



Federal Constitutional Court - Press office -

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Judgment of 19 June 2012

[2 BvE 4/11](#)

**Successful applications in *Organstreit* proceedings
regarding the
"ESM/Euro Plus Pact"**

In its judgment pronounced today, the Federal Constitutional Court considered well-founded the applications made by the Alliance 90/The Greens parliamentary group with which the applicant asserts that the German *Bundestag*'s rights to be informed by the Federal Government have been infringed in connection with the European Stability Mechanism (ESM) and the Euro Plus Pact.

Legal background:

According to Article 23.2 sentence 2 of the Basic Law (*Grundgesetz* - GG), the Federal Government shall keep the German *Bundestag* informed, comprehensively and at the earliest possible time, "in matters concerning the European Union".

The first application is aimed at what is known as the European Stability Mechanism (ESM). The European Stability Mechanism is an intergovernmental instrument of the euro area Member States to combat the sovereign debt crisis in the area of the European Monetary Union. The applicant applies for a declaration that the Federal Government infringed the German *Bundestag*'s rights to be

informed under Article 23.2 GG by omitting to inform immediately before and after the European Council meeting of 4 February 2011 comprehensively, at the earliest possible time and continuously, about the configuration of the ESM, and that it in particular omitted to send the Draft Treaty establishing the ESM to the German *Bundestag* on 6 April 2011 at the latest.

The second application concerns what is known as the Euro Plus Pact, which was presented to the public for the first time at the European Council meeting of 4 February 2011. This agreement which was initially discussed in Germany under the name "*Pakt für Wettbewerbsfähigkeit*" (Competitiveness Pact), is intended in particular to structurally reduce the risk of currency crises in the euro area. To achieve this, the Euro Plus Pact intends, among other things, to strengthen the economic pillar of the monetary union and to achieve "a new quality of economic coordination". In this context, the applicant applies for a declaration that the Federal Government infringed the German *Bundestag's* rights under Article 23.2 GG by omitting to inform the *Bundestag* before the European Council meeting on 4 February 2011 about the Federal Chancellor's initiative for an enhanced economic coordination of the euro area Member States and by omitting until 11 March 2011 to inform it comprehensively and at the earliest possible time about the Euro Plus Pact after the meeting.

Against this backdrop, the *Organstreit* proceedings (proceedings relating to a dispute between supreme federal bodies) have to clarify whether the rights of participation and the rights to be informed which are due to the *Bundestag* according to Article 23.2 GG can also apply to intergovernmental instruments of the nature described which are dealt with by the Federal Government in the context of European integration and which are related to the European Union.

The Second Senate of the Federal Constitutional Court ruled that

the
Federal Government infringed the German *Bundestag*'s rights to be
informed under Article 23.2 sentence 2 GG with regard to the
European
Stability Mechanism and with regard to the agreement on the Euro
Plus
Pact.

**In essence, the decision is based on the following
considerations:**

I. Standard of review

1. Article 23 GG confers on the German *Bundestag* far-reaching
rights of
participation and rights to be informed in matters concerning
the
European Union. The stronger involvement of Parliament in the
process of
European integration serves to compensate the competence shifts
in
favour of the Member States' governments in the national
structure of
powers that result from Europeanisation. Matters concerning the
European
Union include Treaty amendments and corresponding changes at
primary-law
level (Article 23.1 GG) as well as legislative acts of the
European
Union (Article 23.3 GG). International treaties that complement
European
Union law or otherwise show particular proximity to European
Union law
are also matters concerning the European Union. There is no
single
characteristic that is at the same time final and clearly
delimited
according to which it can be ascertained whether such proximity
exists.
What is important instead is an overall consideration of the
circumstances, including planned contents, objectives and
effects of
legislation, which, depending on their weight, can prove
decisive
individually or in their combination.

2. The Federal Government's duty, laid down in Article 23.2
sentence 2
GG, to keep the German *Bundestag* informed comprehensively and at
the
earliest possible time intends to make it possible for the
German
Bundestag to exercise its rights, anchored in Article 23.2
sentence 1
GG, to participate in matters concerning the European Union. The
information must make it possible for the *Bundestag* to influence
the
Federal Government's opinion-forming early and effectively;
information
must be provided in such a way that Parliament's role is not
reduced to
merely exercising indirect influence. Apart from this, the
interpretation and application of Article 23.2 GG must take into

account
that the provision also serves the publicity of parliamentary
work, a
requirement which is derived from the democratic principle laid
down in
Article 20.2 GG.

a) In accordance with its function, the requirement of
comprehensive
information is to be construed in such a way that the more
complex a
matter is, the deeper it intervenes in the legislative's area of
competences and the closer it gets to formal decision-making or
to a
formal agreement, the more intensive the required information
will be.
From this, requirements result with regard to the quality,
quantity and
timeliness of the information. Thus, the duty to comprehensively
inform
encompasses not only initiatives and positions taken by the
Federal
Government itself and the subject-matter, the course and the
result of
the meetings and deliberations of organs and bodies of the
European
Union in which the Federal Government is represented. The duty
to inform
also entails an obligation to make available official materials
and
documents of the organs, bodies and authorities of the European
Union
and of other Member States.

b) To inform in time is as important as the quantity of the
information.
The indication "at the earliest possible time" in Article 23.2
sentence
2 GG means that the *Bundestag* must receive the Federal
Government's
information at the latest at a point in time that enables it to
deal
with the matter in a substantiated manner and to prepare a
statement
before the Federal Government makes declarations which have an
effect on
third parties, in particular binding declarations concerning
legislative
acts of the European Union and intergovernmental agreements. c)
With a
view to the requirements placed on its clarity, continuity and
reproducibility, the information must, in principle, be provided
in a
written form. Exception are only admissible within narrow
limits; they
may, however, be required if the Federal Government can ensure
comprehensive information at the earliest possible time only if
the
information is provided orally.

d) Boundaries of the duty to inform result from the principle of
the

separation of powers. Within the Basic Law's system of functions, a core area of the government's own executive responsibility exists that includes an area of initiative, deliberation and action which in principle has to be respected. As long as the Federal Government's internal formation of opinion has not come to an end, Parliament has no right to be informed. If, however, the Federal Government's opinion-forming has evolved in such a specific direction that the Federal Government can communicate interim or partial results to the public or would like to set out on a process of concertation with third parties with a position of its own, a project no longer falls within the core area of the Federal Government's own executive responsibility that is shielded from the *Bundestag*.

II. Subsumtion

Measured against these standards, the applications are well-founded.

1. With regard to the establishment of the European Stability Mechanism, the Federal Government has infringed the *Bundestag*'s rights to be informed under Article 23.2 sentence 2 GG.

a) The establishment and configuration of the European Stability Mechanism are a matter concerning the European Union within the meaning of Article 23.2 sentence 1 GG because in an overall perspective, the characteristics which define it show substantial connections with the integration programme of the European Treaties. For instance, the establishment of the European Stability Mechanism is to be safeguarded by amending the Treaty on the Functioning of the European Union. Furthermore, the treaty to be concluded for its establishment assigns to the institutions of the European Union, in particular to the European Commission and the Court of Justice of the European Union, new responsibilities concerning the identification, realisation and monitoring of the financing program for Member States in need of assistance. Moreover, the European Stability Mechanism is to serve to complement and safeguard the economic and monetary policy, which has been assigned to the European Union as an exclusive responsibility. The fact that the European Stability Mechanism is to be established by way of a separate international treaty outside the structure of Community law existing so far does not call into question its assignment

to the
integration programme laid down in the Treaties establishing the
European Union and on the Functioning of the European Union. Due
to its
being intertwined with supranational elements, the European
Stability
Mechanism is of a hybrid nature which makes it a matter
concerning the
European Union.

b) The Federal Government infringed the rights of the German
Bundestag
under Article 23.2 sentence 2 GG by omitting to submit to the
German
Bundestag a text of the European Commission on the establishment
of the
European Stability Mechanism, which was available to the Federal
Government on 21 February 2011 at the latest, and the Draft
Treaty
Establishing the European Stability Mechanism (ESM) of 6 April
2011.
Oral and written information, in particular sending the Draft
Treaty
Establishing the European Stability Mechanism, which had already
been
discussed in the extended Eurogroup on 17 or 18 May 2011 came
too late
and do therefore not compensate the infringement of Article 23.2
sentence 2 GG. As results from the cumulative requirement of
early and
comprehensive information, the duty to inform cannot be
exercised "in an
overall package" with regard to processes of the nature existing
here.
The Federal Government is obliged to supply the *Bundestag* not
merely
with the text of a treaty when deliberations have already been
concluded, or after the treaty has been adopted, but must at the
earliest possible time submit interim results and interim
versions of
the text that are available to the Federal Government.

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

a) Due to its specific orientation towards the integration
programme of
the European Union, the agreement on the Euro Plus Pact is a
matter
concerning the European Union within the meaning of Article 23.2
sentence 1 GG. The Euro Plus Pact is directed towards the
European Union
Member States; in view to its objectives of achieving a
qualitative
improvement of the economic policy and of the public budget
situation
and of strengthening financial stability, it is, with regard to
its
contents, oriented towards a policy area of the European Union

which is laid down in the Treaties. European institutions participate in the realisation of the objectives of the Pact. The fact that the Euro Plus Pact operates for the most part with self-commitments of the participating Member States does not call into question its classification as a matter concerning the European Union.

The Euro Plus Pact affects important functions of the German *Bundestag*. In particular the self-commitments in areas which fall within the legislative competence of the Member States, such as for instance tax law and social law, and in which the legislature will in future be subjected to monitoring by institutions of the European Union, concern parliamentary responsibility and are liable to restrict the legislature's freedom of drafting. It was therefore required to inform the legislature early and comprehensively.

b) The Federal Government did not comply with this obligation. Firstly, it did not inform the German *Bundestag* in advance about the initiative for the adoption of "*Pakt für Wettbewerbsfähigkeit*" - later referred to as Euro Plus Pact - which was jointly presented by the Federal Chancellor and the President of the French Republic at the meeting of the European Council on 4 February 2011. The respondent would have had to inform the German *Bundestag* about this plan on 2 February 2011 at the latest. At that date, it was certain that a discussion proposal for enhanced economic policy coordination in the euro area to improve competitiveness would be submitted to the heads of state and government at the forthcoming meeting.

Furthermore, the Federal Government did not submit to the German *Bundestag* an unofficial document prepared by the Presidents of the European Commission and of the European Council meeting of 25 February 2011 with the title "Enhanced Economic Policy Coordination in the Euro Area - Main Features and Concepts", which described essential features of the Pact - later referred to as Euro Plus Pact. The official draft of a "Euro Plus Pact" was handed over to the *Bundestag* on 11 March 2011. At that time, it was no longer possible for the German *Bundestag* to discuss its contents and to exert an influence on the Federal Government by

giving an opinion because the heads of state and government
already
agreed on the Pact on 11 March 2011 already, i.e. on the same
day.