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## **Differentiation of parliamentary powers**

### **The German Constitutional Court and the German Bundestag within the financial crisis**

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# Differentiation of parliamentary powers

## The German Constitutional Court and the German Bundestag within the financial crisis

Oliver Höing

### Abstract<sup>1</sup>

*In combating the financial and debt crisis in Europe a number of measures have been established outside the EU legal framework. This has led to an increased differentiation of parliamentary powers between Eurozone and non-Eurozone countries, but also within the Eurozone itself. Some parliaments must give prior consent to each financial tranche being granted within the EFSF or ESM framework, while in other settings the governments exclusively decide.*

*This paper demonstrates that the strong position of the German Bundestag is also a result of a series of Post-Lisbon judgements of the German Constitutional Court. The judges in Karlsruhe started to enlarge their jurisprudence to intergovernmental treaties. Essentially, the Court regards the Bundestag as the only fully democratic representative institution of the German people in the EU system. Consequently, the democratic legitimacy of decisions taken within the current crisis management must be derived from the German parliament. However, the strengthening of the Bundestag's powers leads to further differentiation of parliamentary powers in the EU. This has far-reaching consequences for the democratic legitimacy of policy-making processes in the Economic and Monetary Union.*

**Key Words:** Differentiation of Parliamentary Powers, Economic and Monetary Union, European Financial Stability Facility, Financial and Debt Crisis, German Constitutional Court, National Parliaments.

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# Differentiation of parliamentary powers

## The German Constitutional Court and the German Bundestag within the financial crisis

Oliver Höing

### I. Introduction

The German Constitutional Court (*Bundesverfassungsgericht*, BVerfG) has become a central player in the European integration process. In a series of judgements related to the financial and debt crisis, the BVerfG strengthened the powers of the German Bundestag which it regards as the only fully democratic representative institution of the German people in the EU political system. Since the BVerfG, however, necessarily takes decisions for the German Bundestag only, its judgments have led to an increased differentiation of parliamentary powers in Europe. These powers are affected by the current crisis for two major reasons:

First, there is a clearly identifiable trend towards a “summitting” (Schulz, 2012) of the current crisis management resulting in the fostering of executive dominance by “bypassing [...] democratic institutions at both the Union and the Member State level” (Eriksen, Fossum, 2011, p. 158). An increase of the Union’s room for manoeuvring in financial and economic policy whilst simultaneously strengthening the democratic legitimacy of its decisions (Pernice, 2012: p. 98) seems impossible to be implemented simultaneously. Most of the time, national parliaments (NPs) only provide for an ex-post legitimation of decisions taken by their executives. Consequently, the recent judgments by the BVerfG can be interpreted as an attempt to “decelerate the decision-making speed” (Münkler, 2012: p. 101) at the European level by allowing the German Bundestag to deliberate more copiously on proposed measures.

Secondly, the financial and debt crisis also revealed that the current crisis management hits Euro Member States asymmetrically - depending upon who provides and who receives financial assistance from the diverse rescue mechanisms. As Fox pointed out, a democratic challenge for so-called programme countries<sup>i</sup> arises from the fact that their governments seem to be more “responsive to the demands of unelected institutions and the financial markets than to those of their public” (Fox, 2012: p. 464). Donor countries, on the other side, are concerned whether financial guarantees can be issued without the explicit approval of their parliaments.

Starting with the Lisbon judgement and contrary to a perceived trend of de-parliamentarization (see for instance Kirchhof, 2004) the Bundestag and the Bundesrat have been strengthened in EU

affairs in recent years (see for instance Kiiver, 2010, p. 580). With the outbreak of the financial and debt crisis, the Court even enhanced its jurisprudence to the intergovernmental area in which a number of instruments were established that potentially pose a challenge to Germany's sovereignty: not only the transfer of competences to supranational institutions, but also the extent of financial liabilities can violate democratic principles (and undermine article 38 of the German Basic Law). In a series of post-Lisbon judgments, the Court therefore tried to define conditions under which financial guarantees may be granted.

This paper focuses the strengthening of the German Bundestag's co-decision powers by the German Constitutional Court. Recent judgments reveal that national provisions to implement the ESM and the EFSF differ significantly across countries of the Eurozone: in some Member States the consent of parliamentary bodies has to be obtained before decisions on financial guarantees are taken while in others the ministers of finance exclusively decide. This reveals a strong differentiation of *parliamentary powers related to budgetary authority* - arguably the key prerogative of parliaments - that has not been sufficiently addressed in academia.

One could argue that powers related to budgetary authority do not constitute an own category but merely a sub-category of NPs' powers within their domestic setting. However, budgetary authority constitutes the most fundamental evidence for parliamentary powers drifting apart *between* Eurozone and non-Eurozone countries and *within* the Eurozone itself. The point of this paper is to present first evidence that this increased differentiation of parliamentary powers has fundamental implications for the democratic legitimacy of EU and EMU policy-making. While some parliaments find themselves as mere bystanders, others can actively influence executive policy-making.

Therefore, recent judgements pose a couple of general questions: which role does the German Constitutional Court attribute to the Bundestag, and why? And how does this impact on the already asymmetric dispersion of parliamentary powers across Europe?

The paper starts with theoretical considerations on the asymmetrical shock that the financial and debt crisis pose to national parliaments. The paper briefly outlines the legal basis of the crisis management before it elaborates on the term "differentiation" and accentuates the role constitutional courts play therein. Three different categories of parliamentary powers are distinguished to better grasp this development. The next part deals with the three latest judgements of the BVerfG which exemplify that powers related to budgetary authority now constitute an own category. Based on these findings, the paper develops a classification of parliamentary powers related to the budgetary authority and presents first empirical evidence for these considerations. The final part draws conclusions on the impact of the democratic legitimacy in the decision-making processes of EU and EMU politics.

## 2. Outside the EU legal framework – classifying parliamentary powers

### 2.1 The legal basis of EU crisis management since 2009

Following the literature, the current crisis management will be categorised into two groups: (i) measures implemented within the EU legal framework and addressing all NPs in the EU (although with partly stronger rules for Eurozone countries) and (ii) measures outside the treaty framework aiming at a subset of Member States that are ratified and implemented at the national level (Kunstein and Wessels, 2012). Within the EU legal framework, the Stability and Growth Pact (StGP) was sharpened and a package of one directive and five regulations (so-called “Six Pack”) implemented to avoid future crises. The newly labelled European Semester allows the Commission to make country-specific recommendations requesting Member States to initiate measures reducing economic imbalances (Delors et al., 2011; Hallerberg et al., 2012). The EU2020 strategy<sup>ii</sup> defines a number of policy goals that Member States are committed to fulfil. Also, the European Financial Stability Mechanism (EFSM) was launched by the Commission covering some of the first payments to financially stricken Member States. Currently a Single Supervisory Mechanism (SSM), a so-called Banking Union, is in the making that was initiated during several European Council meetings in 2012. Its operational implementation shall take place in 2013 (European Council, 2012).

Beyond this still incomplete list of measures<sup>iii</sup> within the EU legal framework, responses to the crisis were very much characterized by an *intergovernmental* approach: The Euro-Plus-Pact<sup>iv</sup> is arguably the least binding of these reforms. Based on European Council conclusions, it was created in March 2011 and adopted by 23 Member States (including all Eurozone countries). It is built on voluntary adherence to its rules; no plans exist to incorporate it into the EU legal framework.

More decisive steps have been taken with the creation of the “European Financial Stability Facility” (EFSF), the “Economic Adjustment Programme for Greece” (entered into force both in June 2010) and the “European Stability Mechanism” (ESM; entered into force in October 2012). These measures had to be implemented and approved by the national parliaments of the Eurozone only.<sup>v</sup> Both of these special purpose mechanisms are located in Luxembourg. Funding from the EFSF and ESM is subject to strict conditionality and is politically bound to the ratification of the “Treaty on Stability, Coordination and Governance in the Economic and Monetary Union” (TSCG).

This treaty encompasses all EU Member States except the Czech Republic and the United Kingdom. Participating countries are required to implement (preferably) constitutional or

statutory mechanisms in order to limit public borrowing (Art. 3 (2) TSCG). The Member States commit themselves to budgets that are, as a rule, in surplus. It foresees economic sanctions to be imposed by the European Court of Justice (CJEU) and therefore constitutes a significant constraint of national sovereignty (Art. 8 (1) TSCG). Each participating parliament had to ratify and implement the TSCG; the overall mechanism is binding under international law and shall be incorporated into the EU legal framework at a later point in time.

**Table I** Economic governance reforms since the beginning of the financial turmoil and sovereign debt crisis

Project	Legal framework and participants
1) EU/ within EU legal framework	
European Financial Supervision: European Systemic Risk Board (ESRB) and European System of Financial Supervisors (ESFS)	Based on EU secondary legislation. Participants: EU Member States
European Financial Stabilisation Mechanism (EFSM)	Based on EU secondary legislation. Participants: EU Member States
European Economic Policy Coordination: European semester; Six-Pack	Based on EU secondary legislation. Participants: EU Member States
Institutional Governance Architecture	Institutional reforms based on Euro Summit and European Council conclusions. A number of institutions only, but only including the Eurozone members
2) Subsets of Member States/outside EU legislative framework	
European Financial Stability Facility (EFSF)	Private company owned by the Eurozone members. European Commission involved in implementation (conditionality)
European Stability Mechanism (ESM)	Intergovernmental organisation based on European Council decision for a limited change of the EU treaties. (Revised) ESM Treaty signed by the Eurozone members. European Commission involved in implementation (conditionality)
Euro-plus Pact	Intergovernmental agreement based on European Council conclusions. Adopted by the Eurozone members as well as Bulgaria, Denmark, Latvia, Lithuania, Poland and Romania. European Commission involved in monitoring
Treaty on Stability, Coordination and Governance (TSCG)	Intergovernmental treaty signed by all EU Member States except the Czech Republic and the United Kingdom. European Commission involved in monitoring. Obligation to introduce national debt brake subject to jurisdiction of Court of Justice of the European Union

**Source I:** Kunstein and Wessels, 2012, 7.

Why is it important to distinguish between measures outside and inside the EU legal framework? First, measures outside the EU legal framework are often treated as foreign policy by the respective national governments. National parliaments do not have a strong say in this policy area – except that they must eventually ratify international treaties. Provisions in the German case exemplify this:

The German Bundestag passed so-called accompanying laws to the Lisbon Treaty regulating the parliaments' participation and information rights in EU affairs. The government assumed that these parliamentary rights literally apply to "EU" affairs only (covering policy proposals initiated *within* the EU legal framework) and not to intergovernmental treaties (see more below). Therefore, the drafting and initiation of measures outside the EU legal framework is likely to be dominated by executive representatives since national parliaments can easily be put aside.

Second, measures outside the EU legal framework had hitherto a much stronger impact on the financial markets than measures inside the framework. The supply of financial guarantees can only be provided for at the national level since the EU lacks the financial and constitutional resources to do so<sup>vi</sup>. That is one of the reasons why the crisis response was and still is very much characterized by an intergovernmental approach. And third, measures outside the EU legal framework exemplify that EU Member States are hit asymmetrically by the recent crisis. The EFSF and the ESM affect Eurozone countries either by the strict conditionality that must be complied with in order to receive financial assistance, or because the financial guarantees provided limit the political manoeuvring of future elected chambers. The differentiation of parliamentary powers in this area is therefore not only significant because different subsets of Member States are affected, but also because the Member States within the Euro Area are affected differently.

All these measures had, furthermore, different impacts on participating countries: countries, such as Poland or Germany, had already incorporated debt brake rules in their constitutions before the TSCG came into force. And while countries such as Slovakia, Malta or Italy have incorporated constitutional mechanisms to limit future public borrowing, countries such as France or the Netherlands have explicitly opted for statutory provisions to do so. Additionally, the debt level of the participating countries varies considerably. While some countries expect a significant impact of the fiscal compact on their annual budgets, others see them largely unaffected. That is one reason why this paper will not deal in detail with the TSCG but concentrates on the differentiation of parliamentary powers within the EFSF and ESM frameworks. These rescue mechanisms impair upon a principal right of parliaments: the budgetary authority. However, before elaborating on this point, the term "differentiation" and the role of constitutional courts in this process will be addressed.



## 2.2 Differentiated Integration and the Role of Constitutional Courts

The term “differentiated or flexible integration” does not constitute a prominent approach to European integration (Tekin, 2012, p. 20), but constitutes a part of the integration reality (see for instance Schimmelfennig et al., 2011). A number of terms have emerged<sup>vii</sup> that try to explain the phenomena in which “one group of EU Member States is not subject to the same Union rules as others” (Tekin and Wessels, 2008, p. 25). What most of these approaches have in common is that they refer to differences with regard to a *Union set of rules* (opposed to diverging national implementation laws). Countries opt-out from certain provisions in EU primary law (Denmark or the UK in case of the Euro) or they don’t participate in new intergovernmental treaties (the non-Euro countries in case of the ESM and EFSF, or the UK and the Czech Republic in case of the TSCG). This differentiation addresses the macro-level. The dividing line is a *Union set of rules* inside or outside the EU primary law. This paper extends this concept of differentiation by looking at domestic differences, specifically how EFSF/ESM provisions have been implemented into national law. For instance, article four of the ESM Treaty regulates that the Board of Governors and the Board of Directors take decisions.<sup>viii</sup> While these provisions apply to all participating countries, the implementation laws to the ESM treaty differ in how far they require a prior approval of a parliamentary body allowing the national representative in the Board of Governors or Directors to take a decision. Constitutional courts, and in particular the German BVerfG played a crucial role in formulating these provisions.

A number of theoretical approaches also deal with the role of courts in the integration process (although mostly with the European Court of Justice). “Integration Through Law” (ITL), for instance, is not a classical theory of European integration but often treated *as if it were* a theory in order to explain the political developments in Europe over the last decades. ITL emphasizes the importance of the “supremacy of EU law” for the integration process (Halter, 2006, p. 399) as well as the powerful position of the European Court of Justice (see for instance Cappelletti et al., 1986; Weiler, 1991). Interestingly, the “supremacy of EU law” was developed in a period in which the integration process seemed to have slowed down. Between the 1960s and 1980s, Member States still possessed veto powers in almost all policy areas. As Haltern argues, this facilitated the recognition of the supremacy of EU law *because* Member States were still able to politically block decisions in the institutions of the European Community (Halter, 2006, p. 406). This pattern changed with the intensification of the integration process from the mid-1980s onward. When it became clear that Member States had irrevocably transferred competences to the European level, national constitutional courts – and in particular the German Bundesverfassungsgericht – tried to counterbalance this development that they feared could bypass democratically elected institutions in the decision-making processes. The famous Maastricht judgment of the BVerfG from 1993, but also judgements such as the Solange I and II decisions (Halter, 2007, pp. 471) underlined that the Member States must remain the “masters of the treaty”. And within the

Member States, it were the national parliaments - as the only democratically elected institutions - that were attributed with this task.<sup>ix</sup>

By safeguarding the constitutionality of European treaties with the democratic principles of the German Basic Law, the BVerfG has recently extended its scope of jurisdiction from the scrutiny of EU primary law to intergovernmental agreements. This development has far-reaching implications for the functioning of the current crisis-management. The BVerfG can only address the participation rights of the German parliament while the powers of other parliaments are not affected. The result is an unprecedented differentiation of parliamentary powers, specifically powers related to the budgetary authority of parliaments.

### **2.3 Three categories of parliamentary powers in the European Union**

This paper proposes distinguishing parliamentary powers into three categories. First, powers regulated in EU primary law applying to all 40 chambers. Second, powers defined in national settings varying among the Member States. And third, powers specifically related to the budgetary authority of parliaments within the EFSF and ESM framework and consequently only applying for parliaments of the Eurozone.

Within the first category, NPs are granted *equal* competences under EU primary law.<sup>x</sup> They are involved in the implementation of European directives into domestic law (Art. 288 TFEU)<sup>xi</sup> - although the degree of NPs' involvement in the transposition of these directives can slightly vary. This is also true for the adaption of new treaties and amendments to EU primary law which parliaments have to ratify (Art. 48 TEU).<sup>xii</sup> Here, domestic provisions on parliamentary involvement can slightly differ: in Ireland, for example, every amendment of the constitution requires a public referendum (with similar provisions in Denmark).

Under the newly introduced Early Warning System (EWS), all national parliaments can claim breaches of the subsidiarity principle of draft legislative proposals in a fixed time period (Protocol 2, Art. 6, Lisbon Treaties). Each parliamentary chamber has at least one vote.<sup>xiii</sup> Additionally, NPs have the possibility to engage in interparliamentary cooperation (IPC). The Lisbon Treaty enhances the role of the Conference of Parliamentary Committees for Union Affairs (COSAC) that shall help to “promote the exchange of information and best practices between National Parliaments and the European Parliament” (Protocol No. 1, Art. 10 Lisbon Treaties).<sup>xiv</sup> With these innovations some scholars expected NPs to form a kind of third or “virtual” chamber (Cooper, 2011) to alleviate the democratic deficit (Follesdal and Hix, 2005; Majone, 1998) of the EU political system.

The second category encompasses parliamentary powers granted to NPs within the domestic settings of their Member States. Classical studies on parliaments' powers emphasize the role NPs play in controlling and scrutinizing their governments (King, 1976; Norton, 1993). This function varies significantly among the Member States (see for instance Maurer and Wessels, 2001). Some parliaments, for instance the Austrian one, can give strong binding mandates to their ministers in Council negotiations (Pollak and Slominski, 2003) while other parliaments have little formal tools to influence executive policy-making. This fact became more relevant since the number of cases in which qualified majority voting applies was significantly increased over the years (O'Brennan & Raunio, 2007; Piriš, 2010, p. 209).

However, not all parliaments make extensive use of the formal powers granted to them in their national settings (Auel, 2007; Pollak and Slominski, 2003). This is also true for instruments such as so-called scrutiny reserves or provisions to control European Council meetings (and the newly emerged Eurozone summits). Some parliaments have incorporated provisions to control and scrutinize the meetings of the Heads of States or Governments into their accompanying laws or rules of procedures, while other parliaments have not. This exemplifies that the search for the *one* role of national parliaments in the EU system can hardly provide for a complete picture since the real impact of NPs depends largely on national provisions that vary from country to country (on the future research agenda for national parliaments see Raunio, 2009).

This picture becomes even more blurred with the outbreak of the financial and debt crisis. NPs within the Eurozone are affected differently than parliaments outside the Eurozone. Only Eurozone parliaments implemented instruments requiring financial commitments. Therefore, the third category of parliamentary powers specifically encompasses powers related to the budgetary authority of parliaments. The provisions regulating the involvement of NPs in the granting of financial guarantees are laid down in the national implementation laws of the ESM and the EFSF. They vary significantly among the members of the Eurozone. While in some parliamentary settings each tranche of financial assistance must be agreed upon by a parliamentary body in advance, the same decisions are exclusively taken by the minister of finance in others (see Figure 1, further below). And beyond that, while some parliaments can tie the hands of national executives in EU negotiations if their budget is affected, other parliaments have no say in this process. The next table summarizes the various forms of influence of national parliaments in the EU political system.

**Table 2:** Various forms of power of national parliaments in the EU political system

Powers attributed in EU primary law	Powers within the domestic setting	Powers related to budgetary authority (EFSF, ESM)
<ul style="list-style-type: none"> <li>• Implementation of EU directives (Art. 288 TFEU)</li> <li>• Ratification of treaty changes (Art. 48 TEU)</li> <li>• EWM (Protocol I and 2)</li> <li>• Interparliamentary Cooperation (Protocol I and 2)</li> <li>• References in EU primary law<sup>xv</sup></li> </ul>	<ul style="list-style-type: none"> <li>• The right to give binding mandates to the minister</li> <li>• The possibility of scrutiny reserves</li> <li>• The control of European Council meetings</li> </ul>	<ul style="list-style-type: none"> <li>• The right to decide on each tranche of financial assistance of a sovereign aid package under the EFSF or ESM</li> <li>• Information rights under the EFSF and ESM</li> <li>• Delegation of competences within the parliament under the EFSF and ESM mechanisms</li> </ul>
All parliaments are principally affected to the same degree; regulated in primary law.	Varying degrees of influence among the 27 Member States; regulated in constitutional and statutory provisions.	Varying degree of influence among the 17 Euro Member States; regulated in the implementation laws of the respective treaties.

**Source 2:** Own presentation.

As outlined above, one may criticize that powers related to budgetary authority do not constitute its own category. They could also be treated as a sub-group of parliamentary powers within the domestic setting. However, since budgetary authority has always been *the* key prerogative of national parliaments these powers deserve to be treated separately. They also illustrate the latest step in a process of differentiation of parliamentary powers in the EU and especially *within* the Eurozone itself. The BVerfG specifically tried to strengthen the German Bundestag in this field in its latest judgements.

### 3. BVerfG Judgements related to the financial and debt crisis

In their Lisbon Judgment the judges in Karlsruhe underlined once again that legitimacy and political sovereignty are still primarily rooted in the nation state (Beck, 2011, p. 475). As outlined above, the price policy-makers pay for this reasoning is that certain competences may not be transferred to the European level at all. In this respect, the Lisbon Judgment had a much stronger impact on the future integration process than the actual revision of the federal accompanying laws (see for instance Höpner et al. 2010, p. 326; Thym, 2009).

The Maastricht and Lisbon judgements asked whether a transfer of competences into a *supranational* setting was violating democratic principles. In its latest judgments, the Court assessed the constitutionality of *intergovernmental* agreements. Its rulings cover the general constitutionality of the EFSF/ESM and Fiscal Compact, but also the information rights of the

German Bundestag and the delegation of competences within the parliament. Both opposition parties as well as members of the government coalition filed actions against some of these instruments. The next table presents the latest judgements of the BVerfG, from which the first three are dealt with in the next subsections.

**Table 3:** Three latest judgments of the BVerfG related to the financial and debt crisis

Date	Subject Matter	Judgement
09/07/2011	EFSF, Economic Adjustment Programme for Greece	Financial liabilities can potentially constrain the sovereignty of the German Bundestag, but the legislator has latitude of assessment.
02/28/2012	EFSF. Division of competences within the Bundestag	If competences are delegated to a special committee, the conditions have to be explicitly defined. An internal delegation of competences may not be the general rule.
06/30/2012	ESM, Euro-Plus-Pact. Information rights of the Bundestag	The government is obliged to inform the German Bundestag comprehensively and at the earliest possible time. This also applies for intergovernmental treaties.
09/12/2012	ESM, Treaty on Stability, Coordination and Governance (TSCG)	Preliminary ruling: the ESM and the TSCG are constitutional. It is confirmed that the legislator has a latitude of assessment to decide how many financial guarantees may be before the sovereignty of the Bundestag is affected.

**Source 3:** Own presentation.

### 3.1 EFSF and first bailout for Greece

In its judgment from September 7<sup>th</sup> 2011 the BVerfG had to assess whether the “Act Concerning the Giving of Guarantees in the Framework of a European Stabilisation Mechanism” (EFSF) and the “Monetary Union Financial Stabilisation Act” (first bailout for Greece) were compatible with the German Constitution. The BVerfG ruled that both international treaties are constitutional since the legislature has latitude of assessment on the probability of having to pay out financial guarantees. However, the BVerfG accepted this claim on the ground of a possible infringement of Article 38 (1) of the German Basic Law, e.g. that democratic principles are violated. The admission of the claim on these grounds is noticeable since both the EFSF and the first bailout package for Greece are limited in time and scope. The protection of the ‘right to vote’ was for the first time expanded to an intergovernmental setting despite the fact that an overwhelming majority in the German Bundestag voted in favour of the two treaties.

The BVerfG underlined that “the decision on public revenue and public expenditure is a fundamental part of the ability of a constitutional state to democratically shape itself” (German Constitutional Court, 2011, par. 122). Only when the Bundestag can freely decide on its revenues

and expenditures, citizens do have sufficient means to take part in the political will formation: budgetary authority has to remain with the German Bundestag, and the Bundestag may not transfer its budgetary responsibility to other actors by means of “imprecise budgetary authorisations” (ibidem).<sup>xvi</sup> The Court therefore underlined that these provisions were to be interpreted to the effect that the Federal Government is obliged to obtain *prior approval* of the Budget Committee before financial guarantees are given. The Bundestag can therefore remain the ‘master of the procedure’; it remains a central player *within* the treaty framework.

The Court declared the two Acts constitutional although it principally acknowledges that there is a threat to the act of voting in the sense of article 38 (1) of the German Basic Law. The reason why it eventually dismissed the claims was that the plaintiffs did not present “a concrete context which indicates a supplementation of primary Union law by measures outside the Treaty structure that is due to the impugned measures” (German Constitutional Court, 2011b). One further reason for the dismissal of the claim was that both treaties are limited in time and scope. The BVerfG clearly permits a system “where only the conduct of other states decide[s] when the guarantees [are] called upon” (ibidem, par. 105). With the obligation to obtain the prior consent of the Budget Committee for each single tranche within the treaties’ frameworks, the Bundestag’s powers related to budgetary authority have been significantly strengthened and outreach the powers of most other Eurozone parliaments.

### **3.2 Delegation of competences within the EFSF framework**

When the extension of the EFSF credit facilities was decided upon in September 2011, the German government envisaged the establishment of a special committee that was supposed to take decision on behalf of the Budget Committee in cases of “urgency” and “confidentiality”. This special committee should consist of nine members from among the Budget Committee reflecting the majorities in the Bundestag’s plenary and granting each party at least one representative. The approval of the complete Budget Committee was seen to potentially hamper efficient decision-making, especially in light of the fast pace with which financial markets operate (German Constitutional Court, 2012a, par. 88).

Two members of the oppositional Social Democrats filed an action against the delegation of competences within the Bundestag (§3 par. 3 and § 5 par. 7, EFSF treaty). According to the plaintiffs, their parliamentary rights were severely constrained by the delegation of competences to a special committee.<sup>xvii</sup> A committee consisting of only nine representatives could not sufficiently comply with the principle of proportionality that must inform the composition of the German Bundestag.

The government side argued that the establishment of the special committee was built as an exceptional case only. It foresaw graduated participation rights for the German Bundestag: the overall budgetary responsibility would still remain with the Bundestag in its entirety while decisions requiring strict confidentiality and urgency - for instance on purchases on the primary or secondary markets - could be taken by the newly created committee. Potential reactions of the financial markets would not allow the involvement of the entire Budget Committee or plenary.

The BVerfG mainly followed the arguments of the plaintiffs. The Court declared the so-called “Sondergremium” partly unconstitutional. In line with previous judgements it underlined that the “German Bundestag complies with its function as a body of representation in *its entirety* and through the participation of *all*<sup>xviii</sup> its Members [...]” (German Constitutional Court, 2012a: par. 102). Article 38 (1) of the German Basic Law does not provide for a differentiation of powers of members of the German Bundestag. All elected representatives have equal rights and may not be excluded from decision-making in specific areas.<sup>xix</sup> The democratic legitimacy of decisions taken within the EFSF framework therefore has to be derived from the German Bundestag in its entirety.

### **3.3 Information Rights of the German Bundestag in EMU policy-making**

Also the information rights of the German Bundestag within the crisis management have been subjected to the BVerfG. In order to ensure the competitiveness of the Euro area as well as its long-term stability, the Heads of States or Government agreed on decisive steps to implement the so-called Euro-Plus-Pact and the European Stability Mechanism in several meetings in the first quarter of 2011. The opposition Alliance 90/ The Greens filed an action against the government arguing that it did not inform the parliament comprehensively and at the earliest possible time on these measures (German Constitutional Court, 2012b). The information rights of the German Bundestag are clearly defined in the German Constitution (Art. 23 GG) and in the “Act on Cooperation between the Federal Government and the German Bundestag in Matters concerning the European Union” (EUZBBG<sup>xx</sup>). However, some provisions were interpreted differently by the government and the opposition.

In its judgement on June 19<sup>th</sup> 2012 the judges underlined the meaning of article 23 (2) of the German Basic Law stipulating that the Bundestag shall ‘participate in matters concerning the European Union’. The government had argued that the ESM and the Euro-Plus-Pact were no ‘European matters’ as in the sense of the constitution and would therefore not fall under the EUZBBG. The BVerfG rejected this reasoning since both treaties make extensive use of EU institutions and show sufficient proximity to EU law: “European matters” does not only refer to EU legislative proposals but can also apply to treaties under international law (German



Constitutional Court, 2012c, par. 100). Similar to the judgement from September 2011, the Court extended constitutional and statutory provisions to an intergovernmental area. This helped clarifying a grey area in the German accompanying laws. The government wanted to argue that decision taken by the still informal Eurozone summit (in which only the Heads of States or Governments of the Eurozone gather together) can be treated differently from decisions taken within the EU legal framework. This argument was rejected.

The BVerfG specified the government's obligation to inform 'comprehensively' and 'at the earliest possible time': 'Comprehensive information' must enable the Bundestag to exercise its participation rights: the more complex an activity and the more the government impairs on the legislative functions of the parliament, the more the parliament must be informed. 'At the earliest possible time' means that the Bundestag is able to formulate an opinion<sup>xxi</sup> before the government publicly issues a position or agrees to a legislative act at the European level.

In sum, the judgement extended the information rights of the German Bundestag to an intergovernmental area. The information rights of the German Bundestag now clearly surpass the powers of most other Eurozone parliaments although problems remain (Kindler and Sarrazin, 2012, p. 218). Nonetheless, a strong differentiation of parliamentary powers can also be observed here.<sup>xxii</sup>


#### **4. Classifying budgetary powers – first empirical evidence**

The latest judgements of the BVerfG have strengthened the budgetary powers of the German Bundestag on three dimensions. First, each tranche of financial assistance has to be agreed upon by the Budget Committee in advance. Second, as a general rule, budgetary authority has to be exercised by the parliament in its entirety. And third, the Bundestag also has to be informed comprehensively and at the earliest possible time about measures outside the EU legal framework.

These provisions guarantee that the Bundestag does not only remain the "master of the treaty", but also the "master of the procedure". Based on these findings, the next table classifies the participation rights of parliaments within the EFSF and ESM treaty frameworks.



**Table 4:** Classifying parliamentary powers related to budgetary authority

Participation rights	Granting of financial assistance		Information rights outside the legal EU framework
		Delegation of competences within the parliament	
Strong  Weak	Prior approval of the plenary	No delegation of competences possible	Obligation to inform the parliament comprehensively and at the earliest possible time
	Prior approval of a committee		
	No approval of parliamentary body, but timely information to the parliament	Delegation of competences possible in strictly defined cases	
	No approval of parliamentary body, but regular reports to the parliament	Delegation to a special committee in all cases as the general rule. Special committee takes decision instead of other parliamentary bodies	
	No approval of parliamentary body, no obligation to inform the parliament		
No information duties			

**Source 4:** Own presentation.

The granting of financial assistance within the EFSF or ESM can theoretically range from a prior approval of the plenary (strong participation rights) to an exclusively executive act in which only the government takes decisions (weak participation rights). In such a case, the government does not even have to inform the parliament. A further distinction between the approval of sovereign aid packages and the additional approval of every financial tranche within a sovereign aid package has to be drawn. This dimension addresses the question whether a parliament has a say in the day-to-day working of the two rescue mechanisms.

The delegation of competences within the parliament encompasses two fundamental questions. First, is it at all possible to delegate competences to special committees within the parliament at all? And second, does this apply to all decisions taken within the EFSF or ESM framework, or only in strictly defined cases? Such a classification allows differentiating in more detail between the diverging participation rights.

And lastly, since most measures to combat the financial and debt crisis were taken outside the EU legal framework they are often treated as “foreign policy” with fewer participation rights for parliaments. Consequently, the question is whether parliaments have the right to be comprehensively informed about these measures or not.

A comparison of budgetary powers within the Eurozone so far widely lacks comprehensive data. A recent study by the Deutsche Bank on the EFSF in 2011, however, provides first insights on where

national parliaments have a say in EMU policy-making. The figure below confirms that powers related to budgetary authority vary considerably and distinguishes three categories of parliaments' influence. In two countries (Spain and Cyprus) there is no participation of parliaments with regard to decisions on sovereign aid packages. The competences lie exclusively with the ministers of finance. In seven other settings, the government has an obligation to report to the parliament. In Ireland, a semi-annual report has to be sent to the lower house on all EFSF activities. In Luxembourg, the Budget Committee must be notified immediately in cases of new aid packages. However, in these nine member states no provision exists that grants the parliaments voting rights on further aid packages.

**Figure 1: EFSF: Where do national parliaments have a say in EMU?**

Country	Sovereign aid packages: Who decides?	Tranches: Who decides?
<b>Category 1: No participation of parliament</b>		
Cyprus	Finance minister. Possible expansion of parliamentary powers by the beginning of November.	
Spain	Minister for Economy and Finance	
<b>Category 2: Government obligation to report to parliament</b>		
Austria	Finance minister in agreement with the Chancellor. The Main Committee must be provided with quarterly reports containing information on all EFSF activities.	
Belgium	Minister for Economy and Finance.	
France	Minister for Economy and Finance. 1) General obligation to provide information on budget-relevant decisions. 2) Semi-annual report on all EFSF activities to the finance committee of both chambers.	
Ireland*	Finance minister. Semi-annual report on all EFSF activities to the lower house.	
Luxembourg	Finance minister. The budget committee must be notified immediately only in the case of new aid packages.	
Netherlands	Finance ministers. Obligation to provide information on all EFSF activities.	
Slovakia	Finance minister. Parliament is informed.	
<b>Category 3: Voting on aid packages</b>		
Estonia	Absolute majority vote in parliament.	Government; consultation with EAC.
Finland	Absolute majority vote in parliament.	Government. The Grand Committee is to be informed
Germany	Simple majority vote in parliament (Bundestag).* **	Finance minister in agreement with budget committee.
Greece*	Simple majority vote in parliament.	Finance minister.
Italy	Government by decree. But has to be ratified by both chambers within 60 days.	Finance minister. Parliament is informed of decisions within 15 days.
Malta	Government. However, the justice minister must decide on a case-by-case basis whether parliamentary approval is required.	Finance minister.
Portugal*	Simple majority vote in parliament on budget-relevant decisions.	Finance minister.
Slovenia	Simple majority vote in parliament.	Government. Committee on EU affairs and Finance committee must be provided with a quarterly report on all EFSF activities.

**Source 5:** Own presentation, based on Deutsche Bank Research<sup>xxiii</sup>.

\* Country is recipient of an aid package and is a stepping-out guarantor, so there is no vote in parliament.

\*\* Special provisions apply on the ratification of measures to prevent contagion risks (e.g. secondary market intervention).

In the remaining eight countries, the involvement of parliaments on the decisions of aid packages varies. As outlined above, Germany is the only case in which the prior approval of the Budget Committee has to be obtained for each financial tranche within a sovereign aid package. In Estonia, the government is obliged to inform the EAC in advance, while in Finland the Grand Committee has to be informed. In Slovenia, the EAC and the Finance Committee must be provided with a quarterly report.

This exemplifies that the influence of NPs within the EFSF framework differs significantly. Parliamentary powers related to the budgetary authority are far from being unified within the Eurozone. Therefore, budgetary authority does not only constitute a differentiation of parliamentary powers between Eurozone and non-Eurozone countries, but also within the Eurozone itself.

## 5. Conclusion

The latest judgments of the BVerfG have significantly expanded the parliamentary powers of the German Bundestag. The Bundestag possesses powers related to its budgetary authority that surpass the powers of most other national parliaments in the Eurozone. However, this should not obscure the fact that the Bundestag will de facto be constrained in its sovereignty should financial guarantees ever become due. The BVerfG therefore tried to create boundaries by accepting that the extent of financial guarantees can in essence pose a threat to democratic principles. However, it left significant latitude for such an assessment to the legislator. The boundaries are therefore not as clear cut as some might have wished for. One of the challenges is that the Court tries to derive the legitimacy for political decisions from the nation state. In the Lisbon and Maastricht judgements this was a reasonable undertaking since the Court decided on the transfer of competences to a supranational setting. However, in the case of the Economic and Monetary Union the distinction between national and European competences becomes increasingly blurred. The Court already accepted the initial creation of a Monetary Union in its 1993 judgement. The jurisdiction to assess the constitutionality of actions within the EMU, however, does not exceed the German state territory. Repercussions of economic turmoil do not stop at national borders. Following its own reasoning, the BVerfG has no choice than to strengthen the parliamentary powers of the German Bundestag which it regards as the only fully democratic representation of the German people.

This promotes, however, a further differentiation of parliamentary powers in Europe. The asymmetric shock caused by the financial and debt crisis has not only affected Eurozone and non-Eurozone parliaments differently; it also created greater imbalances within the Eurozone itself. And this trend will continue for the time being: while some countries might try to circumvent the influence of their parliaments in order to guarantee an effective crisis-management, the Bundestag is likely to be strengthened by future decisions of the BVerfG.

The gap of parliamentary powers is therefore likely to widen in the future. To grasp this development, it is necessary to treat the budgetary authority of parliaments as a distinct category of parliamentary powers.

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## Endnotes

<sup>i</sup> Programme countries are countries that receive financial assistance from either the European Financial Stability Facility or the European Stability Mechanism.

<sup>ii</sup> The EU2020 strategy was strictly speaking not an immediate response to the financial and debt crisis, but defines long-term policy goals of the European Union. It can be described as soft law.

<sup>iii</sup> Due to limited space, this paper cannot cover in detail recent measures to create a banking Union in the EU, the market operations of the European Central Bank (ECB) as well as a number of small-scale measures that have been initiated to tackle the financial and debt crisis.

<sup>iv</sup> The Euro-Plus-Pact was agreed upon by 23 Member States except the Czech Republic, Hungary, Sweden and the United Kingdom.

<sup>v</sup> Slovakia did not participate in the “Economic Adjustment Programme for Greece”, but implemented the EFSF and the ESM later on.

<sup>vi</sup> The European Central Bank is an exception but will not be addressed in this paper.

<sup>vii</sup> Some authors came up with figurative terms such as “European Onion” (De Neve, 2007) or “flying geese” (Wallace & Wallace, 1995). Alexander Stubb has written a seminal article in which he defines the following concepts: *core Europe*, *multi-speed Europe*, *l’Europe à la carte* and *variable geometries* (Stubb, 1996).

<sup>viii</sup> Although Article 4 also states that “a quorum of 2/3 of the members with voting rights representing at least 2/3 of the voting rights must be present”.

<sup>ix</sup> We have seen a number of other national constitutional courts scrutinizing EU treaties in recent years, for instance the Czech Constitutional Court (see Šlosarčík, 2010).

<sup>x</sup> For a more detailed overview of parliamentary involvement in EU decision-making see (Kiiver, 2010, pp. 580).

<sup>xi</sup> Art. 288 TFEU actually leaves the choice, form and method of the directive which is to be implemented to the “national authority”. In most cases, however, directives have to be implemented by the national parliaments.

<sup>xii</sup> Art. 48 TEU merely states: “The amendments shall enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements.” Similar to the provision mentioned above, some constitutional requirements might not foresee the involvement of national parliaments to the same extent. In most cases, however, treaty changes have to be ratified by national parliaments.

<sup>xiii</sup> This arguably disadvantages parliaments in bicameral systems.

<sup>xiv</sup> COSAC was established in the late 1980s with the intention to improve the exchange of information and best practices (Kaczyński, 2011). Other forms of inter-parliamentary cooperation have emerged over the last two decades from which joint committee sessions with the European Parliament have become most prominent. Some scholars observe that national parliaments are increasingly seeking to influence the decision-making process by way of inter-parliamentary cooperation (see for instance Miklin and Crum, 2011).

<sup>xv</sup> For an extensive summary see (Kiiver, 2012, pp. 7).

<sup>xvi</sup> This formulation led to an end of the discussion on the introduction of so-called Eurobonds after policy-makers realized the significance of this part of the judgement.

<sup>xvii</sup> Furthermore, only the European Affairs Committee (EAC) is constitutionally empowered to take decisions on behalf of the plenary (Art. 45 GG). An authorisation of the Budget Committee or even a special committee would therefore be unconstitutional.

<sup>xviii</sup> Emphasis of the author.

<sup>xix</sup> Furthermore, the government did not sufficiently define what it meant by “urgency” and “confidentiality”. The fact that no vice-candidates for the nine representatives of the special committee were elected let the judges assume that the committee would not be capable of acting in urgent matters. Already the absence of one candidate would leave the committee without a quorum (German Constitutional Court, 2012a, par. 146).

<sup>xx</sup> EUZBBG is the German abbreviation for “Gesetz über die Zusammenarbeit von Bundesregierung und Deutschem Bundestag in Angelegenheiten der Europäischen Union”.

<sup>xxi</sup> These opinions have to be considered by the government in negotiations, but it may deviate from it for imperative integration- or foreign policy reasons (EUZBBG, § 9 (4)).

<sup>xxii</sup> This was reconfirmed by the judgement of the BVerfG from 12 September 2012 on the ESM and the TSCG.

<sup>xxiii</sup> Information is accessible from: [http://www.dbresearch.com/PROD/DBR\\_INTERNET\\_EN-PROD/PROD000000000280052/EFSF%3A+Where+do+national+parliaments+have+a+say+in+the+EMU%3F.pdf](http://www.dbresearch.com/PROD/DBR_INTERNET_EN-PROD/PROD000000000280052/EFSF%3A+Where+do+national+parliaments+have+a+say+in+the+EMU%3F.pdf), last accessed: 5 October 2012.