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The National Environmental Premium in Germany: A Rapid Reaction to the Financial Crisis at the Expense of Democracy?

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Abstract

Can it be confirmed that times of crisis are times of executive dominance, as the general hypothesis expressed in the public discourse suggests? The Economic Stimulus Package II had been Germany's reaction to the current financial crisis placing nations all over the world under dramatic pressure. In that case, executive federalism, a trademark of the German political system, should be expected to manifest itself. At the same time – and this shall also be investigated as the flip side of efficient performance of governments – is it possible that the normative, i.e. the constitutionally prescribed standards of democracy have, if not violated, then at least been neglected in these times of crisis? If so, that would certainly indicate "deparliamentarization". The latter has been increasingly viewed as a result of the executive dominance in Germany's cooperative federalism model, even though the popularly elected parliaments should have a wide-ranging, substantive regulatory power. We address this dual issue by focusing on the policy-making process leading to the introduction of the National Environmental Premium. We will look both empirically at its political and legal background as well as its legal precursors set through federal law and European law principles. In doing so, the democratic legitimacy of the Environmental Premium can be scrutinized.

A. Introduction

The current financial crisis places nations all over the world under pressure. The political reactions thus far are being heavily discussed in media and science, seeming as controversial as the reasons that triggered the crisis. Academic analysis, results and evaluations of the economic measures differ among the various scientific disciplines. This is due not least of all to the temporal proximity of the introduction of these measures and thus results are still largely tentative.

In this paper we are concerned from a political science perspective with the Economic Stimulus Package II of Germany as a reaction to the financial crisis. In particular, we focus on the policy-making process leading to the introduction of the National Environmental Premium and pursue a critical, analytical investigation. Can it be confirmed that times of crisis are times of executive dominance – as the general hypothesis expressed in the public discourse suggests? In that case, executive federalism, a trademark of the Germany political system, should be expected to manifest itself. At the

same time – and this shall also be investigated as the flip side of efficient performance of governments – it is possible that the normative, i.e. the constitutionally prescribed, standards of democracy have, if not violated, then at least been neglected in these times of crisis. That would certainly indicate "deparliamentarization". The latter has been increasingly viewed as a result of the executive dominance in Germany's cooperative federalism model, even though "the directly elected parliaments should have a wide-ranging, substantive regulatory power"[1].

We address this dual issue by introducing briefly first the "Environmental Premium" and its origins (B). Then we will recapitulate the basis of the distinction between legislative and executive lawmaking, the normative standards of both the Constitution and "simple" law, which are required for the adoption of regulations (C). The focus lies in the question of how many and which substantive rules are allowed to be made by a regulation. And when is explicit and specific prior permission or consent by the parliament as a legislator needed? In other words: how much clearance does the Constitution provide for executive lawmaking? What must already be covered to be a legal basis for an ordinance? And what is allowed to be new in addition to the regulation given by the executive? After addressing this law-issue, we examine the "Environmental Premium" in the next step on the basis of the previously compiled criteria. We will look empirically both at its political and legal background as well as its legal precursors set through federal law and European law principles (D). Above all we try to test the democratic legitimacy of the Environmental Premium. In conclusion, we summarize our analytical results and provide a short outlook (E).

B. The National Environmental Premium and its Origin

In the following section, we will define the National Environmental Premium with regard to three issues: *the aims, the content description* and *the impacts.* Then we reconstruct the adoption and implementation over time to track the political decision-making process in detail.

[1] R. Johne, 'Bundesrat und parlamentarische Demokratie: Die Länderkammer zwischen Entscheidungshemmnissen und notwendigem Korrektiv in der Gesetzgebung', B 50-51 *Aus Politik und Zeitgeschichte* (2004), 16. Translations from the original German texts are done by the authors.

I. Definition

In accordance with the "Directive to Encourage the Sale of Passenger Cars"[2] adopted by the federal government, the Environmental Premium can be defined as follows: The goal of the premium is to promote the concomitant scrapping of old cars and sale of new cars. With the payment of a premium of 2,500 Euros per vehicle, an incentive will be set to replace older and hence stronger polluting vehicles with newer, environmentally cleaner ones and also strengthen the overall economic demand.[3] Applications must be submitted – since March 30th 2009 exclusively online – to the Federal Office of Economics and Export Control[4], which is responsible for paying out the premium. The applicant must have been the owner of the car for at least 12 months. A new or one-year-old vehicle[5] must then be bought between January 14th and December 31st. The old car must have been initially registered at least nine years ago. The process of scrapping must occur between January 14th and December 31st 2009.[6] The premium is financed through a special investment fund: "Investment and Sinking Fund", which is laid down in the Economic Stimulus Package II[7] and, after an increase in April 2009, the fund amounts to a total of 5 billion Euros. The increase from 1.5 billion to 5 billion Euros stems from the decision of the Federal Government and the subsequent approval by the Federal parliament. In the following chapter, we retrace all relevant decisions and developments leading to the premium.

II. Chronology of the Introduction of the Environmental Premium

In October 2008, Matthias Wissmann, President of the Association of the Automotive Industry (VDA), called for the creation of an Environmental Premium. The introduction of a national "scrappage" scheme is based on the

2 Richtlinie zur Förderung des Absatzes von Personenkraftwagen (FöAbsPkWRL), BAnz 2009, 835.

3 *Id*.

4 Bundesamt für Wirtschaft und Ausfuhrkontrolle (BAFA).

5 The car is required to have an emission standard of at least Euro 4.

6 Art. 6 para. 3 sec. 3 sentence 1 Gesetz zur Errichtung eines Sondervermögens „Investitons- und Tilgungsfonds" (ITFG) Art. 6 Gesetz zur Sicherung von Beschäftigung und Stabilität in Deutschland (BStabSichG), BGBl I 2009, 416.

7 *Id.,* Art. 6.

idea of scrapping old, high-polluting cars and setting at the same time incentives for new investments. The Federal Foreign Minister at the time, Frank-Walter Steinmeier, made this suggestion in December 2008 and the idea of a premium became the subject of political debate in Germany for the first time. Despite differing viewsin the various political parties, associations and the media, the federal government decided in January 2009 to introduce the Environmental Premium and set a funding framework amounting to 1.5 billion Euros. The Directive to Encourage the Sale of Passenger Cars was decided by the federal government in February. This directive establishes the detailed rules of the Environmental Premium.

In the same month the German federal parliament passed the Economic Stimulus Package II.[8] The Environmental Premium is part of the Stimulus Package II. The second chamber of parliament, the Federal Council (*Bundesrat*), approved the Economic Stimulus Package II and therefore implicitly the introduction of the Environmental Premium. Finally, the directive entered into force in March. The federal government passed the Second Regulation amending the Regulation ELV[9] to facilitate the smooth implementation of the Environmental Premium.[10] The eligibility period was extended and December 31st, 2009 was set as a new final date for the applicability of the premium. In April, the federal government amended the Directive to Encourage the Sale of Passenger Cars: The funding was increased from 1.5 billion to 5 billion Euros.

The relevant statutory amendment – Act amending the Act Establishing a Special Fund[11] from 1.5 billion to 5 billion Euros – was passed by the German Bundestag in May. In July, the Act to amend the Act Establishing a Special Fund in the amount of 5 billion Euros came into force. In the beginning of September 2009 the funds appropriated for the National Environmental Premium were exhausted. An extension or renewed increase was rejected by the federal government.

8 BStabSichG, *supra* note 6.

9 The original law was from June 21, 2002: Gesetz über die Entsorgung von Altfahrzeugen (AltfahrzeugG), BGBl I 2002, 2199-2211.

10 The first amendment of the ELV regulation was in October 2006. Art. 7a Änderung der Altfahrzeug-Verordnung, BGBl I 2006, 2332.

11 Gesetz zur Änderung des Gesetzes zur Errichtung eines Sondervermögens "Investitions- und Tilgungsfonds", BGBl I 2009, 1577.

C. Legislative and Executive Law-Making

Parliamentary law, regulations and administrative directives shall be defined subsequently, firstly to present the distinctions and secondly to explain the interaction of these respective instruments. Building upon that, we offer comments about separation of powers as well as democratic aspects.

I. Distinguishing Between Parliamentary Laws, Regulations and Directives

1. Acts of Parliament

The German Bundestag, the federal parliament, is the core legislative body in the parliamentary system. It has however frequently been reminded by the Federal Constitutional Court (*Bundesverfassungsgericht*) of its need to fulfil its decision-making duties as a legislator.[12] The Parliament makes key decisions for the state in the form of legislative acts[13], even though more than 75 percent of all draft legislation the Bundestag deals with has been developed in advance from the ministerial administration.[14] Moreover, the Bundestag is not entirely free in deciding whether there is a need for legislation or regulation. There are frequent cases in which the parliamentary legislature is essentially required to adopt laws.

This is a result mainly from international and European law obligations that require a normative transposition into national law. In particular, Article 249 TEU sets forth a binding provision on the legislatures to implement legal directives of the European Communities in national law. According to the so-called *Wesentlichkeitstheorie* or "Essentiality Principle" of the Federal Constitutional Court, "significant decisions" must be taken by the Parliament itself. This means that the legislature may delegate the enactment of regulations (or of autonomous statutes) to the administration. But key decisions are subject to parliamentary scrutiny reservation. Accordingly, all issues are "essential" that, due to their political importance, affect the foundations of the social community, as well as all basic-right relevant provi-

12 F. Ossenbühl, Bundesverfassungsgericht und Gesetzgebung, in P. Badura & H. Dreier (eds), *Festschrift 50 Jahre Bundesverfassungsgericht*, Volume I (2001), 33-38 and 39-49.

13 F. Ossenbühl, 'Rechtsverordnung', in J. Isensee & P. Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, Volume V (2007), 223-259.

14 W. Rudzio, *Das politische System der Bundesrepublik*, 7th ed. (2006) 230.

sions belonging to the undefined requirements of the Federal Constitutional Court.[15] The base rule is: The more essential an act of public intervention in the rights of others, the more detailed the law's development through parliamentary procedures needs to be.

2. Regulations

Regulations constitute legal principles with a general binding effect that are passed by agencies of the executive who have been expressly empowered to that end. From a political science perspective, the relationship between the parliamentary legislature and the regulator can be described as a simple principal-agent model. The right to legislate via regulations is a law-making power conferred from the legislature (in this case the "Principal") to the executive (here the "Agent"), which will primarily serve the purpose of carrying out activities for the parliamentary legislator. Regulations are ranked in the hierarchy of legal sources below law (in the sense of a parliamentary act), but create generally binding law nonetheless. Once the parliament has defined the framework, the regulator maintains a degree of latitude or discretion, within which independent political action is possible. However, the regulator may not take decisions concerning particular issues or political intent of decisions, and must act within the framework of a statutory program. The underlying principle to this theory is the reservation of the law, meaning that in addition to legal reservations with regard to basic rights, certain measures from the state require authorization via a formal parliamentary act that, in turn, must also conform to the constitution and democratic principles.[16]

Following the constitutional theory, regulations are not intended to replace parliamentary law, but include only technical details and ephemeral schemes with a low level of policy-making details. Therefore, a moderate application of statutory law can hardly lead to a loss of parliamentary power. In practice, however, there is increasing doubt that the politically important decisions are taken in the parliamentary act, which are then 'merely' specified and implemented through corresponding regulations and

15 BVerfGE 33, 125-171. BVerfGE 47, 46-85. BVerfGE 49, 89-147.

16 E.-W. Böckenförde, 'Demokratie als Verfassungsprinzip', in J. Isensee & P. Kirchhof (eds), Handbuch des Staatsrechts der Bundesrepublik Deutschland, Volume II (2004), 429-496.

administrative measures.[17] Especially where the state seeks to regulate economic processes, parliament has come to be widely restricted to formulating highly abstract principles and goals that subsequently require extensive specification and more detailed formulation through regulations. However, the parliament also has rights of participation in designing regulations.[18] Often an act of parliament and the relevant regulations constitute an indissoluble unity, made together by the parliament and government. But it is often the case that "significant" regulations subject to the parliamentary reservation are taken, not in the parliamentary act, but in a subsequent regulation.

3. Administrative Rules, in Particular: "Directives"

Directives serve as administrative and general abstract instructions to department officials with no external legal effect. The legal foundation for directives is laid down in the Federal Budget Code (*Bundeshaushaltsordnung*, BHO). The BHO is a formal federal law that regulates budgetary activity of the federal government. If the "directives" – which are to have "only" internal administrative affect – imply administrative measures that, for example, involve special services or payments to third parties, then a specific legal authorization by the (parliamentary) legislator is necessary, as with conventional regulations.

II. Considerations on Separation of Powers and Democratic Theories

In particular, the distinction between "law" and "regulation"[19] can only be understood against the background of the German constitutional development of the separation of powers: "Only with [...] the distribution of the institutional power of norm setting on various institutions, the distinction between law and regulation has gained a fundamental and central importance for the state constitution".[20] In the constitutional monarchy and even during the Weimar Republic, however, there were basically no limits on the

17 J. Saurer, *Die Funktion der Rechtsverordnung. Der gesetzgeberische Zuschnitt des Aufgaben- und Leistungsprofils exekutiver Rechtsetzung als Problem des Verfassungsrechts, ausgehend vom Referenzgebiet des Umweltrechts* (2005).

18 F. Ossenbühl, 'Rechtsverordnung', *supra* note 13, 261-303 and 263.

19 Art. 80 I GG.

20 F. Ossenbühl, 'Rechtsverordnung', *supra* note 13, 266.

setting of regulations under the pressure of political and economic events – what the Nazis ultimately were able to exploit to overturn the Weimar democracy.

On the one hand, the German Basic Law effectively put a stop to this problem with Article 80, paragraph 1.[21] The transfer of legislative power to the executive is now allowed only in a certain form of content and limited amount. Due to the strongly worded parliamentary reservation, it is supposed to secure the rule of law in general and to uphold the democratic requirement of the Basic Law in particular. Nevertheless, the "simplified legislation"[22] is – even in modern democracies – legitimized by executive norm setting through the traditional empirical proposition that "the necessity [...] breeds executive dominance".[23] Even in Germany, the deep-seated suspicion towards executive lawmaking has meanwhile largely relaxed. It was not a democratic-orientation that led to the rethinking, but rather the matured recognition, born in the 70's, that the Parliament would be overwhelmed in an increasingly complex world with many questions and problems if it were expected to manage all necessary rules and regulations. As in other democracies like Britain, France and the USA,[24] regulations are now the most common source of legislation in Germany, even if they are perceived as more politically significant than the underlying parliamentary act itself.

Consequently, legal studies are increasingly taking the approach of viewing executive legal regulation separately from the delegation stemming from parliamentary legislative power and instead more as an inherent authority and competence of the executive branch.[25] The relationship between law- and rule-making is now conceived as a "cooperative norm-setting", though – as is typical for jurisprudential analyses of this kind – it remains unclear who empirically dominates in this form of cooperation. In a parliamentary system of government such as the Federal Republic of Germany for

21 "By law, the Federal Government, a Federal minister or state governments may be empowered to adopt ordinances too. The content, purpose and extent of the authorization granted in the law to be determined. The legal basis must be stated in the regulation. If a law provides that such authority may be further delegated, it needs to transmit a statutory authorization." Art. 80 I GG.

22 E. R. Huber, *Deutsche Verfassungsgeschichte seit 1789*, Volume VI (1981), 434-437.

23 *Id.*

24 A. v. Bogdandy, *Gubernative Rechtsetzung: eine Neubestimmung der Rechtsetzung und des Regierungssystems unter dem Grundgesetz in der Perspektive gemeineuropäischer Dogmatik* (2000).

25 *Id.*, 304-305..

instance, the executive tends to dominate the ordinary legislative process on account of this system's functional logic. In light of that, one can assume that the legislature, especially in "cooperative norm-setting", only plays a minor role.

This evidently raises constitutional and democratic theoretical questions (because of Article 70 paragraph 1 GG). Indeed the primacy of law and thus also of the parliamentary legislature over the executive regulatory power is theoretically indispensable: The delegation of legislative powers to the executive branch can hence be withdrawn at any time and the relevant regulations can be adopted by the parliament itself again. This widespread (theory? consensus?) among legal scholars still idealizes an "old" separation of powers of dualism between parliament and the government, which no longer corresponds to political realities. But given the conditions of the "new dualism", i.e. the fused unit of government and parliamentary majority,[26] it is hardly imaginable that the majority of the Bundestag could decide to disavow the government of its support by depriving it of authority it has already been assigned. Ordinances can therefore fully demonstrate a democratic deficit, which could emerge more clearly, the stronger the government resorts to decision-making via regulation. And that presumably occurs more frequently in times of crisis than in "normal" times since, then, the parliamentary majority sees even less cause to narrow "its" government through excessive parliamentary scrutiny.

D. On the Democratic Legitimacy of the Environmental Premium

The following chapter deals with an operationalisation of the study subject and, building upon that, will review whether the example of the Environmental Premium and its political implementation could be deemed a case of democratic law-making practice.

I. Operationalisation

In order to evaluate how "democratic" the practice of norm-setting and the ministerial decree of "regulations" are – and, for our study, particularly in the context of the Environmental Premium and its accompanying

[26] W. J. Patzelt, *Parlamente und ihre Funktionen. Institutionelle Mechanismen und institutionelles Lernen*, Wiesbaden 2003, 28.

regulations – the following three criteria seem to be appropriate for the analysis:

1. Determination of Authorization to Enact Regulations

It is essential to investigate whether the content, purpose and extent of the statutory authorization to adopt the environmental incentive in the law were adequately defined, or whether it rather involved a constitutionally and democratically questionable "carte blanche". According to the Federal Constitutional Court, to be "sufficiently defined" means the powers delegated to the regulator must be delineated with regard to the program and its implications to the extent that the authorization itself makes the results recognizable and predictable for citizens.[27] Conversely, it needs to be examined whether the regulator has produced its regulation, the "Scrapped Cars Act"[28], in a manner compatible to the limits set by the legislature in the "Scrapped Cars Act"[29], or whether the regulation follows a very different purpose, as it has been outlined in the Parliament Act as "sufficiently precise". This also applies to the content and dimension of the relevant rules: According to the "Essentiality Principle", the decision by the regulator to introduce a 5 billion euro program like the Environmental Premium would need to have been authorised beforehand in a parliamentary decision (for example in the Economic Stimulus Package II), both in regard to its content and the extent of the program.

2. Participation of the Bundestag and the Bundesrat in Regulation Setting

The next step involves examining whether and how the Bundestag and its committees were involved, not only in the authorising parliamentary act (The Act on Scrapped Cars, for instance), but also in the drafting of the regulation.[30] The more the Bundestag, and in particular its committees, participate in the regulation setting process, the higher the value of democratic

27 BVerfGE 55, 207, 226.

28 Richtlinie zur Förderung des Abstatzes von Personenkraftwagen (FöAbsPkWRL), BAnz 2009, 2264.

29 Richtlinie zur Förderung des Abstatzes von Personenkraftwagen (FöAbsPkWRL), BAnz 2009, 2264.

30 For the different participation opportunities, see F. Ossenbühl, 'Rechtsverordnung', *supra* note 13, 289.

legitimacy for the Environmental Premium. The involvement of the Bundesrat (by consent) should also be examined as it follows from the requirement in Article 80 paragraph 2 GG. In particular, the question also emerges as to whether the Federal Council (*Bundesrat*) has contributed perhaps even more than the Bundestag and its committees to the drafting of the Environmental Premium, which in turn would be typical for "executive federalism".

3. Public Discourse

Finally, the level of democratic legitimacy that can be ascribed to the Environmental Premium also depends on the presence of a public discourse by civil society organizations and interest groups, not least because these channels offer substantial opportunities to participate in the political decision-making process.

II. Analysis of the Democratic Legitimacy and Examination of the Criteria

The following is a systematic testing of the criteria above. After this step, the issues of the analysis raised above should be answered.

1. The Scope Determined by the Authorizing Decisions

The "Directive to Encourage the Sale of Passenger Cars' from 20th of February 2009 with amendments to the directive of the 17th of March 2009 and 26th of June 2009",[31] was adopted by the Federal Government in line with the "Pact for Employment and Stability in Germany", which was adopted into law by the Bundestag with the consent of the Bundesrat and entered into force on March 5th 2009.[32] Although the Environmental Premium was discussed with great interest to the public, the premium is considered merely an internal administrative order to the office responsible for deciding at its official discretion on the approval of paying out the premium – in this case the Federal Office of Economics and Export Control (BAFA)[33].

31 FöAbsPkWRL, *supra* note 28.
32 BStabSichG, *supra* note 6.
33 *Id.*

Thus, this policy will have no external legal effect. Its legal basis derives from the Federal Budget Code as determined by section 3.1 of the Directive itself. Since the directive, with its merely internal effects on the administration, concerns an administrative action which is connected with benefits to third parties, namely the "Environmental Premium", a statutory authorization of the (parliamentary) legislator is required. This statutory authorization is without doubt granted by the aforementioned Act on Employment and Stability. This also provides in Article 6 for a law establishing a special fund, "The Investment and Sinking Fund" (ITFG), which is intended to finance the measures in line with the Federal Government's stimulus plan with up to a maximum funding of 16.9 billion Euros. Art. 6, Para. 2, Indent 3 also announces a "program for strengthening the demand for passenger cars with up to 1.5 billion Euros". More details on this program are written in Art. 6, Para. 3, Section 3 of the "Act to Ensure Employment and Stability in Germany".[34]

In addition, the Bundestag expressly authorizes the Federal Ministry of Finance to cover the cost of incorporating these loans. It likewise provides details on the issue of amortization,[35] which will be provided through allocations from the federal government budget,[36] and the estimate of all revenues and expenditures of the fund in a specially prepared business plan.[37] However, it became apparent that the funds for "strengthening of car demand" had to be substantially increased due to the popularity of the program among citizens. Therefore, the "law in the law"[38] – the "ITFG" in line with the "Employment and Stability Act"[39] – was modified again by the law of June 25th 2009.[40] Now, the Bundestag decided that the program to strengthen the demand for cars could cost up to 5 billion Euros. This shows that the "Directive to Encourage the Sale of Passenger Cars"[41] the federal government passed is based on a sufficient determination of content from the authorizing provisions through the Employment and Stability Act as well as by the law incorporated in it, the "ITFG".

34 *Id*., 417-418.
35 *Id*., 418, Art. 6 para. 5.
36 *Id*., 418, Art. 6 para. 6.
37 *Id*., 418, Art. 6 para. 7.
38 It is common practice in Germany to combine several laws into one law.
39 BStabSichG, *supra* note 6.
40 Gesetz zur Änderung des Gesetzes zur Errichtung eines Sondervermögens "Investitions- und Tilgungsfonds", *supra* note 11.
41 FöAbsPkWRL, *supra* note 2.

The question is still whether the "Second Regulation to Amend the Directive of Scrapped Cars"[42] was determined sufficiently in content to amend the directive by Act of Parliament. The legal basis of the Second Regulation is based less on the "Act on the Disposal of Old Vehicles",[43] which was decided on June 21st, 2002 by the Bundestag with the consent of the Bundesrat, and by that also less based on the implementation of the ELV Directive by the EU in September 2000.[44] Rather, this regulation is based formally on the "Law on the Promotion of Recycling and Ensuring Environmentally Sound Waste Disposal".[45] The fact that the "Recycling and Waste Management Act" determined neither the content nor the purpose and extent of the "Environmental Premium" can be considered unproblematic insofar as the "Second Regulation amending the Directive on Scrapped Cars"[46] only guaranteed the smooth flow and the prevention of abuse of the "Environmental Premium". Only a very *insignificant* detail in the Directive on Scrapped Cars was changed. Therefore, it hardly can be deemed a violation of the "Essentiality Principle" of the Federal Constitutional Court.

Overall, one could conclude that the previous authorizing norms provide a sufficiently reasonable determination of content for the "Environmental Premium". So in particular, the "Act to Ensure Employment and Stability in Germany",[47] which was decided by the Parliament with the consent of the Bundesrat, cannot be accused of uncertainty in content. The provisions regarding the content, purpose and scope of the statutory authorization to adopt the Environmental Premium and corresponding regulations introduced to serve its smooth implementation are hardly causes for criticism. Concerning the tendency and the program, the national support measures implemented by the federal government were even closely regulated by the parliamentary legislator. This applies also and especially for the extension of the adopted incentive measures - for example, the Bundestag explicitly consented to increasing the financial supplement of the Environmental Premium to 5 billion Euros by amendment.

42 Zweite Verordnung zur Änderung der Altfahrzeug-Verordnung, BGBl I 2009, 738

43 Gesetz über die Entsorgung von Altfahrzeugen (AltfahrzeugG), BGBl I 2002, 2199-2211.

44 Directive of the EP and Council 2000/53/EC of 18 September 2000, OJ L 269.

45 Kreislaufwirtschafts- und Abfallgesetz (KrW-/AbfG), BGBl I 1994, 2705.

46 Zweite Verordnung zur Änderung der Altfahrzeug-Verordnung, *supra* note 42.

47 BStabSichG, *supra* note 6.

2. Participation of the Bundestag and the Bundesrat – "Collaborative Standard-Setting"?

As illustrated above, the German parliament was involved in the introduction of the National Environmental Premium explicitly and sufficiently. The following will examine the extent to which a political discourse has taken place in the German parliament and, depending on that evaluation, whether it constitutes a strengthening or weakening of democratic legitimacy. This could be assessed from the media coverage of the committees and of the plenary debates. There is a wealth of materials encompassing statements, recommendations for decisions and detailed motions that document the controversial debates leading up to the adoption of the "Act to Secure Employment and Stability"[48] in Germany.

For example, following the law to establish a special "Investment and Sinking Fund", the recommendation of the Committee for Economy and Technology notes in the sub-report that the Legal Committee, the Finance Committee, the Budget Committee, the Committee on Labour and Social Affairs, the Committee on Transport, Building and Urban Affairs, and the Committee on Environment, Nature Conservation and Nuclear Safety all submitted their opinions on the draft law. The submission and consideration of the recommendations indicate that a substantive discussion had taken place in the committees listed. To that extent, it can also be assumed that the Environmental Premium was taken up for discussion as the subject of the committees' work because the premium derives its funding solely from the investment and sinking fund. Another example is the report by the Budget Committee of February 12th, 2009[49] to the draft law on securing employment and stability in Germany: a total of 14 of the 22 standing committees submitted their opinions.

According to the "new dualism", there should have been a discussion between government and opposition parties. This can be gauged on the basis of corresponding resolutions. In such motions, for example, positions on the draft law amending the "Act Establishing a Special Investment and Sinking Fund"[50] are taken and arguments made in nine sub-items against the introduction of the Environment Premium.[51] Other motions and corresponding reasons for their rejection refer to the draft "Law to Ensure Employment and

48 *Id.*
49 BT-Drs. 16/11825.
50 Art. 6 BStabSichG, *supra* note 6.
51 BT-Drs. 16/13229.

Stability in Germany".[52] Consequently a discourse between government and opposition parties has been demonstrated, at least in the written correspondence.

As explained in D.I.2, it is necessary to examine above all to what extent the Bundestag and Bundesrat were equally involved in the development of the relevant regulation, and if the Bundesrat was possibly more strongly involved in the decisions than the Bundestag committees. If that is the case, a strengthening of executive federalism at the cost of a democratic deficit could be attested. To answer this question, a decision recommendation and a report of the Committee on the Environment, Nature Conservation and Nuclear Safety of March 18th, 2009 can be consulted.[53] It is explicitly concerned with the Second Regulation Amending the ELV Regulation. In this context, the opinions of the committees (Economic, Technology and Transport, Building and Urban Affairs) are listed in the consultation process with its conclusions documented. Furthermore, the Regulation of the Federal Government was forwarded to the Bundesrat on March 20th, 2009.[54] The accompanying letter from the chancellor to the president of the Bundesrat states that the German Bundestag approved the Regulation on the previous day. Based on these findings, one cannot read a tendency for greater Bundesrat involvement in comparison to the Bundestag.

In light of the above, a political discourse has taken place regarding the introduction of the Environmental Premium in the German parliament. Its intensity is documented in records, reports, recommendations and resolutions of the committees. Moreover, the decision-making process has not confirmed our initial hypothesis of an obvious imbalance in participation between the Bundestag and the Bundesrat, so a typical characteristic of executive federalism dominance cannot be confirmed in this case. The presumption of democratic deficit seems weaker after our examination of participation by the Bundestag and the Bundesrat.

3. Public Discourse as a Source of Legitimacy

An important purpose of public discourse is making the political decision-making processes more transparent and therefore more accessible to a broader audience. It is a main – and for some, the only – (occasion?) for interest groups, civil society organizations and citizens to review and moni-

52 BT-Drs. 16/11954.
53 BT-Drs. 16/12313.
54 BR-Drs. 238/09.

tor policy. The media bear a special responsibility here because, through their coverage, they communicate information and content, generate public pressure and are consequently intensely involved in the political decision-making process. Therefore it is important to analyze how national media have reported on the introduction of the National Environmental Premium and whether and in what way organizations have been involved in the political process, for example, through hearings and positions.

The national media reporting has commented on and continues to discuss the possible economic impact and the budgetary consequences of the National Environmental Premium. Thus, according to the data obtained via press reporting, it can be summarized that the coverage of the political decisions taken in Berlin concentrated primarily on the implementation procedures and the implications for citizens. However, one finds essentially no report offering a detailed breakdown of the decision-making process. If the political discourse is reported on, it remains primarily limited to the negotiation and decisions of the federal government and, at most, the statements by party-group leaders. "The agreement has been reached: [...] According to Wilhelm, present at the meeting were – besides Merkel – Finance Minister Peer Steinbrück, Vice-Chancellor Frank-Walter Steinmeier [...], the Head of the Chancellor's Office Thomas de Maizière [...] and via telephone the Minister for Economic Affairs Karl-Theodor zu Guttenberg (CSU). The new regulation was discussed with the Party-Group Leaders, Volker Kauder (CDU), Peter Struck (SPD) and Peter Ramsauer (CSU)".[55] An overview of parliamentary debates on the introduction of the National Environmental Premium was nowhere to be found in the press reports studied. But the Parliament as a legislator was essentially involved in the introduction of the Environmental Premium.

In conclusion it is obvious that the political decision-making process as well as the contrasting positions of the participating and responsible actors has not been made transparent enough in the context of media communication. Media reports on the reactions of different interest groups and organizations on the establishment of the National Environmental Premium address, unsurprisingly, the economic benefits and the positive and negative environmental effects. Yet the political process that led to its introduction has not been questioned from a democratic or legitimacy standpoint. Regarding the involvement of civil society, interest groups and organizations

[55] Spiegel Online, Regierung begrenzt Abwrackprämien-Summe (sic!) auf fünf Milliarden Euro (7 April 2009) available at http://www.spiegel.de/politik/deutschland/0,1518,618023,00.html (last visited 18 January 2010).

in the implementation process of the Environmental Premium, several public hearings have taken place in the Bundestag, where invited organization as well as non-invited organizations and individual experts could express their opinions. An example of such a hearing is summarized in the materials of the Committee on Labour and Social Affairs.[56] Of the nine organizations which had been invited, the Confederation of German Tradesmen and Tradeswomen made a statement explicitly regarding the government's Environmental Premium on February 9th, 2009. Therefore, organized interest groups were not excluded from the policy formulation process. On the contrary, the political process of drafting and passing the Environmental Premium could be described, despite the short drafting phase, as remarkably transparent.

E. Conclusion

In this paper we have examined the political decision-making process for the introduction of the National Environmental Premium in Germany. Firstly, the double hypothesis we posed initially could not be confirmed by the analysis - it has not been confirmed that the National Environmental Premium is the exclusive product of the executive branch as it has been suggested in media. Secondly, in this case the German Federal Republic's system of government with its peculiar executive federalism did not hinder the problem-solving process, nor was the political decision-making process fraught with particular democratic deficits. Even in these times of "financial crisis", the normative, i.e. constitutional democratic standards prescribed by the constitution which all legislation and the enactment of regulations and directives in the parliamentary system of government must adhere to, have not been violated or neglected. In addition, a broad public discourse has taken place which has provided the drafting and enactment of the National Environmental Premium with additional democratic legitimacy.

The democracy of the constitution has proved surprisingly robust in the process of introducing the Environmental Premium. This is illustrated in three aspects: First, the government was able to demonstrate the ability to decide and act especially in times of crisis – regardless of what might be said of the economic, financial or ecological effects of the Environmental Premium. Second, we showed that the German federal parliament, which is at the centre of the legislative process, even in times of crisis hardly did not

[56] BT-Drs. 16(11)1291.

take a back-seat approach and did not merely delegate decision-making to the federal government. In both laws, the Environmental Premium derives its authorization from - namely the Stability and Employment Act and the Act for the Establishment of an Investment and Sinking Fund - the Bundestag strictly ensured that no action by the executive circumvented the parliament. Third, the "new dualism" unity of parliamentary majority and government was shown as exceptionally effective.

Based on these results, we confront the widespread accusation made in the literature that the system of government has been and is experiencing "deparliamentarization". While there is no denying that this phenomenon is occurring at multiple levels, in multiple places, for no less multiple reasons, it does not seem to apply across the board. And this seems all the more surprising in a case where circumstances prevail, in which one would most likely expect that parliaments play only a supporting role: like in times of a global financial crisis that is far from being finished.