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Heidelberg, 12.06.2012
My ref.: 00175-12

**Constitutional complaint**
**of preventive legal protection by urgent proceedings**

of Mr. Simon G. Jakob, Bergheimer Str. 49, 69115 Heidelberg

Complainant -

Legal representatives.: Lawyers Jakob & Kollegen, Bergheimer Str. 49, 69115 Heidelberg

against

the intended passing of the following laws by the German Bundestag:

- Law on the Agreement of 2nd February 2012 on the establishment of the European Stability Mechanism (ESMG)
- Law on Financial Participation in the European Stability Mechanism (ESMFinG)
- Law on the decision of the European Council of 25th March on the amendment of Art. 136 TFEU
- Law on the Agreement on the Stability, Coordination and Control of the Economic and Monetary Union (FiskalVG)

The complaint refers to the violation of the electoral right (Art. 38 GG) in conjunction with the principle of democracy (Art. 20 I GG). Application is made that the above laws be declared unconstitutional, and that their adoption be temporarily prohibited on the principle of preventive legal protection.

## Grounds

### I. The previous stabilisation measures

In the framework of the European financial crisis, an individual ad hoc regulation was initially made for Greece. Greece was supported by bilateral loans coordinated at the European level and with the IMF. The total loan volume was € 80 billion, the German share of which amounted to € 22.4 billion. The German loans were provided by the Bank for Reconstruction and secured by a corresponding guarantee of the Federal Republic of Germany. In order to implement the necessary measures at the national level, the German Bundestag on 07.05.2010 passed the Law on the Assumption of Guarantees to preserve the solvency of the Hellenic Republic necessary for financial stability in the monetary union (EMU Financial Stability Law - WFStG, BGBl 1 p. 537). Under the WFStG, the Federal Finance Ministry was authorised to assume guarantees up to the amount of € 22.4 billion for loans to the Hellenic Republic (§ 1 WFStG). This law was already the subject of constitutional review. By its judgment of 07.09.2011, the Federal Constitutional Court decided that the relevant constitutional appeals, as far as they were based on Art. GG 38 I, were permissible but still unfounded (associated proceedings 2 BvR 987/10, 2 BvR 1485/10 and 2 BvR 1099/10). A corresponding urgent application had already been rejected previously (decision of 07.05.2012-2 BvR 987/10).

In order to create a pan-European regulation for distressed member states above and beyond Greece, the European Union passed the Ordinance (EU) No 407 / 2010 of the Council of 11th May 2010 on the establishment of a European Financial Stabilisation Mechanism (EFSM) (ABl No. I 118 / 1). The EFSM is based on two pillars: (1) Granting of loans by the European Union with a volume up to € 60 billion and (2) the European Financial Stabilisation Facility (EFSF) with a volume of € 440 billion. The EFSF is a special purpose company under Luxembourg law. Its purpose is to grant loans to distressed member states. It finances itself through the issue of bonds on the capital market. The Federal Republic stands surety for the loans with guarantees of up to € 211.0459 billion. To implement the necessary measures at the national level, the Federal Finance Ministry was authorised under the law of 22.05.2010 to give guarantees up to this amount (Law on the Assumption of Guarantees within the framework of a European Stabilisation Mechanism - StabMechG, § 1 I 1). This authorisation is limited until 30.06.2013 (§1 I 3 StabMechG).

This law was also already the subject of constitutional review. In the dispute 2 BvE 8/11, § 3 III StabMechG was declared unconstitutional (verdict of 28.02.2012). § 3 III StabMechG provided that in urgent cases, the parliamentary reservation of § 3 I StabMechG will be exercised by a panel made up from the Budget Committee.

The Federal Constitutional Court (BVerfG) made it clear that the Bundestag fundamentally performs its democratic representation tasks in plenary session. The StabMechG was also the subject of the above constitutional complaints (2 BvR 987/10, 2 BvR 1485/10 and 2 BvR 1099/10) with the same result as that regarding the WFStG - permissible but still unfounded.

The previous European stabilisation measures referred to above were characterised by their individual case reference (Greek aid under the WFStG) or by their temporary nature (guarantees for the EFSF until 30.06.2013 under the StabMechG).

Although the Ordinance (EU) No 407 / 2010 on the establishment of a European Financial Stabilisation Mechanism contains no express limitation period, it is by the history of its origination a short-term reaction to a current crisis. This context is highlighted in the consideration grounds (1) to (5) of the ordinance, and is also apparent from its legal basis: Art. 122 II TFEU authorises immediate aid in the event of natural disasters and other unusual events beyond the control of the member states.

The same also applies for the EFSF. In accordance with Chapter 1 No. 4, the special purpose company was founded not only for a specifically limited period, but was to be dissolved again on achievement of its stated purpose (i.e. overcoming the emergency situation).

## II. ESM and FiskalV

### 1. Overview

In the further course of the European financial crisis, it became clear that the financial crisis could not be mastered by provisional measures, because it is rooted in structural problems of the European Monetary Union:

(1) the asymmetric structure of the Economic and Monetary Union - i.e. the communitisation of the currency with continuing economic policy independence of the member states and
(2) the lack of enforcement regarding the stability criteria.

Further measures were therefore taken:

(1) On 25.03.2011 the European Council, using the simplified amendment procedure of Art. 48 VI, Sub-para. 2 and 3 EUV, decided on an amendment of Art. 136 TFEU. This was intended to create a European legal basis for the European Stability Mechanism (ESM).

(2) On 02.02.2012, the member states of the Euro zone concluded the Agreement on the Establishment of the European Stability Mechanism (ESMV).
(3) On 02.03.2012, the member states of the European Union (with the exception of Great Britain and the Czech Republic) concluded the Agreement on the Stability, Coordination and Control of the Economic and Monetary Union (FiskalV).

The ESMV, FiskalV and the amendment of Art. 136 EUV are to be implemented amongst others by the following national regulations (ratification acts):

- Law on the Agreement of 2nd February 2012 on the establishment of the European Stability Mechanism (ESMG), see Bundestag records 17/9045 and 9370.
- Law on Financial Participation in the European Stability Mechanism (ESMFinG), see Bundestag records 17/9048, 9371 and Budget Committee records 17/441U
- Law on the decision of the European Council of 25th March on the amendment of Art. 136 TFEU, see Bundestag records 17/17/9047 and 9373
- Law on the Agreement on the Stability, Coordination and Control of the Economic and Monetary Union (FiskalVG), see Bundestag records 17/9046 and 9667.

The ESM is to begin its work in July of this year. FiskalV is to come into force on 01.01.2013. The ratification of the corresponding laws was originally to take place in May, although this was postponed at short notice. The corresponding votes in the Bundestag are imminent.

These additional measures are aimed not only at an acute crisis management, but also aim for a lasting restructuring of the Economic and Monetary Union in the sense of a "symmetrical alignment" and a strict enforcement of the stability criteria (see e.g. Nettesheim, Constitutional requirements for the restructuring of the Monetary Union in EuR Issue 6 2011, p. 765 ff.). The reforms are intended to pave the way to a transfer and liability union.

## 2. ESM

### a.

Art. 136 TFEU new version is to run:

> "*(3) The member states whose currency is the Euro can establish a Stability Mechanism, which will be activated when this is essential to preserve the stability of the Euro currency region as a whole.*

*The granting of all necessary financial aid within the framework of the mechanism will be subject to strict requirements."*

The ESM will thereby be detached from the context of natural disasters and similar events (Art. 122 II TFEU - former legal basis) and extended into an instrument for compensating for structural problems of the Monetary Union and of the member states. The central theme is interdependence in the Euro currency area (also: "risk of infection"), see consideration grounds No. 6. In concrete terms the ESM will provide stability aid to an ESM member state if its normal access to financing on the market is impaired or threatens to be so (Consideration grounds No. 16). Article 14 ESMV even provides for the possibility of precautionary financial aid.

Detached from the current financial crisis, the ESM is therefore to be elevated to a permanent institution of the European Monetary Union. The legal basis is an international treaty between the member states. According to general international law, as applied for example in Art. 54 WVK, international agreements can only be cancelled in accordance with the contractual provisions. However, such a provision - cancellation option - is not provided for by the ESMV. On the contrary: According to Art. 8 IV ESMV, the parties undertake "irrevocably" to make their contribution to the authorised capital. There is to be no turning back (unless all parties have agreed unanimously on the termination of the ESM).

b.

The Monetary Union therefore - at least in theory - is designed as a stability community, whose primary aim is to ensure price stability. The three pillars of this desired stability are:

(1) the independence of the European Central Bank and its obligation to price stability (Art. 127, 130 TFEU).

(2) the market-based enforcement of member state budget discipline

(3) regulated procedures – i.e. in particular the procedure in the event of an excessive deficit (Art. 126 TFEU).

The central requirement for market-based enforcement (2nd pillar) is "that the state actors are subject to the same restrictions regarding borrowing as a private capital seeker, and that neither other member states nor the Union are subject to sanction by means of interest rates. If a liability community comes to the aid of a debtor state by standing surety for its debts, this has a corresponding effect on the incentive structure both of the market actors and the

responsible political representatives of the beneficiary debtor state: The credit check by the markets will be extended to the community of liability and diluted, so that disciplinary interest premiums for the individual debtor country will be lower or be omitted entirely. If the markets anticipate a bailout, this will also create incentives to grant member states economically unjustified loans. [...]. On the part of the highly indebted Euro country, its government will find itself exposed to the temptation to postpone or even neglect the necessary fiscal consolidation, because it will necessarily rely on the financial support of other Euro countries or the Union." (Hentschelmann, Financial aid in the light of the no-bail-out clause – Self-responsibility and solidarity in the Monetary Union, in EuR 2011, 282 ff. (284).

This "2nd column" is governed by Art. 125 TFEU: the Union shall not be liable for obligations of the member states and a member state shall not be liable for obligations of other member states (Art. 125 TFEU).

By the perpetuation of the temporary stabilisation mechanism in the form of the ESM in the disputed version, this column falls away, the "stability building" becomes unstable. Basically, the character of the European Monetary Union as a community of stability is put into question. Contrary to the original intentions of the Federal Government and Parliament, there are no regulations on national insolvency. National insolvency is to be averted by the stability aid of the ESM at any price - in particular at the price of monetary stability.

The Deutsche Bundesbank as an expert third party has already pointed out this problem in the proceedings 2 BvR 987/10, 2 BvR 1485/10 and 2 BvR 1099/10: "It must be regarded as critical if the current temporary European Financial Stabilisation Facility was to become a permanent support facility. [...] At the same time such a procedure would also weaken the self-responsibility of national fiscal policies and constitute a further step in the direction of a liability and transfer community. The risk of default on government bonds by individual member states would be spread over all countries of the Monetary Union, and the disciplinary effect of the financial markets largely eliminated." (BVerfG of 07.09.2011 - 2 BvR 987/10 u.a., Rn. 89).

c.

The Monetary Union is characterised according to its present concept by the self-responsibility of the member states. Every member state is responsible for its own debts, aid payments by the EU or other member states are in principle excluded (Art. 125 TFEU).

This self-responsibility is negated by the ESM. Although joint and several debtor liability of the member states is not provided for, the member states are in any case liable in the amount of their payments into the ESM (Art. 8 V 1 ESMV). The German liability volume is therefore estimated at € 190.024 billion (see Annex II to the ESMV and BT records 17/9045 p. 2 D.).

It should be noted that this is only a preliminary indication of the level of liability. The actual level of liability may be much higher.

The ESM is by nature of its structure open to an extension of the level of liability, or even designed for this purpose. According to Art. 10 I ESMV, the Board of Governors of the ESM regularly reviews the adequacy of the capital. According to Art. 8 V 1 ESMV, the liability is not limited to the nominal value of the capital, but to the issue value. According to Art. 8 II ESMV, the Board of Governors may also determine that the capital must be paid in by the contracting countries at a higher issue price, with the result that the level of liability is therefore also higher (for the same capital).

According to Art. 8 V 2 ESMV, the liability to pay the capital also remains in effect if a contracting party receives financial aid or fulfils the requirements for the granting of financial aid. This however begs the question of how a country which is forced to rely on financial aid can find the funds to make such substantial capital payments. The ESMV deliberately leaves this question unanswered. De facto, an increase in the payments by the supporting countries is probably inevitable.

As a whole this represents a structural derogation of self responsibility of the member states and the entry into a transfer union.

This support should essentially take the form of loans (Art. 14 ff. ESM), which theoretically must be repaid. In practice however, these are genuine transfer payments. The need for support regularly has its basis in a structural excessive government deficit. That is, the countries concerned are no longer able to service their loan liabilities. The debt level is increased still further by the granting of loan by the ESM - any repayment is utopian. Although the legislature is entitled to an assessment prerogative with regard to the risks associated with the ESM, the legislature makes no use of this assessment prerogative in the present legislative grounds. There is no assessment of the actual payments and default risks to be expected. Regardless of this fact, it can be concluded that under economic consideration, these are genuine, permanent transfer payments, which for legal purposes are “dressed up” as loans.

Support is also provided for by the purchase of government bonds on the primary or secondary market (Art. 17 f. ESMV). When purchasing on the primary market, funds flow directly to the member state concerned, so that not even (theoretical) repayment methods are provided for, as in the case of loans.

## 3. FiskalV

The Monetary Union in its current form is characterised by the asymmetry between the communitisation of the currency and economic policy independence of the member states. Budgetary authority lies exclusively with the member states. They decide freely on revenue and expenditure.

European law specifies only what debt standards/stability criteria must be observed. In the context of the so-called deficit procedure, the Council can make only non-binding recommendations (Art. 126 VII TFEU). Ultimately it remains subject to national legislation as to what measures are taken to deal with an excessive deficit.

FiskalV is intended to compensate for the collapse of the 2nd column (the market-based enforcement of member state budgetary discipline, see above, letter a.) by stricter regulatory procedures. Whether this is possible however appears more than questionable (see also Hentschelmann, op. cit., p. 311 f.). FiskalV tightens up both the material stability criteria as well as the procedural precautions.

a.

In the grounds of the draft of the ratification act, it states that FiskalV essentially governs the debt brake already provided for in the Basic Law (BT records 17/9046, p. 4, Art. 1). The financial Constitution of the Federal Republic of Germany is actually amended/supplemented on central points:

The benchmark for the “European” debt brake is “comprehensive” and goes far beyond the national debt brake of Art. GG 109 III. Art. 3 I a FiskalV is based on the "General Government budget". In addition to the Federal and regional budgets this also includes the municipal budgets and public social funds. In contrast, Art. 109 III GG explicitly contains only regulations for the Federal and regional budgets, i.e. the national debt brake applies neither to the communities nor to public social funds.

The national debt brake restricts new borrowing. On the other hand, it does not provide regulations for the reduction of the debt. Here, too, the approach of the European debt brake goes further: according to Art. 4 FiskalV, the parties are required to reduce their deficit annually by an average of 1/20, if the deficit quota (ratio of general government debt to gross domestic product) is more than 60%.

According to the information of the European Commission, the current total debt of the Federal Republic of Germany is about 81% of gross domestic product, and therefore clearly above the 60% limit. The commitment to reduce debt in accordance with FiskalV above the provisions of the basic law are therefore of immediate practical relevance for the Federal Republic of Germany.

b.

According to Art. 3 I e) FiskalV, an adjustment mechanism should be triggered automatically "in case of significant deviations from the medium-term target, or the adjustment path leading there". The term of the medium-term target refers back to Art. 3 I (b) FiksalV and designates the deficit limit of 0.5% of GDP (new debt). The regulation leaves open what is meant by a significant deviation and an automatic adjustment mechanism.

"Automatically" means "in the form of a specified response, without the intervention of a decision, and without requiring further action" (according to the wiki-worterbüch wiktionary). The text therefore calls for an adjustment mechanism that takes effect automatically - without requiring further legislative acts - and is thus removed from legislative control. The basic law recognises no such mechanism: the compilation of a budget and savings measures always requires the involvement of the Bundestag as the legislator by the adoption of corresponding budget laws.

In Art. 3 II 2 FiskalV, the member states are explicitly required to establish such an adjustment mechanism. The Commission is also authorised to further define the vague provisions of Art. 3 I e) FiskalV with binding effect for the contracting parties.

c.

A so-called deficit procedure can be instituted against countries which do not comply with the stability criteria. FiskalV thereby significantly tightens up the current deficit procedure (Art. 126 TFEU). This applies both to the requirements for the institution of the deficit procedure and its consequences.

So far, the deficit procedure could be initiated only by a qualified majority in the Council. The majority ratio is now reversed: the deficit procedure can only be averted by a qualified majority, thereby making it a "semi-automatic" procedure.

If the deficit procedure is instituted, the Council is limited under previous legislation (Art. 126 VII TFEU) to making "recommendations" to the country in question. These recommendations are not legally binding. The affected country is nevertheless obliged to meet the deficit criteria, or undertake appropriate measures to comply with the deficit criteria.

The concrete implementation however falls within the scope of responsibility of the country concerned, its budgetary autonomy is not infringed.

Article 5 FiskalV stipulates however, that the country concerned must submit a corresponding budget and economic programme to the Council of the European Union and the Commission for approval and monitoring.

Art. 5 FiskalV states:

> *(1) A contracting party which is subject to an excessive deficit procedure pursuant to the treaties on which the European Union is based, must compile a budgetary and economic partnership programme containing a detailed description of the structural reforms, which must be adopted and implemented in order to ensure an effective and lasting correction of its excessive deficit. The content and form of these programmes are laid down in the law of the European Union. These will be submitted to the Council of the European Union and the European Commission in the context of the existing monitoring procedures of the stability and growth pact for approval, and will be monitored within this framework.*
>
> *(2) The implementation of the budget and economic partnership programme and the annual budgets associated with this programme in line will be monitored by the Council of the European Union and the European Commission.*

It is not expressly regulated what legal consequences will result from the non-approval of the submitted budget and economic partnership programmes by the European Council and the Commission. Legal inconsequence of non-approval would mean that Art. 5 I FiskalV ultimately has no legal content or effect. Such an interpretation can hardly correspond to the sense intended by the contracting parties. FiskalV is intended to bring about precisely a legally binding tightening-up the previous deficit procedure - it cannot remain with the previous non-binding recommendations. It must also be taken into account that FiskalV is to be interpreted in the light of European law (Art. 2 I FiskalV). The guiding principle in the interpretation of European law is the "useful effect". European regulations should develop practical effectiveness. The member states and the Union are also bound to loyal cooperation pursuant to 4 Art. III TEU held. Art. 2 I FiskalV makes express reference to Art. 4 III TEU and gives it particular emphasis in terms of interpretation. The inconsequential ignorance of non-approval would be simply incompatible with the loyalty requirement.

The regulation can therefore only be understood to mean that the European Council and the Commission are granted a concrete right of veto against the budget planning of the country concerned. Budgetary planning is therefore detached from the province of national sovereignty

and must now be agreed with the relevant European institutions, and cannot be legally finalised without their approval.

## III. Violation of Art. 38 I GG

### 1. Guarantee of Art. 38 I GG

According to the jurisdiction of the Federal Constitutional Court, the right to vote in accordance with Art. 38 1 GG extends not merely to a formal guarantee. Art. 38 GG instead protects voting citizens against a loss of material substance of their accompanying constitutional state sovereignty by extensive or even comprehensive transfer of tasks and authority of the Bundestag, in particular to supranational institutions (BVerfG of 12.101993- 2 BvR 2134, 2159/92 = BVerGE 89, 155 <172>, "Maastricht" and BVerfG of 30.06.2009 - 2 BvE 2/08 = BVerGE 123, 267 <330>, "Lisbon").

In this respect, the complainant is injured in his right to vote through the further transfer or circumscription of budgetary powers by the ESM and the fiscal pact and the proposed structure of the participation rights of the Bundestag.

### 2. Transfer of sovereign rights by the ESM and FiskalV and constitutional standards

By means of the ESM the budgetary authority over the German contribution (at the issue value) will be withdrawn from the Bundestag and transferred to the ESM. The contribution can be required at any time by the ESM (Art. 9 I ESMV). A decision on the part of the member state is no longer provided for - in accordance with Art. 8 IV ESMG the parties undertake to comply with all calls for capital, irrevocably, promptly and without restriction.

FiskalV will interfere with the budgetary right of the Bundestag in two respects: on the one hand, the required automatic adjustment mechanism leads to a mechanism beyond free legislative control. On the other hand, the compilation of the budget is made subject to approval by the European Council and Commission, and budgetary authority transferred partly to European institutions. Since Germany substantially exceeds the debt limit of 60% of GDP, and following ratification of FiskalV, the institution of a deficit procedure against the Federal Republic can be expected in 2013, with the corresponding circumscription of budgetary sovereignty.

Through the combination of the ESM and FiskalV, the budgetary authority of the Bundestag will be significantly curtailed and transferred to European institutions.

The decision on expenditure and borrowing - the budgetary sovereignty of parliament - falls within the core area of democratic design (BVerfG of 30.06.2009 -2 BvE 2/08., Rn. 249), which is also protected by Art. 38 I GG. Historically speaking, the budgetary authority of parliaments is the germ cell of the democratic development of the modern era: parliaments were able to obtain decisive influence on the policy of the Royal houses / Executive by the provision or refusal of funds. The circumscription and relativisation of budgetary authority directly attacks the roots of democracy and threatens to destroy them.

Integration steps in the context of supranational organisations or international agreements - such as the ESM and FiskalV under dispute here - must be constitutionally limited by the Transfer Act to be clearly defined and revocable (see BVerfG of 30.06.2009 - 2 BvE 2/08, Rn. 233). In particular, these constitutional boundaries apply to the core area of budget sovereignty. The absolute limit for the transfer of sovereignty is the task of essential structural characteristics of a sovereign state.

It must also be taken into account that the regulations under dispute concern a fundamental restructuring of the Monetary Union with important implications for the German financial Constitution. The meaning content of the regulations under dispute is played down in the relevant legal grounds in terms of democratic policy. Default risks and liabilities to the ESM are not made clear in the budget. The brief reference to the alleged lack of alternatives of the legislation can hardly satisfy the basic law justification requirements in material terms. The breathtaking pace of legislation with unclear scheduling further contributes to the lack of democracy: democracy lives by allowing time for public debate and the consideration of alternatives.

The criteria already developed in the Lisbon jurisdiction for the constitutional drawing of boundaries within the framework of Art. 38 1 GG has already been applied and firmed up by the Federal Constitutional Court in the proceedings 2 BvR 987/10, 2 BvR 1485/10 and 2 BvR 1099/10. As a result, the WFStG and the StabMechG were considered as still constitutional. The ratification acts under review here differ however from the WFStG and StabMechG on essential points:

(1) The WFStG and StabMechG were authorisations strictly limited in terms of time and content. The ESM however constitutes a permanent mechanism with no conclusively defined level of liability.
(2) The WFStG and StabMechG stood “alone”. The ESM is supported by FiskalV. The combination of both sets of regulations (ESM and FiskalV) in total constitute a constitutionally no longer acceptable intervention in Art. 38 1 GG and the democratic principle.

### 3. Violation of constitutional standards by the ESM and FiskalV

The constitutional standards defined under 2. Are violated in several respects by the ESM and FiskalV.

a.

The constitutional requirement of clarity is blatantly not satisfied.

The provisions of FiskalV for an automatic adjustment mechanism therefore (Art. 3 I e FiskalV) remain completely vague. It remains unclear as to what the Federal Republic of Germany should actually commit itself. The parties themselves have recognised that the regulations of Art. 3 I e FiskalV are too vague. They have therefore authorised the Commission to make more detailed regulations (Art. 3 II 2 FiskalV). The Commission is not elected, even indirectly. It is an institution which is not legitimised democratically in any way. The authorisation of the Commission to provide essential regulations of the financial Constitution is simply incompatible with the principle of democracy.

The ESM estimates its capital at € 700 billion. In the ESM however there is a dynamic to increase the capital combined with the possibility of extending the liability level without the increase of the capital by a higher issue value, or in other words by concealed means (see II.2.c above). There is no clear limitation of the liability level. Nor is there any time limitation.

The Federal Constitutional Court indicated in the proceedings 2 BvR 987/10, 2 BvR 1485/10 and 2 BvR 1099/10 that a justifiable limit of the scope of guarantee authorisations could be derived from the principle of democracy (Rn. 131, 135). The Senate assumed for the volume under dispute at that time of around € 170 billion that this could *still* be refinanced by revenue increases, spending cuts and long term government bonds, although possibly at the cost of opportunities for growth and credit rating, with corresponding loss of revenue and risk premiums. The Federal Constitutional Court did not define an absolute limit, although there is much to indicate that it will be in the region of one complete budget (about € 300 billion).

A total view of all contributions to stabilisation by Germany including the participation in IMF loans, the ECB bond purchase and the ESM, produces a highly dubious total of around € 392 billion.

Against this background, the "increase in dynamics" in the ESMV is constitutionally no longer supportable. If the limits of the constitutionally permissible stabilisation volume have not long since been exceeded, they will be overextended in this way "silently and secretly". In this situation, a clear and unambiguous limit would be indicated on the basis of the constitution.

b.

The transfer of sovereign rights must be revocable (see BVerfG of 30.06.2009 - 2 BvE 2/08, Rn. 233). This revocability marks the boundary between a confederation and a state with surrender of national sovereignty. In accordance with these principles, Art. 50 I EUV establishes the right of every member state to withdraw from the European Union. The Federal Constitutional Court emphasises this feature of revocability in the proceedings 2 BvR 987/10, 2 BvR 1485/10 and 2 BvR 1099/10: “No permanent international mechanisms may be established which extend to an assumption of liability for decisions of other countries” (Rn. 128). In Rn. 139 the Federal Constitutional Court stresses that the guarantee authorisation under the StabMechG is limited in time.

The ESM, by contrast, expressly stipulates that revocation is excluded. The ESM is a permanent facility. This means: even if the Federal Republic of Germany were to leave the EU, it would still be bound by the obligation of the ESM to pay in the promised capital on request.

This is incompatible with the nature of the Federal Republic as a sovereign state and exceeds the limits specified under Art. 38 1 GG in conjunction with Art. 79 III GG for the surrender of sovereign rights.

c.

The approval obligation of national budgets in the context of the deficit procedure (Art. 5 FiskalV) is a direct intervention in the budgetary authority of parliament as a core component of democracy. The absolute limit of Art. 79 III GG is thereby exceeded.

A veto right of the Central Government in budget questions has no place in the Federal law of Germany. The Federal Government has no competence to review and to approve the budgets of the states. The European Council and Commission would acquire more powers than envisaged in the federal order of the nation.

## 4. Participation of the Bundestag

In the proceedings 2 BvE 8/11 regarding § 3 StabMechG (verdict of 28.02.2012), the BVerfG laid down the central requirements for the participation of the Bundestag in the context of a supranational or intergovernmental cooperation: The German Bundestag is the direct representative organ of the people (Rn. 101). The German Bundestag basically fulfils its representative function in plenum, i.e. through the participation of all its members (Rn. 102). As regards the determination of the budget, the German Bundestag has a special constitutional position in relation to the other constitutional institutions involved. With its decision on the budget plan, it makes a basic economic decision for central areas of policy-making. The Bundestag decides on revenue and public expenditure with responsibility towards the people. The budgetary right of parliament is one of the foundations of democratic self-determination in a constitutional state (Rn. 105).

The insufficient involvement of the Bundestag curtails the substantive content of the right to vote under Art. 38 I GG.

b.

The draft legislation of the CDU/CSU and FDP and the Federal Government have so far left open as to what extent the Bundestag and if necessary the Bundesrat would participate in the ESM. Regulations for parliamentary participation were only drawn up by the Budget Committee (draft of the ESMFinG, records of the Budget Committee, 17/441U).

The following staged participation is therefore envisaged:

(1) Reservation of approval by the Bundestag in plenum
(2) Reservation of approval by the Budget Committee of the Bundestag
(3) Simple participation of the Budget Committee
(4) Participation by a special committee in cases of special confidentiality

§ 4 provides for a parliamentary reservation in cases where overall budget policy responsibility is concerned (Para. I p. 1). This is “in particular” the case with (Para. I p. 2):

(1) A decision on the basic granting of stability aid (§ 13 II ESMV)
(2) A change in the capital (Art. 1012 ESMV).

§ 5 II contains an enumerative, conclusive list of items which are subject to prior approval (only) by the Budget Committee (and not the entire plenum):

(1) The terms and conditions of financial aid (Art. 13 III 3, IV ESMV)
(2) The provision of additional instruments in the context of agreed financial aid without change of the total volume and without significant changes to the terms
(3) Decisions on the call-off of capital under Art. 9 I ESMV
(4) Adoption and essential amendment of the guidelines

- for the call-off of capital under Art. 9 IV ESMV
- for the implementation modalities of the individual financial aid facilities (Art. 14-18 ESMV)
- for the pricing guidelines to Art. 20 II ESMV

c.

Accordingly, the participation in key decisions is sometimes unclear, sometimes not regulated and sometimes expressly not subject to parliamentary reservation.

It is unclear to what extent the approval of the Bundestag is required for the granting of stability aid. Under § 4 I No. 1 to section 4 I no. 1, the fundamental decision as to whether stability aid is granted (Art. 13 II ESMV) is subject to parliamentary reservation. § 5 II No. 2 however allows for the contradictory conclusion that the Bundestag in plenum decides on the total volume and the essential conditions of the financial aid facility. A parliamentary reservation only on whether a financial aid facility is enough does not satisfy the central position of the Bundestag under budgetary law. A decision on the volume and the essential prerequisites of such a grant must remain subject to the plenary session of the Bundestag. Here, a clear, specific rule would be required to ensure the constitutional position of the Bundestag.

The increase of the issue price under Art. 8 II 2 ESMV, which is a crucial feature for the extension of the level of liability of the ESM, is not specified at all. This lack of regulation in an area so sensitive to the basic and constitutional law is completely unacceptable.

The capital call (Art. 9 I ESMV) is of central importance for the budget. Such a call constitutes the specific payment obligations of the contracting parties and thus a significant burden on the budget. § 5 II No. 3 expressly stipulates that a decision by the Budget Committee is sufficient. This cannot be. The Bundestag must have the opportunity to debate in plenum on significant burdens of the federal budget and to avert them if necessary by a corresponding resolution.

According to § 5 II No. 3 and 4, the decision on the essential guidelines for capital calls (Art. 9 IV ESMV), the performance methods of financial aid facilities and pricing guidelines (Art. 20 II ESMV) are also to be withdrawn from the plenum. This cannot be. The plenum must have the last word on the fundamental structure of the ESM. Major decisions cannot simply be delegated to the Budget Committee.

## IV. Provisional preventive legal protection

The guarantee of effective legal protection here offers preventive legal protection by means of urgent legal proceedings. The implementation of the contested regulations threatens to create facts that can no longer be retrospectively reviewed. Funds called off by the ESM can no longer be recovered, substantial financial burdens, which are not compatible with the basic law, cannot then be revised.

We would also like to state that in the event that the contested ratification nevertheless takes place, the constitutional complaint will be pursued further by means of the main proceedings and the urgent legal protection proceedings.

The constitutional complaint of the complainant is supported by the Alliance for Democracy. The Alliance for Democracy is a loose association of people who are committed to the strengthening of democracy.

**signed Jakob**

Simon G. Jakob
Lawyer