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Central European Constitutional Courts in the face of EU membership : the influence of the German model of integration in Hungary and Poland

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CHAPTER THREE

THE GERMAN FEDERAL CONSTITUTIONAL COURT AND EUROPEAN LAW: A CASE OF “THUS FAR, AND NO FURTHER”?

BACKGROUND

In presenting the German model, the approach of the Federal Constitutional Court (“*Bundesverfassungsgericht*,” hereafter “FCC”) to European integration, the current writer was naturally overwhelmed by the abundance of literature on this issue. Setting out the model has accordingly been no easy task and clearly forms a work in itself.¹ Nevertheless, this Chapter seeks to provide an exposition of the basic traits of the model – with reference to the decisions of the FCC – that might provide guiding principles for the constitutional tribunals in Hungary and Poland which latter courts’ responses are to be analysed in Chapters 4 and 5 respectively.

In order to facilitate the making of comparisons between these three jurisdictions, the present author has considered it apposite to ensure inter-chapter structural consistency. Consequently, the approach used in this Chapter will be maintained in the succeeding Chapters on the Hungarian Constitutional Court and the Polish Constitutional Tribunal. The three Chapters therefore commence with an outline of constitutional review, concentrating on the main procedures by which European law issues come before the relevant constitutional tribunal (A.). The research then examines the essential core of sovereignty, i.e., that part of a State’s existence without which it would cease to be: while the German Constitution² has an express provision in this respect, Art. 79(3)³ known as the eternity clause, the Hungarian and Polish courts (like their Austrian counterpart⁴) have in some way attempted to formulate an

¹ For a detailed description of the FCC case-law, in German see: H.-W. Rengeling, A. Middeke & M. Gellermann (eds.), *Handbuch des Rechtsschutzes der Europäischen Union*, C.H. Beck, München (2003), chap. 35, 628-659. In English, see J. Kokott, “German constitutional jurisprudence and European integration” [1996] EPL 237 and 413; J. Kokott, “Report on Germany,” in A.M. Slaughter, A. Stone Sweet & J.H.H. Weiler, *The European Court and National Courts – Doctrine and Jurisprudence: Legal Change in its Social Context*, Hart Publishing, Oxford (1998), chap. 3, at 86-107; and K. Alter, *Establishing the Supremacy of European Law*, OUP, Oxford (2001), chap. 3, at 64-123.

² The present author has used the expression “Constitution” rather than “Basic Law” which is a direct translation of the German “*Grundgesetz*.”

³ Constitution, Art. 79(3) provides: “Amendments to this Basic Law affecting the division of the Federation into *Länder*, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.”

⁴ The Austrian constitutional order, unlike the German one, has no “eternity clause.” As a result, the Austrian Constitution can be amended, subject to the necessary procedural requirements (see Constitution Arts. 42, 44 and 50). Nevertheless, since the 1950s, the Austrian Constitutional Court (“VfGH”) has developed its own concept of an essential core of sovereignty through the identification of its basic structural principles or building blocks (*Bausteine*). The process started in 1952 in the *Voralberg Nationality* case (VfGH, G17/52, 16 Dezember 1952,

essential core through interpretation of the Constitution, inspired by the German model (B.). Each Chapter continues by addressing the issue of transfers of sovereignty in the face of European integration, providing a constitutional matrix within which the courts examined have operated. In respect of Germany, it is necessary to address the legal situation before (C.II.) and after (C.III.) the coming into force of the amendments to the Constitution, resulting from the ratification of the 1992 Maastricht Treaty.

The focus of this research work is the actual case-law of the respective constitutional courts. Due to the fact that the FCC has been judicially active for many years in negotiating the extent of the impact of European law domestically, the content of its model in this field has been the subject of a number of important cases and the object of intense and incisive criticism both at home and abroad. For this reason, the exposition of the FCC model vis-à-vis European law has proved to be somewhat lengthy.

The discussion in the Chapter looks first at the FCC's acceptance of certain principles and matters regarding European law: supremacy or priority of application; direct effect; as well as references to the European Court of Justice ("ECJ") (D.). However, since all is not so rosy in the German garden for European blooms, the Chapter looks at the limits the FCC has put on its acceptance of European law, basically its defence of the essential core of sovereignty; its review of national legislation transposing European law into the domestic system; as well as refusals to refer questions to the ECJ (E.). The Conclusion, heavily influenced by the 2009 *Lisbon Treaty case*,⁵ seeks to discern the extent both to which the FCC has attempted to maintain any semblance of continuing judicial dialogue with the ECJ and to which the Hungarian and Polish counterparts might be influenced in following their German cousin.

VfSlg 2455) in which the VfGH ruled that what was meant by a total revision of the Constitution under Art. 44(3) was "a revision such that it touched one of the principal *Bausteine* of the Federal Constitution." The VfGH counted in the group of such *Bausteine* the democratic principle; the principle of a state under the rule of law; and the federal principle. It has subsequently added to this list: see R. Walter & H. Mayer, *Grundriß des österreichischen Bundesverfassungsrechts*, 8th ed., Manz Verlag, Wien (1996), at 146ff; F. Ermacora (ed.), *Österreichische Bundesverfassungsgesetze*, 12th ed., Böhlau Verlag, Wien/Köln (1989), at 11ff. On the issue of sovereignty in relation to EU accession, see H. Schäffer, "Österreichischer Landesbericht," in J. Schwarze (ed.), *The Birth of a European Constitutional Order*, Nomos, Baden-Baden (2001), at 372-373.

⁵ On this case see H. Baddenhausen, "Die neue Begleitgesetzgebung zum Vertrag von Lissabon nach Verabschiedung vom Bundestag und Bundesrat" (2009) 36 EuGRZ 543; C.D. Classen, "Legitime Stärkung des Bundestages oder verfassungsrechtliches Prokrustesbett? Zum Urteil des BVerfG zum Vertrag von Lissabon" (2009) 64 JZ 881-889; D. Doukas, "The verdict of the German Federal Constitutional Court on the Lisbon Treaty: Not Guilty, but don't do it again" (2009) 35 EL Rev. 866-888; K.F. Gärditz & C. Hillgruber, "Volkssouveränität und Demokratie ernst genommen – Zum Lissabon-Urteil des BVerfG" (2009) 64 JZ 872-881; T. Giegerich, "The Federal Constitutional Court's Judgment on the Treaty of Lisbon – The Last Word (German) Wisdom Ever Has to Say on a United Europe?" (2009) 52 GYIL 9-43; D. Hanf, "L'encadrement constitutionnel de l'appartenance de l'Allemagne à l'Union européenne. L'apport de l'arrêt 'Lisbonne' de la Cour constitutionnelle fédérale" (2009) 35 CDE 639-710; P. Kiiver, "The Lisbon Judgment of the German Constitutional Court: A Court-Ordered Strengthening of the National Legislature in the EU" (2010) 16 ELJ 578-588; and F. Wohlfahrt & J. Kottmann, "Der gespaltene Wächter? – Demokratie, Verfassungsidentität und Integrationsverantwortung im Lissabon-Urteil" (2009) 69 ZaöRV 469-470.

A. CONSTITUTIONAL REVIEW

1. Introduction

Following on from the negative experiences of the Weimar Republic⁶ and the Third Reich, the drafters⁷ of the 1949 Constitution⁸ sought to provide a constitutional guarantor of democracy and the state under the rule of law (“*Rechtsstaat*”),⁹ independent of the executive and legislature, and with the power to strike down unconstitutional laws as well as upholding the fundamental rights of individuals.¹⁰ In seeking a model from which to derive guidance and inspiration, the drafters turned to the Austrian Constitutional Court (“*Verfassungsgerichtshof*”) which had been established in 1920,¹¹ based on ideas going back to the 19th century.¹² Thus, genesis of the FCC in Germany may be found in its Austrian predecessor.

The jurisdiction of the FCC¹³ is to be found in the 1949 Constitution and in the 1951 Act on the Federal Constitutional Court (“CCA”),¹⁴ which enlarges upon the relevant

⁶ On the Weimar Republic, see H. Schneider, “Die Reichsverfassung vom 11. August 1919,” in J. Isensee & P. Kirchhof, *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, Vol. I, 2nd ed., C.F. Müller Verlag, Heidelberg (1995), chap. 3, 85ff.

⁷ For the German constitutional tradition, see E. Kern, *Geschichte des Gerichtsverfassungsrechts*, C.H. Beck, München/Berlin (1954); H.W. Koch, *A Constitutional History of Germany in the nineteenth and twentieth centuries*, Longman, London/New York (1984); R. Wahl, “Der Konstitutionalismus als Bewegungsgeschichte” (2005) 44 *Der Staat* 571; and W. Heun, “Die Struktur des deutschen Konstitutionalismus des 19. Jh. im verfassungsgeschichtlichen Vergleich” (2006) 45 *Der Staat* 365.

⁸ For a detailed account of the formation of the 1949 Constitution, see A. Hopfauf, “Einleitung,” in B. Schmidt-Bleibtreu, H. Hofmann & A. Hopfner (eds.), *GG: Kommentar zum Grundgesetz*, 11th ed., Carl Heymanns Verlag, Köln/München (2008), 1, at 1-60; and J.F. Golay, *The Founding of the Federal Republic of Germany*, University of Chicago Press, Chicago (1964). On reunification, it was kept in force: R. Piotrowicz & S. Blay, *The Unification of Germany in International and Domestic Law*, Editions Rodopi BV, Amsterdam/Atlanta (GA) (1997), at 36-38.

⁹ In Western Europe at about that time, such process also occurred in Italy and in France: A.J. Zurcher (ed.), *Constitutions and Constitutional Trends since World War II*, New York University Press, New York (1955).

¹⁰ H. Simon, “Verfassungsgerichtsbarkeit,” in E. Banda, W. Maihofer & H.-J. Vogel (eds.), *Handbuch des Verfassungsrechts der Bundesrepublik Deutschland*, 2nd ed., Walter de Gruyter, Berlin and New York (1994), para. 34, Rn. 3ff.

¹¹ H. Steinberger, “Ausländische Einflüsse bei der Entstehung des Grundgesetzes,” in K. Stern (ed.), *40 Jahre Grundgesetz: Entstehung, Bewährung und internationale Ausstrahlung*, C.H. Beck, München (1990), 53; and R. Machacek, *Austrian Contributions to the Rule of Law*, N.P. Engel, Kehl, Strasbourg and Arlington (1994), at 50.

¹² G. Jellinek, *Ein Verfassungsgerichtshof für Österreich*, Alfred Hölder, Wien (1885); and, of course, Hans Kelsen, see, e.g., R. Walter, “Die Organisation der Verfassungsgerichtshofs in historischer Sicht,” in H. Lentze & P. Putzer (eds.), *Festschrift für Ernst Carl Hellbling zum 70. Geburtstag*, Wilhelm Fink Verlag, Salzburg (1971), at 734-736

¹³ See generally, D.C. Umbach & T. Clemens, *Bundesverfassungsgerichtsgesetz: Mitarbeiterkommentar und Handbuch*, C.F. Müller Juristische Verlag, Heidelberg (1992); G. Sturm, “Artikel 93,” in M. Sachs (ed.), *Grundgesetz Kommentar*, 2nd ed., C.H. Beck, München (1999), at 1750-1775; G. Sturm, “Artikel 94,” in Sachs (1999), at 1775-1782; G. Roellecke, “Aufgaben und Stellung des Bundesverfassungsgerichts im Verfassungsgefüge,” in Isensee & Kirchhof, (1998), Vol. II, chap. 53, 665; and W. Löwer, “Zuständigkeiten und Verfahren des Bundesverfassungsgerichts,” in Isensee & Kirchhof, (1998), Vol. II, chap. 56, at 737.

provisions of the Constitution. For the purposes of this research, the two main proceedings before the FCC which are most relevant are constitutional review and constitutional complaints.

2. Types of constitutional review

As regards constitutional review, this is linked to the constitutional requirement in Constitution Art. 20(3) that all federal and *Land* legislation is subject to the constitutional order. As a result, even if a statute has been adopted by the correct procedures, it is not automatically compatible with the Constitution since its substance must also conform with the Constitution: in particular, it must not violate the basic rights of the individual.¹⁵ The FCC must check that the legislature acts in accordance with the provisions of the Constitution when making laws and provides for various types of procedure by which the FCC may perform its tasks in this respect.

First, under CCA s. 13(6) in conjunction with Constitution Art. 93(1)(2), when the FCC conducts an abstract norm control (“*abstrakte Normenkontrolle*”), the question of the unconstitutionality of a (provision of a) statute does not arise in the context of a particular case in which the challenged statute is in issue. Instead, such proceedings are commenced purely to challenge the constitutionality of a (provision of a) statute as such. The FCC thus decides independently of a specific dispute on the compatibility of federal law or *Land* law with the Constitution or on the compatibility of *Land* law with other federal law. Only the Federal Government, a *Land* government or at least one third of the Members of the *Bundestag* may apply for such proceedings.¹⁶ The subject of such review may be any legal rule of the Federation or of a *Land* – in other words, not just laws adopted by parliament but also government decrees or the by-laws of independent public bodies.¹⁷

Secondly, under CCA s. 13(11) in conjunction with Constitution Art. 100(1), when conducting a concrete norm control of specific laws (“*konkrete Normenkontrolle*”), the FCC is seized of a reference from a domestic court. Every German court is entitled and duty-bound to examine whether legal provisions are compatible with the Constitution. Under Constitution Art. 100(1), it must stay its proceedings and obtain a decision from the FCC if it considers a statutory provision to be incompatible with the Constitution.¹⁸ The FCC merely decides whether or not the legal rule submitted is compatible with the Constitution: it does not decide on the legal dispute itself which was the cause of the submission.¹⁹

¹⁴ Different procedures are set out in detail in the *Bundesverfassungsgerichtsgesetz* (the Federal Constitutional Court Act), BVerfGG (“CCA”), 12 März 1951, 1951 BGBl., I, 243; as republished on 11 August 1993, 1993 BGBl., I, 1474.

¹⁵ Constitution Art. 1(3) states expressly that the basic rights listed in it are binding upon the legislature.

¹⁶ By this means in particular the Opposition in the *Bundestag*, provided that it holds at least one third of the seats, has recourse to the FCC if it considers a law adopted by the majority of the deputies to be unconstitutional.

¹⁷ A variation of the review of law in general is contained in Constitution Art. 93(1)(2a), inserted into the Constitution in 1994, according to which the FCC can also rule in case of disagreement as to whether a law meets the requirements of Constitution Art. 72(2) which gives the Federation the right to legislate concurrently with the *Länder*. Applicants may be the *Bundesrat*, a *Land* government or a *Land* parliament.

¹⁸ A *Land* law may also be challenged as being incompatible with a federal law: Constitution Art. 100(1).

¹⁹ For details, see CCA ss. 80-82.

Lastly, when requested by a court under Constitution Art. 100(2),²⁰ the FCC must decide whether or not a rule of international law is an integral part of federal law and whether such rule directly creates rights and duties for the individual (Constitution Art. 25).²¹

3. Constitutional complaints (Fundamental rights protection)

Under Constitution Art. 93(1)(4a) and (4b),²² anyone who claims that his fundamental rights have been breached by a public authority (i.e., legislation, administrative and judicial decisions) may make a constitutional complaint to the FCC. This form of complaint is an extraordinary legal remedy available to the individual for the maintenance of his basic rights and reflects the special importance which the German Constitution attaches to the basic rights of the individual *vis-à-vis* public authority. The basic rights embodied in the Constitution²³ are not mere programmatic tenets but are directly enforceable law binding the legislature, the executive and the judiciary.²⁴ If an individual feels that one of his basic rights has been violated by any act of a public authority, be it a federal or a *Land* authority, he may have direct recourse to the FCC: he does not need to instruct a lawyer or pay court fees.

A constitutional complaint may be entered by any person, whether natural or legal, and where basic rights apply not just to Germans but to everyone (e.g. equality before the law and freedom of expression) foreigners, too, may enter a constitutional complaint if such rights are violated.

While a constitutional complaint may relate to any act by a public authority violating a basic right,²⁵ the requirement for lodging such a complaint is that there is no other means of eliminating the violation of a basic right. In principle all remedies within the relevant branch of jurisdiction (e.g. civil, criminal or administrative) must therefore first be exhausted before having recourse to the FCC.²⁶ If these remedies prove unsuccessful, a person may enter a constitutional complaint with the FCC within one month of the decision being announced or received by the court of last instance (CCA s. 93(1)).²⁷

The complainant has to petition the FCC to grant leave which must be granted if the complaint is of fundamental constitutional significance or if it is indicated for an

²⁰ CCA s. 13(12) and cf. CCA ss. 83 and 84.

²¹ Constitution Art. 25 reads: “The general rules of public international law form part of the Federal law. They take precedence over the laws and directly create rights and duties for the inhabitants of the Federal territory.”

²² Read in conjunction with CCA s. 13(8a).

²³ Cf. the rights listed in Constitution Arts. 1-19, e.g. equal rights for men and women, freedom of religion, expression, assembly and profession, and the right to property as well as allied rights, e.g., the right to a lawful judge, Constitution Art. 101(1).

²⁴ Constitution Art. 1(3).

²⁵ In other words, a law, a directive of an administrative agency, or a court decision.

²⁶ An example of the operation of the principle of subsidiarity, cf. CCA s. 90(2).

²⁷ In exceptional circumstances, the FCC may decide immediately on a complaint lodged before all remedies have been exhausted if it is of general relevance or if recourse to other courts first would entail a serious and unavoidable disadvantage for the complainant.

achievement of fundamental rights (CCA s. 93a(2)). According to the FCC,²⁸ the constitutional complaint serves a dual function: first as a means of extraordinary judicial relief giving the citizen the possibility to defend her/his basic rights; and, secondly, it serves in addition the function of preserving the objective constitutional order and of serving the interpretation and development of constitutional law.²⁹

In its case-law, the FCC has used the European Convention on Human Rights (“ECHR”)³⁰ and the European Court of Human Rights (“ECtHR”)³¹ case-law in its judgments but in combination with the relevant right under the Constitution.³² However, the FCC has consistently ruled³³ that violations of the ECHR *per se* cannot serve as a basis for an individual constitutional complaint before it.

B. ESSENTIAL CORE OF SOVEREIGNTY

1. Introduction

Although the drafters of the 1949 Constitution provided a mechanism for its amendment by a two-thirds majority vote in each house of Parliament,³⁴ the so-called “*Ewigkeitsklausel*” (“eternal guarantee” or “eternity clause”)³⁵ of Constitution Art. 79(3) limits this power of amendment: “Amendments of the Constitution affecting the division of the Federation into *Länder*, the participation in principle of *Länder* in legislation, or the basic principles laid down in Arts. 1 and 20, are inadmissible.” These latter two Articles state:

Article 1. (1) The dignity of man is inviolable. To respect and protect it is the duty of all state authority.

²⁸ *In re Firma K.*, BVerfG 28 Juni 1972, 1 BvR 105/63 and 275/68: BVerfGE 33, 247, at 258-259.

²⁹ It is the subject of some debate as to whether or not the constitutional complaint in each case exclusively serves the individual interests of citizens: see, e.g., K. Schlaich, *Das Bundesverfassungsgericht*, C.H. Beck, München (1997), at 180-182.

³⁰ Convention on the Protection of Human Rights and Fundamental Freedoms, signed in Rome, 4 November 1950: CETS 005.

³¹ ECHR, Arts. 19-51.

³² *Görgülü*, 2 BvR 1481/04, 14 Oktober 2004: BVerfGE 111, 307.

³³ *EMRK*, 2 BvR 621/72, 14 März 1973: BVerfGE 34, 384, at 395; *Reparationsschäden*, 1 BvR 631/69 and 24/70, 13 Januar 1976: BVerfGE 41, 126, at 141; and *Äußerungsrecht und Berücksichtigungsrecht*, 2 BvR 731/80, 17 Mai 1983: BVerfGE 64, 135, at 157.

³⁴ Constitution Art. 79(1) and (2) which state: “(1) This Constitution can be amended only by statutes which expressly amend or supplement the text thereof....

(2) Any such statute requires the consent of two thirds of the members of the House of Representatives [*Bundestag*] and two thirds of the votes of the Senate [*Bundesrat*].”

³⁵ P. Kirchhof, “Die Identität der Verfassung in ihren unabänderlichen Inhalten,” in Isensee & Kirchhof, (1995), Vol. I, chap. 19, 775; J. Lücke, “Artikel 79,” in Sachs (1999), Rdn. 20-47, at 1511-1519; and R. Sannwald, “Artikel 79,” in Schmidt-Bleibtreu, Hofmann & Hopf (2008), 1665-1680, especially at 1672-1679.

- (2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.
- (3) The following basic rights bind the legislature, the executive and the judiciary as directly enforceable law.

Article 20. (1) The Federal Republic of Germany is a democratic and social federal state.

(2) All state authority emanates from the people. It is exercised by the people by means of elections and voting and by separate legislative, executive and judicial organs.

(3) Legislation is subject to the constitutional order; the executive and the judiciary are bound by the law.

(4) All Germans shall have the right to resist any person seeking to abolish this constitutional order, should no other remedy be possible.

One of the main results achieved in the 1949 Constitution is that the essential core of sovereignty of Germany – the structural principles³⁶ including the state under the rule of law (*Rechtsstaat*), democracy, and protection of fundamental human rights – are found in these unamendable constitutional provisions. The contents of these principles have been fleshed out and interpreted by the FCC in its case-law.

2. State based on the rule of law (“*Rechtsstaat*”)

The State must ensure justice and legal certainty. Constitution Art. 20(3) embodies the rule of law principle by stating that all governmental activities – legislative, executive, judicial – are bound by law and justice.³⁷

The Constitution goes beyond raising the rule of law³⁸ in an unspecified manner to the rank of a structural principle by providing a variety of institutions and norms which fall under the general *Rechtsstaat* principle and seek to implement it.³⁹ In addition to the guarantees of basic rights considered separately below, one may mention the separation of powers;⁴⁰ the independence of the judiciary;⁴¹ the ban on extraordinary courts;⁴² the right to a

³⁶ M. Sachs, “Artikel 20,” in Sachs (1999), Rdn. 1-175, at 743-799; and H. Hofmann, “Artikel 20,” in Schmidt-Bleibtreu, Hofmann & Hopfner (2008), 634, at 657-658.

³⁷ Constitution Art. 20(3).

³⁸ U. Karpen, “Rule of Law,” in U. Karpen, *The Constitution of the Federal Republic of Germany*, Nomos Verlagsgesellschaft, Baden-Baden (1988), 172ff; P. Kunig, *Das Rechtsstaatsprinzip: Überlegungen zu seiner Bedeutung für das Verfassungsrecht der Bundesrepublik Deutschland*, Mohr Siebeck, Tübingen (1986); E. Schmidt-Aßmann, “Der Rechtsstaat,” in Isensee & Kirchhof, (1995), Vol. I, chap. 24, 987; M. Sachs, “Artikel 20,” in Sachs (1999), s.v. “Rechtsstaat,” Rdn. 74-165, at 766-797; and H. Hofmann, “Artikel 20,” in Schmidt-Bleibtreu, Hofmann & Hopfner (2008), 634, at 664-681.

³⁹ V. Götz, “Legislative and Executive Power under the Constitutional Requirements entailed in the Principle of the Rule of Law,” in Ch. Starck (ed.), *New Challenges to the German Basic Law*, 49 *Studien und Materialien zur Verfassungsgerichtsbarkeit*, Nomos Verlagsgesellschaft, Baden-Baden (1992), chap. 6, 141, at 143.

⁴⁰ State authority emanating from the people is exercised by specific legislative, executive and judicial organs: Constitution Art. 20(2), second sentence. This principle implies a distinction between legislative, executive and judicial functions and their allocation to specific organs (“separation of powers”) as well as mutual checks and

hearing conducted in accordance with the law, the prohibition on retroactive criminal laws, and on more than one sentence for the same crime.⁴³ The German approach is that all these constitutional guarantees are regarded as safeguards falling under the rule of law since all of them are ultimately instrumental in protecting the individual's rights and freedoms against the power of the State.⁴⁴

Over and above the specific items mentioned in connection with the *Rechtsstaat* in the Constitution, this principle is regarded by both the FCC⁴⁵ and legal theory⁴⁶ as constitutionally binding on the legislator, the executive and the courts.

Legal certainty is one of the most important requirements deduced from the *Rechtsstaat* principle and was drawn⁴⁷ on to establish that administrative decisions – in which an individual is awarded some type of benefit (the grant of a permission, social benefit or subsidy), cannot be simply modified or repealed *ex post facto* even when the administrative authority in question may have reason to believe that its earlier decision was legally unsound.⁴⁸ Legal certainty is also advanced to challenge the legality of retroactive legislation,⁴⁹ retroactive punishment already being prohibited by Constitution Art. 103(2).

The FCC further developed the *Rechtsstaat* to ensure material guarantees of the principle and their material protection: notably the principles of proportionality⁵⁰ and equality.⁵¹

curbs of those organs ("balance of powers"): E. Schmidt-Aßmann, "Der Rechtsstaat," in Isensee & Kirchhof (1995), Vol. I, chap. 24, 987, at 1009-1023; M. Sachs, "Artikel 20," in Sachs (1999), s.v. "Gewaltenteilung," Rdn. 79-93, at 769-773; and H. Hofmann, "Artikel 20," in Schmidt-Bleibtreu, Hofmann & Hopfuf (2008), 634, at 663-664.

⁴¹ Constitution Art. 97.

⁴² Constitution Art. 101.

⁴³ Constitution Art. 103.

⁴⁴ Götz (1992), at 144.

⁴⁵ *Application of the Rechtsstaat principle to Land legislatures*, 1 Juli 1953, 1 BvL 23/51: BVerfGE 2, 380; *Re des hamburgischen Hundesteuergesetzes*, 24 Juli 1957, 1 BvL 23/52: BVerfGE 7, 89, at 92 *et seq.*; *In re Paul H.*, 26 Februar 1969, 2 BvL 15, 23/68: BVerfGE 25, 269, at 290; *In re Karl-Heinz O.*, 26 Mai 1970, 1 BvR 668, 710/68 and 337/69: BVerfGE 28, 264, at 272; *Constitutionality of Art. 232(2) of the Zivilprozeßordnung*, 8 Mai 1973, 2 BvL 5, 6, 7, 13/72: BVerfGE 35, 41, at 47; *Constitutionality of Art. 211 of the Strafgesetzbuch*, 21 Juni 1977, 1 BvL 14/76: BVerfGE 45, 187, at 236; and *Legal Assistance Treaty of 11 September 1970 between the Federal Republic of Germany and Austria*, 22 März 1983, 2 BvR 475/78: BVerfGE 63, 343, at 353.

⁴⁶ K. Stern, *Das Staatsrecht der Bundesrepublik Deutschland*, 2nd ed., C.H. Beck Verlag, München (1984), Vol. I, para. 20 II; Schmidt-Aßmann (1987), sec. 24, No. 3.

⁴⁷ *Application of the Rechtsstaat principle to Land legislatures*, 1 Juli 1953, 1 BvL 23/51: BVerfGE 2, 380.

⁴⁸ Götz (1992), at 145.

⁴⁹ H. Hofmann, "Artikel 20," in B. Schmidt-Bleibtreu, H. Hofmann & A. Hopfuf (eds.), *GG: Kommentar zum Grundgesetz*, 11th ed., Carl Heymanns Verlag, Köln/München (2008), 634, at 675-676; V. Götz, "Bundesverfassungsgericht und Vertrauensschutz," in M. Drath & Ch. Starck (eds.), *Bundesverfassungsgericht und Grundgesetz, FS aus Anlaß des 25jährigen Bestehens des Bundesverfassungsgerichts*, Vol. 2, J.C.B. Mohr (Paul Siebeck), Tübingen (1976), 421 *et seq.*; B. Pieroth, *Rückwirkung und Übergangsrecht: verfassungsrechtliche Maßstäbe für intertemporale Gesetzgebung*, Vol. 395 *Schriften zum öffentlichen Recht*, Duncker und Humboldt, Berlin (1981).

⁵⁰ The basic idea behind the principle of proportionality is that, even when the legislature is specifically

3. Democracy

The sovereignty of the people exists meaning that all state authority emanates from the people.⁵² The concept inherent in the Constitution is that a representative (or indirect) democracy⁵³ which guarantees that political power is – effectively – bound by legal or constitutional restrictions.⁵⁴ Representation is realised according to Constitution Art. 20(2) by the people electing their representatives for the lower chamber of the Federal Parliament (*Bundestag*) and the *Land* Parliaments, in general, direct, free, equal, and secret elections.⁵⁵

Although elements of direct (plebiscitary) democracy can be found at both *Land* and local municipal level,⁵⁶ this was almost completely eschewed by the drafters of the 1949 Constitution at the federal level due to the experiences of the Weimar Republic⁵⁷ and the

authorized to restrict basic rights, the restriction must be reasonable: *In re Admiral a. D.*, 15 Dezember 1965, 1 BvR 513/65: BVerfGE 19, 342, at 348; and *Überwachung des Brief-, Post- und Fernmeldeverkehrs*, 15 Dezember 1970, 2 BvF 1/69, 2 BvR 629/68 and 308/69: BVerfGE 30, 1, at 20. Decisions of the FCC have identified three elements in the principle: (1) the limitation must be adapted to the achievement of a legitimate purpose; (2) it must be necessary to that end; and (3) the burden it imposes must not be excessive: *Kontaksperrgesetz*, 1 August 1978, 2 BvR 1013, 1019, 1034/77: BVerfGE 49, 24, at 58; *Erzwingungshaft zur Abgabe einer eidesstaatlichen Versicherung*, 19 Oktober 1982, 1 BvL 34, 55/80: BVerfGE 61, 126, at 134; and *In re landwirtschaftliche Unternehmer*, 31 Mai 1988, 1 BvL 22/85: BVerfGE 78, 232, at 245-247. See K. Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschlands*, 17th ed., Müller, Heidelberg (1990), Nos. 317ff; and Th. Maunz & R. Zippelius, *Deutsches Staatsrecht*, 27th ed., C.H. Beck, München (1988), at 93ff.

⁵¹ Expressed in Constitution Art. 3(1) and developed by the FCC: *Southwest State Case*, 12 Oktober 1951, 1 BvR 201/51: BVerfGE 1, 14; *In re Firma St. AG*, 7 November 1972, 1 BvR 338/68: BVerfGE 34, 103, at 115; *In re Peter D.*, 27 März 1973, 2 BvR 311/72: BVerfGE 35, 1; *In re H.*, 21 Juni 1977, 2 BvR 308/77: BVerfGE 45, 363, at 375; and *In re Herr B. und Frau T.*, 7 Oktober 1980, 1 BvL 50, 89/79, 1 BvR 240/79: BVerfGE 55, 72, at 88. See Ch. Starck, “Die Anwendung des Gleichheitssatzes,” in Ch. Link (ed.), *Der Gleichheitssatz im modernen Verfassungsstaat: Symposium zum 80. Geburtstag von Gerhard Leibholz am 21. Nov. 1981*, Vol. 20 *Studien und Materialien zur Verfassungsgerichtsbarkeit*, Nomos Verlag, Baden-Baden (1982), 51; and Th. Würtenberger, “Equality,” in U. Karpen, *The Constitution of the Federal Republic of Germany*, Nomos Verlagsgesellschaft, Baden-Baden (1988), 67.

⁵² Constitution Art. 20(2), first sentence.

⁵³ P. Badura, “Die parlamentarische Demokratie,” in Isensee & Kirchhof, (1995), Vol. I, chap. 23, 953; E.-W. Böckenförde, “Demokratie als Verfassungsprinzip,” in Isensee & Kirchhof, (1995), Vol. I, chap. 22, 887; M. Sachs, “Artikel 20,” in Sachs (1999), s.v. “Demokratie,” Rdn. 11-45, at 747-757; and H. Hofmann, “Artikel 20,” in Schmidt-Bleibtreu, Hofmann & Hopfner (2008), 634, at 661-662.

⁵⁴ G. Ress, “The Constitution and the Requirements of Democracy in Germany,” in Ch. Starck (ed.), *New Challenges to the German Basic Law*, 49 *Studien und Materialien zur Verfassungsgerichtsbarkeit*, Nomos Verlagsgesellschaft, Baden-Baden (1991), chap. 5, 111, at 118-119.

⁵⁵ Constitution Arts. 38 and 28.

⁵⁶ P. Krause, “Verfassungsrechtliche Möglichkeiten unmittelbarer Demokratie,” in Isensee & P. Kirchhof (eds.), *Handbuch des Staatsrechts* (1995), Vol. II, chap. 39, 313; A. Weber, “Direkte Demokratie im Landesverfassungsrecht” (1985) DÖV 178; and H.H. von Arnim, “Möglichkeiten unmittelbarer Demokratie auf Gemeindeebene” (1990) DÖV 85.

⁵⁷ C. Schmitt, *Volksentscheid und Volksbegehren. Ein Beitrag zur Auslegung der Weimarer Verfassung und zur Lehre von der unmittelbaren Demokratie*, Vol. 2 *Beiträge zum ausländischen öffentlichen Recht und Völkerrecht*, Walter de Gruyter, Berlin and Leipzig (1927); and H. Hofmann, “Bundesstaatliche Spaltung des Demokratiebegriffs?” in W. Barfuß (ed.), *Festschrift für Karl H. Neumayer*, Nomos Verlag, Baden-Baden (1985), 281, at 286ff.

subsequent Nazi regime:⁵⁸ the only real example being Constitution Art. 29 that lays down a plebiscitary procedure for restructuring the *Länder*.⁵⁹ Consequently, the use of referenda in Germany to decide political issues is severely curtailed.

Political parties, under Constitution Art. 21, form an indispensable element of democracy and participate in the political opinion-forming process of the people. Such process is clearly of vital importance⁶⁰ because it results in the formation of a government (Constitution Art. 63) by Parliament through the means of general parliamentary elections held under Constitution Art. 38. In this way, Germany can be regarded as a “party state.”⁶¹

4. Protection of fundamental human rights

The guaranteed basic rights of the individual⁶² are given a prominent position in the Constitution, exemplified by the fact that the Constitution begins with a Bill of Rights (*Grundrechtskatalog*).⁶³ In order to emphasise that human rights are not a mere appendage to the Constitution, Art. 1(2) states that “the German people acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.”

Since human rights were completely trampled on and obliterated during the Nazi hegemony, the State is therefore directed both to respect and affirmatively to protect them, and Constitution Art. 79(3) protects them even against constitutional amendment.⁶⁴ The detailed catalogue of specific rights bind the legislature, the executive and the judiciary as directly enforceable law.⁶⁵ None of the enumerated freedoms though is absolute: several of

⁵⁸ H. Schneider, “Volksabstimmungen in der rechtstaatlichen Demokratie,” in O. Bachof *et al.* (eds.), *Forschungen und Berichte aus dem öffentlichen Recht. Gedächtnisschrift für Walter Jellinek: 12. Juli 1885 – 9. Juni 1955*, Isar Verlag, München (1955), 155-174. The subject-matter of the three referenda held during the Nazi era clearly show post-war opposition to such process in the new German Constitution: (1) the withdrawal of Germany from the League of Nations, 12 November 1933; (2) the confirmation of Hitler as State President, 19 August 1934; and (3) the annexation of Austria, 10 April 1938.

⁵⁹ See also Constitution Arts. 118 and 118a which allow for plebiscites specifically for the restructuring of what is now the *Land* of Baden-Württemberg, and for the *Länder* of Berlin and Brandenburg, respectively.

⁶⁰ E.G. Mahrenholz, “Bundesverfassungsgericht und Parteistaatlichkeit,” in Stern (1990), 93, at 96.

⁶¹ G. Leibholz, *Der Parteienstaat des Bonner Grundgesetzes*, Schwann, Düsseldorf (1951). Early on in its work, the FCC determined that “[t]oday, any democracy is inherently a party state”: *Der Südschleswigsche Wählerverband*, 5 April 1952, 2 BvH 1/52: BVerfGE 1, 208, at 223. See more recently, R. Stöss, “Parteienstaat oder Parteiendemokratie?” in O. Gabriel, O. Niedermayer & R. Stöss (eds.), *Parteiendemokratie in Deutschland*, 1st ed., Vol. 13 *Schriftenreihe der Bundeszentrale für politische Bildung*, Westdeutscher Verlag, Bonn (1997), 13ff.

⁶² AA.VV., “Artikel 2” to “Artikel 19,” in Sachs (1999), at 155-742; P. Häberle, “Die Menschenwürde als Grundlage der staatlichen Gemeinschaft,” in Isensee & Kirchhof, (1995), Vol. I, chap. 20, 815; W. Höflung, “Artikel 1,” in Sachs (1999), Rdn. 1-105, at 120-155; M. Sachs, “Vor Artikel 1,” in Sachs (1999), Rdn. 1-136, at 79-119; AA.VV., “Artikel 1” to “Artikel 19,” in Schmidt-Bleibtreu, Hofmann & Hopf (2008), 95-633.

⁶³ Constitution Arts. 1-19. For a general introduction to the fundamental rights provisions of the Constitution, see Stern (1984), Vol. V, para. 45.

⁶⁴ On Art. 79(3) of the Constitution, see R. Sannwald, “Artikel 79,” Schmidt-Bleibtreu, Hofmann & Hopf (2008), 1665, at 1672-1680.

⁶⁵ Constitution Art. 1(3).

them (e.g., life and bodily integrity; freedom from bodily restraint; expression; outdoor assembly, occupational freedom) are expressly made subject to restriction by or on the basis of statute. Even those freedoms not expressly subject to restriction (e.g., religious, artistic, and academic freedoms) are understood to be implicitly limited by other constitutional provisions, most obviously the guarantee of human dignity in Constitution Art. 1(1).⁶⁶

Although rights may be limited, the legislature's power to do so is itself subject to restrictions. Under Constitution Art. 19(1) and (2), a statute limiting basic rights must be a general one, must identify the rights affected and must not impinge upon the essence or essential content of the right.

The guarantee of the protection of basic rights is maintained only as long as they are not abused to eliminate the free democratic basic order which has made them possible in the first place. The drafters of the Constitution opted for a "contentious" or "militant democracy," reflected in Constitution Arts. 18 and 21(2):⁶⁷ whoever abuses certain basic rights, namely freedom of expression of opinion, in particular freedom of the press,⁶⁸ freedom of teaching,⁶⁹ freedom of assembly,⁷⁰ freedom of association,⁷¹ privacy of posts and telecommunications,⁷² property,⁷³ or the right of asylum⁷⁴ in order to combat the free democratic basic order forfeits those basic rights.

Due to the fact that Germany operates a modified dualist system,⁷⁵ the ECHR⁷⁶ became part of the domestic legal order by ordinary statute.⁷⁷ It accordingly does not enjoy the rank of constitutional law⁷⁸ and so does not prevail over other ordinary statutes.⁷⁹

⁶⁶ See, e.g., *Mephisto*, 24 Februar 1971, 1 BvR 435/68: BVerfGE 30, 173, at 193-196.

⁶⁷ *Socialist Reich Party*, 23 Oktober 1952, 1 BvB 1/51: BVerfGE 2, 1, at 12-13; and *Communist Party*, 17 August 1956, 1 BvB 2/51: BVerfGE 5, 85.

⁶⁸ Constitution Art. 5(1).

⁶⁹ Constitution Art. 5(3).

⁷⁰ Constitution Art. 8.

⁷¹ Constitution Art. 9.

⁷² Constitution Art. 10.

⁷³ Constitution Art. 14.

⁷⁴ Constitution Art. 16a.

⁷⁵ For more, see below at Chapter Three, point C.

⁷⁶ On the generally positive and co-operative relationship between the ECtHR and the FCC in the protection of human rights, see: F. Hoffmeister, "Die Europäische Menschenrechtskonvention als Grundrechtsverfassung und ihre Bedeutung für Deutschland" (2001) 40 *Der Staat* 365; I. Pernice, "BVerfG, EGMR und die Rechtsgemeinschaft" (2004) 15 *EuZW* 705; and J. Limbach, "Die Kooperation der Gericht in der zukünftigen europäischen Grundrechtsarchitektur" (2000) 27 *EuGRZ* 417.

⁷⁷ BGBl. 1952, II, 686, and reissued recently: BGBl. 2003, II, 1054.

⁷⁸ Unlike in Austria which incorporated it into the Constitution in 1964: *Verfassungsnovelle*, BGBl. 1964/59. See generally A. Drzemczewski, *European Human Rights Convention in Domestic Law: A Comparative Study*, Clarendon Press, Oxford (1983) chap. 4, at 92 ff.; A. Kohl, "The Influence of the Human Rights Convention on Austrian Law" (1970) 18 *AJCL* 237, at 240; K. Berchtold "The European Convention on Human Rights and the Austrian Legal Order: Some Experiences" (1975) VIII *RDH/HRJ* 383, at 384; M. Nowak, "General considerations

Nevertheless, national courts are obliged to observe and the ECHR, as interpreted by the ECtHR:⁸⁰ where they fail to do so, this results in violation of a fundamental right of the Constitution, viz., due respect for the ECHR under the *Rechtsstaat* principle, which can be challenged by a constitutional complaint before the FCC.⁸¹

C. TRANSFERS OF SOVEREIGNTY AND EUROPEAN INTEGRATION

1. Introduction

Having already examined the essential core of sovereignty subsisting in the Constitution and interpreted by the FCC, it is necessary to examine how Germany and in particular the FCC have managed to balance the requirements of the eternity clause with the demands of European integration. In this sense, two periods are relatively easy to discern: first, the original German membership of the EEC, as achieved under Constitution Art. 24 (C.II.); and, secondly, the continued membership of the EU, post Maastricht Treaty, as based on new Constitution Art. 23 (C.III.). These periods and their respective case-law will now be addressed in turn. It will be seen that an initial “integrationist” approach by the FCC during the 1960s and early 1970s, gave way to caution on human rights protection from the mid 1970s in a series of cases (usually referred to in the text as *Internationale Handelsgesellschaft*, *Steinike & Weinlig*, and *Wünsche Handelsgesellschaft* but which, as will be explained in the relevant sections, are also referred to colloquially in German as *Solange I*, *Vielleicht*, and *Solange II*, respectively). Eventually, this led to the FCC evolving an increasingly “State-centric” attitude on protecting the core of sovereignty in the face of the increasing demands of deepening integration in the 1990s and 2000s.

on the ECHR from the point of view of public international law and domestic law,” in F. Ermacora, M. Nowak & H. Tretter (eds.), *Die Europäische Menschenrechtskonvention in der Rechtsprechung der österreichische Rechtsordnung*, W. Braumüller, Wien (1983), at 48.

⁷⁹ *Görgülü*, 2 BvR 1481/04, 14 Oktober 2004; BVerfGE 111, 307, at para. 46. See H.-J. Cremer, “Zur Bindungswirkung von EGMR Urteilen/Anmerkung zum Görgülü-Beschluß des BVerfG vom 14. 10. 2004” (2004) 31 EuGRZ 686; U. Di Fabio, “Das Bundesverfassungsgericht und die internationale Gerichtsbarkeit,” in A. Zimmermann & U. Heinz (eds.), *Deutschland und die internationale Gerichtsbarkeit* (2004), 107; and R. Hoffmann, “The German Federal Constitutional Court and Public International Law: New Decisions, New Approaches?” (2004) 47 GYIL 9.

⁸⁰ *Görgülü*, 2 BvR 1481/04, 14 Oktober 2004; BVerfGE 111, 307, at paras. 61-66.

⁸¹ Thus individuals obtain a remedy by which they can demand respect of the ECHR, especially in the ECtHR’s interpretation: M. Hartwig, “Much Ado About Human Rights: The FCC Confronts the European Court of Human Rights” (2005) 6 German LJ 869, at 893; and D. Richter, “Does International Jurisprudence Matter in Germany? – The Federal Constitutional Court’s New Doctrine of ‘Factual Precedent’” (2006) 49 GYIL 51.

2. Transfers of the exercise of sovereignty

a. Pre-1992 constitutional provisions: EEC membership

According to the provisions of the 1949 Constitution in force at the time of the creation of the EEC and German membership, two provisions are particularly relevant to European integration: (a) the Preamble affirms the will of the German people, in giving itself this new Constitution, “to serve world peace as an equal part in a united Europe”; and (b) Constitution Art. 24(1) explicitly provides that Germany “may, by legislation, transfer sovereign powers to international institutions”⁸² and is regarded as the opening norm of national sovereignty.⁸³ Pernice has asserted that from the very beginning, Germany was accordingly constituted to be a member of a broader political system.⁸⁴

The Constitution itself did not take any dogmatic position between monism and dualism: however, the Parliamentary Council, when drafting the Constitution in 1948, preferred a rather dualistic approach by underlining the aim of reunification of the divided Germany.⁸⁵ The Constitutional Court has not taken any theoretical position and, in its case-law, has used both concepts.⁸⁶ In the period of time under consideration in this section and, despite strong academic debate to the contrary,⁸⁷ a moderated dualistic concept prevailed.⁸⁸

This German concept of moderated dualism required the passing of the Ratification Statute of the Act of Accession to the EEC and EAEC Treaties,⁸⁹ in accordance with Constitution Art. 24(1) and Art. 59(2).⁹⁰ The same procedure was subsequently used in

⁸² The German original refers to “*zwischenstaatliche Einrichtungen*” which may also be rendered “intergovernmental” or “inter-State institutions.” The phrase “sovereign powers” or “sovereign rights” is used to translate the phrase “*Hoheitsrechte*.”

⁸³ See generally, Ch. Hillgruber, “Artikel 24,” in Schmidt-Bleibtreu, Hofmann & Hopf (eds.), *Grundgesetz-Kommentar*, Band 2, C.H. Beck, München (1995), 129, particularly paras. 49-79, at 163-181; Chr. Tomuschat, “Artikel 24,” in R. Dolzer, K. Vogel & K. Graßhof (eds.), *Kommentar zum Bonner Grundgesetz (looseleaf)*, C.F. Müller Juristische Verlag, Heidelberg (1981, as updated), paras. 8-99, at 15-73.

⁸⁴ I. Pernice, “Constitutional Law Implications for a State Participating in a Process of Regional Integration: German Constitution and ‘Multilevel Constitutionalism,’” in E. Riedel (ed.), *German Reports on Public Law*, Vol. 12 *Beiträge zum ausländischen und vergleichenden öffentlichen Recht*, Nomos Verlag, Baden-Baden (1998), 40, at 41.

⁸⁵ M. Hilf, “General Problems of Relations between Constitutional law and International Law,” in Ch. Starcke (ed.), *Rights, Institutions and Impact of International Law according to the German Basic Law*, Nomos Verlag, Baden-Baden (1987), section 8, 177, at 180.

⁸⁶ *Konkordat*, 21 März 1957, 1 BvR 65/54: BVerfGE 6, 290, at 295; and *Vermögenswerte in der Schweiz*, 8 Juni 1977, 1 BvL 4/75: BVerfGE 45, 83, at 96.

⁸⁷ A. Verdross & B. Simma, *Universelles Völkerrecht: Theorie und Praxis*, 3rd ed., Duncker und Humblot, Berlin (1984), 55ff; and I. Seidl-Hohenveldern, *Völkerrecht*, 5th ed., Heymann, Köln (1984), No. 377.

⁸⁸ M. Schweitzer, *Staatsrecht*, Vol. III, C.F. Müller, Heidelberg (1986), 11ff; and W. Rudolf, *Völkerrecht und deutsches Recht*, Mohr, Tübingen (1967), at 283ff.

⁸⁹ BGBl. 1957, II, 753. Germany had similarly passed an earlier ratification statute to ratify the ECSC Treaty: BGBl. 1952, II, 448.

⁹⁰ Constitution Art. 59(2) reads: “Treaties which regulate the political relations of the Federation or relate to matters of federal legislation requires the consent or the participation, in the form of a federal statute, of the bodies competent in any specific case for such federal legislation. As regards administrative agreements, the

respect of the ratification of the Single European Act in 1986:⁹¹ later revisions, as will be seen below, were subject to a different constitutional basis following on from the ratification of the Maastricht Treaty.⁹²

However, the German concept of dualism leads to another matter: the Ratification Statute opening the domestic legal order and allowing the taking of direct and prior effect of European norms (under Constitution Art. 24(1)) was only an ordinary statute voted on by a simple majority. The FCC, possessing the competence to review the constitutionality of statutes, has never hesitated in declaring itself competent in examining all statutes, including treaty ratification statutes (*Vertragsgesetze*).⁹³

The FCC⁹⁴ has further held⁹⁵ that transfers of sovereignty⁹⁶ under Constitution Art. 24⁹⁷ do not permit the basic structure⁹⁸ of the Constitution to be altered and that any such transfer⁹⁹ under Constitution Art. 24 had to be authorised by statute.¹⁰⁰ Further, the FCC has held¹⁰¹ that such transfers are to be regarded in the same way as laws seeking to make

provisions concerning the federal administration are applicable.”

⁹¹ BGBl. 1986, II, 1102. G. Ress, “Das deutsche Zustimmungsgesetz zur Einheitlichen Europäischen Akte” (1987) 14 EuGRZ 361.

⁹² See below at Chapter Three, point C.2.b.

⁹³ *National Implementation of EEC Regulations*, 5 Juli 1967, 2 BvL 29/63: BVerfGE 22, 134, at 146-152; and *Steinike & Weinlig*, 25 Juli 1979, 2 BvL 6/77: BVerfGE 52, 187.

⁹⁴ For a detailed description of the FCC case-law, see J. Kokott, “German constitutional jurisprudence and European integration” [1996] EPL 237 and 413; J. Kokott, “Report on Germany,” in A.M. Slaughter, A. Stone Sweet & J.H.H. Weiler, *The European Court and National Courts – Doctrine and Jurisprudence: Legal Change in its Social Context*, Hart Publishing, Oxford (1998), chap. 3, at 86-107; and K. Alter, *Establishing the Supremacy of European Law*, OUP, Oxford (2001), chap. 3, at 64-123.

⁹⁵ *Internationale Handelsgesellschaft*, 29 Mai 1974, 2 BvL 52/71: BVerfGE 37, 271, at 279; [1974] 2 CMLR 540, at 550.

⁹⁶ On sovereignty generally and especially in the face of European integration, see H.G. Koppensteiner, *Die Europäische Integration und das Souveränitätsproblem*, A. Lutzer, Baden-Baden (1963); H. Quaritsch, *Staat und Souveränität, s.v. Die Grundlagen*, Vol. 1, Athenäum Verlag, Frankfurt am Main (1970); P. Kirchhof, “Der deutsche Staat im Prozeß der europäischen Integration,” in Isensee & Kirchhof, Vol. VII (1992), chap. 183, 855; A. Randelzhofer, “Staatsgewalt und Souveränität,” in Isensee & Kirchhof, Vol. I (1995), chap. 15, 691; and L. Wildhaber, “Entstehung und Aktualität der Souveränität,” in G. Müller *et al.* (eds.), *Staatsorganisation und Staatsfunktionen im Wandel, Festschrift für Kurt Eichenberger zum 60. Geburtstag*, Helbing & Lichtenhahn, Basel (1982), 131ff.

⁹⁷ See generally, J. Kokott, “Report on Germany,” chap. 3, in Slaughter, Stone Sweet & Weiler (1998), at 86-107.

⁹⁸ This basic structure was considered above at Chapter Three, point B.1. In particular respect of European law, see Chr. Kirchener & J. Haas, “Rechtliche Grenzen für Kompetenzübertragungen auf die Europäische Gemeinschaft” *Juristen Zeitung* 1993, 760-771; and I. von Münch, *Staatsrecht*, Band I, 5th ed., Kohlhammer, Berlin (1993).

⁹⁹ H. Mosler, “Die Übertragung von Hoheitsgewalt,” in Isensee & Kirchhof, Vol. VII (1992), chap. 175, 599.

¹⁰⁰ See generally, J. Schwarze, “Deutscher Landesbericht” in J. Schwarze, *The Birth of a European Constitutional Order: The Interaction of National and European Constitutional Law*, Vol. 249 *Schriftenreihe Europäisches Recht, Politik und Wirtschaft*, Nomos Verlagsgesellschaft, Baden-Baden (2001), 109, at 129-136.

¹⁰¹ *Eurocontrol I*, 23 Juni 1981, 2 BvR 1107, 1124/77 und 195/79: BVerfGE 58, 1, at 35ff.

changes to the Constitution, *i.e.* by requiring a special majority to be achieved in both houses of the German Parliament.¹⁰²

German public law academia maintained that Constitution Art. 24(1) only permitted a limited and materially defined transfer of sovereign rights to the then Community. The transfer of the entirety of state power and, as a consequence, the accession of Germany to a federal European state, could not be achieved by virtue of Art. 24(1).¹⁰³ In *Internationale Handelsgesellschaft*,¹⁰⁴ the FCC stated:¹⁰⁵

Article 24 ... does not open up the way to amending the basic structure of the Constitution, which forms the basis of its identity, without a formal amendment to the Constitution, that is, it does not open up any such way through the legislation of the inter-state institution.... [I]t nullifies any amendment of the [EEC] Treaty which would destroy the identity of the valid constitutional structure of the Federal Republic of Germany by encroaching on the structures which go to make it up....

Thus the FCC held that Art. 24 of itself could not cover a transfer of legislative power to an international organisation which altered or amended an “inalienable essential feature” of German constitutional identity, e.g., provisions on fundamental rights protection. Article 24(1) did not allow legislation of the intergovernmental institution to change the basic structure of the Constitution on which its identity was founded.¹⁰⁶ Such a change would require a constitutional amendment.¹⁰⁷ As will be seen,¹⁰⁸ the issue of constitutional identity was raised in the *Lisbon Treaty* case.

¹⁰² Foster observed: “Article 24 does not appear to allow the complete transfer of sovereign powers from Germany, in effect the dissolution of the German state by abdication of all state power and the transfer of the power to establish further powers to another body. Until recently this point had not been developed as it was generally accepted that a complete transfer of powers could not be envisaged.” See N. Foster, “The German Constitution and E.C. Membership” [1994] PL 392, at 394.

¹⁰³ Th. Schilling, “Die deutsche Verfassung und die europäische Vereinigung” (1991) 116 AöR 32, at 40-44.

¹⁰⁴ *Internationale Handelsgesellschaft*, 29 Mai 1974, 2 BvL 52/71: BVerfGE 37, 271; [1974] 2 CMLR 540.

¹⁰⁵ BVerfGE 37, 271, at 278ff; [1974] 2 CMLR 540, at 550.

¹⁰⁶ Kokott (1998), at 86.

¹⁰⁷ BVerfGE 37, 271, at 278; [1974] 2 CMLR 540, at 550.

¹⁰⁸ See below at Chapter Three, point E.2.d.

b. Constitutional amendments post-1992: the European Union

Constitution Art. 24 was not regarded as providing a sufficient constitutional basis for the continued progress in European integration under the terms of the Maastricht Treaty¹⁰⁹ since the Treaty touched the core of German sovereignty more than the previous European Community Treaties.¹¹⁰ To provide a firmer constitutional basis for the EU under the Maastricht Treaty, Germany adopted a new Art. 23 that essentially codified the conditional conception of European integration previously articulated by the FCC:¹¹¹

(1) With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social, and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Constitution. To this end the Federation may transfer sovereign powers by a law with the consent of the Bundesrat. The establishment of the European Union, as well as changes in its treaty foundations and comparable regulations that amend or supplement this Constitution, or make such amendments or supplements possible, shall be subject to paragraphs (2) and (3) of Article 79.

This paragraph guarantees that a complete parliamentary process is observed with the full participation of the *Länder* and that the fundamental principles of the State set out in Constitution Art. 20¹¹² are also observed before any transfer of powers can occur.¹¹³

Fears that the traditional notion of sovereignty (the classic criterion of state quality of Germany under Constitution Art. 79(3))¹¹⁴ could no longer act as a brake on the dynamic process of integration and that Maastricht Treaty ratification would result in the permanent and irreversible extension of EC and EU competences, led to a challenge, before the FCC, on

¹⁰⁹ N. Kloten, "Europäische Perspektiven nach Maastricht" (1993) 13-14 *Europa-Archiv* 397, at 406.

¹¹⁰ Since it moved Member States more towards a political union and contemplated common foreign and security policies as well as unification of various internal policies, including judicial policies: Kloten (1993), at 406.

¹¹¹ See Ch. Hillgruber, "Artikel 23," in Schmidt-Bleibtreu, Hofmann & Hopfner (2008), at 733-755, esp. 742-749; Rojahn "Artikel 23," Band 2 (1995), at 83ff; R. Breuer, "Die Sackgasse des neuen Europaartikels (Art. 23 GG)" 1994 NVwZ 417; P. Wilhelm, "Europa im Grundgesetz: Der neue Artikel 23" 1992 BayVBl. 705; and L. Michael, "Die Wiedervereinigung und die europäische Integration als Argumentationstopoi in der Rechtsprechung des Bundesverfassungsgerichts: Zur Bedeutung der Art. 23 S.2 a.F. und 23 Abs. 1 S.1 n.F. GG" (1999) 124 AöR 583.

¹¹² See above at Chapter Three, point B.1.

¹¹³ For a more general discussion of Constitution Art. 23, see U. di Fabio, "Der Neue Artikel 23 des Grundgesetzes," (1993) 32 *Der Staat* 191ff. Some observers took the view, however, that the addition of Art. 23 was superfluous because Constitution Arts. 24 and 25, as with all other provisions of the Constitution, had to conform to the basic state principles in Constitution Arts. 20 and 79: K.A. Schachtschneider *et al.*, "Maastricht Urteil: Bemerkungen," *Juristen Zeitung* 1993, 751.

¹¹⁴ D. Murswiek, "Maastricht und der Pouvoir Constituant. Zur Bedeutung der verfassungsgebenden Gewalt im Prozeß der europäischen Integration" (1993) 32 *Der Staat* 161, at 163-168; Hanf (1994), at 412.

the constitutionality of such ratification.¹¹⁵ The FCC held that Constitution Art. 23 was subject to the principle of democracy,¹¹⁶ which prohibited diluting the legitimacy of exercising state power through elections:¹¹⁷

The right guaranteed by Article 38 of the Constitution to participate in the legitimation of state power and to acquire influence on its exercise through the electoral process excludes the possibility, within the sphere of application of Article 23, of its being made so devoid of content through the transfer of the functions and powers of the Bundestag that there is a breach of the democratic principle in so far as it is declared by Article 79(3), in conjunction with Article 20(1) and (2), to be unassailable.

In accepting the arguments put by the petitioner – that since German citizens could influence law-making in the EU by electing members to the German Parliament, the Parliament had to be able to control the power it delegated to the EU by means of Constitution Art. 23¹¹⁸ – the FCC held that the EU could not “develop further by an amendment to the basic treaty instruments or an extension of the European Union’s powers” without the approval of two thirds of each house of the Parliament. The Parliament had to participate in maintaining Germany’s rights as a member of European institutions and in formulating the German government’s EU policy.¹¹⁹ The FCC’s interpretation of Art. 23 actually suggested that the EU remained predominantly an association of sovereign states (or *Staatenverbund*):¹²⁰

The Federal Republic of Germany, therefore, even after the Union Treaty comes into force, will remain a member of a [*Staatenverbund*], the common authority of which is derived from the member-States and can only have binding effects within the German sovereign sphere by virtue of the German instruction that its law be applied. Germany is one of the ‘Masters of the Treaties [*Herren der Verträge*]’, which have established

¹¹⁵ *Maastricht*, 12 Oktober 1993, 2 BvR 2134 und 2159/92: BVerfGE 89, 155; [1994] 1 CMLR 57. J. Kokott, “Deutschland im Rahmen der Europäischen Union – zum Vertrag von Maastricht” (1994) 11 AöR 207; U. Everling, “Das Maastricht-Urteil des Bundesverfassungsgerichts und seine Bedeutung für die Entwicklung der Europäischen Union (1994) 17 Integration 165; I. Winkelmann (ed.), *Das Maastricht-Urteil des Bundesverfassungsgerichts vom 12. Oktober 1993: Dokumentation des Verfahrens mit Einführung*, Duncker & Humblot, Berlin (1994); J. Wieland, “Germany in the European Union – The Maastricht Decision of the Bundesverfassungsgericht” (1994) 5 EJIL 259.

¹¹⁶ Contained in Constitution Art. 38 which reads that “the Members of the German Parliament’s Lower House shall be elected in general, direct, free, equal, and secret elections.”

¹¹⁷ BVerfGE 89, 155, at 182; [1994] 1 CMLR 57, at 84.

¹¹⁸ BVerfGE 89, 155, at 171-172; [1994] 1 CMLR 57, at 77: “[W]hat is guaranteed to Germans entitled to vote is the individually assertable right to participate in the election of the Bundestag and thereby to co-operate in the legitimation of state power by the people at federal level and to have an influence over its exercise.” An individual’s fundamental right under Constitution Art. 38 to participate in elections (BVerfGE 89, 155, at 172; [1994] 1 CMLR 57, at 77) – “can therefore be infringed if the exercise of the powers within the competence of the Bundestag is transferred to an institution of the European Union or the European Communities formed by the member-States’ governments to such an extent that the minimum requirements ... for democratic legitimation of the sovereign power exercised in respect of citizens are no longer satisfied.”

¹¹⁹ BVerfGE 89, 155, at 187; [1994] 1 CMLR 57, at 88-89.

¹²⁰ BVerfGE 89, 155, at 190; [1994] 1 CMLR 57, at 91.

their adherence to the Union Treaty, concluded ‘for an unlimited period’ (Article Q) with the intention of long-term membership, but could also ultimately revoke that adherence by a contrary act. *The validity and application of European law in Germany depend on the application-of-law instruction of the Accession Act. Germany thus preserves the quality of a sovereign State* in its own right as well as the status of sovereign equality with other States within the meaning of Article 2(1) of the United Nations Charter of 26 June 1945. [Emphasis supplied.]

According to the FCC, the Treaty regarded Member States as independent and sovereign, and protected their national identities.¹²¹ Member States established the EU¹²² to “exercise some of their sovereignty jointly.” Even after the Maastricht Treaty, Germany would continue to be a member of a “*Staatenverbund*” that derived its authority solely from the Member States.¹²³

This idea of conferral of authority by the States on the Union and the concept of a *Staatenverbund* was reiterated in the recent *Lisbon* case,¹²⁴ in which the FCC – in these matters – largely built and expanded on its reasoning in *Maastricht*. In *Lisbon*, the petitioners challenged the constitutionality of three statutes: (i) the Act ratifying the Treaty of Lisbon;¹²⁵ (ii) the Act amending the Constitution (Arts. 23, 45 and 93);¹²⁶ and (iii) the Act extending and strengthening the Rights of the *Bundestag* (“Federal Parliament”) and the *Bundesrat* (“Federal Council of States”) in European Union Matters.¹²⁷ On the issue of sovereignty, the petitioners essentially argued that the EU’s evolution into a federal State (with the consequent loss of sovereignty by Germany) infringed the competences of the Federal Republic.

The *Lisbon* case repeats the *Maastricht* formulae in a number of ways: the Member States remain the “masters of the Treaties”¹²⁸ who have conferred the exercise of some of their powers on the EU, an example of an “international or supranational organization,”¹²⁹

¹²¹ BVerfGE 89, 155, at 182-187; [1994] 1 CMLR 57, at 84-88.

¹²² BVerfGE 89, 155, at 189; [1994] 1 CMLR 57, at 90.

¹²³ BVerfGE 89, 155, at 190; [1994] 1 CMLR 57, at 88:

“The exercise of sovereign power through a [*Staatenverbund*] like the European Union is based on authorisations from States which remain sovereign and which in international matters generally act through their governments and control the integration process thereby. It is therefore primarily determined governmentally. If such a community power is to rest on the political will-formation which is supplied by the people of each individual State, and is to that extent democratic, that presupposes that the power is exercised by a body made up of representatives sent by the member-States’ governments, which in their turn are subject to democratic control.”

¹²⁴ *Lisbon*, 30 Juni 2009, 2 BvE 2/08 and 5/08, and 2 BvR 1010/08, 1022/08, 1259/08 and 182/09; BVerfGE 123, 267; [2010] 2 CMLR 712; (2009) 36 EuGRZ 339. The paragraph numbering, as per the FCC official website’s German and English versions, has been retained in these footnotes.

¹²⁵ Gesetz vom 8. Oktober 2008 zum Vertrag von Lissabon vom 13. Dezember 2007: BGBl. 2008, II, 1038.

¹²⁶ Gesetz zur Änderung des Grundgesetzes vom 8. Oktober 2008: BGBl. 2008, I, 1926.

¹²⁷ Gesetz über die Ausweitung und Stärkung der Rechte des Bundestages und des Bundesrates in Angelegenheiten der Europäischen Union: *BT-Drucksache* 16/8489.

¹²⁸ BVerfGE 123, 267; [2010] 2 CMLR 712; (2009) 36 EuGRZ 339, at para. 231.

¹²⁹ For example, BVerfGE 123, 267; [2010] 2 CMLR 712; (2009) 36 EuGRZ 339, at para. 237.

whose primary Treaty law “constituting the powers of the Union” merely remained an “*abgeleitete Grundordnung*,” i.e., a derivative legal order. Moreover EU citizenship enjoyed only a derivative status that did not challenge the existence of the German people (“*Staatsvolk*”).¹³⁰ Consequently, the Union remained, as in *Maastricht*, a “*Staatenverbund*,” “an association of sovereign States to which sovereign powers are transferred.” But Thym argues¹³¹ that whereas the notion of “*Staatenverbund*” in the *Maastricht* ruling had mainly served the classification of the legal status quo without any direct impact on further evolution, the *Lisbon* ruling juxtaposes *Staatenverbund* with *Bundesstaat* – federal statehood – thereby transforming *Staatenverbund* “from a descriptive categorization of the state of European integration into a prescriptive constitutional finality of future developments.”¹³²

Nevertheless, the FCC in *Lisbon* gives a clear and brief definition of this concept:¹³³ it covers a close long-term association of States which remain sovereign, an association which exercises public authority on the basis of a treaty, whose fundamental order, however, is subject to the disposal of the Member States alone and in which the peoples of their Member States, i.e. the citizens of the States, remain the subjects of democratic legitimisation. Against this background, Thym observes¹³⁴ that the *Staatenverbund* continues to serve as the conceptual underpinning for the derivative character of the European legal order whose ultimate authority rests with the Member States.¹³⁵

The FCC in *Lisbon* noted then that the 1949 Constitution thus not only assumes sovereign statehood but also guarantees it¹³⁶ and such statehood is even protected¹³⁷ by Constitution Art. 79(3), the “eternity clause.” Integration of Germany into a European federal State – and the consequent loss of sovereignty – would consequently require the German people freely to adopt a new Constitution,¹³⁸ according to Constitution Art. 146.¹³⁹

¹³⁰ BVerfGE 123, 267; [2010] 2 CMLR 712; (2009) 36 EuGRZ 339, at paras. 346-350.

¹³¹ D. Thym, “In the Name of Sovereign Statehood: A Critical Introduction to the Lisbon Judgment of the German Constitutional Court” (2009) 46 CML Rev. 1795, at 1799.

¹³² Thym notes that such prescriptive, normative understanding of *Staatenverbund* had always been advocated in the extra-judicial writings of (now former) Constitutional Court Judge Kirchhof: see, e.g., P. Kirchhof, “The European Union of States,” in A. von Bogdandy & J. Bast (eds.), *Principles of European Constitutional Law*, 2nd ed., Hart Publishing, Oxford and Portland (OR) and C.H. Beck, München (2010), chap. 20, 735, at 741-746 and at 751-761.

¹³³ BVerfGE 123, 267; [2010] 2 CMLR 712; (2009) 36 EuGRZ 339, at para. 229.

¹³⁴ Thym (2009), at 1799.

¹³⁵ BVerfGE 123, 267; [2010] 2 CMLR 712; (2009) 36 EuGRZ 339, at paras. 233 and 329-330, in which the FCC also underlines the fact that Art. 50 TEU on the right to withdrawal from the EU emulates the pre-existing option of withdrawal under national constitutional and public international law. For a similar point with respect to the *Maastricht* ruling, see M. Herdegen, “Maastricht and the German Constitutional Court: Constitutional Restraints for an Ever Closer Union” (1994) 31 CML Rev. 235, at 242-244.

¹³⁶ BVerfGE 123, 267; [2010] 2 CMLR 712; (2009) 36 EuGRZ 339, at paras. 216 and 228.

¹³⁷ BVerfGE 123, 267; [2010] 2 CMLR 712; (2009) 36 EuGRZ 339, at para. 216.

¹³⁸ BVerfGE 123, 267; [2010] 2 CMLR 712; (2009) 36 EuGRZ 339, at paras. 217-218.

¹³⁹ Constitution Art. 146: “This Basic Law, which since the achievement of the unity and freedom of Germany applies to the entire German people, shall cease to apply on the day on which a constitution freely adopted by the German people takes effect.

While the Constitution was open to European integration and enshrined the principle of openness to European law (“*Europarechtsfreundlichkeit*”)¹⁴⁰ – which principle makes its first appearance in constitutional case-law – the Member States remained sovereign and transfers of power to the Union had to remain limited and, in principle, revocable,¹⁴¹ with the FCC remaining as the guardian of the Constitution, monitoring and controlling the further transfer of powers (when called upon) in combination with the German legislature and people (as seen later in this Chapter at points E.2.b. and d).

D. NATIONAL CONSTITUTIONAL COURT ACCEPTANCE

1. Introduction

The FCC has enjoyed – even to this day – a somewhat tempestuous relationship with the ECJ, as exemplified by the 2009 *Lisbon Treaty decision*.¹⁴² Its position as a protagonist defending the sovereignty of the State, controlling the limits of European integration and protecting the essential core of the constitutional identity of Germany in such integration process is the subject of Section E below. Nevertheless, despite its tenacious attitude to sovereignty preservation in the face of deepening integration, the FCC has – in certain respects – successfully integrated the effects of the ECJ’s constitutionalisation of the Treaties into the domestic legal order. This section seeks to highlight and analyse a number of these related areas.

2. Supremacy/Priority of application

Complying with the traditionally dualist approach of the FCC and German doctrine, Section C above has shown that it was neither the EEC Treaty nor Constitution Art. 24 that formed the basis for the effect of European law internally. Rather it was the German Ratification Statute of the Act of Accession to the Treaties, enacted under Constitution Art. 24(1) and Art.

¹⁴⁰ BVerfGE 123, 267; [2010] 2 CMLR 712; (2009) 36 EuGRZ 339, at paras. 219 and 225. The concept amounts to a conscious innovation derived from the German principle of friendliness towards public international law. The FCC has previously derived from this principle a general rule of interpretation that, in case of doubt, the Constitution as well as all ordinary statutes have to be interpreted as much as possible in conformity with German obligations under public international law: *Eurocontrol I*, 23 Juni 1981, 2 BvR 1107, 1124/77 und 195/79: BVerfGE 58, 1, at 34; and *Eurocontrol II*, 10 November 1981, 2 BvR 1058/79: BVerfGE 59, 63, at 89. See generally on this new concept: J. Ziller, “Zur Europarechtsfreundlichkeit des deutschen Bundesverfassungsgerichtes. Eine ausländische Bewertung des Urteils des Bundesverfassungsgerichtes zur Ratifikation des Vertrages von Lissabon” (2010) 65 ZÖR 157.

¹⁴¹ BVerfGE 123, 267; [2010] 2 CMLR 712; (2009) 36 EuGRZ 339, at paras. 231 and 233.

¹⁴² *Lisbon*, 30 Juni 2009, 2 BvE 2/08 and 5/08, and 2 BvR 1010/08, 1022/08, 1259/08 and 182/09: BVerfGE 123, 267; [2010] 2 CMLR 712; (2009) 36 EuGRZ 339. On previous cases, see, e.g., Alter (2001), chap. 3, at 64-123.

59(2),¹⁴³ which contained the requisite (application-of-law) instructions to domestic bodies – including the courts – as to which law was to be applied.¹⁴⁴ In this way, it was the Ratification Statute that ordered the legal effect of (then) EEC law (including its primacy and direct effect) in the national legal domain.¹⁴⁵ As the FCC stated in *Wünsche*:¹⁴⁶

Article 24(1) of the Constitution makes it possible to open up the legal system of the Federal Republic of Germany in such a way that the Federal Republic's exclusive claim to control in its sphere of sovereignty can be withdrawn and room can be given for the direct validity and application of a law from another source within that sphere of sovereignty. It is true that Article 24(1) of the Constitution does not itself provide for the direct validity and application of the law established by the international institution, nor does it directly regulate the relationship between such law and domestic law, for example the question of the priority of their respective application. Internal validity and application, as well as the possible internal priority of validity or application of international treaties (including those of the sort in issue here), do not follow directly from general international law.

The FCC then addressed the fact that international law did not contain any general rule arising out of the agreed practice of States or undoubted legal acceptance to the effect that States were required to incorporate their treaties into their domestic law and to accord them thereunder such priority of validity or application as against domestic law. Internal priority of validity or application only arose by virtue of an “application-of-law” instruction to that effect under the domestic law, and that also applied in the case of treaties the content of which required the parties to provide for internal priority of validity or application. The FCC continued:¹⁴⁷

Article 24(1), however, makes it possible constitutionally for treaties which transfer sovereign rights to international institutions and the law established by such institutions to be accorded priority of application as against the internal law of the Federal Republic by the appropriate internal application-of-law instruction. That is what took place in the case of the European Community Treaties and the law established on their basis by the Community organs by the passing of the Acts of Accession to the Treaties under Articles 24(1) and 59(2), first sentence, of the Constitution. From the application-of-law instruction of the Act of Accession to the

¹⁴³ “Treaties which regulate the political relations of the Federation or relate to matters of Federal legislation require the consent or participation, in the form of a Federal law, of the bodies competent in any specific case for such Federal legislation....”

¹⁴⁴ *In re Kloppenburg*, Bundesfinanzhof (“BFH”) 25 April 1985, V R 123/84: BFHE 143, 383. According to the FCC, the direct applicability of Regulations was therefore a combined result of European law demanding direct applicability and German law with its application-of-law instruction in the Acts of Accession: see *Wünsche Handelsgesellschaft*, 22 Oktober 1986, 2 BvR 197/83: BVerfGE 73, 339; [1987] 3 CMLR 225.

¹⁴⁵ W. Roth, “The Application of Community Law in West Germany: 1980-1990,” (1991) 28 CML Rev. 137, at 138. In order to accede to the founding Treaties (and later to the SEA and TEU), the Federal Republic was required to enact a statute making the relevant Treaties applicable in the national system.

¹⁴⁶ *Wünsche Handelsgesellschaft*, 22 Oktober 1986, 2 BvR 197/83: BVerfGE 73, 339, at 374-375; [1987] 3 CMLR 225, at 256. Footnote omitted.

¹⁴⁷ *Ibid.*, at 257.

EEC Treaty, which extends to Article 189(2) EEC, arises the immediate validity of the regulations of the Community for the Federal Republic and the precedence of their application over internal law.

Briefly put, the German dualist concept recognises the primacy of European law for most of the cases involving conflicts between domestic and European norms, but not in cases involving conflicts with the fundamental constitutional principles protected in Constitution Art. 79(3): the implications for this will be examined in Section E below.

How then did this approach to “application-of-law” requirements convert into a German judicial recognition of the primacy of European law? Such instruction did, in fact, make the FCC more amenable to principles enunciated by the ECJ. From the beginning in dealing with European law, the FCC relied on the ECJ’s position on the autonomous character of European law. In its first decision, in 1967,¹⁴⁸ the FCC held that Community acts no longer needed to be confirmed or ratified (“*bestätigt* (‘*ratifiziert*’)”) in order to take direct effect in the national legal system, and that they could not be modified by Member States.

Consequently, through its case-law, the FCC recognised the primacy of European law over national law not in the form of “priority of validity” (*Geltungsvorrang*) but rather of “priority in application” (*Anwendungsvorrang*), e.g., in the *Alfons Lütticke* case.¹⁴⁹ The proceedings concerned the complainant German company which claimed, before the local customs office, that the difference in tax rates imposed on imported milk powder as opposed to the domestic product, breached the prohibition on internal discriminatory taxation under Art. 95 EEC (now Art. 110 TFEU). The matter eventually came before the FCC which ruled:¹⁵⁰

There are no valid objections from the standpoint of constitutional law to the fact that the Federal Fiscal Court, on the basis of the preliminary ruling obtained from the European Court of Justice on 16 June 1966 pursuant to Article 177 of the Treaty [now Art. 267 TFEU], has given priority to Article 95 of the EEC Treaty over the conflicting provisions of German tax law. As a result of the ratification of the EEC Treaty (cf. Article 1 of the Law of 27 July 1957, BGBl. II 753), an independent legal order of the European Economic Community has been created. This new legal order has been inserted into the municipal legal order and is to be applied by the German courts (cf. BVerfGE 22, 293 at 296). The judgment of the European Court concerning the interpretation of Article 95 of the EEC Treaty, handed down in the exercise of its jurisdiction under Article 177 of the EEC Treaty, was binding on the Federal Fiscal Court. Article 24(1) of the Basic Law implies, in relation to the interpretation at issue, not only that the transfer of sovereign rights to inter-State institutions is permissible, but also that the sovereign acts of its organs, in this case the European Court of

¹⁴⁸ *European Community Regulations*, 18 Oktober 1967, 1 BvR 248/63 und 216/67: BVerfGE 22, 293, at 296.

¹⁴⁹ *Alfons Lütticke GmbH* (“*Milk powder*”/“*Milchpulver*”), 9 Juni 1971, 2 BvR 225/69: BVerfGE 31, 145. This idea would subsequently be followed by the Austrian Constitutional Court based on Constitution Art. 83(2) which states that “no one may be deprived of his lawful judge.” VfGH B2300/95, 11 Dezember 1995, VfSlg. 14390; VfGH B3486/96, 26 Juni 1997, VfSlg. 14889; and VfGH B614/01 and B1642/02, 30 September 2003, VfSlg. 16988. See generally on references from the Austrian courts to the ECJ: G. Reichelt (ed.), *Vorabentscheidungsverfahren vor dem Gerichtshof der Europäischen Gemeinschaft – Europäische Erfahrungen und österreichische Perspektiven*, Manz, Wien (1998); and C. Stix-Hackl, “Österreichische Gerichte und das Vorabentscheidungsverfahren” [1998] AnwBl. 375.

¹⁵⁰ BVerfGE 31, 145, at 173-174.

Justice, are to be recognised as deriving from an original and exclusive sovereign authority.

From this legal position, the FCC continued, it followed that – since the creation of the common market – German courts had had to apply those legal provisions that stemmed from an autonomous non-state sovereign authority and which, on the basis of their interpretation by the ECJ, had direct effect internally and overlaid and overrode inconsistent national law (the so-called “priority of application” of European law domestically). It was only through this concept of priority of application that Community (now Union) nationals could put into effect the subjective rights that they had been granted.

Further, the FCC excluded itself from this process, stating that it was not competent to answer the question whether a provision of German law was incompatible with a European law provision invested with priority. In such cases, it was for the national court seised of the matter to ensure the priority of application of Art. 95 EEC (now Art. 110 TFEU) over the conflicting national tax legislation.¹⁵¹

The FCC’s recognition of the priority of application of European law over inconsistent domestic norms¹⁵² was reiterated in the *Lisbon* case,¹⁵³ when it stated:¹⁵⁴

The primacy of application of European law does not affect the claim to validity of conflicting law in the Member States; it only forces it back as regards its application to the extent required by the Treaties and permitted by them pursuant to the order to apply the law given nationally by the Act approving the Treaty.^[155] Community law and law of a Member State that is contrary to the European Union is rendered inapplicable merely to the extent required by the content of regulation under Community and European Union law that is contrary to it.

According to the FCC,¹⁵⁶ then, the primacy of application of European law thus remained – even with the entry into force of the Lisbon Treaty – an institution conferred under an international agreement, i.e. a derived institution which would have legal effect in Germany only by means of the order to apply the law given by the Ratification Act of the Treaty of Lisbon. This connection of derivation was not altered by the fact that the institution of the

¹⁵¹ This viewpoint was subsequently reaffirmed in the *Kloppenburger* case when the FCC stated (*Kloppenburger*, 8 April 1987, 2 BvR 687/85: BVerfGE 75, 223, at 244-245; [1988] 3 CMLR 1, at 20): “Acts of Community law must be given precedence even by German courts if they conflict with national legislation. This precedence over later and earlier national legislation is based on an unwritten rule of primary Community law which, by virtue of the acts ratifying the Community treaties in conjunction with Article 24(1) of the Constitution, must be applied in the same way as national law.”

¹⁵² As in *Kloppenburger*, the priority of application of European law over conflicting national law being reinforced by the existence of an ECJ ruling in the matter was also demonstrated in *Alcan* (17 Februar 2000, 2 BvR 1210/98: (2000) 35 EuR 257) by reference to Case C-24/95 *Land Rheinland-Pfalz v. Alcan Deutschland* [1997] ECR I-1591, at 1606.

¹⁵³ *Lisbon*, 30 Juni 2009, 2 BvE 2/08 and 5/08, and 2 BvR 1010/08, 1022/08, 1259/08 and 182/09: BVerfGE 123, 267; [2010] 2 CMLR 712; (2009) 36 EuGRZ 339

¹⁵⁴ BVerfGE 123, 267; [2010] 2 CMLR 712; (2009) 36 EuGRZ 339, at paras. 335-336.

¹⁵⁵ See *Wünsche Handelsgesellschaft*, 22 Oktober 1986, 2 BvR 197/83: BVerfGE 73, 339, at 375; [1987] 3 CMLR 225, at 256-257.

¹⁵⁶ BVerfGE 123, 267; [2010] 2 CMLR 712; (2009) 36 EuGRZ 339, at para. 339.

primacy of application was not explicitly provided for in the Treaties but has been obtained in the early phase of European integration by means of interpretation by ECJ case-law.

Moreover, in respect of Declaration No. 17 Concerning Primacy annexed to the Treaty of Lisbon,¹⁵⁷ the FCC observed that Germany did not recognise an absolute primacy of application of European law, which would be constitutionally objectionable, but merely confirmed the legal situation as the FCC had interpreted it.

The foundation and the limit of the applicability of European law in Germany was, according to the FCC,¹⁵⁸ the order to apply the law which was contained in the Ratification Act of the Treaty of Lisbon, which could only be given within the limits of the current constitutional order.¹⁵⁹ In this respect, it was irrelevant as to whether the primacy of application¹⁶⁰ was provided for in the Treaties themselves or in Declaration No. 17 of the Lisbon Treaty, since the primacy of European law only applied by virtue of the order to apply the law issued by the Act ratifying the Treaties. Lastly, the primacy of application rule only reached as far as Germany approved this conflict of law rule and was permitted to do so:¹⁶¹ it could not displace the original powers of the Member States which had to remain competent to examine whether or not the EU had respected the borderlines that delimited its area of jurisdiction.¹⁶² Such approach has recently been reconfirmed in the *Honeywell/Mangold* case.¹⁶³

3. Direct effect

The issue of direct effect of European law before the FCC has largely been affirmed although there are instances of rejection. In the 1971 decision of *Lütticke*,¹⁶⁴ the FCC accepted that Constitution Art. 24(1), by permitting the transfer of sovereign rights to international institutions, would imply at the same time the recognition of the direct effect of acts of European institutions and their priority of application. As a result, national law which did not conform to the demands of European law had to remain unapplied:¹⁶⁵

¹⁵⁷ BVerfGE 123, 267; [2010] 2 CMLR 712; (2009) 36 EuGRZ 339, at para. 331.

¹⁵⁸ BVerfGE 123, 267; [2010] 2 CMLR 712; (2009) 36 EuGRZ 339, at para. 343.

¹⁵⁹ *Wünsche Handelsgesellschaft*, 22 Oktober 1986, 2 BvR 197/83: BVerfGE 73, 339, at 374 et seq.; [1987] 3 CMLR 225, at 256 et seq.

¹⁶⁰ This point the FCC had already essentially recognised for Community law (see *Alfons Lütticke GmbH*, 9 Juni 1971, 2 BvR 225/69: BVerfGE 31, 145, at 174).

¹⁶¹ At this point, the FCC referred to M. Nettesheim, “Die Kompetenzordnung im Vertrag über eine Verfassung für Europa” (2004) 39 EuR 511, at 545-546; H. Sauer, *Jurisdiktionskonflikte in Mehrebenensystemen: die Entwicklung eines Modells zur Lösung von Konflikten zwischen Gerichten unterschiedlicher Ebenen in vernetzten Rechtsordnungen*, Springer Berlin (2008), at 162 et seq.; R. Streinz, *Europarecht*, 8th ed., Müller, Heidelberg/ München/Landsberg/Berlin (2008), at Rn. 224 et seq.

¹⁶² C. Tomuschat, “Lisbon – Terminal of the European Integration Process? The Judgment of the German Constitutional Court of 30 June 2009” (2010) 70 ZaöRV 251, at 262-263.

¹⁶³ *Honeywell/Mangold*, 6 Juli 2010, 2 BvR 2661/06: (2010) 37 EuGRZ 497, at paras. 53-59.

¹⁶⁴ *Alfons Lütticke GmbH*, 9 Juni 1971, 2 BvR 225/69: BVerfGE 31, 145.

¹⁶⁵ *Ibid.*, at 174-175.

... [I]t follows that, since the creation of the Common Market, the German courts must apply those legal provisions which stem from an autonomous non-State sovereign authority and which, on the basis of their interpretation by the European Court, have direct effect at the municipal level and superimpose themselves upon and displace conflicting national law. Only in this way can the citizens of the Common Market put into effect the subjective rights which they have been granted.

This affirmation was not accepted in such an unproblematic fashion in other Member States – the French *Conseil d’Etat* was initially dismissive¹⁶⁶ and took till 1990 to recognise the principle of direct effect,¹⁶⁷ while the Italian Constitutional Court was finally explicit on this principle in the late 1980s.¹⁶⁸ Reaffirmation of the FCC acceptance of this European law principle occurred in *Kloppenburg*,¹⁶⁹ where the direct effect of the Sixth VAT Directive¹⁷⁰ was at issue: Germany had failed to transpose the Directive into national law by the relevant deadline.¹⁷¹ While under the terms of the Directive, loan agents were to be exempt from VAT, such exemption was not recognised by German law.

The complainant claimed exemption on the basis of the Directive – which exemption had had to be applied to her since the ECJ’s decision in *Grad v. Finanzamt Traunstein*¹⁷² – even though it conflicted with the relevant German VAT law. On appeal, the Fiscal Court of Lower Saxony referred the matter to the ECJ which, applying its previous ruling in *Becker*,¹⁷³ gave direct effect to the relevant provision of the Sixth VAT Directive.¹⁷⁴ On the basis of this ruling, the Fiscal Court allowed the complainant’s appeal but, on further appeal by the tax office, this was overturned by the Federal Fiscal Court (*Bundesfinanzhof*).¹⁷⁵ This federal court refused to grant the complainant the tax exemption sought and ruled that it was unconstitutional for Directives to have any direct effect as long as they had not been properly transposed.

¹⁶⁶ *Syndicat Général de Fabricants de Semoules de France*: CE 1 mars 1968, Rec. 149; [1970] CMLR 395 ; and *Ministre de l’Intérieur v. Cohn-Bendit*: CE 22 décembre 1978, Rec. 524; [1980] 1 CMLR 543.

¹⁶⁷ *Nicolo*: CE 20 octobre 1989, Rec. 190; [1990] 1 CMLR 173; *Boisdet*: CE 24 septembre 1990, Rec. 251; [1991] 1 CMLR 3; and *Rothmans International France SA and Philip Morris France SA*; and *Arizona Tobacco Products GmbH Export KG and Philip Morris France SA*: CE 28 février 1992, Rec. 78 et 81; [1993] 1 CMLR 253.

¹⁶⁸ *Provincia autonoma di Bolzano v. Presidente del Consiglio dei ministri*: Corte cost. 11 luglio 1989, n. 389: *Riv. dir. internaz.* 1989, 404; *S.p.A. Industria Dolciaria Giampaoli v. Ufficio del Registro di Ancona*: Corte cost. 8 aprile 1991, n. 168: *Giur. cost.* 1991, 327; and *Zerini*: Corte cost. 23 marzo 1994, n. 117: *Giur. cost.* 1994, 785.

¹⁶⁹ *Kloppenburg*, 8 April 1987, 2 BvR 687/85: BVerfGE 75, 223; [1988] 3 CMLR 1.

¹⁷⁰ Directive 77/388/EEC: OJ 1977 L145/1.

¹⁷¹ It eventually managed to achieve it, through Federal Law of 26 November 1979 (BGBl. 1979, I, 1953) with effect from 1 January 1980.

¹⁷² Case 9/70 *Grad v. Finanzamt Traunstein* [1970] ECR 825

¹⁷³ Case 8/81 *Becker v. Finanzamt Münster-Innenstadt* [1982] ECR 53.

¹⁷⁴ Case 70/83 *Kloppenburg v. Finanzamt Leer* [1984] ECR 1075.

¹⁷⁵ *In re Kloppenburg*, 25 April 1985, VR 123/84: BFHE 143, 383.

She challenged this refusal as unconstitutional before the FCC which, on the point of direct effect (and having discussed the development of this principle by the ECJ¹⁷⁶), noted that the effects of a Directive normally reached European citizens only by way of the implementing measures taken by the respective Member State. However:¹⁷⁷

Only if a directive is not duly implemented by a member-State, particularly if it is not implemented within the specified time limit, has the [ECJ] granted private individuals the right to invoke, before the courts of member-States, the obligations imposed by the directive as against contrary national law, provided that the obligations are clear and unconditional and in this connection need no further implementing act in order to be applied.

It then cited extensively, with approval, from the ECJ ruling in *Becker*¹⁷⁸ and its discussion on Directives. The FCC stated:¹⁷⁹

....The actual purpose of enabling an individual to invoke a directive is not to extend the Community's legislative power, but to sanction effectively and, in particular, constitutionally, the member-State's obligation created by the directive: independent courts should find that the obligation exists and sanction the failure to fulfil it by judgment in the particular case.

No doubt this does amount to a slight development of the law by the Court of Justice ... and is not merely an amplification in a particular case of a system of sanctions already provided generally by the Treaty: the sanctioning of the non-fulfilment of directives, not only by an action by the Community against a member-State for failure to fulfil its obligations, but also by making it possible "to invoke the directive" in an action by the private individual against the member-State, creates a new category of sanction. Its main idea, however, fits in with the structure of the Community which is founded on law and justice, has been aligned by the Court precisely with that fundamental structure and has been developed from it.

The FCC further observed that the ECJ's existing case-law on the direct effect of Directives did not overstep the general limits to the scope of the Union's authority: Directives were not being extended or added to by new kinds of Community act; and Member States' obligations to obey Directives were not being increased or made more stringent. Rather the efficacy of certain types of Directive was being increased with the aim of greater assurance that Member States comply with them. In fact, the FCC welcomed the ECJ's interpretative case-law on

¹⁷⁶ Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Tariefcommissie* [1963] ECR 1; Case 9/70 *Grad v. Finanzamt Traunstein* [1970] ECR 825; Case 20/70 *Transports Lesage & Cie SA v. Hauptzollamt Freiburg* [1970] ECR 861; Case 23/70 *Haselhorst v. Finanzamt Düsseldorf-Altstadt* [1970] ECR 881; Case 33/70 *SpA SACE v. Finance Minister of the Italian Republic* [1970] ECR 1213; Case 8/81 *Becker v. Finanzamt Münster-Innenstadt* [1982] ECR 53; Case 255/81 *R.A. Grendel GmbH v. Finanzamt für Körperschaften in Hambourg* [1982] ECR 2301; and Case 70/83 *Kloppenburg v. Finanzamt Leer* [1984] ECR 1075.

¹⁷⁷ *Kloppenburg*, 8 April 1987, 2 BvR 687/85; BVerfGE 75, 223, at 237-238; [1988] 3 CMLR 1, at 15.

¹⁷⁸ Case 8/81 *Becker v. Finanzamt Münster-Innenstadt* [1982] ECR 53.

¹⁷⁹ *Kloppenburg*, 8 April 1987, 2 BvR 687/85; BVerfGE 75, 223, at 241-242; [1988] 3 CMLR 1, at 18. Footnote omitted.

direct effect of Directives since, in view of the considerable differences between Member States in implementing Directives, the principle of direct effect of Directives created equality in the application of the law among Union nationals.¹⁸⁰

4. References to the European Court of Justice

The understanding of the FCC in its relationship with the ECJ was enunciated in the *Internationale Handelsgesellschaft* case,¹⁸¹ where the FCC observed¹⁸² that the ECJ had jurisdiction to rule on the legal validity of the norms of European law (including the unwritten ones which it considered existed) and on their construction. It did not, however, the FCC said, decide incidental questions of German law with binding force on the State. Consequently, statements in the reasoning of ECJ judgments that a particular aspect of a European norm accorded or was compatible in its substance with a constitutional rule of national law (e.g., in the present case, with a guarantee of fundamental rights in the Constitution) constituted non-binding *obiter dicta*. In the framework of this jurisdiction, the ECJ determined the content of European law with binding effect for all Member States. Accordingly, under the terms of Art. 177 EEC (now Art. 267 TFEU), German courts had to obtain the ruling of the ECJ before they raised the question of the compatibility of the norm of European law which was relevant to their decision with guarantees of fundamental rights in the Constitution. The FCC continued:¹⁸³

As emerges from the foregoing outline, the Bundesverfassungsgericht never rules on the validity or invalidity of a rule of Community law. At most, it can come to the conclusion that such a rule cannot be applied by the authorities or courts of the Federal Republic of Germany in so far as it conflicts with a rule of the Constitution relating to fundamental rights. It can (just like, vice versa, the European Court) itself decide incidental questions of Community law in so far as the requirements of Article 177 of the Treaty, which are also binding on the Bundesverfassungsgericht, are not present or a ruling of the European Court, binding under Community law on the Bundesverfassungsgericht, does not supervene.

Yet despite the wording of the latter paragraph, the FCC has so far never made a reference to the ECJ.

Further understanding of its relationship with the ECJ came in *Steinike & Weinlig*.¹⁸⁴ The Frankfurt am Main Court made a reference to the FCC seeking constitutional examination of the question whether Arts. 92-94 EEC (now Arts. 107-109 TFEU) – as interpreted by the ECJ in a preliminary ruling in the same case¹⁸⁵ – to mean that a national

¹⁸⁰ For further applications for the principle of direct effect, see e.g., *Working Hours Equality*, 28 Januar 1992, 1 BvL 16/83 und 10/91: BVerfGE 85, 191.

¹⁸¹ *Internationale Handelsgesellschaft*, 29 Mai 1974, 2 BvL 52/71: BVerfGE 37, 271; [1974] 2 CMLR 540.

¹⁸² BVerfGE 37, 271, at 281-282; [1974] 2 CMLR 540, at 551-552.

¹⁸³ BVerfGE 37, 271, at 281-282; [1974] 2 CMLR 540, at 552.

¹⁸⁴ *Steinike & Weinlig* (“Vielleicht”), 25 Juli 1979, 2 BvL 6/77: BVerfGE 52, 187; [1980] 2 CMLR 531.

¹⁸⁵ Case 78/76 *Firma Steinike & Weinlig v. Federal Republic of Germany* [1977] ECR 595.

court was, in certain cases, prevented from ascertaining the incompatibility of a national statute with Art. 92 EEC (now Art. 107 TFEU) – were applicable in Germany.

The FCC declared the lower court's reference inadmissible. It noted that the relationship between the European and national legal orders was not one of standing side by side starkly and in isolation – rather these systems were, in many ways, geared to one another, intertwined with one another and exposed to reciprocal influences.¹⁸⁶ The FCC continued:¹⁸⁷

This is shown with particular force by means of the co-ordinations of jurisdiction in Article 177 EEC Treaty [now Art. 267 TFEU]. They are directed at collaboration between the courts of the member-States and the Court of Justice of the Community. In the interest of the purpose of the Treaty, of integration, of certainty of law and of equality of application of law, they serve to ensure that Community law is interpreted and applied as uniformly as possible by all courts in the sphere of applicability of the EEC Treaty....

The FCC clearly envisaged the existence of a relationship of transjudicial communication between itself and the ECJ, established through the operation of Art. 177 EEC (now Art. 267 TFEU). The FCC subsequently returned to this point in *Wünsche*¹⁸⁸ where, having referred to the exclusive competences of the ECJ under Art. 177 EEC, it noted:¹⁸⁹

That partly functional incorporation of the European Court into the jurisdiction of member-States expresses the fact that the legal orders of member-States and that of the Community are not abruptly juxtaposed in a state of mutual insulation but are in numerous ways related to each other, interconnected and open to reciprocal effects. That becomes particularly clear in the allocation of jurisdiction under Article 177 orientated towards co-operation between the courts of member-States and the European Court. In the interests of the Treaty objectives of integration, legal security and uniformity of application it serves to bring about the most uniform possible interpretation and application of Community law by all the courts within the sphere of application of the EEC Treaty.

This viewpoint was reinforced in the *Maastricht* decision,¹⁹⁰ where the FCC again made reference to the *Kooperationsverhältnis* ("relationship of co-operation" or "co-operative relationship")¹⁹¹ as the basis of its links with the ECJ, stating:¹⁹²

¹⁸⁶ The FCC cited Art. 215(2) EEC (now Art. 340(2) TFEU) and the general principles referred to in it.

¹⁸⁷ BVerfGE 52, 187, at 200-201; [1980] 2 CMLR 531, at 535. ECJ case references omitted.

¹⁸⁸ *Wünsche Handelsgesellschaft*, 22 Oktober 1986, 2 BvR 197/83; BVerfGE 73, 339; [1987] 3 CMLR 225.

¹⁸⁹ BVerfGE 73, 339, at 368; [1987] 3 CMLR 225, at 251-252.

¹⁹⁰ *Maastricht*, 12 Oktober 1993, 2 BvR 2134 und 2159/92; BVerfGE 89, 155; [1994] 1 CMLR 57.

¹⁹¹ On this point, see G. Hirsch, "Europäischer Gerichtshof und Bundesverfassungsgericht – Kooperation oder Konfrontation?" (1996) 49 NJW 2457. Hirsch indicated ((1996), at 2466) that the proper functioning and further existence of the then Community depended on the respect of the ECJ-created principles of autonomy, supremacy, direct and indirect effect of European law, based on a further underlying principle of European law's integration with national law into one united legal system which was composed, nevertheless, of two distinct but intertwined legal orders: see also Pernice (1998), at 43-44.

If a Council decision made in accordance with Titles V or VI of the Union Treaty should be implemented by a legal measure of the European Community (for example, under Article 228a of the E.C. Treaty [now Art. 215 TFEU]) and constitutional rights were infringed as a result, then the European Court or alternatively the Federal Constitutional Court would offer adequate protection of those rights. [*Wünsche*: BVerfGE 73, 339, at 387] Here, too, the Constitutional Court and the European Court are in a relationship of co-operation for the guarantee of constitutional protection under which they complement one another.

The FCC's exposition of a fundamental, interrelationship between the domestic and European legal orders through the pivotal preliminary reference procedure is laudable, but does not hide the fact that the FCC has never seen fit to use this procedure. Moreover, the *Lisbon* case does not repeat the offer of a relationship of co-operation but rather states that its novel *ultra vires* review of European law vis-à-vis the Constitution¹⁹³ would only be carried out "[if] legal protection cannot be obtained at the Union level."¹⁹⁴ The ECJ will, in this event, have to be seised of a question by the Art. 267 TFEU preliminary reference procedure: in principle, it will be enough for the German court to continue its enforcement of the reference obligation of the federal higher courts.¹⁹⁵ The constitutional identity review¹⁹⁶ set out in the *Lisbon* case, while arguably requiring the FCC to make a reference to the ECJ, is unlikely to bear such fruit for some time.

Nevertheless, the FCC in *Honeywell/Mangold*¹⁹⁷ seemed to imply that it might itself be under a duty to refer to the ECJ before exercising its *ultra vires* review:¹⁹⁸

Prior to the acceptance of an *ultra vires* act [by the FCC] of the European bodies and institutions, the ECJ should therefore be afforded the opportunity – in the framework of Art. 267 TEU – to interpret the Treaties as well as to rule on the validity and interpretation of the acts in question. As long as the ECJ has not yet had the opportunity to clarify the EU law questions which have arisen, the FCC should not determine for Germany the inapplicability of Union law (cf. [*Lisbon*:] BVerfGE 123, 267, at 353).

The FCC's refusal so far to refer questions is not to say that its attitude is inimical to the ECJ, even post *Lisbon*. Rather it has been tempered with the desire on the part of the FCC to transfer the responsibility for making references onto the lower courts in the German system. It has done this in various ways, including (a) acceptance that a lower court's failure to make

¹⁹² BVerfGE 89, 155, at 178; [1994] 1 CMLR 57, at 81-82. Later confirmed in *Ermächtigung des Krankenkassenverbände für Arznei- und Hilfsmittelfestbeträge*, 17 Dezember 2002, 1 BvL 28, 29 und 30/95: BVerfGE 106, 275, at 294-296.

¹⁹³ See below at Chapter Three, point E.2.d. for a complete explanation.

¹⁹⁴ BVerfGE 123, 267; [2010] 2 CMLR 712; (2009) 36 EuGRZ 339, at para. 240.

¹⁹⁵ Thym (2009), at 1810. This obligation is discussed below at Chapter Three, point D.4.a.

¹⁹⁶ For a full discussion, see below at Chapter Three, point E.2.d.

¹⁹⁷ *Honeywell/Mangold*, 6 Juli 2010, 2 BvR 2661/06: (2010) 37 EuGRZ 497.

¹⁹⁸ (2010) 37 EuGRZ 497, at para. 60.

a reference to the ECJ breaches the German constitutional right to a lawful judge; and (b) recognition of the priority of ECJ rulings.

a. Lawful judge

Under Constitution Art. 101(1), everyone has a right to their “lawful judge” (*gesetzlicher Richter*). This provision, which protects the right of the citizen to have her case heard by the lawfully constituted court having jurisdiction in the matter, was intended to prevent the establishment of special courts which might be less impartial than the ordinary courts.¹⁹⁹

Article 267(3) TFEU (originally Art. 177(3) EEC, and subsequently renumbered as Art. 234(3) EC) states that a court “against whose decision there is no judicial remedy” is obliged to make a reference to the ECJ when its judgment depends on a question of European law. Until the ECJ’s ruling in *Köbler*,²⁰⁰ there was no remedy for individuals against a national court’s decisions not to refer to the ECJ.

However, the FCC created such a remedy: having already considered the matter,²⁰¹ it confirmed its view in *Wünsche* thereby recognising the ECJ as being a “lawful judge” within the terms of the second sentence of Constitution Art. 101(1), read in conjunction with Art. 234(3) EC (ex-Art. 177(3) EEC). The FCC held the ECJ to be a statutory court within the meaning of Constitution Art. 101(1), a matter which the FCC expressly stated that it had not previously decided, fulfilling the FCC’s own criteria²⁰² for a legally-established judicial organ, independent and impartial, and satisfying the rule of law requirements of due process. The FCC stated:²⁰³

The European Court is not an institution of the Federal Republic of Germany but a common institution of the European Communities. The functional interlocking of the jurisdiction of the European Communities with those of the member-States, together with the fact that the Community Treaties, by virtue of the instructions on the application of law given by the ratification legislation under Articles 24(1) and 59(2), first sentence, of the Constitution, and the subordinate law passed on the basis of the Treaties are part of the legal order which applies in the Federal Republic and have to be adhered to, interpreted and applied by its courts, give the European Court the character of a statutory court within the meaning of Article 101(1), second sentence, of the Constitution in so far as the legislation ratifying the Community Treaties confers on the Court judicial functions contained therein. Those functions include in particular the Court’s jurisdiction to give preliminary rulings under Article 177 EEC.

¹⁹⁹ R. Müller-Terpitz, “Artikel 101,” in Schmidt-Bleibtreu, Hofmann & Hopf (2008), 2085-2100.

²⁰⁰ As will be subsequently examined, the ECJ in that case provided a remedy for damages arising from judicial liability: Case C-224/01 *Köbler v. Austria* [2003] ECR I-10239 and its related case-law, e.g., Case C-173/03 *Traghetti del Mediterraneo SpA v. Italy* [2006] ECR I-5177. For an analysis of this case, see below at point 000.

²⁰¹ See, e.g., *Firma E.K.*, 13 Oktober 1970, 2 BvR 618/68: BVerfGE 29, 198.

²⁰² *Eurocontrol II*, 10 November 1981, 2 BvR 1058/79: BVerfGE 59, 63, at 91.

²⁰³ *Wünsche Handelsgesellschaft*, 22 Oktober 1986, 2 BvR 197/83: BVerfGE 73, 339, at 367-368; [1987] 3 CMLR 225, at 251. U. Wölker, “Wann verletzt eine Nichtvorlage an den EuGH die Garantie des gesetzlichen Richters?” (1988) 15 EuGRZ 97; and Chr. Vedder, “Ein neuer gesetzlicher Richter?” (1987) 40 NJW 526.

Such classification of the ECJ as a statutory court under Constitution Art. 101(1) was not impeded by reason of the fact that a reference for a preliminary ruling amounted to an objective interim procedure in which the parties to the main action had no right of application of their own and which primarily served the purpose of, *inter alia*, interpreting European law. Rather, in the eyes of the FCC, such a reference formed part of a uniform legal dispute, for the outcome of which the ECJ's ruling was decisive. The right of an individual involved in the main action to demand implementation of the guarantees in Constitution Art. 101(1) also extended to the observation of the duty, set out in Art. 177 EEC (now Art. 267 TFEU) to commence proceedings for a ruling regardless of the legal nature of the proceedings and the rules which constituted its substance. However, having ruled that the ECJ could be a "lawful judge" within the terms of Constitution Art. 101(1), the FCC found in *Wünsche* that such right had not been infringed in that case.

Instead it turned to exercise this guarantee shortly after in *Kloppenburg*.²⁰⁴ In that case, the FCC found that the Federal Fiscal Court (*Bundesfinanzhof*) was bound by the interpretation of the Sixth VAT Directive, given by the ECJ in a preliminary ruling in answer to a reference from a German lower fiscal court. If the Federal Fiscal Court had not wanted to follow the view of the law stated by the ECJ, the FCC said, then it should have requested another preliminary ruling from the ECJ – since the interpretation of the Sixth VAT Directive was a question on which the Federal Fiscal Court had to give judgment. Such reference would have had to include its objection to the ECJ's previous ruling, and particularly its competence (which, according to the Federal Fiscal Court, it did not possess), to develop European law. The FCC continued:²⁰⁵

The Federal [Fiscal] Court avoided in an objectively arbitrary way the obligation to request a further preliminary ruling from the Court of Justice pursuant to Article 177(3) EEC. If a court of final appeal refuses to fulfil this obligation regarding questions of law which have already been the subject of a preliminary ruling by the European Court of Justice in the same proceedings, that constitutes a violation of Article 101(1), sentence 2 of the Constitution, regardless of how the criterion of arbitrariness is construed in relation to violations of the obligation to obtain a preliminary ruling pursuant to Article 177.

According to the FCC, then, failure by the Federal Fiscal Court to refer to the ECJ constituted a breach of this fundamental constitutional right of Mrs. Kloppenburg. She was able therefore to seise the FCC due to this infringement of her constitutionally guaranteed right, allowing it to reverse the judgment of the Federal Fiscal Court on the grounds of violation of the right to a lawful judge and to refer the case back to the Federal Fiscal Court for new consideration – either to make a new reference to the ECJ in the terms the FCC had already outlined or to accept the earlier reference made by the lower fiscal court and so allow Mrs. Kloppenburg's claim for repayment of tax.

The FCC went on to develop this line of case-law to establish²⁰⁶ that a German court – which had not referred a question to the ECJ – violated the principle of a lawful judge only if either (a) the court of final instance had gone fundamentally against a decision of the ECJ

²⁰⁴ *Kloppenburg*, 8 April 1987, 2 BvR 687/85: BVerfGE 75, 223; [1988] 3 CMLR 1.

²⁰⁵ BVerfGE 75, 223, at 245; [1988] 3 CMLR 1, at 20-21.

²⁰⁶ *Exclusion of Part-time Employees from Company Pension Scheme*, BVerfG 5 August 1998, 1 BvR 264/98: (1999) 52 NJW 46 L; 1998 NZA 1246.

on a question that was material to the settlement of the dispute; or (b) in the absence of an ECJ ruling, it had manifestly gone beyond its discretionary power to decide whether it must refer the question to the ECJ.²⁰⁷

In cases of mandatory references to the ECJ, the fundamental right to a lawful judge is infringed if a German court does not try sufficiently to be informed of the relevant European law and therefore misjudges its obligation to refer.²⁰⁸ In addition, claims on the alleged a violation of the duty to refer to the ECJ and with it the right to a lawful judge must state clearly whether the action concerned the interpretation of European law rather than a question of application of a European legal rule to the individual case; failure to do so renders the claim inadmissible.²⁰⁹ However, it must also be emphasised, that the FCC interprets the right to a lawful judge through the ECJ reference procedure as binding all domestic courts except itself.²¹⁰

The recent case of *Honeywell/Mangold*²¹¹ has further added to this case-law. The case, it will be recalled, concerned *inter alia* the complaint that the Federal Labour Court should have referred to the ECJ the question as to whether or not the principle of protection of legitimate expectations under EU and national law required the ECJ ruling in *Mangold*²¹² to be subject to a time restriction and not enjoy retroactive effect. In this respect the FCC reaffirmed its previous case-law, according to which the standard of arbitrariness which it generally applied when interpreting and applying competence norms also applied to the obligation to make a reference to the ECJ in accordance with Art. 267(3) TFEU.²¹³ It continued:²¹⁴

²⁰⁷ For an extensive review of the right to a lawful judge in respect of the ECJ, see *T. GmbH & Co. KG (Preliminary Reference Concerning the Collective Redundancies Directive)*, 25 Februar 2010, 1 BvR 230/09: (2010) 37 EuGRZ 247; [2010] 3 CMLR 47, 1286, at paras. 15-24, subject to the rider in *Honeywell/Mangold*, 6 Juli 2010, 2 BvR 2661/06: (2010) 37 EuGRZ 497, at para. 89.

²⁰⁸ *Rinke*, 9 Januar 2001, 1 BvR 1036/99: (2001) 54 NJW 1267 (present author's translation):

"Accordingly, there is an infringement of the obligation to make a reference particularly in those cases where a court of final instance basically fails to comply with its obligation. There is also an infringement where the ECJ has not given judgment on an issue of Community law that is liable to determine the outcome of a case or if its existing rulings do not perhaps exhaustively deal with the issue. If it appears that a further development of the case-law of the ECJ is not merely a remote possibility, in such a way there is an infringement of the second sentence of Constitution Art. 101(1) according to the FCC if a court of competent jurisdiction of final instance exceeds its discretion in such cases to an unacceptable degree. This can particularly be the case where it is manifestly possible to take issue with the position adopted by that court on a question of Community law on which the outcome in the main case turns.

The FCC could basically only conduct its review on the basis of this rule if it were adequately acquainted with the reasons why the court of final instance ruling on the merits had declined to make a reference for a preliminary ruling to the ECJ."

²⁰⁹ *Biobronch Cough Sweets*, BVerfG 30 Januar 2002, 1 BvR 1542/00: (2002) 55 NJW 1486.

²¹⁰ P. Sensburg, "Die Vorlagepflicht an den EuGH: Eine einheitliche Rechtsprechung des BVerfG" (2001) 54 NJW 1259; and F.C. Mayer, "Das Bundesverfassungsgericht und die Verpflichtung zur Vorlage an den Europäischen Gerichtshof" (2002) 37 EuR 239.

²¹¹ *Honeywell/Mangold*, 6 Juli 2010, 2 BvR 2661/06: (2010) 37 EuGRZ 497, at paras. 87-91.

²¹² Case C-144/04 *Mangold v. Helm* [2005] ECR I-9981.

²¹³ *Firma E.K.*, 13 Oktober 1970, 2 BvR 618/68: BVerfGE 29, 198, at 207; and *Absatzfonds*, 31 Mai 1990, 2 BvL 12, 13/88, 2 BvR 1436/87: BVerfGE 82, 159, at 194.

²¹⁴ *Honeywell/Mangold*, 6 Juli 2010, 2 BvR 2661/06: (2010) 37 EuGRZ 497, at 89.

The standard of arbitrariness is also applied, if an infringement of Art. 267(3) TFEU is under discussion. The FCC is not obliged by Union law to review fully the violation of the obligation to submit under Union law and to orientate it in line with the case-law of the ECJ on Art. 267(3) TFEU (cf. FCC, 6 Mai 2008, 2 BvR 2419/06: 2008 NVwZ-RR 658, at 660; contrary, FCC, 25 Februar 2010, 1 BvR 230/09: 2010 NJW 1268, at 1269). Article 267(3) TFEU does not require any additional legal means for the review of the content of the obligation to make a reference... A court of last instance under Art. 267(3) TFEU is by definition the last instance before which the individual can assert his rights vested in him on the basis of Union law (ECJ, Case C-224/01 *Köbler v. Austria* [2003] ECR I-10239, at para. 34).

Thus the courts with special jurisdiction (like the Federal Labour Court) maintained, through the interpretation and application of Union law, an area of discretion for their own assessment and judgement. The FCC was only required to guard the observance of the limits of this discretion was thus not the superior court for the review of references to the ECJ.

b. ECJ ruling priority

This particular approach was expounded in *Steinike & Weinlig*.²¹⁵ Here the FCC ruled that domestic rules,²¹⁶ allowing a ruling on constitutionality to be sought before it, did not confer jurisdiction on it to declare EEC Treaty provisions to be applicable in Germany contrary to the effect which the ECJ had already attributed to such Treaty provisions in a preliminary ruling in the same (original) proceedings. It stated:²¹⁷

The judgments of the European Court of Justice issued in accordance with Article 177 EEC Treaty [now Art. 267 TFEU] are binding on all national courts concerned with the same original proceedings. This follows from the sense and purpose of Articles 177 and 164 EEC [now Art. 267 TFEU and Art. 19 TEU]. In this respect, they are also binding on the Bundesverfassungsgericht in proceedings involving the interlocutory review of norms under Article 100(1) GG. For in this kind of proceedings, too, the Bundesverfassungsgericht is concerned with the original proceedings within the meaning of Article 177 EEC. It is true that it decides only on the questions of law defined in Article 100(1) (s. 81 BVerfGG); these, however, are relevant to the decision – as a prerequisite for the admissibility of the proceedings – with regard to the original case....

The fact that the Bundesverfassungsgericht is bound by the interpretation of Articles 92 to 94 EEC [now Arts. 107-109 TFEU] by the preliminary ruling of the European Court of Justice in the present original proceedings in any event precludes the interpretation or declaration of applicability of these Treaty rules for the sovereign territory of the Federal Republic of Germany in contradiction to this preliminary

²¹⁵ *Steinike & Weinlig*, 25 Juli 1979, 2 BvL 6/77: BVerfGE 52, 187; [1980] 2 CMLR 531.

²¹⁶ Constitution Art. 100(1) and CCA ss. 80ff.

²¹⁷ BVerfGE 52, 187, at 201-202; [1980] 2 CMLR 531, at 535.

ruling. This would violate the above-demonstrated guarantee function of Articles 177 and 164 EEC; there are no constitutional objections to the ratification statute to the EEC Treaty, which has ratified both these Treaty rules.

The FCC reinforced its position, in the final paragraph of its judgment, where it clearly affirmed the priority of the ECJ rulings in interpreting primary European law (i.e., Treaty provisions) although it left open the question with respect to secondary or derived European law:²¹⁸ “The Court leaves open whether and, if so, to what extent – for instance, in view of political and legal developments in the European sphere occurring in the meantime – the principles contained in its decision of 29 May 1974 (BVerfGE 37, 271) can continue to claim validity without limitation in respect of future references of norms of *derived* Community law. [Emphasis in original.]”

Thus German courts – including the FCC – were bound to accept as binding on them the ECJ’s interpretation of Treaty Articles. This was extended to secondary legislation in the *Kloppenburg* case²¹⁹ which concerned the rulings of the ECJ giving direct effect to certain provisions of Directives and the failure of the Federal Fiscal Court to follow them.²²⁰

The FCC, through these and other cases, clearly reinforced the priority of the ECJ’s interpretations of provisions of both the Treaties as well as European secondary legislation. Such interpretations were generally applicable and subject only to the ultimate review power of the FCC itself.²²¹ Nevertheless, such approach is not a blanket one: as will be seen subsequently in the latter part of this Chapter.²²²

²¹⁸ BVerfGE 52, 187, at 202-203; [1980] 2 CMLR 531, at 537.

²¹⁹ *Kloppenburg*, 8 April 1987, 2 BvR 687/85: BVerfGE 75, 223; [1988] 3 CMLR 1.

²²⁰ BVerfGE 75, 223, at 240; [1988] 3 CMLR 1, at 17. Footnote omitted.

²²¹ *Honeywell/Mangold*, 6 Juli 2010, 2 BvR 2661/06: (2010) 37 EuGRZ 497, at 60.

²²² See below at Chapter Three, points E.2.-E.3.

E. LIMITS TO NATIONAL COURT ACCEPTANCE

1. Introduction

The FCC – like higher, supreme or constitutional courts in certain other EU Member States²²³ – has not accepted without question the constitutionalisation of the European legal order, as created and managed by the ECJ. In this respect, a number of aspects have been challenged or confronted by the FCC but, so far, they have not led to open conflict with their European counterpart although (as will be examined later) its ruling in the *Lisbon* case²²⁴ renders an eventual clash more likely.

2. Essential core as limitation to integration

One initial remark should be made as regards the eternity clause – Constitution Art. 79(3) – in the context of Community/Union membership. This clause is imposed on all powers constituted through the Constitution since European law itself has its basis in the Constitution;²²⁵ thus European law is also subject to the eternity clause. As a result, any provision of European law which challenges one of the principles protected by Art. 79(3) would therefore not be applicable in Germany.

The case-law of the FCC has borne out this proposition, where initially the FCC focused on the limits as constituted by the strong constitutional protection afforded to fundamental rights. In the *Maastricht* ruling, the emphasis switched to the principle of democracy as underlying the limits to integration and while this continued into the *Lisbon* case, the latter ruling further enhanced these limits by emphasising the FCC's role in supervising the boundaries of those powers conferred by the Member States on the EU (by *ultra vires* review) and of the protection of Germany's own constitutional identity.

a. Fundamental rights

In *Internationale Handelsgesellschaft* (“*Solange I*”)²²⁶ the plaintiff had requested the Frankfurt Administrative Court to annul a decision of the ECGF²²⁷ based on two Regulations.

²²³ See generally J. Rideau (ed.), *Les Etats membres de l'Union européenne. Adaptations – Mutations – Résistances*, L.G.D.J., Paris (1997); A.M. Slaughter, A. Stone Sweet & J.H.H. Weiler (eds.), *The European Court and National Courts – Doctrine and Jurisprudence: Legal Change in its Social Context*, Hart Publishing, Oxford (1998).

²²⁴ *Lisbon*, 30 Juni 2009, 2 BvE 2/08 and 5/08, and 2 BvR 1010/08, 1022/08, 1259/08 and 182/09: BVerfGE 123, 267; [2010] 2 CMLR 712; (2009) 36 EuGRZ 339.

²²⁵ D. Hanf, “Le jugement de la Cour constitutionnelle fédérale allemande sur la constitutionnalité du Traité de Maastricht: Un nouveau chapitre des relations entre le droit communautaire et le droit national” (1994) 30 RTDE 391, at 397.

²²⁶ *Internationale Handelsgesellschaft*, 29 Mai 1974, 2 BvL 52/71: BVerfGE 37, 271; [1974] 2 CMLR 540. E. Bülow, “Case Note” (1974) 1 EuGRZ 19; J. Frowein, “Europäisches Gemeinschaftsrecht und Bundesverfassungsgericht,” in Ch. Starck, *Bundesverfassungsgericht und Grundgesetz: Festgabe aus Anlaß des 25jährigen Bestehens des Bundesverfassungsgerichts*, Band II, J.C.B. Mohr (Paul Siebeck) Verlag, Tübingen (1976), 187ff.; H. Golsong, Case Note (1974) 1 EuGRZ 17; H.P. Ipsen, “Das Bundesverfassungsgericht löst die Grundrechtsproblematik, Zum ‘Mittlerweise’-Beschuß des 2. Senats vom 22. Oktober 1986” (1987) 22 EuR 1;

The company contended that the Regulations ought not to be applied as they were contrary to the fundamental human rights provisions of the Constitution. Having received the decision of the ECJ, the Frankfurt Administrative Court then made a reference to the FCC to discover whether or not the basis of the company's argument was correct.

This latter Court²²⁸ denied the full supremacy of European law, essentially because the Constitution enshrined certain fundamental rights which did not benefit from similar protection in European law:²²⁹ "The part of the Constitution dealing with fundamental rights is an inalienable essential feature of the valid Constitution of the Federal Republic of Germany and one which forms part of the constitutional structure of the Constitution. Article 24 of the Constitution does not without reservation allow it to be subjected to qualifications."

Considering the fact that the transfer of sovereign powers under then Constitution Art. 24 had to be compatible with the German constitutional order, if powers were transferred to a system (*i.e.*, the then EEC) which failed to provide the same protection then German courts still retained the right to test the legislation coming from such system (*i.e.* European law) for compliance with the national scheme of fundamental rights *as long as* ("*solange*") European law was deficient. This deficiency was caused by the absence of a directly-elected European Parliament to which the then Community organs with legislative powers were responsible on a political level and of a "codified catalogue of fundamental rights" comparable to that in the German Constitution.

Accordingly, at least in theory, the FCC qualified and limited the supremacy of European law over domestic law. However, having thus decided these points with regard to its own jurisdiction, the FCC next considered the substantive issue by ruling that the European measures in question did not violate German constitutional provisions.

This ruling consequently represented a *potential* conflict between the case-law of the ECJ (which, under the then Arts. 173 and 174 EEC had the exclusive right at that time – now shared with the General Court²³⁰ – to review secondary European legislation) and that of the FCC. *Internationale Handelsgesellschaft* had represented a warning shot across the bows of the ECJ (and the then EEC institutions) to take human rights seriously,²³¹ thereby stimulating the ECJ to develop fundamental rights protection as part of the general principles of European law.²³² As stated, this case amounted to a potential for conflict but one which the FCC did not act upon – having drawn its "line in the sand," it refrained from any further development of the constitutional review threat for many years.²³³

Kokott (1998), at 83-87 and at 118-121; U. Scheuner, "Der Grundrechtsschutz in der Europäischen Gemeinschaft und Verfassungsrechtsprechung" (1975) 100 AöR 30.

²²⁷ ECGF, the respondent, was the national cereals intervention agency.

²²⁸ Having reiterated its previous stance in *European Community Regulations*, 18 Oktober 1967, 1 BvR 248/63 and 216/67: BVerfGE 22, 293.

²²⁹ BVerfGE 37, 271, at 280; [1974] 2 CMLR 540, at 550.

²³⁰ Art. 256 TFEU. The General Court was originally set up under the 1986 SEA and was formerly known the Court of First Instance.

²³¹ J. Coppel & A. O'Neill, "The European Court of Justice: Taking Rights Seriously?" (1992) 29 CML Rev. 669; and, for a contrary opinion, see J.H.H. Weiler & N.Lockhart, " 'Taking Rights Seriously' Seriously: The European Court of Justice and its Fundamental Rights Jurisprudence - Part I" (1995) 32 CML Rev. 51

²³² On the actual developments, see B. de Witte, "The Past and Future Role of the European Court of Justice in the Protection of Human Rights," in P. Alston (ed.), *The EU and Human Rights*, OUP, Oxford (1999), 859.

²³³ *Steinike & Weinlig* ("Vielleicht"), 25 Juli 1979, 2 BvL 6/77: BVerfGE 52, 187; [1980] 2 CMLR 531; and

This matter was substantially resolved in 1986 in the case of *Wünsche Handelsgesellschaft* (“*Solange II*”)²³⁴ where the FCC stated that, as long as (“*solange*”) the general level of protection of human rights under Community law (as it then was) remained adequate by German standards, it would no longer entertain proceedings to examine secondary European legislation for compliance with national constitutional provisions relating to fundamental rights.²³⁵

This decision amounted to a waiver of the right of review as long as the then Community protection could be equated with that provided under the Constitution.²³⁶ Although the FCC did not conceive of any reduction or deterioration in the protection offered, it nevertheless did not give up its right to apply national provisions protecting fundamental human rights to European laws in such an eventuality. The FCC wanted to preserve its final authority to intervene where real problems concerning the protection of fundamental rights in European law could arise.²³⁷

b. Democracy

The passing of the necessary German Ratification Statute of the TEU occurred in 1992 without any real debate or call for a referendum on continued European integration.²³⁸ However, before the Federal President signed the formal instrument of ratification, constitutional challenges were brought before the FCC focussing on the threat to the constitutionally guaranteed principles of German democracy and sovereignty posed by accession to the TEU, in particular to Constitution Art. 20 (requirement that Germany be a democratic state) and Art. 38 (right to participate in elections to select a government and its policies). The principle of democracy as a fundamental principle of the German constitutional order in fact superseded protection of fundamental rights as the basis for challenging the further deepening of European integration, which change continued into the 21st century.

Eurocontrol I, 23 Juni 1981, 2 BvR 1107, 1124/77 und 195/79: BVerfGE 58, 1.

²³⁴ *Wünsche Handelsgesellschaft*, 22 Oktober 1986, 2 BvR 197/83: BVerfGE 73, 339; [1987] 3 CMLR 225. J. Frowein, “Case Note,” (1988) 25 CML Rev. 201.

²³⁵ Despite the absence of a Community Bill of Rights, the FCC reached its decision on three grounds: (i) the development by the ECJ of a case law on the protection of fundamental human rights within the Community: e.g. Case 4/73 *Nold v. Commission* [1974] ECR 491; Case 44/79 *Hauer v. Land Rheinland-Pfalz* [1979] ECR 3727; Case 222/84 *Johnston v. RUC Chief Constable* [1986] ECR 1651; (ii) the acceptance by the ECJ that any gaps in Community protection could be plugged by reference to the European Convention on Human Rights as an authoritative source of law; and (iii) the Declaration of 5 April 1977 of the European Parliament, the Council and the Commission to respect fundamental rights in the exercise of their powers (OJ 1977 C103/1), confirmed by the European Council meeting of 7 and 8 April 1978 (Bull. EEC, Supp. 3/78, 5). Although not formal treaty law, these two documents were regarded by the FCC as having great legal significance as an expression of the common view of the Member States and the Institutions.

²³⁶ H.G. Crossland, “Three major decisions given by the Bundesverfassungsgericht (Federal Constitutional Court)” (1994) 19 EL Rev. 202, at 204.

²³⁷ As long as the Community system had not developed into a federal structure, questions of sovereignty or final priority, as to sources of law, had to be kept in suspense: J. Frowein, “Note: *Solange II*” (1988) 25 CML Rev. 201, at 203-204.

²³⁸ Gesetz zum Vertrag vom 7. Februar 1992 über die Europäische Union vom 28. Dezember 1992: BGBl. 1992, IIS, 1251.

In this *Maastricht case*,²³⁹ the FCC found that such ratification was not contrary to the Constitution and also that amendments made to the Constitution in consequence of the Treaty were not in themselves unconstitutional. However, in its decision, the FCC set certain limits for Germany's participation in the European Union. The decision underlined the FCC's belief that – in its view – the concept of sovereignty of the German State was still very important and clearly evinced its intention of maintaining power to review the validity and compatibility of European law with the Constitution.

The FCC reiterated the traditional doctrine as regards the mode of incorporation of European law when it considered Constitution Art. 38 would be infringed if a statute which made provision for the direct applicability and effect of supranational European law in Germany did not clearly set out the specific rights to be transferred. As a consequence, were substantial changes in the integration programmes of the TEU to be made later, the acts thereby authorised would no longer be covered by the ratification statute. Thus the FCC would be in a position to review whether or not legal acts of the European institutions came within the remit of the transfer of sovereign rights permitted by the ratification statute.

In addition, the FCC restated its opinion on fundamental human rights protection. It considered that greater integration in the EU extended the application of German fundamental rights since the FCC would also provide protection against acts of European institutions. These acts were capable of affecting German citizens and it was the FCC's task to provide protection, irrespective of the source of the act. Such protection would, however, be provided in a spirit of co-operation²⁴⁰ with the ECJ:²⁴¹

The ... Court by its jurisdiction guarantees that an effective protection of basic rights for the inhabitants of Germany will also generally be maintained as against the sovereign powers of the Communities and will be accorded the same respect as the protection of basic rights required unconditionally by the Constitution, and in particular the Court provides a general safeguard of the essential content of the basic rights. The Court thus guarantees this essential content as against the sovereign powers of the Community as well.... However, the Court exercises its jurisdiction on the applicability of secondary Community legislation in Germany in a 'relationship of co-operation' with the European Court, under which that Court guarantees protection of basic rights in any particular case for the whole area of the European Communities, and the Constitutional Court can therefore restrict itself to a general guarantee of the constitutional standards that cannot be dispensed with.

It also allowed "review [of] legal instruments of European institutions and agencies to see whether they remain within the limits of the sovereign rights conferred on them or transgress

²³⁹ *Maastricht*, 12 Oktober 1993, 2 BvR 2134 und 2158/92: BVerfGE 89, 155; [1994] 1 CMLR 57. For a full discussion of this decision, see Crossland (1994) at 206-214; F. Wooldridge, "The German Federal Constitutional Court Upholds the Ratification of the Treaty on European Union," (1994) 5 EBL Rev. 38; N. Foster, "The German Constitution and E.C. Membership" [1994] PL 392, at 401-405; M. Herdegen, "Maastricht and the German Constitutional Court: Constitutional Restraints for an Ever Closer Union" (1994) 31 CML Rev. 235.

²⁴⁰ See critically, M. Vachek, "Das 'Kooperationsverhältnis' im Bananenstreit – Eine Anmerkung zum Vorlagebeschuß des Verwaltungsgerichts Frankfurt a.M. vom 24 Oktober 1996 an das Bundesverfassungsgericht" (1997) 38 ZfRV 136; M. Huber, "Das Kooperationsverhältnis zwischen BVerfG und EuGH in Grundrechtsfragen" (1997) 8 EuZW 517.

²⁴¹ BVerfGE 89, 155, at 175; [1994] 1 CMLR 57, at 79: Footnotes omitted. The official version is worded somewhat more narrowly than in the English translation: "... das BVerfG (kann) sich deshalb auf eine generelle Gewährleistung des unabdingbaren Grundrechtsstandards (BVerfG 73, 339, 387 = *Solange II*) beschränken."

them.”²⁴² The FCC thus reserved²⁴³ its right of judicial review not only to the extent that it claimed to decide for itself whether or not an act of the European institutions remained within the limits of the competences conferred on the Community/Union but also in the field of fundamental human rights. While the ECJ would be responsible for the exercise of judicial control over the cases themselves, the FCC enjoyed the right of control as far as the general standard of human rights’ protection in the EC/EU was concerned²⁴⁴ – this was the kernel of the relationship of co-operation between the two courts.²⁴⁵

c. *Bananas II: fundamental rights protected?*

The assertion in *Maastricht* regarding protection of fundamental rights²⁴⁶ seemed to modify the relationship between European law and German fundamental rights which had previously caused great difficulties and which had appeared to be resolved in *Wünsche Handelsgesellschaft*.²⁴⁷ At the time of *Maastricht*, it was not clear whether this was a mere temporary, singular attitude (dictated by the context of the decision) or whether it amounted to the first step in a road of possible conflict again between the ECJ and the FCC.²⁴⁸ The conflict arena marked out in theory by the FCC in the *Maastricht Case* came into practical existence in the so-called “*Banana Litigation*.”²⁴⁹

In its 2000 *Bananas II* decision,²⁵⁰ the FCC clarified the scope of previous case-law on the primacy of European law and on its own jurisdiction to review the legality of

²⁴² BVerfGE 89, 155, at 188; [1994] 1 CMLR 57, at 89: Footnotes omitted.

²⁴³ J. Schwarze, “A German View on the European Charter of Fundamental Rights: *Effect on the Bundesverfassungsgericht*” (2000) 3 CYELS 407, at 412.

²⁴⁴ *Maastricht*: BVerfGE 89, 155, at 175; [1994] 1 CMLR 57, at 79-80; *Wünsche*: BVerfGE 73, 339, at 387; [1987] 3 CMLR 225, at 265.

²⁴⁵ The relationship of co-operation eventually evolved in a more *communautaire* way than had been thought possible at the time of *Maastricht*: J. Limbach, “Inter-Jurisdictional Cooperation within the Future Scheme of Protection of Fundamental Rights in Europe” (2000) 21 HRLJ 333; G. Nicolaysen & C. Nowak, “Teilrückzug des BVerfG aus der Kontrolle der Rechtmäßigkeit gemeinschaftlicher Rechtsakte: Neuere Entwicklungen und Perspektiven” (2001) 54 NJW 1233.

²⁴⁶ Crossland (1994), at 214.

²⁴⁷ *Wünsche*, 22 Oktober 1986, BVerfGE 73, 339; [1987] 3 CMLR 225.

²⁴⁸ J. Frowein, “Das Maastricht-Urteil und die Grenzen der Verfassungsgerichtsbarkeit” (1994) 54 ZaöRV 1; Chr. Tomuschat, “Die Europäische Union unter Aufsicht des Bundesverfassungsgerichtes” (1993) 20 EuGRZ 489. The finest articulation in English of the difficulties inherent in the *Maastricht Case* is to be found in the searching criticism of the decision in M. Zuleeg, “The European Constitution under Constitutional Constraints: The German Scenario” (1997) 22 E.L. Rev. 19-34.

²⁴⁹ Including the FCC in *Bananas I*, 25 Januar 1995, 2 BvR 2689/94 and 2 BvR 52/95: (1995) 48 NJW 950; (1995) 30 EuR 91; and the ECJ in Case C-280/93 *Germany v. Council* [1994] ECR I-4973: see G.M. Berrisch, “Zum Bananen-Urteil des EuGH vom 5.10.1994” (1994) 29 EuR 461. See generally U. Everling, “Will Europe slip on bananas? The Bananas Judgment of the Court of Justice and National Courts” (1996) 33 CML Rev. 401-437; N. Reich, “Judge-made ‘Europe à la carte’: Some Remarks on Recent Conflicts between European and German Constitutional Law Provoked by the Banana Litigation” (1996) 7 EJIL 103-111.

²⁵⁰ *Banana Market II*, 7 June 2000, 2 BvL 1/97: BVerfGE 102, 147; (2000) 21 HRLJ 251. See F. Mayer, “Grundrechtsschutz gegen europäische Rechtsakte durch das BVerfG: Zur Verfassungsmäßigkeit der Bananenmarktordnung” (2000) 11 EuZW 685-689; Nicolaysen & Nowak (2001), at 1235-1236.

secondary European legislation in the light of the fundamental rights provisions of the Constitution. In so doing, the FCC reaffirmed its adherence to its formula in *Wünsche*.

The background to the case was formed through domestic proceedings brought by the Atlanta Group banana importers, in which an administrative court made a reference to the FCC following a judgment of the ECJ²⁵¹ which latter had indicated that Regulation 404/93/EC²⁵² on the common system for banana imports, in force at the time, was valid.

The FCC held²⁵³ inadmissible the reference in which the lower court sought a preliminary ruling on the constitutionality of Regulation 404/93/EC. It can be seen that the FCC dealt with the matter by addressing a procedural – as opposed to a substantive – legal solution, involving the burden and standard of proof. According to the FCC, both constitutional complaints as well as submissions by courts which put forward an infringement by secondary European law of fundamental rights guaranteed in the Constitution would be inadmissible from the outset if their grounds did not show that the European evolution of law, including the rulings of the ECJ, had resulted in a decline below the required standard of fundamental rights after *Wünsche* (“*Solange II*”). Therefore, the FCC ruled, the grounds of the submission by a court or of a constitutional complaint had to state in detail that the protection of fundamental rights required unconditionally in the respective case was not generally ensured. This required a comparison of the protection of fundamental rights on the national and on the European level similar to the one made by the FCC in *Solange II*.

Moreover, Constitution Art. 23(1) confirmed this ruling.²⁵⁴ According to the FCC, it was not necessary for protection to be afforded in the different areas of fundamental rights afforded by European law and ECJ judgments, which are based on European law, to be identical to the protection afforded under German constitutional law and practice. The constitutional requirements were satisfied in accordance with preconditions mentioned in *Solange II* if the judgments of the ECJ generally ensured effective protection of fundamental rights as against the exclusive powers of the EU which were to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the Constitution, and in so far as they generally safeguarded the essential content of those rights.²⁵⁵ Limbach

²⁵¹ Case C-466/93 *Atlanta Fruchthandelsgesellschaft (II) v. Bundesamt für Ernährung und Forstwirtschaft* [1995] ECR I-3799.

²⁵² OJ 1993 L47/1. A detailed analysis of the complexities of the litigation is beyond the present part of this thesis: suffice it to say, the banana regime set up by Reg. 404/93/EC while seeking to create an open market for the product in the EU had the consequence of radically altering the relatively restriction-free position previously enjoyed by German importers to such an extent that they faced severe financial handicap or bankruptcy. For a full and balanced discussion of this issue, see Everling (1996), at 403-409.

²⁵³ BVerfGE 102, 147, at 161-163; (2000) 21 HRLJ 251, at 254.

²⁵⁴ BVerfGE 102, 147, at 163-164; (2000) 21 HRLJ 251, at 254.

²⁵⁵ The reasoning in *Bananas II* was affirmed in a 2001 case, *Rinke*, 1 BvR 1036/99, 9 Januar 2001: (2001) 54 NJW 1267. Hoffmeister contended that these judgments of the FCC should have ended the debate on *Maastricht* and in fact marked the FCC’s willingness to accept the European legal architecture, which has entrusted the guardianship of the common legal order to the ECJ. However, as will be seen in the next few sections, this hope has proven to be illusory: F. Hoffmeister, “German *Bundesverfassungsgericht*: *Alcan*, Decision of 17 February 2000; *Constitutional review of EC Regulations on bananas*, Decision of 7 June 2000” (2001) 38 CML Rev. 791, at 803-804. For a more recent affirmation of this position, see *Constitutional Review of the Single Payment Implementation Act*, 1 BvF 4/05, 14 Oktober 2008: BVerfGE 122, 1; [2010] 2 CMLR 37, 986, at para. 84.

noted²⁵⁶ that while the ECJ had the principal responsibility for ensuring the protection of fundamental rights in the EU, the FCC would “only reassert its jurisdiction in such matters if and only if the European Court of Justice would depart from the standard of protection recognised by *Solange II*.”²⁵⁷

d. Lisbon: democracy, constitutional identity and ultra vires review

In the *Lisbon* case,²⁵⁸ the FCC built on its prior case-law (especially the *Maastricht* ruling) and went further, deriving many references from the key concept of democracy.²⁵⁹ It sought to develop the operation of the principle of democracy as the pre-eminent structural principle of the Constitution and suborn European integration (under Art. 23) to it; to define in more detail the essential core of sovereignty; and to extend its review jurisdiction in the face of the implications of deepening integration.

(i) Democracy

First, in respect of principle of democracy, or more particularly the fact that European integration was subject to democratic legitimisation in the classic form of electoral democracy through the self-determination of citizens under the condition of equality, the FCC again based its assessment upon violation of Constitution Art. 38(1), a right equivalent to a fundamental right,²⁶⁰ which – in addition to the direct, free, equal and secret election of the *Bundestag* – guarantees citizens the right to participate in the law-making function of state authority and to influence its exercise.²⁶¹ The free and equal right to vote is the basis of democratic rule²⁶² and, according to the FCC, it is even an expression of human dignity.²⁶³ such equal right to vote is an unalterable principle of domestic constitutional law because the

²⁵⁶ Limbach (2000), at 336.

²⁵⁷ According to Schwarze, if it were assumed that there was no intention on the ECJ’s part to lower the general standard of rights’ protection in the future, the *Bananas II* judgment “has established such considerable obstacles to additional judicial review of Community acts by means of national constitutional law as will be hardly ever be overcome.” Thus, although the FCC claimed that only a “misunderstanding” (BVerfGE 102, 147, at 164-165; (2000) 21 HRLJ 251, at 254-255) of its *Maastricht* ruling could have led the lower court to the assumption that the FCC would actually exercise its jurisdiction, *Bananas II* really deviated from the more demanding and critical *Maastricht* case-law and returned to *Solange II*: Schwarze (2000), at 414-415.

²⁵⁸ *Lisbon*, 30 Juni 2009, 2 BvE 2/08 and 5/08, and 2 BvR 1010/08, 1022/08, 1259/08 and 182/09: BVerfGE 123, 267; [2010] 2 CMLR 712; (2009) 36 EuGRZ 339.

²⁵⁹ Tomuschat (2010), at 274.

²⁶⁰ BVerfGE 123, 267; [2010] 2 CMLR 712; (2009) 36 EuGRZ 339, at paras. 173 and 208.

²⁶¹ BVerfGE 123, 267; [2010] 2 CMLR 712; (2009) 36 EuGRZ 339, at para. 179.

²⁶² BVerfGE 123, 267; [2010] 2 CMLR 712; (2009) 36 EuGRZ 339, at paras. 208-215.

²⁶³ BVerfGE 123, 267; [2010] 2 CMLR 712; (2009) 36 EuGRZ 339, at para. 211.

democratic principle²⁶⁴ and human dignity²⁶⁵ are both specifically protected²⁶⁶ by Constitution Art. 79(3), the “eternity clause.”²⁶⁷

Moreover,²⁶⁸ “The principle of democracy is not amenable to weighing with other legal interests; it is inviolable” and is a concept that is limited to a State with a people and its territory²⁶⁹ but, simultaneously, the elaboration of the democratic principle is open to the integration of Germany into an international and European peaceful order.²⁷⁰ The constitutional mandate to realise a united Europe flows from the Preamble²⁷¹ to the Constitution as well as Constitution Art. 23(1),²⁷² with the FCC referring to the openness towards European law (“*Grundsatz der Europarechtsfreundlichkeit*”).²⁷³

In *Maastricht*,²⁷⁴ in order to demonstrate the admissibility of a constitutional complaint under Constitution Art. 38, it was necessary to claim that the *Bundestag* had lost functions and powers to such an extent that it had, in fact, ceased to be a real “parliament.” In *Lisbon*, however, it would be enough²⁷⁵ to submit:

in a sufficiently determined manner that the democratic possibilities of the *Bundestag* of shaping social policy would be restricted by the competences of the European Union pursuant to the Treaty of Lisbon to such an extent that the *Bundestag* would no

²⁶⁴ Constitution Art. 20(1) and (2).

²⁶⁵ Constitution Art. 1(1).

²⁶⁶ BVerfGE 123, 267; [2010] 2 CMLR 712; (2009) 36 EuGRZ 339, at para. 211

²⁶⁷ See above at Chapter Three, points B.1. and C.1.

²⁶⁸ BVerfGE 123, 267; [2010] 2 CMLR 712; (2009) 36 EuGRZ 339, at para. 216.

²⁶⁹ BVerfGE 123, 267; [2010] 2 CMLR 712; (2009) 36 EuGRZ 339, at paras. 298 and 344-345.

²⁷⁰ BVerfGE 123, 267; [2010] 2 CMLR 712; (2009) 36 EuGRZ 339, at para. 219.

²⁷¹ The Preamble to the Constitution states, in part: “Inspired by the determination to promote world peace as an equal partner in a united Europe, the German people, in the exercise of their constituent power, have adopted this Basic Law.”

²⁷² BVerfGE 123, 267; [2010] 2 CMLR 712; (2009) 36 EuGRZ 339, at para. 225.

²⁷³ BVerfGE 123, 267; [2010] 2 CMLR 712; (2009) 36 EuGRZ 339, at para. 225. Yet such openness to European integration generally is circumscribed by the limits imposed by Germany’s inalienable “constitutional identity,” outlined in Constitution Art. 79(3) (“*unverfügbare Verfassungsidentität*”): BVerfGE 123, 267; [2010] 2 CMLR 712; (2009) 36 EuGRZ 339, at para. 219. Consequently, the Constitution does not permit bodies – acting on behalf of Germany – to abandon the right to self-determination of the German people in the form of Germany’s sovereignty under international law by joining a federal State: this last step is exclusively reserved for the directly declared will of the people: BVerfGE 123, 267; [2010] 2 CMLR 712; (2009) 36 EuGRZ 339, at para. 228. *Lisbon* thus contains (in contrast to *Maastricht*) the express refusal to create a European federal State: Ch. Wohlfahrt, “The *Lisbon Case*: A Critical Summary” (2009) 10 Ger LJ 1277, at 1279; F. Schorkopf, “The European Union as An Association of Sovereign States: Karlsruhe’s Ruling on the Treaty of Lisbon” (2009) 10 Ger LJ 1219, at 1237-1238; and D. Halberstam & C. Möller, “The German Constitutional Court says ‘Ja zu Deutschland!’ ” (2009) 10 Ger LJ 1241, at 1251.

²⁷⁴ See above at Chapter Three, point E.2.b.

²⁷⁵ BVerfGE 123, 267; [2010] 2 CMLR 712; (2009) 36 EuGRZ 339, at para. 182.

longer be able to fulfil the minimum requirements of the principle of the social state that result from Constitution Art. 23(1) sentence 3 in conjunction with Art. 79(3).

The FCC also went far in *Lisbon* to limit the role of the European Parliament (“EP”) within the system of democratic legitimisation. In *Maastricht*,²⁷⁶ the FCC had appeared to appreciate the EP’s contribution to the democratic legitimisation of the Union’s authority and had argued for a gradual increase in its role as the Member States grew together. In *Lisbon*, by contrast, the FCC was much more critical concluding²⁷⁷ that there was a “deficit of European public authority ... [that] cannot be compensated by other provisions of the Treaty of Lisbon.” The EP only complied with democratic principles because it was part of an institutional system that was not analogous to a State²⁷⁸ – i.e., the reason the EP was compatible with national constitutions was because it enjoyed only a relatively weak and complementary (or subsidiary) role in the EU.²⁷⁹

Lastly, through interpretation of Constitution Art. 23(1), the FCC created a new term, *Integrationsverantwortung* (“responsibility for integration”), with respect to the role of domestic organs: it was in effect a means to extend German parliamentary interference into federal government action in TFEU/TEU matters. In this way, the FCC extended parliamentary control or review, e.g., into the operation of the bridging and passerelle clauses of the Lisbon Treaty.²⁸⁰ It was in fact the role of the Bundestag which ultimately led to the FCC declaring the relevant statute – that provided for parliamentary participation, especially respecting the initiation of amendments pursuant to such clauses – to be unconstitutional as they did not provide a sufficient level of parliamentary involvement.

(ii) Essential core and democracy

In respect of the essential core of sovereignty, the FCC justified the contents on the basis of the democratic principle and determined that integration on the basis of a union of sovereign States could only be realised where the Member States retained sufficient space for the political formation of the economic, cultural and social circumstances of life. In particular this applied to areas which shaped the citizens’ circumstances of life, especially the private

²⁷⁶ *Maastricht*, BVerfGE 12 Oktober 1993: BVerfGE 89, 155, at 184-186; [1994] 1 CMLR 57, at 86-88.

²⁷⁷ BVerfGE 123, 267; [2010] 2 CMLR 712; (2009) 36 EuGRZ 339, at para. 289.

²⁷⁸ BVerfGE 123, 267; [2010] 2 CMLR 712; (2009) 36 EuGRZ 339, at para. 278.

²⁷⁹ BVerfGE 123, 267; [2010] 2 CMLR 712; (2009) 36 EuGRZ 339, at para. 262.

²⁸⁰ BVerfGE 123, 267; [2010] 2 CMLR 712; (2009) 36 EuGRZ 339, at para. 320. The Lisbon Treaty allows for the changing of voting procedures without amending the EU Treaties. Under this so-called “passerelle clause,” the European Council can, after receiving the consent of the European Parliament, vote unanimously to allow: (a) the Council of Ministers to act on the basis of qualified majority in areas where they previously had to act on the basis of unanimity (this is not available for decisions with defence or military implications); or (b) for legislation to be adopted on the basis of the ordinary legislative procedure (i.e., the Council and EP make law as co-equal partners) where it previously was to be adopted on the basis of a special legislative procedure. A decision of the European Council to use either of these provisions can only come into effect if, six months after all national parliaments have been given notice of the decision, none object to it: see Art. 48(7) TEU (the general bridge clause) and Art. 31(3) TEU (the CFSP bridge clause for the Council); and Art. 81(3) TFEU (family law); Art. 153(2) TFEU (social rights); Art. 192(2) TFEU (certain environmental protection provisions); Art. 312(2) TFEU (multi-annual financial framework); and Art. 333(2) TFEU (enhanced co-operation).

space of their own responsibility and of political and social security, which was protected by the fundamental rights, and to political decisions that particularly depended on previous understanding as regards culture, history and language and which unfolded in discourses in the space of a political public that was organised by party politics and Parliament. The FCC characterised these elements as acting as a brake on continued integration, outlining them in a non-exhaustive list.²⁸¹

Essential areas of democratic formative action comprise, *inter alia*, citizenship, the civil and the military monopoly on the use of force, revenue and expenditure including external financing and all elements of encroachment that are decisive for the realisation of fundamental rights, above all as regards intensive encroachments on fundamental rights such as the deprivation of liberty in the administration of criminal law or the placement in an institution. These important areas also include cultural issues such as the disposition of language, the shaping of circumstances concerning the family and education, the ordering of the freedom of opinion, of the press and of association and the dealing with the profession of faith or ideology.

Linking this core to the democratic principle (which now appears to be, at least, the *primus inter pares* of constitutional structural principles), the FCC²⁸² noted that the public perception of factual issues and of political leaders remained connected (to a great extent) to patterns of identification which were related to the nation state, language, history and culture. The principle of democracy as well as the principle of subsidiarity²⁸³ therefore required the restriction of the transfer and exercise of sovereign powers to the EU in a predictable manner, especially in central political areas of the space of personal development and the shaping of the circumstances of life by social policy. The FCC then continued²⁸⁴ to list those matters which have “always been deemed especially sensitive for the ability of a constitutional state to democratically shape itself” before a more detailed discussion²⁸⁵ of their actual content and operation.

²⁸¹ BVerfGE 123, 267; [2010] 2 CMLR 712; (2009) 36 EuGRZ 339, at para. 249.

²⁸² BVerfGE 123, 267; [2010] 2 CMLR 712; (2009) 36 EuGRZ 339, at para. 251.

²⁸³ The principle of subsidiarity that was also structurally demanded by Constitution Art. 23(1), first sentence which reads: “With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social, and federal principles, to the rule of law, and to the *principle of subsidiarity*, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law.” [Emphasis supplied.]

²⁸⁴ BVerfGE 123, 267; [2010] 2 CMLR 712; (2009) 36 EuGRZ 339, at para. 252.

²⁸⁵ BVerfGE 123, 267; [2010] 2 CMLR 712; (2009) 36 EuGRZ 339, at paras. 253-260. The list comprised decisions on: (1) substantive and formal criminal law; (2) the disposition of the police monopoly on the use of force internally and of the military monopoly on the use of force externally; (3) the fundamental fiscal decisions on public revenue and public expenditure, with the latter being particularly motivated, *inter alia*, by social-policy considerations; (4) the shaping of circumstances of life in a social state; and (5) matters of particular importance culturally, e.g., family law, the school and education system and religious communities.

(iii) New review powers: protecting boundaries of conferred powers and constitutional identity

Lastly, concerning its own jurisdiction in the face of integration, the FCC determined the contours of its power to intervene by identifying the fact that the non-transferable identity of the Constitution (under Article 79(3)) – which was not amenable to integration in this respect – corresponded to the obligation under European law to respect the constituent power of the Member States as the masters of the Treaties.²⁸⁶ Within the boundaries of its competences, the FCC was to review, if necessary, whether or not these principles had been adhered to.

An amendment of the law laid down in the Treaties²⁸⁷ could be brought about – through the Lisbon Treaty changes²⁸⁸ – without a ratification procedure alone or to a significant extent by the EU institutions (albeit under the requirement of unanimity). In such matters, the FCC observed²⁸⁹ a special responsibility was laid down on the German legislature²⁹⁰ (apart from the federal government) to ensure German participation in such amendments complied with the requirement under Constitution Art. 23(1) (“*Integrationsverantwortung*,” responsibility for integration) and could, if necessary, be asserted before the FCC itself.

While considering that the ability of the ECJ to maintain the *acquis*²⁹¹ and to interpret it effectively were to be tolerated as part of the *Integrationsverantwortung*,²⁹² nevertheless under the Constitution trust in the constructive force of integration was not unlimited.²⁹³ Thus the FCC warned that, if primary European law amended or was interpreted in an extending sense by EU institutions (e.g., the ECJ), it would conflict with the principle of conferral and Member States’ own constitutional responsibility for integration:²⁹⁴

If legislative or administrative competences are only transferred in an undetermined manner or with the intention of their being further developed dynamically, or if the institutions are allowed to newly establish competences, to round them off in an extending manner or to factually extend them, they risk transgressing the predetermined integration programme and acting beyond the powers which they have been granted [i.e., *ultra vires*].

²⁸⁶ Repeating its wording in *Maastricht*, BVerfG 12 Oktober 1993: BVerfGE 89, 155, at 190; [1994] 1 CMLR 57, at 91.

²⁸⁷ Under the Lisbon Treaty, these would be the TEU and TFEU.

²⁸⁸ Under the so-called passerelle clauses: see above at footnote 281.

²⁸⁹ BVerfGE 123, 267; [2010] 2 CMLR 712; (2009) 36 EuGRZ 339, at para. 236.

²⁹⁰ Elsewhere in the judgement, the FCC indicates how the legislature is to participate in ensuring the principle of democratic legitimisation was to be exercised in relation to the new law-making procedures: Halberstam & Möllers (2009), at 1243-1244.

²⁹¹ A.F. Tatham, *Enlargement of the European Union*, Kluwer Law International, Alphen aan den Rijn (2009), chap. 12, 327, at 328.

²⁹² BVerfGE 123, 267; [2010] 2 CMLR 712; (2009) 36 EuGRZ 339, at para. 237.

²⁹³ *Ibid.*, at para. 238.

²⁹⁴ *Ibid.*, at para. 238.

The FCC thus opened up the way of the *ultra vires* review, which applied where European institutions infringed the boundaries of their competences. In those cases where protection could not be obtained at the Union level, the FCC reviewed whether European legal instruments – adhering to the principle of subsidiarity²⁹⁵ kept within the boundaries of the sovereign powers accorded to them by way of conferral.²⁹⁶

In addition, the FCC retained²⁹⁷ a very moderate and exceptional jurisdiction to ensure that integration would occur according to the principle of conferral without violating German constitutional identity which was not amenable to integration. Within its jurisdiction, the FCC was able to assert the responsibility for integration if obvious transgressions of the boundaries occurred when the Union claimed competences and to preserve the inviolable core content of constitutional identity by means of an identity review.²⁹⁸ Thus, the FCC could review whether the inviolable core content of the constitutional identity of the Constitution, pursuant to Constitution Art. 23(1), sentence 3 in conjunction with Art. 79(3),²⁹⁹ was respected.³⁰⁰

The exercise of this competence of review, which is rooted in constitutional law, follows the principle of the [Constitution's] openness towards European law ("*Europarechtsfreundlichkeit*"), and it therefore also does not contradict the principle of loyal co-operation (TEU Art. 4(3)); with progressing integration, the fundamental political and constitutional structures of sovereign Member States, which are recognised by TEU Art. 4(2), sentence 1, cannot be safeguarded in any other way. In this respect, the guarantee of national constitutional identity under constitutional and the one under Union law go hand in hand in the European legal area.

The identity review made it possible for the FCC to examine whether (due to the action of European institutions) the principles under Constitution Arts. 1 and 20, which were declared inviolable in Art. 79(3), had been violated. Importantly, either type of review³⁰¹ could result in European law being declared inapplicable in Germany. Moreover, it was not necessary in the present case to decide how these review proceedings could be invoked – either within the current proceedings provided for in Constitution Arts. 93 and 100 or, which was also conceivable, new types of proceeding, especially tailored to safeguard the obligation of

²⁹⁵ Art. 5(1) TEU, sentence 2, and Art. 5(3) TEU together with TEU and TFEU, Protocol (No. 2) on the Application of the Principles of Subsidiarity and Proportionality.

²⁹⁶ See *Eurocontrol I*, 23 Juni 1981, 2 BvR 1107, 1124/77 und 195/79; BVerfGE 58, 1, at 30-31; *Kloppenburger*, 8 April 1987, 2 BvR 687/85; BVerfGE 75, 223, at 235 and 242; [1988] 3 CMLR 1, at 13 and 18; *Maastricht*, BVerfG 12 Oktober 1993; BVerfGE 89, 155, at 188; [1994] 1 CMLR 57, at 89. See the latter case concerning legal instruments transgressing the limits ("*ausbrechende Rechtsakte*").

²⁹⁷ BVerfGE 123, 267; [2010] 2 CMLR 712; (2009) 36 EuGRZ 339, at paras. 238-239.

²⁹⁸ See *Kloppenburger*, 8 April 1987, 2 BvR 687/85; BVerfGE 75, 223, at 235 and 242; [1988] 3 CMLR 1, at 13 and 18; *Maastricht*, BVerfG 12 Oktober 1993; BVerfGE 89, 155, at 188; [1994] 1 CMLR 57, at 89; *European Arrest Warrant*, 18 Juli 2005, 2 BvR 2236/04; BVerfGE 113, 273, at 296; [2006] 1 CMLR 378, at 401.

²⁹⁹ See *European Arrest Warrant*, 18 Juli 2005, 2 BvR 2236/04; BVerfGE 113, 273, at 296; [2006] 1 CMLR 378, at 401.

³⁰⁰ BVerfGE 123, 267; [2010] 2 CMLR 712; (2009) 36 EuGRZ 339, at para. 240

³⁰¹ *Ibid.*, at para. 241.

German bodies not to apply (in individual cases) European legal instruments that transgressed competences or that violated constitutional identity.

The *Lisbon* ruling amounts to a notable alteration in the FCC's *Solange* case-law: thus any European legal act can be scrutinised by the FCC for its conformity with the Constitution with respect to "obvious" transgressions of the boundaries of competence and identity.³⁰²

(iv) *Ultra vires* review applied

The first litmus test for the exercise of the FCC's *ultra vires* review power came in the *Honeywell/Mangold*³⁰³ which concerned the attempt of a complainant company to have the ECJ ruling in *Mangold*³⁰⁴ annulled on the grounds that it was an *ultra vires* act of the ECJ having transgressed its conferred competences through its expansive interpretation of EU law and principles. This interpretation by the ECJ, the complainant alleged, had infringed its contractual freedom as guaranteed under the German Constitution. If successful, this would have led to a decision of the Federal Labour Court, based on *Mangold*, being overturned to the benefit of the complainant vis-à-vis a former employee who had previously and successfully claimed before the labour courts that the complainant had discriminated against him on the grounds of age.

In its decision, the FCC observed that its *ultra vires* review could only be exercised in a restrained manner and one of openness to European law.³⁰⁵ Moreover, in using its *ultra vires* review in respect of acts of European bodies and institutions:³⁰⁶

[T]he FCC must in principle adhere to the rulings of the ECJ as providing a binding interpretation of Union law. Prior to the acceptance of an *ultra vires* act [by the FCC] of the European bodies and institutions, the ECJ should therefore be afforded the opportunity – in the framework of Art. 267 TEU – to interpret the Treaties as well as to rule on the validity and interpretation of the acts in question. As long as the ECJ has not yet had the opportunity to clarify the EU law questions which have arisen, the FCC should not determine for Germany the inapplicability of Union law (cf. [*Lisbon*:] BVerfGE 123, 267, at 353)

Moreover such a review could only be considered if it were obvious that acts of the European bodies and institutions had been enacted beyond the competences conferred on them. A violation of the principle of conferral was only obvious then, the FCC stated:³⁰⁷

³⁰² Interestingly a constitutional complaint against the new accompanying statute to the Lisbon Treaty (2 BvR 2136/09) was rejected by the FCC, Second Senate, on 22 September 2009: <<http://www.bundesverfassungsgericht.de/pressmitteilungen/bvg09-106.html>>. Visited 10 October 2009.

³⁰³ *Honeywell/Mangold*, 6 Juli 2010, 2 BvR 2661/06: (2010) 37 EuGRZ 497. For a first English-language critique of this case, see M. Mahlmann, "The Politics of Constitutional Identity and its Legal Frame – the *Ultra Vires* Decision of the German Federal Constitutional Court" (2010) 11 Ger LJ 1407.

³⁰⁴ Case C-144/04 *Mangold v. Helm* [2005] ECR I-9981.

³⁰⁵ *Honeywell/Mangold*, 6 Juli 2010, 2 BvR 2661/06: (2010) 37 EuGRZ 497, at paras. 58 and 59.

³⁰⁶ (2010) 37 EuGRZ 497, at para. 60.

[I]f the European bodies and institutions have overstepped the limits of their competences and breached the principle of conferral in a specific offending manner (Constitution Art. 23(1)), i.e. the violation of competence is “sufficiently serious” (cf. the formulation of “sufficiently serious” as characteristics facts of the case in Union tortious liability, see C-472/00 P *Commission v. Fresh Marine Co. A/S* [2003] ECR I-7541, at para. 26ff). This means that the acts of the EU authority are manifestly in breach of competences and the impugned act leads to a structurally significant shift to the detriment of the Member States in the structure of competences between Member States and the European Union.

Measured against these standards, the Federal Labour Court had not ignored the scope of the complainant’s constitutional guaranteed contractual freedom. In any event, the ECJ in *Mangold* had not violated its competences in a sufficiently serious manner. This particularly applied to the derivation of a general principle of non-discrimination in respect of age.³⁰⁸ It was irrelevant whether such a principle could be derived from the constitutional traditions common to the Member States and their international agreements. For even a putative further development of the law on the part of the ECJ – that would no longer be justifiable in terms of legal method – would only constitute a sufficiently serious breach of its competences if it also had the effect of establishing competences in practice. The derivation of a general principle of non-discrimination in respect of age would however not have introduced a new competence for the EU, nor would have an existing competence been expanded. In this sense, Anti-Discrimination Directive 2000/78/EC³⁰⁹ had already made non-discrimination in respect of age binding for legal relationships based on employment contracts, and hence had opened up discretion for interpretation by the ECJ.

Mahlmann³¹⁰ noted that not just any misapplication of the law could possibly suffice because otherwise the FCC would become a *Cour de cassation* for all acts of EU organs that are (as any act of a public authority) open to the claim of misapplying the law. He saw that no other standard than that formulated by the FCC on *ultra vires* was sustainable. In this respect, of particular importance was the second element of the FCC’s test demanding the structural significance of the possible breach of competences that was a workable tool to identify acts that could be regarded with good reasons as *ultra vires*. He indicated³¹¹ that while regarding the ECJ as possessing a “right to tolerance of error,” the FCC had also protected itself against the consequences of its own possible errors by demanding a specifically qualified degree of breach of the order of competences. Sufficient certainty of such violations was thus only possible if the breach had to be qualified and manifest and needed a systemic impact. The FCC thereby shielded itself against the danger of confusing perhaps justified criticism of a decision with the sufficiently secure establishment of an *ultra vires* act.

³⁰⁷ (2010) 37 EuGRZ 497, at para. 61.

³⁰⁸ (2010) 37 EuGRZ 497, at paras. 71-79.

³⁰⁹ Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation: OJ 2000 L303/16.

³¹⁰ Mahlmann (2010), at 1414.

³¹¹ Ibid.

The criterion of structural importance of the *ultra vires* act also served another function, said Mahlmann,³¹² viz., it gave legitimacy to the effects of such control exercised by the FCC: declaring a judgment of the ECJ *ultra vires* and thus not applicable in Germany would mean a major disruption of the EU legal order with clear consequences for the whole integration project. Evidently only a violation of the structure of competences of the EU and the Member States would carry enough weight to justify the consequences of the *ultra vires* control that, in itself, represented a measure of last resort.

3. Review of national transposing law

The FCC, under its jurisdiction to protect fundamental rights in the national system, has emphasised its ultimate authority in this arena.³¹³ While it has refrained from directly striking down secondary European legislation *per se*, the FCC has nevertheless not shied away from reviewing national legal rules that implement Directives.³¹⁴

For example, in *M GmbH*,³¹⁵ the FCC ruled that the applicant German tobacco companies could not seek an injunction to require the Federal Government to vote in the then EEC Council of Ministers against the adoption of a common position on the draft Directive on the Labelling of Tobacco Products.³¹⁶ This was because the German Government's participation in the European legislative process with respect to the Directive did not constitute a sovereign act with a direct adverse effect on the applicants. Rather, the FCC argued, the appropriate stage to bring constitutional review proceedings was when the Directive came into force *and* was implemented into national law. It continued:³¹⁷

³¹² Ibid., at 1414-1415.

³¹³ See *Wünsche*, 22 Oktober 1986, BVerfGE 73, 339; [1987] 3 CMLR 225; and *Bananenmarkt II*, 7 June 2000, 2 BvL 1/97: BVerfGE 102, 147; (2000) 21 HRLJ 251.

³¹⁴ In this sense, it is strongly arguable that such position is no different from the one expressed by the ECJ in *Kadi* (Joined Cases C-402/05 P and C-415/05 P *Kadi v. Council and Commission* [2008] ECR I-6351) to which the FCC made express reference in *Lisbon* (BVerfGE 123, 267; [2010] 2 CMLR 712; (2009) 36 EuGRZ 339, at para. 340). In the case of *Kadi*, the ECJ stated ([2008] ECR I-6351, at para. 316) that “a constitutional guarantee stemming from the EC Treaty as an autonomous legal system [is] not to be prejudiced by an international agreement.” Thus, in that case, the annulment by the ECJ of a Regulation implementing a UN Security Council Resolution – on the grounds that the former was incompatible with European constitutional norms (human rights) – did not affect the primacy of such Resolution under international law. This interesting parallel with the FCC's decision in *Solange* (noted in B. Kunoy & A. Dawes, “Plate tectonics in Luxembourg: The *ménage à trois* between EC law, International law and the European Convention on Human Rights following the UN Sanctions cases” (2009) 46 CML Rev. 73, at 102-103) has however been challenged. Gattini rather noted that the ECJ had failed to accept the positive wording of the *Solange* theory – as proposed by Poiares Maduro AG in his Opinion (para. 54) – that the ECJ would maintain this review jurisdiction so long as the UN did not organise “a genuine and effective mechanism of judicial control by an independent tribunal at the level of the United Nations”: A. Gattini, “Case Note: Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi, Al Barakaat International Foundation v. Council and Commission*, judgment of the Grand Chamber of 3 September 2008, nyr.” (2009) 46 CML Rev. 213, at 234-235.

³¹⁵ *M GmbH v. Bundesregierung*, BVerfG 12 Mai 1989, 2 BvQ 3/89: (1989) 24 EuR 270; [1990] 1 CMLR 570.

³¹⁶ Initial draft: OJ 1988 C48/8; amended draft: OJ 1989 C62/12. Final version Dir. 89/662/EEC: OJ 1989 L359/1, as amended by Dir. 92/41/EEC: OJ 1992 L158/30.

³¹⁷ (1989) 24 EuR 270, at 273; [1990] 1 CMLR 570, at 574.

[T]he labelling directive obliges member-States to implement its content into national law and gives them a considerable freedom of choice in the formulation of such legislation. In the process of implementation the national legislature is subject to the restrictions imposed by the Constitution. The question whether the applicants' constitutional or equivalent rights are infringed in the implementation of the directive within the scope for choice as to formulation allowed to the legislature by the directive is one which is open to constitutional judicial review in all respects.

The FCC concluded its judgement by referring, obliquely, to the “relationship of co-operation” with the ECJ. Consequently, where the Directive might infringe the basic constitutional standards of European law, the ECJ would ensure legal protection of rights. However, the FCC was not excluded from this process and so where the constitutional standards laid down as unconditional by the Constitution were not satisfied by the ECJ, recourse could be had to the FCC.

The possibility of constitutional review of secondary European legislation, through this indirect route, became reality in the 2005 *European Arrest Warrant case*,³¹⁸ where the FCC reaffirmed its jurisdiction to review domestic implementing rules of such secondary legislation against fundamental rights standards in the German Constitution. The relevant secondary European legislation was a 2002 Framework Decision of the Council of Ministers, exercising its powers under the then (pre-Lisbon) EU Treaty.³¹⁹ Such Framework Decision operated at that time like a Directive passed under the then EC Treaty³²⁰ but was expressly forbidden, by the former (pre-Lisbon) Art. 34(2)(b) TEU, from enjoying direct effect.

The 2002 EU Council Framework Decision on the European Arrest Warrant was implemented into the German legal system by the European Arrest Warrant Act 2004,³²¹ itself an amendment to the domestic Act on International Judicial Assistance in Criminal Matters. The complainant in the case challenged his extradition to Spain, as ordered by the Upper Regional Court of Hamburg on the basis of the rules of the European Arrest Warrant (“EAW”), and submitted that certain of his fundamental rights had been infringed, viz.: (a) under Constitution Art. 16(2), which bans extradition of German citizens but provides further: “The law may provide otherwise for extraditions to a Member State of the European Union or to an international court, provided that the rule of law is observed”; and (b) under Constitution Art. 19(4), which guarantees access to a court:³²² “Should any person’s right be violated by public authority, he may have recourse to the courts.”

The FCC declared the European Arrest Warrant Act void on the grounds that (a) the Act had infringed the freedom from extradition in a disproportionate and unwarranted manner because the legislature had not exhausted the margins afforded to it by the Framework Decision in such a way that the implementation of the Framework Decision for

³¹⁸ *European Arrest Warrant*, 18 Juli 2005, 2 BvR 2236/04: BVerfGE 113, 273; [2006] 1 CMLR 378. For an analysis, see C. Tomuschat, “Inconsistencies – The German Federal Constitutional Court on the European Arrest Warrant” (2006) 2 EuConst 209-226.

³¹⁹ 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States: OJ 2002 L190/1.

³²⁰ Case C-105/03 *Criminal proceedings against Maria Pupino* [2005] ECR I-5285, at paras. 33-36.

³²¹ BGBl. 2004, I, 1748.

³²² Although, according to the case-law of the FCC, this right varies according to the margin of discretion exercised by an authority in a particular situation: *Sasbach*, 8 Juli 1982, 2 BvR 1187/80: BVerfGE 61, 82, at 111; and *Gerichtliche Prüfungskontrolle*, 17 April 1991, 1 BvR 419/81 and 213/83: BVerfGE 84, 34, at 53.

incorporation into national law showed the highest possible consideration in respect of the fundamental right concerned. Constitution Art. 16(2) was to guarantee the specific link between German citizens and the German legal order, whose sovereign they were. Moreover, they were to be protected from the uncertainties of criminal procedure and conviction in a foreign legal system: the trust that a suspect put in his own legal system was of constitutional value as this was, which was guaranteed by Art. 16(2) as a fundamental right. Since the legislature was obliged to preserve to the greatest level possible the guarantee of citizenship, any infringement of the fundamental right in Art. 16(2) had to be proportionate; and (b) the Act infringed the right to a court. The new law had rendered the extradition procedure a two-stage process: first the competent *Oberlandesgericht*³²³ was to decide on admissibility; and secondly the Federal Government was to decide on whether or not to grant extradition. Because there was no possibility of a challenge – before the courts – against the executive decision that granted extradition, the right had been infringed.

Accordingly, the extradition of a German citizen was not possible as long as the legislature had failed to adopt a new Act implementing Constitution Art. 16(2). The complainant's constitutional challenge was therefore successful and, as he could not be extradited to Spain as previously requested (in relation to suspected terrorist offences), he was released.

As a result of the FCC's decision, extraditions based on the EAW had to be refused not only in respect of German citizens but also in cases which did not concern German citizens and which posed no constitutional problems. Moreover, critically, the decision took effect immediately – the absence of any temporary suspension of the ruling meant that the EAW no longer had any force in Germany with the consequent failure of the State to comply with its duty to respect (pre-Lisbon) EU law. With this legal lacuna, Germany had to revert to the unamended provisions of its previous rules based on the 1957 European Convention on Extradition.³²⁴

The *European Arrest Warrant* decision has been strongly criticised,³²⁵ particularly since it based its reasoning solely within the fundamental right contained in Constitution Art. 16(2) and persisted in staying there as if within an “étatist snail shell.”³²⁶ It further expended enough time on discussing whether the possibility to extradite nationals could lead to a disintegration of the legal order as envisaged by the Constitution (“*Entstaatlichung*”)!

The FCC's majority decision ignored the ECJ ruling in *Pupino*³²⁷ and rendered its judgment solely on national constitutional grounds. While the FCC evidently had the right to apply national constitutional standards to the national law implementing the Framework

³²³ Higher *Land* Courts or Provincial Courts of Appeal primarily review points of law raised in appeals from the lower courts. Appellate courts also hold original jurisdiction in cases of treason and anti-constitutional activity.

³²⁴ European Convention on Extradition, CETS No. 24: opened for signature 13 December 1957, entered into force 18 April 1960.

³²⁵ See, e.g., M. Böhm, “Das Europäische Haftbefehlsgesetz und seine rechtsstaatlichen Mängel” (2005) 58 NJW 2588; U. Hufeld, “Der Europäische Haftbefehl vor dem BVerfG” (2005) 45 *Juristische Schulung* 865; S. Mölders, “European Arrest Warrant Act is Void – The Decision of the German Federal Constitutional Court of 18 July 2005” (2005) 7 German LJ 45; and J. Vogel, “Europäischer Haftbefehl und deutsches Verfassungsrecht” (2005) 60 JZ 801.

³²⁶ Hufeld (2005), at 870.

³²⁷ Case C-105/03 *Criminal proceedings against Maria Pupino* [2005] ECR I-5285. On *Pupino*'s importance, see M. Fletcher, “Extending ‘Indirect Effect’ to the Third Pillar: The Significance of *Pupino*” (2005) 30 EL Rev. 862.

Decision,³²⁸ and (perhaps positively) human rights had eventually been confirmed and invigorated with the right to judicial review, nevertheless the *European Arrest Warrant* judgement:³²⁹ “conveys the impression, that the protection of human rights ... served only as a stalking horse for a more skeptical, a more etatist view on European integration, especially within the third pillar.”³³⁰

Concerns that the constitutional complaints seeking the unconstitutionality of data retention provisions, harmonised to EU law, were proven unfounded in the recent *Data Retention* case.³³¹ The complainants sought an Art. 267 TFEU reference by the FCC to the ECJ that the latter make a preliminary ruling declaring void Directive 2006/24/EC³³² on the retention of data. They reasoned that this would have opened up the way for a review of the challenged provisions of the domestic implementing statute by the standard of German fundamental rights since the complainants had been unable to assert this before the ordinary courts because their constitutional complaints had directly challenged the implementing statute.

The FCC ruled³³³ that the constitutional complaints were inadmissible to the extent that the challenged domestic provisions were promulgated in implementation of the Directive. A reference to the ECJ was excluded since the potential priority of European law was irrelevant. The validity of the Directive and priority of European law over German fundamental rights which might possibly have resulted from such a conflict were not relevant to the decision. The contents of the Directive gave Germany a broad discretion and were essentially limited to the duty of storage and its extent. The Directive’s provisions did not govern access to or use of the data by Member State authorities and thus such provisions could be implemented in German law without violating constitutional fundamental rights; moreover, the Constitution did not prohibit such data storage in all circumstances. This meant that the “non-European” parts of the German telecommunications statute could be reviewed against basic constitutional rights:³³⁴ “[The FCC] thus found a middle path whereby the Directive-mandated portion of the law was left unchallenged, but the portions of the German implementation legislation that exceeded the terms of the Directive were nullified

³²⁸ A. Hinarejos Parga, “Case Note: *Bundesverfassungsgericht* (German Constitutional Court), Decision of 18 July 2005 (2 BvR 2236/04) on the German European Arrest Warrant Law” (2006) 43 CML Rev. 583, at 589-590.

³²⁹ F. Geyer, “The European Arrest Warrant in Germany – Constitutional Mistrust towards the Concept of Mutual Trust,” in E. Guild (ed.), *Constitutional Challenges to the European Arrest Warrant*, Wolf Legal Publishers, Nijmegen (2006), chap. 5, 101, at 117.

³³⁰ Two dissenting judges in the case, Lübke-Wolff and Gerhardt, considered the outcome disproportionate (BVerfGE 113, 273, at 331-333 and at 342-346; [2006] 1 CMLR 378, at 423-425 and at 430-433): the total nullity of the Act meant that extraditions based on the EAW also had to be refused in cases which did not concern German citizens and which posed no constitutional problems. Moreover Germany’s duty to respect (the then Third Pillar) EU law required an interim regulation: Vogel (2005), at 804.

³³¹ *Data Retention*, 2 März 2010, 1 BvR 256/08, 1 BvR 263/08 and 1 BvR 586/08: (2010) 37 EuGRZ 85.

³³² Directive 2006/24/EC on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC: OJ 2006 L105/54.

³³³ (2010) 37 EuGRZ 85, at paras. 180-187.

³³⁴ C. DeSimone, “Pitting Karlsruhe Against Luxembourg? German Data Protection and the Contested Implementation of the EU Data Retention Directive” (2010) 11 Ger LJ 291, at 316.

until brought in line with German constitutional arrangements. It continued to honor *Solange II* precedent, maintaining the layered integrity of European legal development.”

4. Refusals to refer

It has already been mentioned³³⁵ that the FCC – although conceding the possibility in *Internationale Handelsgesellschaft* – has never actually made a reference to the ECJ. An example of the FCC’s continued reticence in this matter is the *NPD Verbot* case³³⁶ which concerned a constitutional challenge to the ban on the extreme right-wing National Democratic Party of Germany on the grounds that the ban infringed the Constitution.

In the proceedings before the FCC, the applicant Party expressly suggested that a reference should be made to the ECJ because a ban would also prevent the NPD from participating in future elections to the EP. The applicant therefore suggested that the reference would clarify the possible impact of European law on the German law on political parties. The question would be, the applicant submitted, whether European law precluded a Member State from prohibiting a political party that stood not only at national but also at EP elections.

The FCC, as the originating and final judicial instance in party ban proceedings,³³⁷ refused the proposed reference since there were no questions that required clarification as to the interpretation of European law. The FCC’s reasoning was based on four different provisions of the then EC Treaty.

First, it referred to the ECJ’s jurisdiction under Art. 234(1)(a) EC (now Art. 267(1)(a) TFEU) to interpret the Treaty and argued (i) Art. 191 EC³³⁸ (now Art. 10 TEU and Art. 224 TFEU), on the role of political parties in the EU, remained silent in respect of the conditions upon which a party could be banned in a Member State; (ii) on a reading of Art. 190 EC³³⁹ (now Art. 14(1)-(3) TEU and Art. 223 TFEU) and the 1976 Act on Direct Elections to the Assembly,³⁴⁰ Art. 7(2),³⁴¹ it was clear that the rules governing the organisation of EP

³³⁵ See above at Chapter Three, point D.4.

³³⁶ *Nationaldemokratische Partei Deutschlands Verbot*, 22 November 2001, 2 BvB 1/01: BVerfGE 104, 218.

³³⁷ Constitution Art. 21(2) and CCA s. 13(2).

³³⁸ “Political parties at European level are important as a factor for integration within the Union. They contribute to forming a European awareness and to expressing the political will of the citizens of the Union.

The Council ... shall lay down the regulations governing political parties at European level and in particular the rules regarding their funding.”

³³⁹ “1. The representatives in the European Parliament of the peoples of the States brought together in the Community shall be elected by direct universal suffrage.

2. The number of representatives elected in each Member State shall be as follows.... In the event of amendments to this paragraph, the number of representatives elected in each Member State must ensure appropriate representation of the peoples of the States brought together in the Community....

4. The European Parliament shall draw up a proposal for elections by direct universal suffrage in accordance with a uniform procedure in all Member States or in accordance with principles common to all Member States.

The Council shall ... after obtaining the assent of the European Parliament ... lay down the appropriate provisions, which it shall recommend to Member States for adoption in accordance with their respective constitutional requirements.”

³⁴⁰ Act concerning the election of the representatives of the Assembly by direct universal suffrage: OJ 1976 L278/5.

elections fell within the powers of the Member States. Further the 1976 Act, Art. 12(2) provided that a seat in the EP could become vacant as a result of national provisions, including those that related to the prohibition of the party to which the MEP belonged on the grounds of incompatibility with the Member State's Constitution; and (iii) on the basis of the EU Charter of Fundamental Rights,³⁴² Art. 51,³⁴³ the application of the general principles of European law – e.g., the state under the rule of law, democracy and the protection of fundamental rights – was conditional upon the EU and its Member States acting together in the application of European law.

Secondly, Art. 234(1)(b) EC (now Art. 267(1)(b) TFEU), which gave jurisdiction to the ECJ to render preliminary rulings on the validity and interpretation *inter alia* of acts of the European institutions, was not applicable either. The 1976 Act on Direct Elections was not an act adopted by the European institutions on the basis of the Treaties but rather as an agreement in public international law concluded within the field of application of the then EC Treaty, as the ECtHR had held in the *Matthews* case.³⁴⁴

Thirdly, no ground for a reference subsisted under Art. 68(1) EC³⁴⁵ (repealed by the Lisbon Treaty) as the case raised no questions relating to the free movement of persons within Art. 61 EC (now Art. 67 TFEU) *et seq.*³⁴⁶ Finally, the FCC ruled that, since the ban on the NPD (by German authorities) was neither an act of the European Council nor any European institution, the application for a reference under Art. 46(d) TEU³⁴⁷ (repealed by the Lisbon Treaty), read with ex-Art. 234 EC was also inadmissible.

The FCC's decision in the *NPD Verbot case* has not passed without criticism, with Mayer noting³⁴⁸ that the FCC had yet again failed to make any express reference to the fact

³⁴¹ “Pending the entry into force of a uniform electoral procedure and subject to the other provisions of this Act, the electoral procedure shall be governed in each Member State by its national provisions.”

³⁴² OJ 2000 C364/1; now see OJ 2007 C303/1.

³⁴³ “1. The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.”

³⁴⁴ ECtHR *Matthews v. United Kingdom* (App. 24833/94), Judgment of 18 February 1999: (1999) 30 EHRR 361.

³⁴⁵ “Article 234 shall apply to this Title under the following circumstances and conditions: where a question on the interpretation of this Title or on the validity or interpretation of acts of the institutions of the Community based on this Title is raised in a case pending before a court or a tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.”

³⁴⁶ These Articles concerned the adoption measures aimed at creating an area of freedom, justice and security ensuring the free movement of persons in accordance with Art. 14 EC (now Art. 26 TFEU), especially with respect to external border controls, asylum and immigration and measures to prevent and combat crime in accordance with (pre-Lisbon) Art. 31(1)(e) TEU (now Art. 83 TFEU).

³⁴⁷ “The provisions of the Treaty establishing the European Community ... concerning the powers of the Court of Justice of the European Communities and the exercise of those powers shall apply only to the following provisions of this Treaty: ...

(d) Article 6(2) with regard to action of the institutions, in so far as the Court has jurisdiction under the Treaties establishing the European Communities and under this Treaty...”

³⁴⁸ F.C. Mayer, “Das Bundesverfassungsgericht und die Verpflichtung zur Vorlage an den Europäischen

that it felt itself bound by ex-Art. 234 EC. Moreover, Mayer continued, the procedure for banning a party contains a unique feature: the major decisions of the FCC on European law had, up until that time, been decided as a rule in the framework of two types of proceedings, either: (a) constitutional complaints under Constitution Art. 93(1); or (b) on a reference from a domestic court under Constitution Art. 100(1). The FCC was able to justify its refusal to refer questions to the ECJ by arguing that (a) the constitutional complaint was an extraordinary remedy; or (b) the reference from the lower court amounted to an interlocutory procedure. Thus, the FCC could conceivably argue that its involvement in these two sets of proceedings was supplementary or additional to the work of the actual domestic court making the decision against which no appeal lay and which was therefore itself subject to Art. 234(3) EC (now Art. 267(3) TFEU).

In party banning proceedings, this sort of argumentation was without doubt irrelevant as the FCC in this process is the only court that could make a decision. As Mayer noted,³⁴⁹ the *NPD Verbot case* accordingly represented an exceptional opportunity for the FCC to make fundamental observations on its duty under and its relationship with Art. 234(3) EC (now Art. 267(3) TFEU). Unfortunately, it squandered this opportunity³⁵⁰ and chose instead – once again – to avoid addressing the issue, effectively undermining³⁵¹ the *Kooperationsverhältnis* between national courts and the ECJ which it had itself proclaimed in the *Maastricht* decision.³⁵²

More recently in the *Data Retention* case,³⁵³ as discussed above, the FCC managed to sidestep the issue of making a reference to the ECJ. It observed that the challenges to the relevant German law as infringing fundamental rights under the Constitution did not encompass those provisions which had been passed to implement the requirements of Directive 2006/24/EC on the retention of data. Since the potential priority of European law was therefore irrelevant to the decision of the case in hand, no reference was necessary.

Gerichtshof – zugleich Anmerkung zum Beschluss vom 22. November 2001 – 2 BvB 1-3/01 (NPD Verbot)” (2002) 37 EuR 239, at 251.

³⁴⁹ Mayer (2001), at 252.

³⁵⁰ Mayer (2001), at 257.

³⁵¹ Mayer (2001), at 256.

³⁵² See above at Chapter Three, point D.4.

³⁵³ *Data Retention*, 2 März 2010, 1 BvR 256/08, 1 BvR 263/08 and 1 BvR 586/08: (2010) 37 EuGRZ 85.

F. CONCLUDING OBSERVATIONS

In the development of its approaches to European law, the FCC may be considered as a beneficiary as well as an initiator of transjudicial communication, both intrajudicial (among the constitutional tribunals of the Member States) and interjudicial (between the ECJ and itself).³⁵⁴

An appreciation of the initial premise from which the FCC has expounded its own view of this relationship is firmly grounded in the immutability of the essential core of sovereignty, as determined by the Constitution itself in Arts. 20 and 79. Having had the principles contained in these Articles already cast for it as the basic tenets of the German constitutional system, the FCC accordingly took upon itself its constitutionally-defined role as the defender of these fundamentals. The nature of the changes wrought by the ECJ in its constitutionalisation of the Treaties only really began to draw the FCC's attention from the 1970s: while supremacy of European law over national law and even the principle of direct effect were accepted with relatively little difficulty compared to Italy³⁵⁵ or France,³⁵⁶ the essential core of German sovereignty – initially focused on the protection of fundamental rights³⁵⁷ and latterly democracy³⁵⁸ – came to be regarded as the shoals upon which the ship of European law has come close to foundering.

This essential core is viewed by other national courts as a benchmark for their own standards of protection of the national constitutional order in the face of deepening European integration. The French Constitutional Council espoused the concept³⁵⁹ of “the essential conditions of the exercise of national sovereignty,”³⁶⁰ while the Italian Constitutional Court

³⁵⁴ Generally, see F. de Londras & S. Kingston, “Rights, Security, and Conflicting International Obligations: Explaining Inter-Jurisdictional Judicial Dialogues in Europe” (2010) 58 AJCL 359, at 371-387.

³⁵⁵ Italian Constitutional Court in *Costa v. ENEL*, Corte cost. 9 marzo 1964, n. 14: *Giur. cost.* 1964, 129; R. Guastini, “La primauté du droit communautaire: une révision tacite de la Constitution italienne” (2000) 9 *Les Cahiers du Conseil constitutionnel* 119, at 119-120.

³⁵⁶ French Conseil d'Etat in *Syndicat Général de Fabricants de Semoules de France*, CE 1 mars 1968, Rec. 149; [1970] CMLR 395.

³⁵⁷ *Internationale Handelsgesellschaft*, 29 Mai 1974, 2 BvL 52/71: BVerfGE 37, 271; [1974] 2 CMLR 540; and *Wünsche Handelsgesellschaft*, BVerfG 22 Oktober 1986, 2 BvR 197/83: BVerfGE 73, 339; [1987] 3 CMLR 225.

³⁵⁸ *Maastricht*, BVerfG 12 Oktober 1993: BVerfGE 89, 155; [1994] 1 CMLR 57; and *Lisbon*, 30 Juni 2009, 2 BvE 2/08 and 5/08, and 2 BvR 1010/08, 1022/08, 1259/08 and 182/09: BVerfGE 123, 267; [2010] 2 CMLR 712; (2009) 36 EuGRZ 339.

³⁵⁹ These cases include *Re Direct Elections to the European Parliament*: Cons. constit. 29 et 30 décembre 1976, n. 71, Rec. 15; *Re Abolition of the Death Penalty*: Cons. constit. 22 mai 1985, n. 188, Rec. 15; *Re Law authorising the approval of the Schengen Agreement*: Cons. constit. 25 juillet 1991, n. 294, Rec. 91; *Re the Treaty on European Union (Maastricht I)*: Cons. constit. 9 avril 1992, n. 308, Rec. 55; *Re the Treaty on European Union (Maastricht II)*: Cons. constit. 2 septembre 1992, n. 312, Rec. 76; *Re Organic Law concerning the Application of Article 88(3) of the French Constitution*: Cons. constit. 20 mai 1998, n. 400, Rec. 251; *Re the Treaty of Amsterdam*: Cons. constit. 31 décembre 1997, n. 394, Rec. 344; and *Re the EU Constitutional Treaty and the French Constitution*: Cons. constit. 19 novembre 2004, n. 505, Rec. 173; [2005] 1 CMLR 750.

³⁶⁰ These “essential conditions of the exercise of national sovereignty” include the respect of the institutional structure of the French Republic; the continuity of the life of the nation; and the guarantee of the rights and liberties of the citizen.

was clear in setting the “counter limits”³⁶¹ to the transfer of the exercise of national sovereignty to the then Communities.³⁶²

The FCC’s *Maastricht* decision³⁶³ should therefore be seen against a broader domestic constitutional judicial reaction to pressing the accelerator pedal on further and deeper European integration. While not ultimately rejecting the ratification of the Maastricht Treaty by Germany, it did however amount to a warning shot across the bows of the EU and the ECJ.³⁶⁴ For their part, the French Constitutional Council and the Spanish Constitutional Tribunal both ruled that their constitution needed to be amended in order to ratify the Maastricht Treaty.³⁶⁵

The importance of *Maastricht* in Central Europe cannot be underestimated: both the Hungarian Constitutional Court³⁶⁶ and the Polish Constitutional Tribunal³⁶⁷ have, as will be seen, used it in their reasoning in respect of protecting national sovereignty in the face of European integration, as has the Czech Constitutional Court.³⁶⁸ It comes as no surprise then that the 2009 *Lisbon* case reignited the debate on the FCC’s approach to European integration, replacing the “constitutional restraints” of *Maastricht*³⁶⁹ with constitutional limits to further integration.

Again the FCC in *Lisbon* must not be viewed in isolation. For example, the conferral of powers on the Union by the Member States and the primacy of Union law within its own sphere of operation through the 2004 Constitutional Treaty remained constitutional for both the French³⁷⁰ and Spanish³⁷¹ constitutional jurisdictions, provided the essential core of

³⁶¹ Guastini (2000), at 120.

³⁶² *SpA Fragg c. Amministrazione delle Finanze dello Stato*, Corte cost. 21 aprile 1989, n. 232: *Giur. cost.* 1989, I, 1001; M. Cartabia, “Nuovi sviluppi nelle ‘competenze comunitarie’ della Corte costituzionale,” *Giur. cost.* 1989, I, 1012.

³⁶³ *Maastricht*, BVerfG 12 Oktober 1993: BVerfGE 89, 155; [1994] 1 CMLR 57.

³⁶⁴ Partly as a result of this decision, the ECJ refused to change its case-law and allow the horizontal direct effect of Directives to be accepted: Case C-91/92 *Faccini Dori v. Recreb srl* [1994] ECR I-3325, confirming Case 152/84 *Marshall v. Southampton and South West Hampshire Area Health Authority (Teaching)* [1986] ECR 723. On this point, see S. Weatherill, *Law and Integration in the European Union*, Clarendon Press, Oxford (1995), at 213-219, particularly at 217-218. In 1993 and 1994, three Advocates General had delivered Opinions in favour of overruling *Marshall* and acknowledging the horizontal direct effect of Directives: van Gerven AG in Case C-271/91 *Marshall v. Southampton and South-West Hampshire Area Health Authority (Marshall No. 2)* [1993] ECR I-4367; Jacobs AG in Case C-316/93 *Vaneetveld v. SA Le Foyer* [1994] ECR I-763; and Lenz AG in *Faccini Dori v. Recreb* itself.

³⁶⁵ For France: Cons. constit., 9 avril 1992, n. 308, Rec. 55; and Cons. constit., 2 septembre 1992, n. 312, Rec. 76. For Spain: Trib. Const. 10 julio 1992, DTC n. 1/1991: BOE n. 177, Suppl. 24 julio 1992.

³⁶⁶ See below at Chapter Four, point E.2.d.

³⁶⁷ See below at Chapter Five, point E.2.c.

³⁶⁸ Czech Const. Ct. Decision of 3 November 2009: Case No. Pl. ÚS 29/09.

³⁶⁹ Herdegen (1994), at 235.

³⁷⁰ Cons. const. 19 novembre 2004, n. 505, Rec. 173. G. Carcassonne, “Case Note: France. *Conseil Constitutionnel* on the European Constitutional Treaty. Decision of 19 November 2004, 2004-505 DC” (2005) 1 EuConst 293.

³⁷¹ Trib. Const. 13 diciembre 2004, DTC n. 1/2004: BOE 4 enero 2005. C.B. Schutte, “Case Note: Spain. *Tribunal Constitucional* on the European Constitution. Declaration of 13 December 2004” (2005) 1 EuConst

domestic sovereignty was respected. The underlying proposition of this co-operative constitutionalism was the cumulative respect, at national and Union level, of such values or principles as the rule of law, democracy, subsidiarity and the protection of fundamental (human) rights.

A mutual respect for the particular constitutional identities of the Member States and the EU, leading to their possible conciliation and formation of the perspectives of a peaceful co-existence between national and Union pretensions for normative supremacy,³⁷² had previously been signalled by the ECJ in the *Omega* case³⁷³ and was subsequently underlined and extended in *Spain v. United Kingdom*.³⁷⁴ When the French *Conseil constitutionnel* turned to examine the 2007 Lisbon Treaty, it reaffirmed its co-operative approach from its *Constitutional Treaty* decision, while identifying certain areas which would need domestic constitutional amendment before the new Treaty could be ratified.³⁷⁵

The Czech Constitutional Court was required to make two rulings on *Lisbon*,³⁷⁶ in the former referring to *Wünsche* and *Maastricht* cases, in the latter to the FCC *Lisbon* case. However, the Czech Court was at pains to distance itself from its German counterpart in both cases: (a) by declining the task of determining which competences were to remain with the Czech Republic, except on a case-by-case basis through specifying the contents of its own constitutional eternity clause³⁷⁷; (b) by not considering European democracy as fundamentally flawed due to the absence of “one man, one vote” equality in EP elections, unlike its German cousin; and (c) its continued belief in the pooling or sharing of sovereignty by Member States in the EU as entailing a reinforcement rather than a loss of national sovereignty.³⁷⁸ The Hungarian Court’s own decision in *Lisbon*, examined later,³⁷⁹ was equally accommodating to the constitutional realities of the new EU legal order.

Moreover, these courts reiterated that the exercise of their review jurisdiction vis-à-vis European law would only occur in the most exceptional circumstances, viz. (as the

281.

³⁷² J. Roux, “Le Conseil constitutionnel et le contrôle de constitutionnalité du Traité de Lisbonne: *bis repetita*? A propos de la décision n^o 2007-560 DC du 20 décembre 2007 (2008) 44 RTDE 5, at 16.

³⁷³ Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609.

³⁷⁴ Case C-145/04 *Spain v. United Kingdom* [2006] ECR I-7917.

³⁷⁵ Cons. const. 20 décembre 2007, n. 560, Rec. 459.

³⁷⁶ (1) Czech Const. Ct. Decision of 26 November 2008: Case No. Pl. ÚS 19/08; and (2) Czech Const. Ct. Decision of 3 November 2009: Case No. Pl. ÚS 29/09.

³⁷⁷ The eternity clause is found in 1992 Czech Constitution (as amended), Art. 9(2): “Any changes in the essential requirements for a democratic state governed by the rule of law are impermissible.” This must be read with Constitution, Art. 1(1): “The Czech Republic is a sovereign, unitary, and democratic state governed by the rule of law, founded on respect for the rights and freedoms of man and citizens.” It is the key provision with respect to the EU and also in relation to Constitution Art. 10(1): “Certain powers of Czech Republic authorities may be transferred by treaty to an international organisation or institution.”

³⁷⁸ Thus the Czech Court at least – as a Central European constitutional tribunal – does not feel obliged to follow the ubiquitous German example. P. Bříza, Case Note: The Czech Republic. The Constitutional Court on the Lisbon Treaty: Decision of 26 November 2008” (2009) 5 EuConst 143; and J. Komárek, “The Czech Constitutional Court’s Second decision on the Lisbon treaty of 3 November 2009” (2009) 5 EuConst 345.

³⁷⁹ Dec. 143/2010 (VII.14) AB: ABK 2010. 7-8, 872.

Spanish Tribunal noted) where the making and applying of European law failed to comply with the basic principles and limits set by national constitutions and these excesses could not be remedied by European institutions in the ordinary procedures provided under the Treaties. It could therefore be argued that such exceptional circumstances would then amount to a grave and manifest breach of domestic constitutional principles forming the essential core of a nation's sovereignty and constitutional identity, a matter which the FCC found in *Lisbon* to trigger its constitutional identity review powers and repeated in respect of the *ultra vires* review in *Honeywell/Mangold*.³⁸⁰

Also plagued by problems is the relationship of the FCC and the ECJ and its oft-lauded but seldom fully respected *Kooperationsverhältnis* (as propounded by the FCC itself in *Maastricht*³⁸¹) has been difficult to implement in practice. Without doubt, the ruling in *Lisbon* could ultimately lead to a radical repositioning, not only of the FCC but of the other sister courts, in their relationship with the ECJ and European law. Or they might ultimately come round to a more friendly *Europarechtfreundlichkeit* position as announced in *Lisbon*. The complementarity of national and European review standards has been emphasised³⁸² since the FCC in *Lisbon* modelled its concept of constitutional identity review on the corresponding European obligation under Art. 4(2) TEU to respect Member States' national identity;³⁸³ the resulting complementarity of standards being accordingly emphasised by the FCC.³⁸⁴ Such realisation seems to have been implied in the FCC's recent ruling in *Honeywell/Mangold*³⁸⁵ where it stated that, before using its *ultra vires* review jurisdiction, the ECJ had to be given the opportunity to rule in the case.

The formulation of a German model cannot accordingly be viewed in isolation from the evolution of approaches by other national constitutional tribunals when faced with the demands of deepening European integration. At the same time, the model is itself considered important for systems much less influenced by German legal culture; thus it is strongly arguable that it is likely to be much more dominant in systems deriving much of their law and *mentalité* from Germany. This is the theme of the next two Chapters.

³⁸⁰ *Honeywell/Mangold*, 6 Juli 2010, 2 BvR 2661/06: (2010) 37 EuGRZ 497.

³⁸¹ But not even mentioned by it in *Lisbon*.

³⁸² Thym (2010), at 1810-1811.

³⁸³ *Lisbon*, 30 Juni 2009, 2 BvE 2/08 and 5/08, and 2 BvR 1010/08, 1022/08, 1259/08 and 182/09: BVerfGE 123, 267; [2010] 2 CMLR 712; (2009) 36 EuGRZ 339, at para. 234 concerning constitutional identity and *ultra vires* review as an "expression of the foundation of Union authority in the constitutional law of the Member States."

³⁸⁴ *Lisbon*, 30 Juni 2009, 2 BvE 2/08 and 5/08, and 2 BvR 1010/08, 1022/08, 1259/08 and 182/09: BVerfGE 123, 267; [2010] 2 CMLR 712; (2009) 36 EuGRZ 339, at para. 240. Schwarze's exhortation is most apposite (J. Schwarze, "Die verordnete Demokratie: Zum Urteil des 2. Senats des BVerfG zum Lissabon-Vertrag" [2010] EuR 108, at 116-117. Footnote omitted): "Wir brauchen in diesem Kooperationsverhältnis keine neuen Regeln, die dieses näher ausgestalten. Wir brauchen nur den Willen beider Gerichte, auf der Basis des geltenden Gemeinschaftsrechts diese Zusammenarbeit vertrauensvoll zu praktizieren."

³⁸⁵ *Honeywell/Mangold*, 6 Juli 2010, 2 BvR 2661/06: (2010) 37 EuGRZ 497, at para. 60.

