

A qualified majority of the other members of the Council shall be defined in accordance with Article 238(3)(a).

(5) <sup>1</sup>The President of the Council and the Commission shall report to the European Parliament on the results of multilateral surveillance. <sup>2</sup>The President of the Council may be invited to appear before the competent committee of the European Parliament if the Council has made its recommendations public.

(6) The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, may adopt detailed rules for the multilateral surveillance procedure referred to in paragraphs 3 and 4.

#### **Article 288 [Community legislation; Catalogue]**

[...] (3) A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods. [...]

#### **Article 352 [Clause on additional competencies]**

(1) <sup>1</sup>If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. <sup>2</sup>Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament.

(2) Using the procedure for monitoring the subsidiarity principle referred to in Article 5(3) of the Treaty on European Union, the Commission shall draw national Parliaments' attention to proposals based on this Article.

(3) Measures based on this Article shall not entail harmonisation of Member States' laws or regulations in cases where the Treaties exclude such harmonisation.

(4) This Article cannot serve as a basis for attaining objectives pertaining to the common foreign and security policy and any acts adopted pursuant to this Article shall respect the limits set out in Article 40, second paragraph, of the Treaty on European Union.

## Basic Law for the Federal Republic of Germany

### Article 20 [Constitutional Principles – Right of Resistance]

(1) The Federal Republic of Germany is a democratic and social federal state.

(2) <sup>1</sup>All state authority is derived from the people. <sup>2</sup>It shall be exercised by the people through elections and other votes and through specific legislative, executive and judicial bodies. [...]

### Article 23 [Realisation of the European Union – Participation of the Bundesrat and of the government]

(1) <sup>1</sup>With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law. <sup>2</sup>To this end the Federation may transfer sovereign powers by a law with the consent of the Bundesrat. <sup>3</sup>The establishment of the European Union, as well as changes in its treaty foundations and comparable regulations that amend or supplement this Basic Law, or make such amendments or supplements possible, shall be subject to paragraphs (2) and (3) of Article 79.

(1a) <sup>1</sup>The Bundestag and the Bundesrat shall have the right to bring an action before the Court of Justice of the European Union to challenge a legislative act of the European Union for infringing the principle of subsidiarity. <sup>2</sup>The Bundestag is obliged to initiate such an action at the request of one fourth of its Members. <sup>3</sup>By a statute requiring the consent of the Bundesrat, exceptions from the first sentence of paragraph (2) of Article 42, and the first sentence of paragraph (2) of Article 52, may be authorised for the exercise of the rights granted to the Bundestag and the Bundesrat under the contractual foundations of the European Union.

(2) <sup>1</sup>The Bundestag and, through the Bundesrat, the Länder shall participate in matters concerning the European Union. The Federal Government shall keep the Bundestag and the Bundesrat informed, comprehensively and at the earliest possible time.

(3) <sup>1</sup>Before participating in legislative acts of the European Union, the Federal Government shall provide the Bundestag with an opportunity to state its position. The Federal Government shall take the position of the Bundestag into account during the negotiations. Details shall be regulated by a law.

(4) The Bundesrat shall participate in the decision-making process of the Federation insofar as it would have been competent to do so in a comparable domestic matter, or insofar as the subject falls within the domestic competence of the Länder.

(5) <sup>1</sup>Insofar as, in an area within the exclusive competence of the Federation, interests of the Länder are affected, and in other matters, insofar as the Federation has legislative power, the Federal Government shall take the position of the Bundesrat into account.

<sup>2</sup>To the extent that the legislative powers of the Länder, the structure of Land authorities, or Land administrative procedures are primarily affected, the position of the Bundesrat shall be given the greatest possible respect in determining the Federation's position consistent with the responsibility of the Federation for the nation as a whole. <sup>3</sup>In matters that may result in increased expenditures or reduced revenues for the Federation, the consent of the Federal Government shall be required.

(6) <sup>1</sup>When legislative powers exclusive to the Länder concerning matters of school education, culture or broadcasting are primarily affected, the exercise of the rights belonging to the Federal Republic of Germany as a member state of the European Union shall be delegated by the Federation to a representative of the Länder designated by the Bundesrat. <sup>2</sup>These rights shall be exercised with the participation of, and in coordination with, the Federal Government; their exercise shall be consistent with the responsibility of the Federation for the nation as a whole.



(7) Details regarding paragraphs (4) to (6) of this Article shall be regulated by a law requiring the consent of the Bundesrat.

#### **Article 38 [Elections]**

(1) <sup>1</sup>Members of the German Bundestag shall be elected in general, direct, free, equal and secret elections.

<sup>2</sup>They shall be representatives of the whole people, not bound by orders or instructions, and responsible only to their conscience. [...]

#### **Article 45 [Committee on the European Union]**

<sup>1</sup>The Bundestag shall appoint a Committee on the Affairs of the European Union. It may authorise the committee to exercise the rights of the Bundestag under Article 23 vis-à-vis the Federal Government. <sup>2</sup>It may also empower it to exercise the rights granted to the Bundestag under the contractual foundations of the European Union.

#### **Article 59 [Representation of the Federation for the Purposes of International Law]**

[...] (2) <sup>1</sup>Treaties that regulate the political relations of the Federation or relate to subjects of federal legislation shall require the consent or participation, in the form of a federal law, of the bodies responsible in such a case for the enactment of federal law. <sup>2</sup>In the case of executive agreements the provisions concerning the federal administration shall apply mutatis mutandis.

#### **Article 79 [Amendment of the Constitution]**

[...] (2) Any such law shall be carried by two thirds of the Members of the Bundestag and two thirds of the votes of the Bundesrat.

(3) Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.

#### **Article 115 [Generation of credit]**

(1) The borrowing of funds and the assumption of surety obligations, guarantees, or other commitments that may lead to expenditures in future fiscal years shall require authorisation by a federal law specifying or permitting computation of the amounts involved.

(2) <sup>1</sup>Revenues and expenditures shall in principle be balanced without revenue from credits. <sup>2</sup>This principle shall be satisfied when revenue obtained by the borrowing of funds does not exceed 0.35 percent in relation to the nominal gross domestic product. <sup>3</sup>In addition, when economic developments deviate from normal conditions, effects on the budget in periods of upswing and downswing must be taken into account symmetrically. <sup>4</sup>Deviations of actual borrowing from the credit limits specified under the first to third sentences are to be recorded on a control account; debits exceeding the threshold of 1.5 percent in relation to the nominal gross domestic product are to be reduced in accordance with the economic cycle. <sup>5</sup>The regulation of details, especially the adjustment of revenue and expenditures with regard to financial transactions and the procedure for the calculation of the yearly limit on net borrowing, taking into account the economic cycle on the basis of a procedure for adjusting the cycle together with the control and balancing of deviations of actual borrowing from the credit limit, requires a federal law. <sup>6</sup>In cases of natural catastrophes or unusual emergency situations beyond governmental control and substantially harmful to the state's financial capacity, these credit limits may be exceeded on the basis of a decision by a majority of the Bundestag's Members. <sup>7</sup>The decision has to be combined with an amortisation plan. <sup>8</sup>Repayment of the credits borrowed under the sixth sentence must be accomplished within an appropriate period of time.

## Law on the Co-operation between the Bund and Länder in Matters of the European Union

### Section 5 [Consideration of the opinion of the Bundesrat]

[...] (2) <sup>1</sup>If a proposal primarily concerns the legislative powers of the Länder and the Bund has no right of legislation or a proposal primarily concerns the structure of Land authorities or their administrative procedures, then the Bundesrat's views must be given due consideration in determining the negotiating position; in other respects, Paragraph 1 applies. <sup>2</sup>The general governmental responsibility of the Bund, including questions that are to be considered in terms of foreign, defence and integration policy, is to be preserved. <sup>3</sup>Should the opinion of the Bundesregierung not be in accordance with the position of the Bundesrat, an agreement is to be sought. <sup>4</sup>To bring about this agreement, the Bundesregierung, with representatives of the Länder, is to be consulted again. <sup>5</sup>Should an agreement not eventuate and the Bundesrat afterwards confirm its opinion with a decision reached with two thirds of its votes, then the opinion of the Bundesrat is authoritative. <sup>6</sup>The agreement of the Bundesregierung is required when decisions lead to expenditure increases or revenue decreases for the Bund. [...]

## Law on the Co-operation between the Bundesregierung and Bundesrat in Matters of the European Union

### Section 9 [Opinions of the Bundesrat]

[...] (4) <sup>1</sup>Should the Bundestag make use of the opportunity to present its comments, in accordance with Article 23 Paragraph 3 Sentence 1 of the Basic Law, then the Bundesregierung shall enter a parliamentary reservation in the Council if the decision of the Bundestag is in one of its fundamental respects not enforceable. <sup>2</sup>The Bundesregierung shall immediately inform the Bundestag about this in a separate report. <sup>3</sup>This report must be suitable in form and content to make an advisory session in the committees of the Bundestag possible. <sup>4</sup>Before the final decision in the Council, the Bundesregierung shall endeavour to reach an agreement with the Bundestag. <sup>5</sup>This also applies when the Bundestag adopts a position on a proposal of the European Union in questions of local service provisions. <sup>6</sup>The right of the Bundesregierung, when aware of the position of the Bundestag, to make divergent decisions, remains unaffected. [...]

**Act on the Exercise by the Bundestag and the Bundesrat of their Responsibility for Integration in Matters  
Concerning the European Union (Responsibility for Integration Act)**

**Section 4 [Bridging Clauses]**

(1) <sup>1</sup>The German representative in the European Council may approve a proposal for a decision within the meaning of Article 48(7), first subparagraph, first sentence, or second subparagraph, of the Treaty on European Union or abstain from voting on such a proposal only after a law to that effect as defined in Article 23(1) of the Basic Law has entered into force. <sup>2</sup>In the absence of such a law, the German representative in the European Council must reject the proposal for a decision.

(2) <sup>1</sup>The German representative in the Council may approve a proposal for a decision within the meaning of Article 81(3), second subparagraph, of the Treaty on the Functioning of the European Union or abstain from voting on such a proposal only after a law to that effect as defined in Article 23(1) of the Basic Law has entered into force. <sup>2</sup>In the absence of such a law, the German representative in the European Council must reject the proposal for a decision [...].

**Section 5 [Approval in the European Council in the case of special bridging clauses]**

(1) <sup>1</sup>The German representative in the European Council may approve a proposal for a decision within the meaning of Article 31(3) of the Treaty on European Union or Article 312(2), second subparagraph, of the Treaty on the Functioning of the European Union or abstain from voting on such a proposal only after the Bundestag has taken a decision to that effect. <sup>2</sup>The Federal Government may also table a motion in the Bundestag to that end. <sup>3</sup>In the absence of such a decision by the Bundestag, the German representative in the European Council must reject the proposal for a decision.

(2) In addition to the decision of the Bundestag, the Bundesrat must also have taken a corresponding decision if areas of activity are affected

1. for which no federal legislative competence exists,
2. in which the Länder are empowered to legislate by virtue of Article 72(2) of the Basic Law,
3. in which the Länder may adopt divergent provisions under Article 72(3) or Article 84(1) of the Basic Law, or
4. the regulation of which by means of a federal law requires the consent of the Bundesrat.

**Section 6 [Approval in the European Council in the case of special bridging clauses]**

(1) <sup>1</sup>The German representative in the Council may approve a proposal for a decision within the meaning of Article 153(2), fourth subparagraph, Article 192(2), second subparagraph, or Article 331(1) or (2) of the Treaty on the Functioning of the European Union or abstain from voting on such a proposal only after the Bundestag has taken a decision to that effect. The second and third sentences of section 5(1) of this Act shall apply, mutatis mutandis.

(2) Section 5(2) of this Act shall apply, mutatis mutandis.

**Section 8 [Flexibility clause]**

<sup>1</sup>The German representative in the Council may approve a decision on the adoption of measures within the meaning of Article 352 of the Treaty on the Functioning of the European Union or abstain from voting on such a decision only after a law to that effect as defined in Article 23(1) of the Basic Law has entered into force. <sup>2</sup>In the absence of such a law, the German representative in the Council must reject the proposal for a decision.

## Act on Financial Participation in the European Stability Mechanism

### Section 4 [Parliamentary reservation for decisions in the European Stability Mechanism]

(1) <sup>1</sup>The plenary of the German Bundestag will take responsibility for matters of the European Stability Mechanism that concern the budgetary comprehensive responsibility of the German Bundestag. <sup>2</sup>The budgetary comprehensive responsibility is especially concerned.

1. in decisions according to Article 13 Paragraph 2 of the Treaty Establishing the European Stability Mechanism, to grant stability aid, in the form of a financial grant facility provided for in the Treaty Establishing the European Stability Mechanism, to a signatory party to the European Stability Mechanism in response to their requests for assistance,
2. in the approval of an agreement concerning the financial grant facility in accordance with Article 13 Paragraph 3 Sentence 3 of the Treaty Establishing the European Stability Mechanism and an agreement to a corresponding Memorandum of Understanding in accordance with Article 13 Paragraph 4 of the Treaty Establishing the European Stability Mechanism,
3. in decisions within the scope of the European Stability Mechanism that change the approved share capital as well as the maximum loan volumes in accordance with Article 10 Paragraph 1 of the Treaty Establishing the European Stability Mechanism; Article 2 Paragraph 1 of the Law to the Treaty of February 2, 2012 Establishing the European Stability Mechanism remains unaffected. [...]

### Section 7 [Information provided by the Bundesregierung]

(1) <sup>1</sup>The Bundesregierung must comprehensively, at the earliest possible point in time, continually and as a rule in writing, inform the Bundestag and the Bundesrat in matters of this law. <sup>2</sup>The Bundesregierung must give the Bundestag, in matters that concern its competencies, opportunity to take a position; the Bundesregierung must also consider the opinions of the Bundestag. [...]

## VII. Legal Notice

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The Europeanization of the Bundestag:  
From Observer to Player?

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