# Germany and the Euro Rescue Agreements


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In 2010 EU Member States agreed to economic aid (so-called 'bailouts') to help Greece and Ireland, and also to a future permanent bailout system, the European Stability Mechanism (ESM), for Member States that have adopted the euro. In May 2010 the European Financial Stability Facility (EFSF) was created within the framework of the Ecofin Council. In July 2011 an additional €109 billion aid programme for Greece was agreed which will run until the end of 2014. The support programme included measures to expand the flexibility of the EFSF.

German agreement on the bailout mechanisms has been unpopular in Germany and the Chancellor, Angela Merkel, has suffered setbacks in two recent state elections. Her euro policies have also led to divisions within the CDU-led coalition government. The Government faces important parliamentary votes at the end of September on the new expanded EFSF.

On 5 July 2011 the German Constitutional Court began deliberations on legal challenges launched in 2010 by the Bavarian conservative politician, Peter Gauweiler, and a group of professors, as to whether the German Government acted lawfully in committing money to the bailout of Greece and whether the EFSF and ESM are compatible with German law.

On 7 September 2011 the Constitutional Court rejected as unfounded the constitutional complaints about the German and EU legal instruments and other measures in connection with aid to Greece and the euro rescue package.

This Note looks at German political and public views of the euro rescue package and the new EFSF mechanisms.

For further information on the ESM and EFSF, see the following Standard Notes:

5812, Amending the EU Treaty: the European Stability Mechanism, 23 December 2010

5973, The European Financial Stabilisation Mechanism (EFSM), 20 May 2011

5800, Article 122(2) TFEU as Treaty Base for Financial Stability Mechanism, 14 December 2010

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## 1 German Government views

The Merkel-led coalition government of Christian Democrats, Christian Social Union and Free Democrats was initially opposed to financial rescues for debt-stricken eurozone countries (bailouts) and in 2010 Angela Merkel spoke in the German Parliament about the possible exclusion of a member of the eurozone.[1] However, Chancellor Merkel eventually came round to the view that the stability of the eurozone was worth the cost to Germany of a bailout. She also insisted on Greece tackling its own problems. She attributed the fear of the debt crisis spreading to other eurozone countries, such as Portugal, on traders speculating against the euro and rating agencies which downgraded the outlook for debt in these countries.

Finance Minister Wolfgang Schäuble, in the face strong opposition from the European Central Bank and EU governments including France, called for bondholders to assume a "fair" share of further Greek aid and in a speech in the Bundestag on 10 June 2011 appealed to the spirit of German unity and European integration. The Social Democrat opposition leader, Frank-Walter Steinmeier, said the speech underlined the lack of European leadership spirit elsewhere in a cabinet that governed, particularly on EU affairs, "by the regulation book".

Angela Merkel wanted private banks to contribute funds to a second Greek bailout package, but after a meeting with the French president, Nicolas Sarkozy, on 16 June 2011, she said that any contribution from private creditors to the package would have to be voluntary. The *Guardian* reported on 17 June 2011 that Merkel's defeat "was a significant climbdown from her earlier position. Berlin had lobbied noisily for the compulsory participation in a new Greek bailout of private lenders, many of whom stand to lose heavily if Greece defaults on its €300bn (£265bn) debts".

[1] See *BBC News*, 17 March 2010

On 6 July 2011 senior German officials resurrected the earlier Schäuble proposal calling for investors to be encouraged to swap Greek government bonds for new bonds. They reopened the debate over whether the eurozone members should agree to one of their number becoming a defaulter, even temporarily.

There has been criticism of the German Government's indecisiveness on the euro crisis. *Der Spiegel* commented: "The chancellor's indecisiveness is infuriating her party. First she declares Germany's fate is tied to the survival of the euro. Then she claims the Spaniards and Greeks don't work hard enough and complains that the German taxpayer has to bail them out. It's unclear whether she's trying to be stateswoman or queen of the tabloids".[2] The various German plans for the Greek debt were set out in another *Spiegel* report:

> **German Officials Seeking 'Fundamental Solution'**
>
> Officials in Germany's Finance Ministry are analyzing several models for paring down Greece's debt burden to a more tolerable size. They are aiming to reduce its debt to about 120 percent of GDP. In absolute terms, this would involve relieving the country of roughly €70 billion ($99 billion) in debt. "We are searching through our entire arsenal for a fundamental solution to the problem," said one official close to Finance Minister Wolfgang Schäuble.
>
> The basic version of such a solution would be to have the European Financial Stability Facility (EFSF) -- the European rescue fund -- purchase Greek sovereign bonds from banks and insurance companies that want to unload them. As an alternative, the fund could exchange Greek bonds for European ones.
>
> The problem with this is that at present, the EFSF's rules don't allow these kinds of operations. They could be amended, of course, but not without resistance. In Germany, the business-friendly Free Democratic Party (FDP), the junior partner in the ruling coalition, is leading the fight in parliament against allowing the rescue fund to buy up bonds on the secondary market.
>
> The second model tries to get around this constraint by allowing the EFSF to give Greece the money it needs to buy back its own bonds. Since its bonds are currently trading at only half their nominal value at most, this would be a good deal for Greece.
>
> Such an offer might be very attractive for creditors, too. Many of them only stocked up on Greek sovereign bonds after the crisis, when they were already being traded at below face value. Other creditors, such as financial institutions, have already written down their Greek bonds and have them on their books at low market value. If the Greeks offer more than market value, it might be worth it for such companies to sell their bonds.
>
> Since it is purely voluntary and tax-funded, this model would be far removed from the real private-sector participation that the German government has been calling for. But finance officials still believe this program could reduce Greek debt by up to €20 billion. The model would require a slight rise in the planned €120 billion volume of the second Greek aid package, but it would not require an increase in the overall EFSF rescue fund.
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> **Not Enough Support For Debt Rescheduling**

[2] *Der Spiegel* 18 July 2011

In early June, Schäuble was still backing a third and completely different model for tackling the problem: gently rescheduling the debts. This model envisions extending the maturity period of all bonds in the hands of private creditors by seven years. But it doesn't have majority support in the EU.

There even less backing for tougher debt rescheduling models, such as one proposed by Martin Blessing, the head of Commerzbank, Germany's second-largest bank. In a guest editorial for *Frankfurter Allgemeine Zeitung* last week, he called on creditors to forgive part of the debt and to allow the remainder to be converted into bonds with longer maturities, largely guaranteed by the euro zone.

On Monday, *Die Welt* newspaper reported that euro governments were considering imposing a bank levy as a way to force banks to contribute to a Greek rescue. Citing unnamed diplomats, *Die Welt* said such a move could enable Greece to avoid being categorized as a credit default case by ratings agencies. However, it is unclear whether a bank tax would be politically acceptable because it would hit all banks, regardless of whether they held Greece bonds or not.

Employees of the EU and the Institute of International Finance (IIF), the international banking association, are currently meeting in Rome with a number of major players to discuss what a restructuring of Greek debt could look like. These include executives from major banks -- such as HSBC, BNP Paribas and Deutsche Bank, the largest banks in the UK, France and Germany, respectively -- as well as representatives of Allianz, the Munich-based insurance giant. The teams of experts are also trying to figure out which banks could take over responsibility for conducting this complicated deal.

Detailed proposals could be ready by mid-August. But one stumbling block continues to be the potential reaction of the ratings agencies. They oppose any substantive participation by private creditors and are threatening to treat it as a de facto default.

Despite this threat, there is growing willingness in Germany's Finance Ministry to take this risk and to lock horns with the European Central Bank (ECB) -- if this ratings downgrade is short term. The reasoning behind this is the belief that such a restructuring would put Greece on a better footing no matter what, thereby obliging the ratings agencies to award it a better rating.[3]

On 21 July 2011 eurozone Member States agreed a second bailout for Greece to supplement the €440 billion rescue package launched in May 2010 and to expand the powers of the EFSF. This decision is subject to parliamentary approval in some Member States, including Germany (by 23 September), the Netherlands (in October), Austria, Finland and Slovakia (see section 6 below for envisaged timetable).

A CSU paper published on 29 August sought changes to the EU monetary union rules to allow bankrupt Member States to leave the eurozone if they do not do enough to reduce their debts. The FDP wants the forthcoming EFSF bill to include a veto right for the German Parliament in approving future euro bailout applications. Wolfgang Schäuble is reported to have told CDU and CSU leaders on 1 September that the EU should have more powers over economic and financial policy, which would be brought about by another Treaty change. Other EU leaders, including Chancellor Merkel, have argued that a Treaty change could help

3 *Der Spiegel* 18 July 2011

enforce fiscal rules and thereby avoid further debt crises in the euro zone. Schäuble is reported to believe that such reforms are necessary even if they threaten to divide the 17 Eurozone Members and the remaining ten non-euro States.[4]

## 2 German Central Bank

The President of the German Central Bank, the *Bundesbank*, Dr Jens Weidmann issued a statement on the outcome of the European Council meeting on 21 July 2011, in which he noted both positive and negative elements of the agreement on aid for Greece and the EFSF:

> The key monetary policy requirement in the sovereign debt crisis is that no additional risks spill over to the Eurosystem and that the dividing line between monetary policy and fiscal policy is not blurred any further. Solvent counterparties and sufficient collateral are crucial for the Eurosystem's refinancing operations. To that extent we expressly welcome the Council's announced intent, within a new support programme for Greece, to ensure sufficiently capitalised banks and adequate collateral, thereby addressing concerns held by the Deutsche Bundesbank and the Eurosystem.
>
> The European Council has decided to grant Greece considerable relief. Private sector creditors are to contribute to the financing measures, although they will be partly protected by the donor member states. The support programme notably includes measures to significantly expand the flexibility of the European Financial Stability Facility (EFSF) and to make it a considerably more attractive option for all countries receiving assistance.
>
> The combined effect of these decisions might reduce the acute tension in the financial markets. However, by shifting extensive additional risks to the countries providing assistance and to their taxpayers, the euro area has taken a major step towards communitising risks arising from unsound public finances and misdirected macroeconomic policies. This weakens the underlying principle of national fiscal responsibility on which European monetary union is founded. It will make it more difficult in future to maintain the incentives to pursue a sound fiscal policy.
>
> This makes it all the more important to decisively tackle the root-causes of the crisis. The adopted adjustment programmes must now be implemented. Greece remains in need of extensive consolidation and reform. It is now all the more imperative to firmly stick to the goals of rigorously consolidating government finances throughout the euro area and strengthening the overall fiscal framework of monetary union.

However, the *Bundesbank* was opposed to the ECB buying eurozone government bonds, as the *Financial Times* reported on 22 August 2011, and on 2 September the *Daily Telegraph* reported Dr Weidmann's belief that the mass bond purchases by the ECB had "strained the existing framework of the currency union and blurred the boundaries between monetary policy and fiscal policy". He said that decisions "on further risk-taking should be made by governments and parliaments, as only they have democratic legitimacy". The *Bundesbank* President also stated in the Bank's August monthly report that the EU's July decisions could weaken the institutional framework of European monetary union, concluding:

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4 *Spiegel* on-line, 2 September 2011

> While fiscal policy will continue to be determined by democratically elected parliaments at national level, the resultant risks and burdens will increasingly be borne by the Community in general and the financially sound countries in particular, without this being offset by any concrete powers to intervene in the sovereignty of national fiscal policies. No comprehensive change in the European treaties is currently envisaged that would democratically empower a central entity to exert some control over national budgetary policies. This means there is a danger that the euro-area countries' propensity to incur debt may increase even further, and the pressure on the euro area's single monetary policy to adopt an accommodating stance may grow. Unless and until a fundamental change of regime occurs involving an extensive surrender of national fiscal sovereignty, it is imperative that the no bail-out rule that is still enshrined in the treaties and the associated disciplining function of the capital markets be strengthened, and not fatally weakened.[5]

## 3 Parliamentary views

### 3.1 Parliamentary support

On 5 May 2010 the German Parliament Budget Committee approved a draft law on Germany's contribution to the first Greek financial package. The vote was along party lines with the three ruling coalition parties all supporting the plan. On 7 May 2010 the German Parliament, the *Bundestag*, approved a $28 billion contribution to the Greek bailout package. The Bundestag voted by 390 to 72 votes in favour, with 139 abstentions. Reports on the vote said that it signalled Germany's move from opponent of the bailout to reluctant participant, and its adoption was described as a victory for Chancellor Merkel. The Finance Minister, Wolfgang Schäuble, told the Bundestag there was no better alternative and that any other way would be more expensive and more dangerous for Germany and the eurozone as a whole. The Upper House, the *Bundesrat*, which represents the governments of the 16 German states, also endorsed the package.

On 31 August the Cabinet agreed a draft law to expand the EFSF, and it was envisaged that all eurozone States would ratify the agreement by the end of October (a deadline that is looking somewhat unlikely). The German Bundestag is to vote on 29 September and the Senate around the same time, but the Bundestag is also seeking increased authority in approving future euro-zone bailout packages.

A *Reuters* report in August was optimistic that there would not be a parliamentary veto of the EFSF agreement:

> Despite increasingly vocal warnings from rebel lawmakers in her conservative camp, senior members of her Christian Democrats (CDU) and junior coalition partners the Free Democrats (FDP) scoff at the prospect of a Bundestag veto of the EFSF and ESM next month.
>
> Volker Wissing, deputy leader for the FDP in parliament and head of the Bundestag's finance committee, told Reuters on Monday he expected a "clear majority" for the measures agreed by euro zone leaders at their summit last month.
>
> Michael Meister, a senior finance expert in the CDU, also played down the risks of a veto. Even if some members of the ruling party refuse to back the euro

5 *Bundesbank monthly report*, August 2011

> zone's new anti-crisis powers, Merkel should be able to rely on the opposition Social Democrats (SPD) and Greens to see them through.[6]

The opposition Social Democrats have indicated they will vote for the EFSF agreement, which would allow its adoption, even if some members of the centre-right coalition vote against it.

### 3.2 Parliamentary opposition

Opposition Social Democratic Party (SPD) Members abstained from the bailout vote. They argued that the burden of the bailout would fall too heavily on German taxpayers.[7] They also criticised Chancellor Merkel for attempting (unsuccessfully) to delay a decision on Greece until after the North Rhine-Westphalia state election. This further damaged her reputation and she was blamed for aggravating the Greek crisis and adding to turbulence on global financial markets.

Frank-Walter Steinmeier, SPD leader in the *Bundestag*, accused Merkel of undermining Germany's leading role in the EU. Frank Schäffler, the FDP financial spokesman, voted against the first Greek bailout because he thought it would obstruct the principles of the free market. He said later that the option of a regulated sovereign default and a change in the eurozone contract were needed allowing countries like Greece to leave the euro temporarily.

On 7 August 2011, crossing 'red lines' she had set earlier, Chancellor Merkel, in a joint statement with President Sarkozy of France, pledged support for euro zone stragglers. Commentators noted that this would make it even more difficult for her to get parliamentary approval at the end of September for changes to the EFSF and the blueprint for its successor, the ESM. In the run-up to the parliamentary vote, CDU and FDP parliamentarians have been calling for Greece to leave the eurozone.

Reuters reported on 25 August that "Fears are growing that Merkel may have to rely on opposition support to win the vote, a humiliation that could trigger a challenge to her position", and *Bloomberg* quoted a *Handelsblatt* report of 29 August 2011 that the CDU would not muster enough votes in the Bundestag to pass the EFSF bill:

> German Chancellor Angela Merkel's ruling bloc of Christian Democrats and Free Democrats may lack a majority to secure passage of a bill to expand the euro's temporary rescue fund, the Handelsblatt reported.
>
> As many as 23 coalition lawmakers may reject the bill that's due in parliament next month, said the newspaper, without citing names. That underscores her dependence on the opposition to ensure ratification.
>
> To gain passage of the bill on the coalition's own strength, Merkel needs 311 votes in favor of the changes among the 620 lawmakers sitting in parliament's lower chamber in Berlin. Her bloc comprises 330 lawmakers, implying that the German chancellor may lack 4 votes to achieve a coalition majority if 23 vote against the bill, Handelsblatt said.

[6] *Reuters* "Analysis: Merkel's room for maneuver on euro crisis narrows", 8 August 2011

[7] See *BBC News* 7 May 2011, "German parliamentary vote backs Greece bail-out funding"

The German magazine *Focus* reported at the end of August that 23 members of the ruling coalition "are gearing up to vote against the EFSF", including some loyal CDU supporters such as Wolfgang Bosbach, the deputy parliamentary leader.[8]

## 4 Popular discontent

Research reports and polls attributed German public anger to media reports showing demonstrations in Greece over working longer hours, reforms to their allegedly generous pension system, and cutbacks, while they, the Germans, felt under enormous pressure themselves. Chancellor Merkel was blamed for not explaining to the general public why German taxpayers would benefit from the Greek bailout, that the explanation given in May 2010 about not wanting turmoil in the financial markets was no longer enough.

The public reaction in Germany to the first bailout was also directed against Greeks living in Germany, who reported that they had been the target of xenophobic remarks. The tabloid *Bild* newspaper ran a campaign against the bailout, urging the Greeks to leave the eurozone and take the drachma back. Opinion polls in May 2011 at the time the second bailout was agreed showed a fall in the Chancellor's popularity and *Bild* urged its readers to write to German MPs to express their unhappiness with the proposals.

A *Euronews* report in July 2011 stated that not only was the population divided, but that "even in her own government camp, the number of euro sceptics has risen. Among the liberals and Merkel's conservative sister party in Bavaria, there are powerful voices who are unwilling to use billions in taxpayers' money to stabilise the single currency".[9]

*Reuters* reported on a poll in July which "showed her popularity dropping to its lowest level in nearly five years, and running neck-and-neck in a hypothetical battle for chancellor with Frank-Walter Steinmeier, the grey SPD politician she trounced in 2009".

According to German ARD television's *Deutschlandtrend* poll published on 19 August, 22% of Germans polled had strong faith in Chancellor Merkel's leadership, 55% were not very confident in her and 20% had no confidence at all.[10]

### 4.1 North Rhine Westphalia elections

The parliamentary approval of the first bailout came just before state elections in North Rhine Westphalia (NRW), Germany's most populous state (18 million) on 9 May 2010. The SPD and the Greens did not win in the first round, where an absolute majority is required. In the second round a simple majority was needed. Hannelore Kraft of the SPD won a simple majority in the second round with 90 deputies voting for her, 80 against and 11 abstaining.

In the NRW election, with a turnout of 59%, the CDU took 34.6% and the FDP 6.7% (a drop in support by half). The SPD polled 34.5%, the Greens 12.1% and the Left Party 5.6%. Many analysts attributed the defeat of the ruling coalition in large part to the Government's decision to contribute to the Greek rescue package.

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8 *EurActiv* 1 September 2011

9 Claudia Kade, *Euronews* 18 July 2011

10 Reported in *EurActiv* 22 August 2001

The parties that form the governments in each of Germany's 16 states are allocated a number of votes in the *Bundesrat*. NRW had six votes out of 69 in total. The incumbent CDU/FDP coalition in NRW had to retain its six votes for the governing coalition to be able to rely on its support in the *Bundesrat*. The vote gave the CDU 67 seats in the *Bundesrat*, the FDP 13 seats, the SPD also 67, the Greens 23 and the Left Party 11. This means the CDU-FDP have lost their majority in the *Bundesrat*.

The new NRW President is Hannelore Kraft of the SPD. Her coalition governs with one seat short of an absolute majority.

### 4.2 Mecklenburg-Western Pomerania elections

The Merkel Government suffered another defeat on 4 September 2011 in regional elections in Germany's poorest state, Mecklenburg-Western Pomerania, Merkel's home state. Again, commentators attributed her fall in popularity largely to discontent over the euro-crisis and the Greek bailouts.

The CDU won 23.1% (down from 28.8% in 2006), to the SPD's 35.7%, while the FDP won only 2.7%, below the five-percent threshold needed for a seat in the state legislature. The far-right NPD won 5.9%, down from 7.3% in 2006. The Greens cleared the 5% hurdle for the first time, as did *Die Linke*.

## 5 Constitutional Court complaint

On 7 May 2010, after the Bundestag had passed legislation to approve the financial bailout plan,[11] four professors (Wilhelm Hankel, Wilhelm Nölling, Joachim Starbatty, Karl Albrecht Schachtschneider, and Dieter Spethmann) submitted a constitutional complaint to the German Constitutional Court, together with a request for a temporary court injunction that would prevent the then President, Horst Köhler, from signing the bill into law before the Court had considered their complaint.[12] Andreas Vosskuhle, President of the Constitutional Court, asked the Chancellor, ministers, parliament, the German President, state governments, the ECB and the Bundesbank, for statements addressing a request from Peter Gauweiler (CSU) for a temporary injunction. In June 2010 the Court dismissed Gauweiler's bid to stop the implementation of the rescue package allowing German participation in the measure. The court still had to consider the challenge itself, but ruled that it would be too damaging to suspend German involvement in the bailout package while it decided on the measure's constitutionality.

The German *Centrum für Europäische Politik* (CEPS) published a report by Dr. Thiemo Jeckon on 5 July 2010 on the Article 122 mechanism and the Greek "bailout".[13] The CEP report argued that the EU had misused Article 122 as a legal base for the bailout fund and that the European Parliament had not been consulted, which amounted to a breach of EU law. The report also suggested that the bailout package did not satisfy the terms of the German Constitutional Court's previous rulings on EU issues, as it did not provide a strong enough role for the German Parliament in approving aid. The CEP report also pointed out that the package had sidelined the Bundestag and Bundesrat, despite the German

11 See http://www.spiegel.de/international/europe/0,1518,693579,00.html

12 See http://www.spiegel.de/international/germany/0,1518,699471,00.html

13 http://www.cep.eu/fileadmin/user_upload/Kurzanalysen/Euro-Rettungsschirm/CEP-Studie_Euro-Rettungsschirm.pdf

Constitutional Court requiring a stronger role for these bodies in EU affairs conditional on approving the Lisbon treaty in its ruling on the Treaty in 2009.

The German Government's response did not mention the Constitutional Court challenge, and stated only that that Germany was entering "unchartered constitutional territory" and that "The federal government has always taken great care to minimise possible constitutional risks along with the emergence of the EU aid package".

On 5 July 2011 the Constitutional Court began its deliberations on the legal challenge launched in May by the Bavarian conservative politician, Peter Gauweiler, and a group of professors, as to whether the German Government acted lawfully in committing money to the multi-billion euro bailout of Greece. The Court must also decide on the legality of Germany's participation in the bailouts for Ireland and Portugal.

The complainants argued that the bailouts:

- breach the German Constitution's protection of property (Article 14 of the German Constitution – *Eigentumsgarantie*) because they could endanger the stability of the German economy and generate inflation.
- breach the right to democratic representation (Articles 20 and 28 of the German Constitution – *Demokratieprinzip*) by restricting the Bundestag's control over its own budget.
- violate the EU's no-bailout provisions (Article 125 of the *Treaty on the Functioning of the European Union*), which states that neither the EU nor the Member States must assume each others' debts without sufficient justification.

The Court made clear that basic economic and political issues would not be subject of the proceedings, but only the constitutional limitations of government decisions. *Der Spiegel* speculated on 6 July that "The judges are likely to grant parliament greater power in decision-making and perhaps even set an upper ceiling on any future rescue package". Franz Mayer, a professor of state law representing the Bundestag, believes the Court "has a responsibility for the future of the monetary union" and that the judges "must leave room for future developments".

The Court rejected the complainants' request for interim relief, so until the main complaint was decided, the German Government was able to participate in the financial aid package for Greece.

## 6 Constitutional Court ruling

The *EUObserver* reported on 6 September that "Earlier statements by judges involved in the case suggest the court is unlikely to declare Germany's steps to secure the eurozone illegal but will demand that the parliament has more say – similar to a recent ruling it handed down on the EU's Lisbon Treaty".[14] The Court President, Andreas Voßkuhle, has pointed out that the Court "is not deciding on economic policy but on a question of law".[15]

[14] EUObserver, 6 September 2011, "Germany's top court to decide on Greek bailout"
[15] Ibid

The Constitutional Court ruled on the EFSF and related matters at 10 am on 7 September 2011. The Court stated that the EU's 2010 bailout for Greece and subsequent aid granted through the rescue fund is legal, but also that Germany's Parliament should have more say in major future euro-zone bailouts, which would need the approval of the Parliament's budget committee. This latter requirement is less demanding than some suggestions that wanted plenary approval. This would have slowed progress on future bailout efforts.

The Court's press release Press release no. 55/2011 of 7 September 2011 was as follows:

> In today's judgment, the Federal Constitutional Court has rejected as unfounded three constitutional complaints which are directed against German and European legal instruments and other measures in connection with the aid to Greece and with the euro rescue package.
>
> Press Release no. 37/2011 of 9 June 2011 informs about the facts of the case. It is available (in German) on the Federal Constitutional Court's website.
>
> The Second Senate of the Federal Constitutional Court has decided that the Monetary Union Financial Stabilisation Act (*Währungsunion-Finanzstabilisierungsgesetz*), which grants the authorisation to provide aid to Greece, and the Act Concerning the Giving of Guarantees in the Framework of a European Stabilisation Mechanism (*Gesetz zur Übernahme von Gewährleistungen im Rahmen eines europäischen Stabilisierungsmechanismus*), hereinafter: Euro Stabilisation Mechanism Act (*Euro-Stabilisierungsmechanismus-Gesetz*), which relates to the euro rescue package, do not violate the right to elect the *Bundestag* under Article 38.1 of the Basic Law (*Grundgesetz* – GG). By adopting these Acts, the German *Bundestag* did not impair in a constitutionally impermissible manner its right to adopt the budget and control its implementation by the government or the budget autonomy of future Parliaments.
>
> However, § 1.4 of the Euro Stabilisation Mechanism Act is only compatible with the Basic Law if it is interpreted in conformity with the constitution. The provision is to be interpreted to the effect that the Federal Government is obliged to obtain prior approval by the Budget Committee before giving guarantees within the meaning of the Act.
>
> Furthermore, the Senate determines the boundaries under constitutional law for authorisations to give guarantees for the benefit of other states in the European monetary union.
>
> **In essence, the judgment is based on the following considerations:**
>
> <u>I. Scope of review / admissibility</u>
>
> The Senate regards the constitutional complaints which have been lodged as admissible only to the extent that the citizens, invoking their right to elect the *Bundestag*, which is protected by Article 38 GG, challenge a loss of substance of their power to rule, as it is organised in a constitutional state, by a far-reaching, or even comprehensive, transfer of duties and authorities of the *Bundestag*. Article 38.1 GG protects competences of the present or of a future *Bundestag* from being undermined, which would make the realisation of the citizens' political will legally or practically impossible. In principle, there is a threat of the act of voting being devalued in such a way if authorisations to give guarantees are granted in order to implement obligations which the Federal

Republic of Germany incurs under international agreements concluded in order to maintain the liquidity of currency union member states. The Senate was permitted to leave undecided under what preconditions constitutional complaints lodged against a supplementation of primary Union law by measures outside the Treaty structure may rely on Article 38.1 sentence 1 GG. In this respect, the complainants have not presented a concrete context which indicates a supplementation of primary Union law by measures outside the Treaty structure that is due to the impugned measures. Also with regard to a possible violation of the fundamental right to property (Article 14 GG), the complainants have not sufficiently presented facts from which it follows that the challenged measures might result in objectively impairing the euro's purchasing power to a considerable extent. To the extent that the constitutional complaints impugn not only the two pertinent Acts of the German *Bundestag*, they are inadmissible because they lack a suitable object of complaint.

II. Standard of review

Article 38 GG demands, in connection with the tenets of the principle of democracy (Article 20.1 and 20.2, Article 79.3 GG), that the decision on revenue and expenditure of the public sector remain in the hand of the German *Bundestag* as a fundamental part of the ability of a constitutional state to democratically shape itself. As elected representatives of the people, the Members of Parliament must remain in control of fundamental budget policy decisions in a system of intergovernmental governance as well. When establishing mechanisms of considerable financial importance which can lead to incalculable burdens on the budget, the German *Bundestag* must therefore ensure that later on, mandatory approval by the *Bundestag* is always obtained again. In this context, the *Bundestag*, as the legislature, is also prohibited from establishing permanent mechanisms under the law of international agreements which result in an assumption of liability for other states' voluntary decisions, especially if they have consequences whose impact is difficult to calculate. Every larger scale aid measure of the Federation taken in a spirit of solidarity and involving public expenditure at international or European Union level must be specifically approved by the *Bundestag*. Sufficient parliamentary influence must also be ensured with regard to the manner in which the funds that are made available are dealt with.

The Senate, which, with a view to the procedural setting of the proceedings, was barred from reviewing the impugned Acts against provisions of Union law, nevertheless points out that the existing European Treaties are not contrary to an understanding of the national budget autonomy as an essential, inalienable competence of the directly democratically legitimised parliaments of the Member States but that they, on the contrary, require the existence of such competence. Strict observance of the European Treaties guarantees that the actions of the institutions of the European Union have a sufficient democratic legitimation in Germany and for Germany. In this context, the Senate also points out that the conception under the Treaty of the currency union as a stability-oriented community is the basis and the object of the German Act approving the Treaty, as the Senate has already made clear by its Maastricht ruling (Decisions of the Federal Constitutional Court (*Entscheidungen des Bundesverfassungsgerichts* – BVerfGE) 89, 155 <205>).

III. Subsumption

When establishing a prohibited relinquishment of budget autonomy, the Federal Constitutional Court cannot put itself in the place of the legislature with an expertise of its own. With regard to the extent of the assumption of guarantees, it has to restrict its review to evident transgressions of ultimate boundaries. In this context, the legislature has a margin of appreciation with regard to the probability of having to make payments in a guarantee event, which the Federal Constitutional Court has to respect. Something similar applies to the assessment of the future sustainability of the federal budget and of the economic performance of the Federal Republic of Germany. Taking this legislative priority of appreciation into account, and measured against the constitutional standards that have permissibly been applied, both the Monetary Union Financial Stabilisation Act and the Euro Stabilisation Mechanism Act prove to be compatible with the Basic Law. The *Bundestag* did not deplete its right to adopt the budget and control its implementation by the government and did not disregard the essential content of the principle of democracy.

It cannot be established that the amount of the guarantees given exceeds the limit of budget capacity to such an extent that budget autonomy would virtually be rendered completely ineffective. The legislature's assessment that the authorisations to give guarantees to the amount of a total of approximately EUR 170 billion are within the capacity of the federal budget does not transgress its margin of appreciation and is therefore constitutionally unobjectionable. The same applies to the legislature's expectation that even in the case of the complete realisation of the guarantee risk it would still be possible to refinance the losses through revenue increases, cuts in expenditure and longer-term government bonds. At present, there is also no reason to assume an irreversible process with consequences for the German Bundestag's budget autonomy.

The German Act Approving the Treaty of Maastricht in the version of the Treaty of Lisbon still guarantees in a manner that is sufficiently definite under constitutional law that the Federal Republic of Germany is not subjecting itself to an incalculable automatism of a liability community which follows a course of its own that can no longer be steered.

Neither of the two impugned Acts establishes or consolidates an automatism by which the *Bundestag* would relinquish its right to adopt the budget and control its implementation by the government.

The Monetary Union Financial Stabilisation Act restricts the authorisation to give guarantees with regard to their amount, it indicates the objective of the guarantee, provides, to a certain extent, for the payment modalities and makes certain agreements with Greece the basis of the giving of guarantees. Thus, the content of the authorisation to give guarantees is defined to a large extent.

The Euro Stabilisation Mechanism Act lays down not only the objective and the fundamental modalities but also the amount of possible guarantees. The giving of guarantees is only possible during a certain period of time, and it is made contingent on agreeing an economic-policy and finance-policy programme with the Member State affected. The programme requires mutual agreement of the euro currency area states, which secures a determining influence to the Federal Government.

However, § 1.4 sentence 1 of this Act merely obliges the Federal Government to strive to reach an agreement with the *Bundestag*'s Budget Committee before giving guarantees. This is not sufficient. Instead, guaranteeing parliamentary budget autonomy requires an interpretation of this provision in conformity with the constitution to the effect that the Federal Government is in principle obliged

> to always obtain prior approval by the Budget Committee before giving guarantees.

*EurActiv* reported on 6 September that the CDU/CSU and FDP parties had already agreed "on a multi-level approach to involve the German Bundestag in future EFSF decisions. The main idea is that the government needs parliament's approval before it can agree in Brussels on new EFSF rescue packages, but will have an extended margin to decide on technical implementation of EFSF decisions".[16] The coalition Government is reported to be aiming to bring the SPD and the Greens on board, but will negotiate the final agreement on parliamentary participation rights after the Court ruling.

The *Economist* Newsbook blog commented on 7 September:

> Essentially, the court accepted the government's argument that these mechanisms did not constitute the creation of an open-ended "transfer union" that would in effect strip the Bundestag of its core responsibility to exercise control over the budget. "The Bundestag did not deplete its right to adopt the budget and control its implementation by the government and did not disregard the essential content of the principle of democracy," the judges wrote. The court demanded just one revision: rather than merely "striving" to obtain the approval of the Bundestag's budget committee before issuing guarantees to other euro countries it must always obtain prior approval from the committee.
>
> This demand is likely to have an effect on changes now being contemplated by the Bundestag. Already, there had been a move to strengthen the authority of the legislature in weighing up euro rescue measures. And there had been a fear that the parliamentarians would strengthen their powers to the extent of paralysing the EFSF and the ESM. That now looks unlikely. Although the Bundestag's budget committee will now rule on individual bail-out programmes, the court's ruling does not seem to mandate that the Bundestag sign off on such operational questions as whether to buy a country's bonds in the secondary market. But the constitutional court's verdict is also a warning to the government: future rescues cannot exceed the capacity of the federal budget, they cannot be automatic, they must be contingent on reforms by the receiving country and they cannot be forced upon Germany.

The ruling was reported to have brought some relief to financial markets, with the euro briefly rising against the dollar, but the gain then reversing, as traders assimilated the Court's warning that the ruling was not a blank check for future bailouts. The ruling is also likely to make it easier for Chancellor Merkel to gain parliamentary approval in the vote on the EFSF on 29 September.

## 7 Timetable for adoption of ESFS decision

A report by Andrew Busch,[17] Global Economic and Political Forum, on 31 August provides a useful summary of the timetable for adoption of the EFSF agreement in certain other eurozone States.

> FRANCE – Government approval is enough in France. The fiscal consequences of it then get folded into the budget law which is voted on in

[16] EurActiv 6 September 2011-09-06, German court seen approving EU bailouts, with conditions

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parliament as normal and should be easily passed. The French will present a revised budget to parliament in early September incorporating additional debt due to their guarantees of the EFSF.

SLOVAKIA – Parliament reconvenes on September 6. No date has been set yet for the EFSF/ESM debate and vote. The government has indicated it is likely to be in September but has not yet decided whether to use fast-track procedure. Prime Minister Iveta Radicova is not certain of a majority because one party in her center-right coalition, SaS, led by parliament speaker Richard Sulic, has said it opposes expanding the EFSF's mandate. A coalition source said Sulic was under fierce pressure to fall into line. His objection could delay implementation of the deal and make it dependent on the pro-euro left-wing opposition SMER party of former Prime Minister Robert Fico, a fierce critic of the government. That might bring the coalition down.

FINLAND – Parliament reconvenes on September 6. The Finance Ministry says no date has been set for the EFSF/ESM debate and vote because the final official document has still not been circulated to member states. Prime Minister Jyrki Katainen told Reuters in an interview on Monday he was confident parliament would pass the plan as soon as legislative preparations are completed, although he could not say when. “I would say it will get through well. These policies have had the support of the government and the Grand Committee as well,” he said.

However, there is a risk that some members of the government coalition Social Democratic Party and Leftist Alliance vote against. The opposition True Finns is strongly opposed to bailouts in general. Finland has demanded collateral for any further loans to Greece. It is also against expanding the size of the EFSF, or issuing euro-area bonds. If any of those issues arise while parliament is deliberating, it could force Katainen or Finance Minister Jutta Urpilainen to take a more critical stance toward euro zone rescue plans.

The Finnish requirement for collateral on Greek loans is the newest monkey wrench in the approval process. Today, the Austrian Finance Minister said progress was being made on a compromise to resolve the situation.

NETHERLANDS – Parliament reconvenes on September 6 but a vote on the EFSF/ESM changes is expected in October at the earliest. That would make the Dutch probably the last to approve. The changes do not legally require parliament's approval, since they do not affect the size of Dutch guarantees for the EFSF. But politically the government needs its backing.

A majority last month supported the July 21 euro zone bailout agreement for Greece. The finance committee will meet next week, probably on Tuesday August 16, and has invited Finance Minister Jan Kees de Jager and Prime Minister Mark Rutte to discuss issues including the EFSF changes and to clarify details of the Dutch contribution to the Greek bailout. Some of the political parties have said they want to propose motions, and for this a plenary session of parliament will be required, tentatively scheduled for Wednesday August 17. These debates will show how much support there is among MPs for the EFSF changes and other rescue measures.

Any change of position by the opposition Labour party could derail the approval process because it is the second largest in the lower house. Prime Minister Rutte's minority center-right coalition of Liberals and Christian Democrats depends for support on the right-wing populist Freedom Party, which is against supporting Greece. The Freedom Party could threaten the approval process if it withdrew support for the coalition. The Dutch government opposes increasing the size of the EFSF and insisted on private sector involvement in the second Greek bailout.

AUSTRIA – Parliament resumes session on September 21. No date has been set for the EFSF vote, which requires only a simple majority, unlike a on the creation of the ESM, where a two-thirds majority is needed for ratification. A parliamentary official said fast-track approval could take place within two days with the votes of the ruling coalition of the center-right Austrian People’s Party and the center-left Socialists.