Universiteit
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The Netherlands

A European Ministry of Finance? Charting and testing the national constitutional limits to EU fiscal integration

Behre, F.

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III Macro-Comparative Assessment of Germany

1 Germany and EU integration

In contrast to the flexible Finnish constitutional approach, German constitutional law appears to impose strict limitations on further EU fiscal integration steps despite the overall importance of EU cooperation for post-war German constitutionalism. Historically, the adoption of the Treaty of Paris in 1951 and of the Treaty of Rome in 1957[1] initiated a crucial step in the on-going German redemption process to address the atrocities committed between 1933 and 1945. Hence, for Germany European cooperation was a means to internationally showcase a commitment to fundamental rights protection, to establish peaceful relations amongst European countries, but also to regain political trust and to foster economic development. Hence, EU cooperation is of historic importance for post-war Germany and it is supported by a broad political consensus.[2] However, the Eurocrisis also triggered intense domestic debates on the future direction of the EU in Germany. Notably, when drafting the various Eurocrisis-measures, the dominant German political view was that financial support had to be tied to strict (austerity) conditions.[3] This view translated into a persistent reluctance towards conferring additional fiscal competences to the EU-level. At the same time, this initial political hesitation towards a more fiscally integrated EU appears to slowly soften, as apparent from Next Generation EU, which is based on a Franco-German proposal.[4]

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1 Rupert Scholz, 'Art. 23 GG' in Theodor Maunz and Günter Düring (eds), *Grundgesetz-Kommentar* (92nd edn, C.H. Beck 2020) para 11; Paul Craig, 'Development of the EU' in Catherine Barnard and Steve Peers (eds), *European Union Law* (2nd edn, Oxford University Press 2017) 13-15; Craig and de Búrca, *EU Law Text, Cases, and Materials* 3-4.

2 Although, the support is less enthusiastic, cf. Angelika Scheuer and Hermann Schmitt, 'Sources of EU Support: The Case of Germany' (2009) 18 German Politics 577, 578; Stephen Wood, 'Germany and the Eastern Enlargement of the EU: Political Elites, Public Opinion and Democratic Processes' (2002) 24 Journal of European Integration 23, 29-30.

3 Federico Fabbrini, 'Austerity, the European Council, and the Institutional Future of the European Union: A Proposal to Strengthen the Presidency of the European Council' (2015) 22 Indiana Journal of Global Legal Studies 269, 271, 278-281.

4 Bundeskanzlerin, *Press Release 173/20: A French-German Initiative for the European Recovery from the Coronavirus Crisis*; Cf. as well: Großner and Lawton, 'Merkel and Macron Roll Out €500 Billion COVID-19 Recovery Initiative'; Pancevski and Norman, 'France, Germany Propose €500 Billion EU Pandemic Recovery Fund'; Brössler and Finke, 'Merkel und Macron setzen die Zauderer unter Druck'; Kafsack, ''Alte Zwistigkeiten hintanstellen''.

The political resistance against EU fiscal integration apparent during the Eurocrisis was echoed by the German Federal Constitutional Court,[5] the guardian[6] of the German Constitution[7] and, in EU-related disputes, as *Weiler* put it, a *barking dog that never bites*.[8] This metaphor captures the German constitutional jurisprudence of the past four decades, during which the Court established rigid abstract limits against EU integration steps without, however, annulling any concrete EU measure.[9] The Court's latest jurisprudence suggests that this barking dog turned into a biting one as it declared the ECB's PSP-program and the *Weiß*-judgment *ultra vires*.[10] Although the German Court elaborated how the ECB could remedy the German concerns and ultimately escape incompatibility with the German Constitution, the PSPP-judgment could be exemplary of a new German judicial readiness to more actively challenge EU law. The prevailing question is whether the PSPP-judgment constitutes a singular instance, or whether it marks the start of a stricter application of the established German constitutional limits. In light of this new development, it seems likely that the Court will closely scrutinize any future EU fiscal integration steps and that it might in certain cases not refrain from declaring these incompatible with the German Constitution, which could impede the reform plans for the Euro.

Whilst the apparent readiness to enforce the existing limits is novel, the constitutional limits themselves are not. The German Constitutional Court clearly displayed its concerns towards EU fiscal and budgetary integration in the Eurocrisis-related case law.[11] Although it ultimately accepted all adopted

5 In German: *Bundesverfassungsgericht*.

6 Mehrdad Payandeh, 'Constitutional Review of EU Law After Honeywell: Contextualizing the Relationship Between the German Constitutional Court and the EU Court of Justice' (2011) 48 Common Market Law Review 9, 15; In the context of EU integration, the German Court appears to see itself as advocate of the Member States, cf. Ludwigs, 'Der Ultra-vires-Vorbehalt des BVerfG – Judikative Kompetenzanmaßung oder legitimes Korrektiv' 537-538; Schwerdtfeger, 'Europäisches Unionsrecht in der Rechtsprechung des Bundesverfassungsgerichts – Grundrechts-, ultra-vires- und Identitätskontrolle im gewaltenteiligen Mehrebenensystem' 300.

7 In German: *Grundgesetz*.

8 Joseph H. H. Weiler, 'The 'Lisbon Urteil' and the Fast Food Culture' (2009) 20 The European Journal of International Law 505, 505.

9 In chronological order: *Solange I-Decision* ; 2 BvR 197/83 *Solange II-Decision* [1986] (German Federal Constitutional Court); *Maastricht-Judgment*; *Lisbon-judgment*; *Honeywell-judgment*; *OMT-reference*; *Final OMT-Judgment*; *Quantitative Easing (PSPP) Reference*; *Quantitative Easing (PSPP) Final Judgment*.

10 *Quantitative Easing (PSPP) Final Judgment* paras 163, 178.

11 *Financial Support for Greece and EFSF* (issued in September 2011); 2 BvE 8/11 *Participation of Members of German Parliament in the EFSF* [2012] (German Federal Constitutional Court) (February 2012); 2 BvE 4/11 *Right to Participation for German Parliament at the Occasion of ESM-Treaty and Euro-Plus-Pact* [2012] (German Federal Constitutional Court) (issued in June 2012); *ESM-Treaty and Fiscal Compact (interim relief)* (issued in July 2012); *OMT-reference* (issued in January 2014); *ESM-Treaty and Fiscal Compact* (issued in March 2014); *Final OMT-*

measures, the Court defined substantive, competence-based limits in its *constitutional identity* review. In this case law, the *eternity clause* enshrined in Article 79 (3) GG emerged as the pivotal constitutional reference point for EU (fiscal) integration ambitions.[12] The increasing use of the *eternity clause* has significant practical implications, as every element that the Constitutional Court subsumes under Article 79 (3) GG is immune against constitutional change[13] and EU fiscal integration reforms might thus be heading into a German constitutional dead-end. In light of these serious German constitutional obstacles, the following Chapter investigates the apparent rigidity of the German constitutional approach towards EU fiscal integration proposals. It thereby not only charts existing constitutional limits, but also explores whether additional flexible constitutional space exists, or may be created, under the current German Constitution in order to accommodate such EU proposals without lifting effective protection of the German constitutional core.

Following the structure adopted in the assessment of the Finnish constitutional approach, the analysis of the German constitutional approach first outlines the relevant components of the German constitutional system (2.). Subsequently, the applicable procedural-institutional framework will be assessed (3.). This is followed by the evaluation of the substantive German framework for EU fiscal integration (4.). It is followed by a conclusive overview of the resulting constitutional space under the German Constitution (5.). In a subsequent step, this initially charted constitutional space is deconstructed based on *constitutional flexibility* (6.).

2 SETTING THE STAGE: EU MEMBERSHIP AND THE GERMAN CONSTITUTION

Different to the Finnish constitutional order, which had to incorporate an existing and advanced body of supranational law, German constitutional law

Judgment (June 2016); *Quantitative Easing (PSPP) Reference* (issued in July 2017); *Quantitative Easing (PSPP) Final Judgment* (issued in May 2020).

12 As the *identity review* based on Article 79 (3) GG sets absolute limitations to the German Parliament, cf. Christoph Ohler, 'Rechtliche Maßstäbe der Geldpolitik nach dem Gauweiler-Urteil des EuGH' (2015) 34 Neue Zeitschrift für Verwaltungsrecht (NVwZ) 1001, 1002.

13 Herdegen, 'Art. 79 GG' paras 60-63; Johannes Dietlein, 'Art. 79 GG – Änderungen des Grundgesetzes' in Volker Epping and Christian Hillgruber (eds), *Beck Online Kommentar zum Grundgesetz* (45th edn, C.H. Beck 2020) paras 19-20; Ziller, 'The German Constitutional Court's Friendliness Towards European Law: On the Judgment of *Bundesverfassungsgericht* over the Ratification of the Treaty of Lisbon' 68; Only the constituting power may decide to replace the German Constitution and thereby overcome Article 79 (3) GG, cf. Herbst, 'Legale Abschaffung des Grundgesetzes nach Art. 146 GG?' 33; Schöbener, 'Das Verhältnis des EU-Rechts zum nationalen Recht der Bundesrepublik Deutschland' 892.

evolved alongside the process of EU integration.[14] The subsequent section outlines the origins of the German Constitution which might explain core constitutional design choices (2.1.), before then considering the mentioned authoritative German Constitutional Court (2.2.).

2.1 Origin of the German Constitution and its EU features

The German Constitution was adopted in 1949. Haunted by the horrors of the *Hitler*-dictatorship that emerged under the *Weimar Constitution*, the drafters of the *Grundgesetz* designed a resilient constitutional system that is based on irreversible constitutional values and devoted to peaceful European cooperation. Hence, the commitment to a unified Europe in the preamble and the initial possibility to confer state powers to the supranational level established in Article 24 GG[15] as well as the prominent commitment to human dignity in Article 1 GG, the following catalogue of fundamental rights in Articles 2-19 GG and the *eternity clause* can be understood as direct reactions to these historic experiences. Specifically, the latter is devised as constitutional shield against constitutional abuses by locating core constitutional principles outside the reach of the constituted state institutions.[16] This resilient constitutional design is paired with a central constitutional authority that supervises all state action,

14 For example, with the ratification of the Maastricht Treaty when Article 23 GG was introduced, cf. Wolff Heintschel von Heinegg and Robert Frau, 'Art. 23 GG – Mitwirkung bei Entwicklung der EU' in Volker Epping and Christian Hillgruber (eds), *Beck Online Kommentar zum Grundgesetz* (45th edn, C.H. Beck 2020) paras 1, 21-23; Christian Hillgruber, 'GG Präambel' in Volker Epping and Christian Hillgruber (eds), *Beck Online Kommentar zum Grundgesetz* (45th edn, C.H. Beck 2020) paras 16-16.2; Herdegen, 'Präambel des Grundgesetzes' paras 69, 74; Claudio Franzius, '70 Jahre Grundgesetz und Europa: Passt das zusammen?' (2019) 54 Europarecht (EuR) 365, 366-367; Calliess, '70 Jahre Grundgesetz und europäische Integration: 'Take back control' oder 'Mehr Demokratie wagen'?' 685-686; Konrad Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* (C.F. Müller 1993) para 106.

15 Christian Calliess, 'Art. 24 GG' in Theodor Maunz and Günter Düring (eds), *Grundgesetz-Kommentar* (92nd edn, 2020) paras 1-2.

16 Ohler, 'Rechtliche Maßstäbe der Geldpolitik nach dem Gauweiler-Urteil des EuGH' 1002; Rainer Wahl, 'Elemente der Verfassungsstaatlichkeit' (2001) 41 Juristische Schulung (JuS) 1041, 1042; These powers are outside the reach of the constitution-amending legislator, cf. Herdegen, 'Art. 79 GG' paras 60-61; Armin von Bogdandy and Stephan Schill, 'Die Achtung der nationalen Identität unter dem reformierten Unionsvertrag – Zur unionsrechtlichen Rolle nationalen Verfassungsrechts und zur Überwindung des absoluten Vorrangs' (2010) 70 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV) 701, 715; The protection of the *eternity clause* extends to EU integration steps, cf. Klaus F. Gärditz, 'Glaubwürdigkeitsprobleme im Unionsverfassungsrecht' (2020) 31 Europäische Zeitschrift für Wirtschaftsrecht (EuZW) 505, 505; Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 150.

the German Constitutional Court.[17] It is constituted as the independent authority that ensures the compliance with the German Constitution. Different to courts in other EU Member States,[18] the German Court is empowered to review compliance with all constitutional provisions, including the *eternity clause*.[19] Overall, this suggests that the constitutional design and the Court's authoritative position are historically rooted design choices. Throughout the process of EU integration, both elements became more relevant. For example, although the *eternity clause* was originally drafted as *internal* constitutional safeguard, it is increasingly applied to EU integration.[20] Notably, the German constitutional jurisprudence illustrates that the *eternity clause* is mainly employed as constitutional benchmark or shield against too far-reaching EU integration steps.[21]

As EU cooperation increased over the past six decades, the constitution-amending legislator introduced a specific EU clause when adopting the Maastricht Treaty into Article 23 GG which regulates the conferral of competences to the EU and the participation of German institutions in EU affairs[22] thereby introducing a distinctive constitutional framework for European cooperation.

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17 Michaela Hailbronner and Stefan Martini, 'The German Federal Constitutional Court' in András Jakab, Arthur Dyevre and Giulo Itzcovich (eds), *Comparative Constitutional Reasoning* (Cambridge University Press 2017) 356-359; Peter C. Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law – The Theory and Practice of Weimar Constitutionalism* (Duke University Press 1997) 1.

18 Cf. for example the French *Conseil Constitutionnel* which has no power to review constitutional amendments, cf. Polzin, 'Constitutional Identity, Unconstitutional Amendments and the Idea of Constituent Power: The Development of the Doctrine of Constitutional Identity in German Constitutional Law' 434-435.

19 At the same time, constitutional jurisprudence is also confronted with criticism, for example in relation to the wide standing requirements in EU matters that were criticized as introducing a *de facto* actio popularis in Germany, cf. Gärditz, 'Beyond Symbolism: Towards a Constitutional Actio Popularis in EU Affairs? A Commentary on the OMT Decision of the Federal Constitutional Court' 190-197; Volker Epping, *Grundrechte* (6th edn, Springer Verlag 2015) 183; Oliver Klein and Christoph Sennekamp, 'Aktuelle Zulässigkeitsprobleme der Verfassungsbeschwerde' (2007) 60 Neue Juristische Wochenschrift (NJW) 945, 949; Yet, the German Federal Constitutional Court maintains internally that no such *actio popularis* exists under the German Constitution, cf. 1 BvR 2980/14 *Fundamental Rights for Residents of Nursing Homes* [2016] (German Federal Constitutional Court) para 22.

20 As obvious from the strict limits that the German Court developed based on this provision, cf. Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 147; Franz C. Mayer, 'Rashomon in Karlsruhe: A Reflection on Democracy and Identity in the European Union' (2011) 9 International Journal of Constitutional Law 757, 780-782.

21 Martin Nettesheim, 'Wo 'endet' das Grundgesetz – Verfassungsgebung als grenzüberschreitender Prozess' (2012) 52 Der Staat 313, 332, 354; Cf. as well: Herdegen, 'Art. 79 GG' paras 177-179.

22 Calliess, '70 Jahre Grundgesetz und europäische Integration: 'Take back control' oder 'Mehr Demokratie wagen'?' 686; Jörg-Uwe Hahn, 'Die Mitwirkungsrechte von Bundestag und Bundesrat in EU-Angelegenheiten nach dem neuen Integrationsverantwortungsgesetz' (2009) 20 Europäische Zeitschrift für Wirtschaftsrecht (EuZW) 758, 758.

The provision allows for the conferral of competences in Article 23 (1) (2) GG,[23] by yet recalling the applicability of the *eternity clause* in Article 23 (1) (3) GG.[24] Therefore, Article 23 GG functions as both the framework for and the limit to German EU membership.[25] The then newly introduced provision complemented the previous constitutional framework, which consisted of a firm commitment to European cooperation in the preamble[26] and Article 24 GG. Today, the Constitutional Court employs all these provisions to construe the general openness of the German Constitution towards EU integration.[27]

2.2 The German Constitutional Court

As highlighted, the constitution establishes the German Constitutional Court as an independent, centralized judicial authority in charge of constitutional review. Its judgments are binding on all state institutions,[28] and through its interpretation of the *eternity clause* it can identify matters that are located outside the mandate of even the constitution-amending legislator.[29] Its authority in relation to other institutions is historically rooted[30] and unique from

23 Heintschel von Heinegg and Frau, 'Art. 23 GG – Mitwirkung bei Entwicklung der EU' paras 21-23; Herdegen, 'Präambel des Grundgesetzes' paras 69, 74; Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* para 106; Note also the explicit wording which indicates a dynamic process, rather than a mere participation in a static supranational organization, cf. 'Art. 23 (1) (1): With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union (...).'

24 Cf. for example the *OMT*-reference, *OMT-reference* paras 27-29; Cf. as well: Calliess, '70 Jahre Grundgesetz und europäische Integration: 'Take back control' oder 'Mehr Demokratie wagen'?' 685; Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 144; Peter Häberle, *Das Grundgesetz zwischen Verfassungsrecht und Verfassungspolitik* (Nomos 1996) 449.

25 Thiele, 'Die Integrationsidentität des Art. 23 Abs. 1 GG als (einzige) Grenze des Vorrangs des Europarechts' 371; Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* para 106.

26 Marcus Schladebach, 'Staatszielbestimmungen im Verfassungsrecht' (2018) 58 Juristische Schulung (JuS) 118, 120.

27 Cf. further discussion within this Chapter under Section 4.1.3.1.

28 As stipulated in § 31 BVerfGG, decisions of the Constitutional Court are binding for all state actors and decisions on the constitutionality of legislative acts have the force of law, cf. Klaus Schlaich and Stefan Korioth, *Das Bundesverfassungsgericht – Stellung Verfahren, Entscheidungen* (11th edn, C.H. Beck 2018) paras 495-496; Helmut Philipp Aust and Florian Meinel, 'Entscheidungsmöglichkeiten des BVerfG – Tenor, Systematik und Wirkungen' (2014) 54 Juristische Schulung (JuS) 25, 26.

29 Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 147; Schwerdtfeger, 'Europäisches Unionsrecht in der Rechtsprechung des Bundesverfassungsgerichts – Grundrechts-, ultra-vires- und Identitätskontrolle im gewaltenteiligen Mehrebenensystem' 293-294, 307.

30 Hailbronner and Martini, 'The German Federal Constitutional Court' 357-360; Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law – The Theory and Practice of Weimar Constitutionalism* 1.

a comparative angle.[31] Article 93 GG assigns to the *Bundesverfassungsgericht* the exclusive power to supervise the constitutionality of legislative and other public action,[32] the competence to adopt binding decisions on the interpretation of constitutional provisions[33] as well as the power to settle constitutional disputes between institutions.[34] Proceedings can be initiated by institutional actors but also by private individuals,[35] which is of particular relevance in EU matters.[36] Today, around 95% of all applications are initiated by private individuals.[37] On the one hand, this ensures a steady caseload and, on the other hand, it elevates the individuals in relation to state actors.

The judges serving in the Court's two senates[38] are independent, as guaranteed by Article 97 (1) GG.[39] This underscores the judicial nature of the Court, which exclusively adjudicates on the basis of constitutional law.[40] The sixteen constitutional judges are appointed in equal parts by Bundestag and Bundesrat. The appointed candidates have to have the qualification to work as judge[41] and their appointment has to be confirmed by a two-thirds major-

31 In comparison, the German Federal Constitutional Court is one of the most powerful constitutional courts globally, cf. Schlaich and Korioth, *Das Bundesverfassungsgericht – Stellung Verfahren, Entscheidungen* paras 1-3; Georg Vanberg, *The Politics of Constitutional Review in Germany* (Cambridge University Press 2005) 17.

32 As established by the Court based on Article 100 GG, cf. 1 BvL 13/52, 1 BvL 21/53 *Law on Direct (Financial) Support* [1955] (German Federal Constitutional Court) para 33.

33 As specified in § 31 BVerfGG (Law on the Bundesverfassungsgericht), cf. Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 144; also stressed by the Court, cf. 2 BvR 1018/74 *Driving Licence Regulation* [1975] (German Federal Constitutional Court) para 12.

34 Cf. the different proceedings listed in Article 93 GG; For an overview, cf. Schlaich and Korioth, *Das Bundesverfassungsgericht – Stellung Verfahren, Entscheidungen* para 9.

35 For example: ibid paras 79, 194.

36 Which is highly controversial, cf. Schwerdtfeger, 'Europäisches Unionsrecht in der Rechtsprechung des Bundesverfassungsgerichts – Grundrechts-, ultra-vires- und Identitätskontrolle im gewaltenteiligen Mehrebenensystem' 305, 307.

37 Epping, *Grundrechte* para 147.

38 The Bundesverfassungsgericht consists of 16 judges that are divided into two Senates consisting of 8 judges, cf. § 2 (1) and (2), § 14 BVerfGG; Schlaich and Korioth, *Das Bundesverfassungsgericht – Stellung Verfahren, Entscheidungen* paras 38-39.

39 And further specified in § 1 (1) BVerfGG; Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* para 670.

40 The *Bundesverfassungsgericht* pointed out itself that it was not conducting politics, cf. 2 BvF 1/73 *Treaty concerning the Basis of Relations Between the Federal Republic of Germany and the German Democratic Republic* [1973] (German Federal Constitutional Court) para 75; Cf. as well: Gerd Morgenthaler, 'Art. 93 GG – Bundesverfassungsgericht, Zuständigkeit' in Volker Epping and Christian Hillgruber (eds), *Beck Online Kommentar zum Grundgesetz* (45th edn, C.H. Beck 2020) para 4; Schlaich and Korioth, *Das Bundesverfassungsgericht – Stellung Verfahren, Entscheidungen* paras 501-504; Hailbronner and Martini, 'The German Federal Constitutional Court' 357-358.

41 Following § 2 (3) BVerfGG at least three judges per Senate have to be recruited from the other highest German courts with a minimum of three-year working experiences at these courts; Additionally, they have to poses the qualification to become a judge under German

ity. These requirements ensure that the appointed judges are both qualified and enjoy support beyond a specific political party.[42] Therefore, constitutional judgments are less politically driven, in contrast to, for example, the US Supreme Court,[43] which likely contributes to the wide acceptance of Court.[44]

Taken together, this illustrates the authoritative and important position the German Constitutional Court occupies under the *post-war* German constitutional system. As is apparent from its extensive case law, the Court extends this authoritative position to EU law, too. Through its constitutional review,[45] the Court continues to determine the relationship between the German and the EU constitutional order, which has clear implications for the feasibility of EU fiscal integration steps.[46]

3 Procedural and institutional framework for EU cooperation

Article 23 GG extensively regulates German EU membership, as visualized in *Figure 6*. It aims to ensure the comprehensive involvement of the German Parliament and Federal Council in EU matters.[47] Article 23 GG prescribes parliamentary approval for the transfer of competences, it establishes a right to receive information,[48] and it enables both institutions to participate in the

labor law, following § 3 (2) BVerfGG, cf. Schlaich and Korioth, *Das Bundesverfassungsgericht - Stellung Verfahren, Entscheidungen* para 41.

42 Ibid paras 46-47; Hailbronner and Martini, 'The German Federal Constitutional Court' 365-366.

43 Christoph Hönnige and Thomas Gschwend, 'Das Bundesverfassungsgericht im politischen System der BRD – ein unbekanntes Wesen?' (2010) 51 Politische Vierteljahresschrift 507, 513.

44 Schlaich and Korioth, *Das Bundesverfassungsgericht – Stellung Verfahren, Entscheidungen* para 550; Vanberg, *The Politics of Constitutional Review in Germany* 119-124.

45 For an overview cf. Schwerdtfeger, 'Europäisches Unionsrecht in der Rechtsprechung des Bundesverfassungsgerichts – Grundrechts-, ultra-vires- und Identitätskontrolle im gewaltenteiligen Mehrebenensystem' 292-293; For an outline of the possible conflict between EU and German legal order, cf. Wendel, 'Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference' 305-306.

46 As the Court protects budgetary prerogatives under the *eternity clause*, cf. Herdegen, 'Art. 79 GG' paras 182-184; Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 144-145; Pilz, 'Ein Schatzamt für die Eurozone? – Überlegungen zu den Vorschlägen des Europäischen Parlaments und der Kommission zu einer Reform der Wirtschaftsunion' 644; Calliess, 'Der Kampf um den Euro: Eine "Angelegenheit der Europäischen Union" zwischen Regierung, Parlament und Volk' 6-7.

47 *Right to Participation for German Parliament at the Occasion of ESM-Treaty and Euro-Plus-Pact* paras 91, 96-98; 2 BvE 6/99 *NATO-Concept* [2001] (German Federal Constitutional Court) paras 149-150; 2 BvE 13/83 *Deployment of Atomatic Weapons* [1984] (German Federal Constitutional Court) paras 144-145; Cf. as well Heintschel von Heinegg and Frau, 'Art. 23 GG – Mitwirkung bei Entwicklung der EU' para 33.

48 Note that the right to information is not restricted to specific EU acts, cf. *Right to Participation for German Parliament at the Occasion of ESM-Treaty and Euro-Plus-Pact* paras 100-101.

exercise of conferred powers. Furthermore, Articles 23 (3) (3) and (7) GG empower the German legislator to regulate the institutional interaction between parliament and government, now laid down in the Law on the cooperation of the German Government and the German Parliament in matters of the European Union (EUZBBG),[49] as well as the regional and the federal state level, now laid down in the Law on the cooperation of the federal level and the regional level in matters of the European Union (EUZBLG)[50].[51]

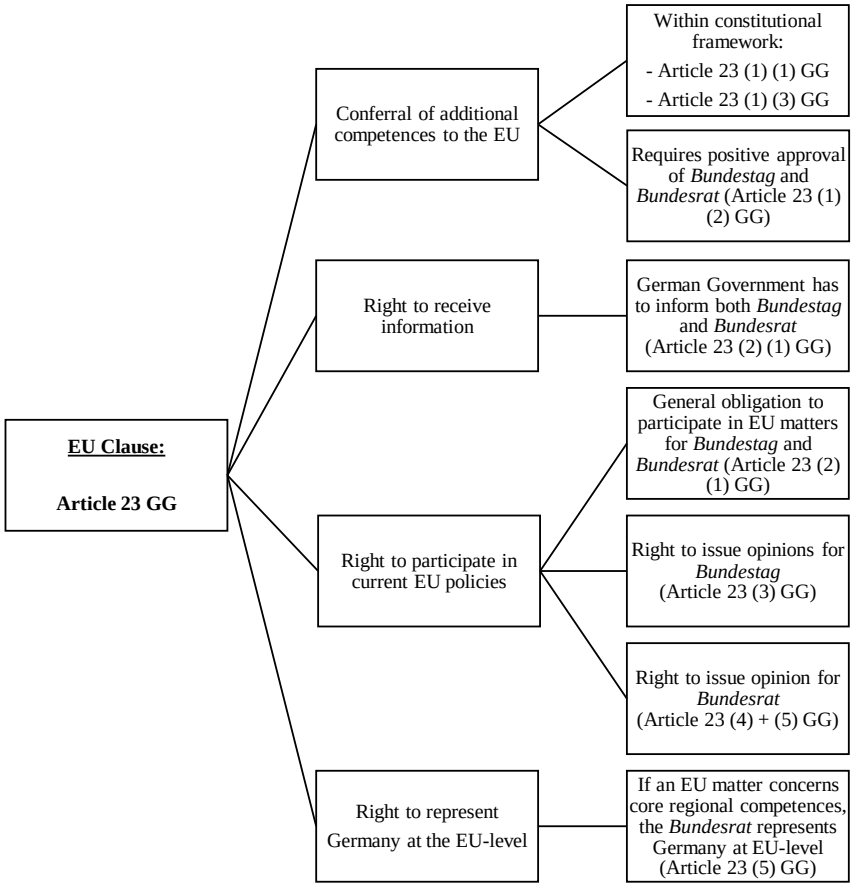

Figure 6: Different components of German EU membership clause

49 *EUZBBG* is the abbreviation for: Gesetz über die Zusammenarbeit von Bundesregierung und Deutschem Bundestag in Angelegenheiten der Europäischen Union.

50 *EUZBLG* is the abbreviation for: Gesetz über die Zusammenarbeit von Bund und Ländern in Angelegenheiten der Europäischen Union.

51 Timm Beichelt, 'Recovering space lost? The German Bundestag's new potential in European Politics' (2012) 21 German Politics 143, 145; Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* para 106.

In the subsequent assessment, the constitutional framework for the conferral of competences to the EU (3.1.) and the involvement of the German Parliament (3.2.) as well as the Federal Council (3.3.) in the exercise of conferred competences are analyzed. Finally, the procedural requirements for initiating constitutional review are assessed (3.4.).

3.1 Conferral of additional competences to the EU under Article 23 GG

Article 23 (1) (2) GG permits the conferral of competences from the German to the EU-level.[52] Following the jurisprudence of the Constitutional Court, a conferral of powers is given in case of explicit Treaty amendments,[53] in case EU voting requirements are altered according to Article 48 (7) TEU,[54] or in case the EU's flexibility clause in Article 352 TFEU is employed.[55] In all three instances, the German legislator enjoys a so-called *parliamentary reservation*,[56] which prescribes parliamentary approval. Moreover, it is questionable whether a conferral of competences in the sense of Article 23 (1) (2) GG could also occur through an EU secondary act. However, following the case law of the German Constitutional Court[57] as well as the Treaty-logic[58] a transfer of competences to the EU seems to require an explicit recognition in the Treaties.

This conferral of competences is restricted in two regards. First, Article 23 (1) (1) GG establishes structural requirements that EU cooperation has to comply with (3.1.1.). And second, Article 23 (1) (3) GG reiterates that the majority requirement for constitutional amendments laid down in Article 79 (2) GG as well as the *eternity clause* apply to any envisaged conferral (3.1.2.).

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52 Heintschel von Heinegg and Frau, 'Art. 23 GG – Mitwirkung bei Entwicklung der EU' paras 21-23; Scholz, 'Art. 23 GG' paras 61-64; Hans D. Jarass, 'Art. 23 GG – Europäische Union' in Hans D. Jarass and Bodo Pieroth (eds), *Grundgesetz für die Bundesrepublik Deutschland – Kommentar* (9th edn, C.H. Beck 2007) paras 17-20.

53 In the sense of Article 48 (1) – (6) TEU; As the Bundesverfassungsgericht clarified, a textual modification of EU primary law always requires approval under Article 23 (1) (2) GG, cf. *Lisbon-judgment* para 243.

54 Ibid para 316; Cf. as well: Scholz, 'Art. 23 GG' para 149.

55 *Lisbon-judgment* para 328.

56 In German: *Parlaments- oder Gesetzesvorbehalt*; Then, the approval of the legislator is constitutive, cf. Scholz, 'Art. 23 GG' para 152.

57 *Lisbon-judgment* para 243; Also inherent in the *ultra vires* review, which scrutinizes EU secondary acts, cf. Andrej Lang, 'Ultra Vires Review of the ECB's Policy of Quantitative Easing: An Analysis of the German Constitutional Court's Preliminary Reference Order in the PSPP case.' (2018) 55 Common Market Law Review 923, 929; Schwerdtfeger, 'Europäisches Unionsrecht in der Rechtsprechung des Bundesverfassungsgerichts – Grundrechts-, ultra-vires- und Identitätskontrolle im gewaltenteiligen Mehrebenensystem' 292-293; Ohler, 'Rechtliche Maßstäbe der Geldpolitik nach dem Gauweiler-Urteil des EuGH' 1001-1002; Wendel, 'Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference' 273-274.

58 Notably, the principle of conferral enshrined in Article 5 (2) TEU.

3.1.1 Structural requirements applicable to the conferral of powers

EU cooperation has to comply with the requirements established in Article 23 (1) (1) GG, which states:

> '(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 Basic Law.'

As becomes obvious from the wording, Germany can only participate in supranational cooperation in case the EU complies with the listed structural requirements, which in fact largely correspond to the EU's foundational values. Hence, the legislator has to establish that the EU conforms to these requirements before approving the conferral. However, in contrast to the *eternity clause*, Article 23 (1) (1) GG does not formulate absolute limits. Instead, it sketches a general framework for EU cooperation[59] and aims to steer integration towards compliance with core German constitutional values.[60] This is equally reflected in the jurisprudence of the *Bundesverfassungsgericht*, which emphasized, for example, that the fact that EU democracy differed from the concept of German democracy did not render the EU undemocratic under Article 23 (1) (1) GG. It illustrates that the provision is interpreted in an open manner[61] and therefore unlikely to restrict EU fiscal integration ambitions.

3.1.2 Constitutional requirements for the conferral

Article 23 (1) (3) GG reiterates the internally applicable procedural requirements for constitutional amendments. It reads:

> '(1) [...] The establishment of the European Union, as well as changes in its treaty foundations and comparable regulations that amend or supplement this Basic Law or make such amendments or supplements possible, shall be subject to paragraphs (2) and (3) of Article 79.'

Article 79 (2) GG establishes that constitutional amendments require approval by a two-thirds majority in parliament and federal council. Article 79 (3) GG

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59 Note the distinction between 'integration goal' in Article 23 (1) (1) GG and 'integration limits' in Article 23 (1) (3) GG, cf. Calliess, '70 Jahre Grundgesetz und europäische Integration: 'Take back control' oder 'Mehr Demokratie wagen'?' 685-686.

60 Scholz, 'Art. 23 GG' paras 70- 71; Calliess, '70 Jahre Grundgesetz und europäische Integration: 'Take back control' oder 'Mehr Demokratie wagen'?' 686.

61 Yet, respecting Article 23 (1) (3) GG, cf. *Maastricht-Judgment* paras 92-94; Cf. as well: Heintschel von Heinegg and Frau, 'Art. 23 GG – Mitwirkung bei Entwicklung der EU' paras 10-11.

precludes amendments to the core constitutional values. By referencing these provisions, Article 23 (1) (3) GG clarifies that the internally applicable constitutional framework extends to the EU, too. Thereby Article 23 (1) (3) GG alters the previously applicable constitutional arrangement established under Article 24 (1) GG, which did not refer to Article 79 (2) GG.[62]

Now, Article 23 (1) (3) GG prescribes a two-thirds majority for all EU conferrals that directly or indirectly alter the German Constitution.[63] A constitution-amending majority was for example deemed necessary for adopting the ESM and the Fiscal Compact,[64] given the instruments' implications on constitutionally enshrined parliamentary prerogatives and their effect on *overall budgetary responsibility*.[65] Less far-reaching EU commitments can be approved by simple majority.[66] Yet, the precise delimitation, which was already disputed in the initial adoption process of Article 23 (1) GG,[67] remains ambiguous and a detailed assessment of the envisaged conferral is required in order to determine the applicable majority requirement.[68]

62 Scholz, 'Art. 23 GG' para 114; Jarass, 'Art. 23 GG – Europäische Union' para 21.

63 Everything that would internally be characterised as a (material) constitutional amendment requires constitution-amending majority, cf. Wissenschaftliche Dienste des Deutschen Bundestages, *Zum Erfordernis eines qualifizierten Mehrheitsbeschlusses des Bundestages hinsichtlich des Zustimmungsgesetzes zum Eigenmittelbeschluss der EU (WD 4 – 3000 – 055/20)* (German Parliament 2020) 5; Heintschel von Heinegg and Frau, 'Art. 23 GG – Mitwirkung bei Entwicklung der EU' para 25; Ralph Alexander Lorz and Heiko Sauer, 'Verfassungsändernde Mehrheiten für die Stabilisierung des Euro? – Mehrheitserfordernisse bei der Zustimmung zum Fiskalpakt, zum ESM-Vertrag und zur Änderung des AEUV' (2012) 47 Europarecht (EuR) 682, 685.

64 Although both instruments are intergovernmental agreements, the German Court clarified that in case such agreements have a close connection to EU law they are considered EU matters under German constitutional law and Article 23 GG is applicable, cf. *Right to Participation for German Parliament at the Occasion of ESM-Treaty and Euro-Plus-Pact* paras 135-137; Cf. as well: Matthias Ruffert, 'Europarecht für die nächste Generation – Zum Projekt Next Generation EU' (2020) 39 Neue Zeitschrift für Verwaltungsrecht (NVwZ) 1777, 1779; Lena Ketterer, *Zustimmungserfordernis beim Europäischen Stabilitätsmechanismus* (Freiburger Rechtswissenschaftliche Abhandlungen, Mohr Siebeck 2016) 359.

65 Ariane Richter, *Funktionswandel im Mehrebenensystem? Die Rolle der nationalen Parlamente in der Europäischen Union am Beispiel des Deutschen Bundestags* (Herbert Utz Verlag 2016) 176; Ketterer, *Zustimmungserfordernis beim Europäischen Stabilitätsmechanismus* 6, 277; Christian Calliess, 'Finanzkrise als Herausforderung der internationalen, europäischen und nationalen Rechtsetzung' in Wolfram Höfling (ed), *Grundsatzfragen der Rechtsprechung und Rechtsfindung* (Walter de Gruyter 2012) 160.

66 Otherwise, Article 23 (1) (2) GG would have mentioned the constitution-amending majority immediately, cf. Scholz, 'Art. 23 GG' para 118; Jarass, 'Art. 23 GG – Europäische Union' para 21.

67 Scholz, 'Art. 23 GG' paras 118-119; Rüdiger Breuer, 'Die Sackgasse des neuen Europaartikels (Art. 23 GG)' (1994) 13 Neue Zeitschrift für Verwaltungsrecht (NVwZ) 417, 423.

68 Heintschel von Heinegg and Frau, 'Art. 23 GG – Mitwirkung bei Entwicklung der EU' paras 24, 27; Scholz, 'Art. 23 GG' para 118; Overall, it remains highly debated when an act requires constitution-amending majority following Article 23 (1) (3) GG and a detailed assessment has to be conducted, cf. German Parliament, *Parlamentarische Zustimmungserfordernisse bei*

3.1.3 Application of Article 23 (1) GG to EU fiscal integration

Overall, Article 23 (1) (2) GG empowers the German legislator to confer competences to the EU. This conferral has to comply with the outlined structural requirements in Article 23 (1) (1) GG and the procedural requirements in Article 23 (1) (3). Therefore, EU fiscal integration steps that involve the conferral of additional competences to the EU will have to be approved by the German legislator. The core question is which parliamentary majority requirements would apply. In light of the constitutional experiences during the Eurocrisis,[69] it seems possible that a qualified two-thirds majority will be required to approve EU fiscal integration steps in particular in light of the implications of EU fiscal integration steps for the budgetary prerogatives that the German Parliament enjoys.[70]

Notably, it seems likely that EU fiscal integration proposals have direct implications for *overall budgetary responsibility* which protects the constitutional responsibility of the German Parliament for budgetary and fiscal decisions. Hence, the envisaged conferral would seemingly alter and amend the current constitutional framework. Consequently, EU fiscal integration steps will likely have to be adopted by a two-thirds majority in the German Parliament and the German Federal Council, as prescribed by Article 23 (1) (3) in conjunction with Article 79 (2) GG. As recently established by the German Constitutional Court, the application of the appropriate constitutional majority-requirement can also be challenged by individuals.[71] This recent decision underscores the constitutional importance of the legislator's decision regarding the applicable majority-threshold for the adoption of EU commitments and makes it near certain that any choice for a simple majority would be challenged in front of the German Constitutional Court. Finally, the conferral of competences to the EU generally presupposes that the envisaged commitments are compatible with the *eternity clause*, which is evaluated below.

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der Umsetzung des Vorschlags COM (2017) 827 final zur Errichtung eines Europäischen Währungsfonds (German Parliament 2018).

69 Ketterer, *Zustimmungserfordernis beim Europäischen Stabilitätsmechanismus* 359; Parliamentary Fraction of CDU/CSU und FDP, *Drucksache 17/9046 – Gesetzentwurf der Fraktionen der CDU/CSU und FDP: Entwurf eines Gesetzes zu dem Vertrag vom 2. März 2012 über Stabilität, Koordinierung und Steuerung in der Wirtschafts- und Währungsunion* (German Parliament 2012).

70 Ruffert, 'Europarecht für die nächste Generation – Zum Projekt Next Generation EU' 1779; In particular, in case the proposed act impacts 'democratic self-determination' and entails a high degree of EU-control, cf. Frank Schorkopf, 'Die Europäische Union auf dem Weg zur Fiskalunion – Integrationsfortschritt durch den Rechtsrahmen des Sonderhaushalts 'Next Generation EU'' (2020) 73 Neue Juristische Wochenschrift (NJW) 3085, 3089.

71 2 BvR 739/17 *Decision on the Unified Patent Court* [2020] (German Federal Constitutional Court) paras 95-99; Cf. as well: Ruffert, 'Europarecht für die nächste Generation – Zum Projekt Next Generation EU' 1779; Schorkopf, 'Die Europäische Union auf dem Weg zur Fiskalunion – Integrationsfortschritt durch den Rechtsrahmen des Sonderhaushalts 'Next Generation EU'' 3089.

3.2 Participation of parliament in the exercise of conferred powers

Following Article 23 (2) (1) GG, the German *Bundestag* participates in EU matters. This includes a general right to be informed by the government on EU developments, as established in Article 23 (2) (2) GG.[72] The information has to be comprehensive[73] and occur at the earliest moment possible[74] so that the *Bundestag* can internally debate the matter.[75] Once parliament is informed on envisaged EU legislative acts, an internal parliamentary decision-making process follows, which may result in the issuing of a parliamentary position, following Article 23 (3) GG.[76] Given the parliamentary workload and the required expertise, decisions are prepared in specialized committees.[77] These committees are established by the rules of procedures[78] or the German Constitution itself, including the Committee for EU Affairs (hereafter: EU Committee).[79] After an initial screening process supported by a specialized unit of the legal service of the *Bundestag*,[80] the chairman of the EU Committee recommends to the president of the Bundestag the referral of the respective matter to a leading committee. Based on this recommendation, the president then assigns the matter. This leading committee issues a voting recommenda-

72 As emphasized by the *Bundesverfassungsgericht* 'matters of the EU' indicate that also decisions with close link to the EU are covered, cf. *ESM-Treaty and Fiscal Compact (interim relief)* para 182; *Right to Participation for German Parliament at the Occasion of ESM-Treaty and Euro-Plus-Pact* paras 101-104; On the obligation of the German Government to inform parliament, cf. Hahn, 'Die Mitwirkungsrechte von Bundestag und Bundesrat in EU-Angelegenheiten nach dem neuen Integrationsverantwortungsgesetz' 762.

73 The Bundesverfassungsgericht adopts a wide definition of the obligation to 'inform', cf. examples provided *Right to Participation for German Parliament at the Occasion of ESM-Treaty and Euro-Plus-Pact* paras 118-124; Yet, some executive discretion is preserved, cf. Scholz, 'Art. 23 GG' para 157.

74 Which is why Article 45 (2) and (3) GG allows for a delegation of EU matters to the specialized parliamentary committee, cf. Heintschel von Heinegg and Frau, 'Art. 45 GG – Ausschuss für Angelegenheiten der EU' paras 1, 6, 14; Scholz, 'Art. 23 GG' paras 156-157; Scholz, 'Art. 45 GG' para 8.

75 *Right to Participation for German Parliament at the Occasion of ESM-Treaty and Euro-Plus-Pact* paras 125-127; Cf. as well: Heintschel von Heinegg and Frau, 'Art. 23 GG – Mitwirkung bei Entwicklung der EU' para 34.

76 Following Article 40 (1) (2) GG, it is for the *Bundestag* to organise its internal decision-making process, cf. *Right to Participation for German Parliament at the Occasion of ESM-Treaty and Euro-Plus-Pact* para 131.

77 Scholz, 'Art. 45 GG' para 3.

78 In German: *Geschäftsordnung des Bundestages (GO-BT)*.

79 Article 45 GG was included in the *Grundgesetz* together with the EU enabling clause in Article 23 GG, cf. Heintschel von Heinegg and Frau, 'Art. 45 GG – Ausschuss für Angelegenheiten der EU' para 1; Scholz, 'Art. 45 GG' para 1.

80 The *Bundestag* moved away from the idea of a centralized and exclusive parliamentary committee for EU affairs. Instead, a specialized administrative unit was created that evaluates all EU matters determining their importance for parliament, cf. Beichelt, 'Recovering space lost? The German Bundestag's new potential in European Politics' 148.

tion to the plenary of the Bundestag[81] but it is the plenary that takes the final decision.[82] Although Article 45 (2) GG in conjunction with § 93b (2) GO-BT allows to delegate the power to issue parliamentary positions to the EU Committee, this possibility has not yet been employed.[83]

Subsequently, the parliamentary view on the envisaged EU legislation is communicated to the government. The wording of Article 23 (3) GG reveals that the government is not legally bound by the forwarded position,[84] but has to thoroughly consider it.[85] Hence, the position can affect the final governmental view given the politically dependency of government and parliament. Nevertheless, Article 23 (3) GG does not prescribe parliamentary approval.[86]

3.3 The involvement of the German Federal Council

Given the federal structure of Germany, the federal *Länder* exercise a central role in the constitutional decision-making mainly through the federal council. Article 23 GG extends the federal council's internal prerogatives to EU decisions. It entails a comprehensive right to be informed on EU developments[87] as well as the federal council's participation in EU decisions that would have required its involvement internally.[88] Furthermore, it can issue a position on EU matters that impact its own interests, as established in Article 23 (5) GG. These positions

81 Following Article 93 GO-BT.

82 Conceptually different to the situation in Finland where all matters are decided in specialized committees, cf. Auel and Raunio, 'Debating the State of the Union? Comparing Parliamentary Debates on EU Issues in Finland, France, Germany and the United Kingdom' 19.

83 Against the original intention of the constitution-amending legislator that aimed to incentivise delegation of decision-making competences under Article 23 GG to the Committee for EU affairs, cf. Heintschel von Heinegg and Frau, 'Art. 45 GG – Ausschuss für Angelegenheiten der EU' para 1; Scholz, 'Art. 45 GG' para 3.

84 Article 23 (3) GG states that the government has to 'take into account' the parliamentary position.

85 Heintschel von Heinegg and Frau, 'Art. 23 GG – Mitwirkung bei Entwicklung der EU' para 39; Martin Nettesheim, 'Die Integrationsverantwortung – Vorgaben des BVerfG und gesetzgeberische Umsetzung' (2010) 63 Neue Juristische Wochenschrift (NJW) 177, 181; The Constitutional Court raised concerns regarding the participation of Bundestag and Bundesrat in EU matters in its *Lisbon*-decision, after which the German Integration Law was amended, cf. Ulrich Everling, 'Europas Zukunft unter der Kontrolle der nationalen Verfassungsgerichte' (2010) 45 Europarecht (EuR) 91, 105.

86 Scholz, 'Art. 23 GG' para 159.

87 The right of the *Bundesrat* and the *Bundestag* to receive information are identical, and the previously made conclusions apply correspondingly here, cf. Ibid para 164; Patrick Melin, 'Die Rolle der deutschen Bundesländer im Europäischen Rechtsetzungsverfahren nach Lissabon' (2011) 46 Europarecht (EuR) 655, 657.

88 For example, the *Länder* enjoy prerogatives in the legislative process, cf. Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* paras 510-519; These equally apply to EU legislation, cf. Heintschel von Heinegg and Frau, 'Art. 23 GG – Mitwirkung bei Entwicklung der EU' para 40.

can be adopted by the so-called Europe-Committee, which is empowered to take decisions on behalf of the entire institution to ensure speedy decision-making.[89] The legal effect of this position depends on the nature of the affected competences. In case the envisaged EU act alters exclusive federal competences or concurring federal competences,[90] the federal council's position is non-binding. However, in case the envisaged EU act mainly affects exclusive competences of the *Länder*, the establishment of *Länder* institutions or their administrative procedures, the forwarded position is generally binding for the German EU vote.[91]

Finally, in case EU matters fall within the exclusive competences of the *Länder* in the areas of school education, culture or public broadcasting,[92] Germany is represented by a member of the *Bundesrat* in the EU Council of Ministers.[93] Although the *Bundesrat* is required to coordinate with the government and has to take federal interests into due account, it negotiates on behalf of Germany. This central involvement mirrors the internal responsibility for these policy areas and underscores the constitutional importance of federalism, which is protected by the *eternity clause* in Article 79 (3) GG.[94]

3.4 Constitutional oversight: Proceedings before the *Bundesverfassungsgericht*

Once the legislator conferred competences to the EU, the conferral can be challenged before the *Bundesverfassungsgericht*. Any constitutional challenge has to be admissible, as the German Court cannot proceed *ex officio*.[95] As the history of constitutional proceedings reveals, EU acts are mainly challenged

89 Scholz, 'Art. 45 GG' para 3; Melin, 'Die Rolle der deutschen Bundesländer im Europäischen Rechtsetzungsverfahren nach Lissabon' 680.

90 Scholz, 'Art. 23 GG' para 168; Thomas Würtenberger and Eugen Kunz, 'Die Mitwirkung der Bundesländer in Angelegenheiten der Europäischen Union' (2010) 42 Juristische Arbeitsblätter (JA) 406, 408-409.

91 Heintschel von Heinegg and Frau, 'Art. 23 GG – Mitwirkung bei Entwicklung der EU' paras 45-47; Scholz, 'Art. 23 GG' paras 168-170; Melin, 'Die Rolle der deutschen Bundesländer im Europäischen Rechtsetzungsverfahren nach Lissabon' 658-659.

92 Heintschel von Heinegg and Frau, 'Art. 23 GG – Mitwirkung bei Entwicklung der EU' para 49; Scholz, 'Art. 23 GG' para 176; Melin, 'Die Rolle der deutschen Bundesländer im Europäischen Rechtsetzungsverfahren nach Lissabon' 660-662.

93 Melin, 'Die Rolle der deutschen Bundesländer im Europäischen Rechtsetzungsverfahren nach Lissabon' 661-662; Wiland Tresselt, *Die Vertreter der Länder im Rat der Europäischen Gemeinschaft* (Books on Demand (BoD) 2006) 205.

94 Herdegen, 'Art. 79 GG' para 89; Dietlein, 'Art. 79 GG – Änderungen des Grundgesetzes' para 52.

95 Following § 23 (1) BVerfGG, the *Bundesverfassungsgericht* proceeds upon an application, cf. Schlaich and Korioth, *Das Bundesverfassungsgericht – Stellung Verfahren, Entscheidungen* para 58.

by either individuals through constitutional complaints[96] or by institutional actors through inter-institutional proceedings.[97]

3.4.1 Individuals initiating constitutional proceedings

The constitutional complaint, enshrined in Article 93 (1) no. (4a) GG and further specified by ordinary statute in §§ 13 no. (8a), 90 ff. BVerfGG,[98] is the most prominent procedure used to challenge EU integration measures before the *Bundesverfassungsgericht*. Its frequent use was arguably encouraged by the *Maastricht*-judgment, where the Court established that EU measures could be challenged based on the individual's right to vote.[99] The complaint offers legal protection against public acts that infringe the applicant's individual fundamental or equivalent rights.[100] Therefore, *subjective gravamen* is a particularly important standing requirement.[101] It reflects the legislator's choice not to include a general constitutional complaint that could have entitled individuals to proceed in the public interest. Instead, individuals have to demonstrate that their subjective constitutional rights are violated by a public act, as abstract constitutional review is reserved to privileged institutional actors in Germany.[102] Yet, this standing requirement is less strictly applied in EU-related proceedings.

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96 In German: *Verfassungsbeschwerde*; The most important EU-related constitutional challenges by individuals are in chronological order: *Maastricht-Judgment*; *Lisbon-judgment*; *Honeywell-judgment*; *ESM-Treaty and Fiscal Compact*; *OMT-reference*; *Quantitative Easing (PSPP) Reference*.

97 In German: *Organstreitverfahren*; The most important EU-related constitutional challenges by German institutions are in chronological order: *Lisbon-judgment*; *ESM-Treaty and Fiscal Compact*; *OMT-reference*.

98 Specified by simple law in § 13 (8) (a) and §§ 90 ff. *Bundesverfassungsgerichtsgesetz (BVerfGG)*.

99 Cf. Thiele, 'Friendly or Unfriendly Act? The 'Historic' Referral of the Constitutional Court to the ECJ Regarding the ECB's OMT Program' 251-253; Gärditz, 'Beyond Symbolism: Towards a Constitutional Actio Popularis in EU Affairs? A Commentary on the OMT Decision of the Federal Constitutional Court' 189.

100 As becomes obvious from the wording in Article Article 93 (1) no. (4a) GG, which requires a 'violation' of 'own' fundamental rights, cf. Christian Walter, 'Art. 93 GG' in Theodor Maunz and Günter Düring (eds), *Grundgesetz-Kommentar* (92nd edn, C.H. Beck 2020) para 350; cf. also: Christian Tomuschat, 'Lisbon – Terminal of the European Integration Process? The Judgment of the German Constitutional Court of 30 June 2009' (2010) 70 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV) 251, 266.

101 For a full overview, cf. Schlaich and Korioth, *Das Bundesverfassungsgericht – Stellung Verfahren, Entscheidungen* paras 215-242; Thiele, 'Friendly or Unfriendly Act? The 'Historic' Referral of the Constitutional Court to the ECJ Regarding the ECB's OMT Program' 250; Gärditz, 'Beyond Symbolism: Towards a Constitutional Actio Popularis in EU Affairs? A Commentary on the OMT Decision of the Federal Constitutional Court' 186; Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* para 689.

102 1 BvR 213/08 *Copyright-Law Amendment I* [2009] (German Federal Constitutional Court) para 52; Klein and Sennekamp, 'Aktuelle Zulässigkeitsprobleme der Verfassungsbeschwerde' 949.

3.4.1.1 Possible violation of individual constitutional rights

The German Constitutional Court established, that individuals have to substantiate how the challenged act violates their constitutional rights. This requires that applicants demonstrate that the alleged violation personally, immediately and directly affects them in their constitutional rights.[103] Personal concern is given in case the challenged measure is capable of directly affecting the applicants in their constitutional rights,[104] an 'abstract' possibility is therefore not sufficient.[105] The violation is immediate if it has an on-going effect on the applicants' rights and is therefore not merely hypothetically possible.[106] Nevertheless, the German Court constantly held that a constitutional complaint can also be directed against future violations, in case such violations are serious and presumably difficult to reverse.[107] And finally, applicants are directly affected whenever the challenged measure does not require further implementation.[108]

In case applicants can substantiate all three conditions, subjective gravamen is given. As recognized by the *Bundesverfassungsgericht*, these conditions ensure that constitutional complaints can only be initiated in case the applicant has a genuine, subjective legal interest[109] and they prevent the initiation of an *actio popularis*, which is alien to the German constitutional system.[110]

103 1 BvR 1509/91 *Interest-Rate Adjustment for Mortgage Awarded by the GDR* [1993] (German Federal Constitutional Court) para 93; 1 BvR 602/78 *Non-Contributory Health Insurance* [1982] (German Federal Constitutional Court) para 36; 1 BvR 385/77 *Nuclear Plant Mülheim-Kärlich* [1979] (German Federal Constitutional Court) para 35; Cf. as well: Schlaich and Korioth, *Das Bundesverfassungsgericht – Stellung Verfahren, Entscheidungen* para 215.

104 1 BvR 539/96 *Casino-Regulation of the German Region of Baden-Württemberg* [2000] (German Federal Constitutional Court) para 48; *Non-Contributory Health Insurance* para 38; Cf. as well: Epping, *Grundrechte* para 183.

105 1 BvR 2062/09 *Copyright-Law Amendment II* [2010] (German Federal Constitutional Court) para 16.

106 *Casino-Regulation of the German Region of Baden-Württemberg* para 48; 1 BvR 220/51 *Survivor's Pension I* [1951] (German Federal Constitutional Court) paras 27-29.

107 *Casino-Regulation of the German Region of Baden-Württemberg* para 48; Schlaich and Korioth, *Das Bundesverfassungsgericht – Stellung Verfahren, Entscheidungen* para 234.

108 2 BvR 2292/13 *Vereinten Dienstleistungsgewerkschaft (ver.di)* [2015] (German Federal Constitutional Court) para 64; *Casino-Regulation of the German Region of Baden-Württemberg* para 48.

109 *Survivor's Pension I* paras 26-27; Cf. as well: Schlaich and Korioth, *Das Bundesverfassungsgericht – Stellung Verfahren, Entscheidungen* paras 215, 217.

110 Cf. *Fundamental Rights for Residents of Nursing Homes* para 22; 1 BvR 131/14 *Alleged Violation of Protective Duties by State Organs Towards Individuals in Nursing Homes* [2014] (German Federal Constitutional Court) para 2; *Survivor's Pension I* para 27; Cf. as well: Schlaich and Korioth, *Das Bundesverfassungsgericht – Stellung Verfahren, Entscheidungen* paras 217; Epping, *Grundrechte* para 183; Ludwigs, 'Der Ultra-vires-Vorbehalt des BVerfG – Judikative Kompetenzanmaßung oder legitimes Korrektiv' 540; Klein and Sennekamp, 'Aktuelle Zulässigkeitsprobleme der Verfassungsbeschwerde' 949.

3.4.1.2 Application of subjective gravamen in EU matters

An assessment of the case law reveals that the German Court applies subjective gravamen differently when adjudicating on EU-related matters than when it adjudicates on internal cases. Notably, individuals can proceed against EU acts based on their right to vote, enshrined in Article 38 (1) GG.[111] According to the Court, Article 38 (1) GG entails the subjective right to participate in German parliamentary elections.[112] By participating, individuals legitimize the exercise of power by the *Bundestag*. This presupposes that the *Bundestag* is able to take political decisions.[113] Together, this constitutes the core of the right to vote which is protected as part of German democracy, enshrined in Article 20 (1) and (2) GG, and rooted in human dignity, enshrined in Article 1 (1) GG, as covered by the *eternity clause.* According to this jurisprudence, the conferral of competences to the EU could potentially undermine this democratic bond, in case either important political decisions can no longer be taken by the German Parliament or in case EU institutions exercise competences not conferred upon them.[114] In both cases, the individual's right to elect a functioning representation is at risk.[115] The Court initially established in its *Maastricht*-judgment that Article 38 (1) GG precluded the conferral of constitutional prerogatives to the EU-level in conflict with the basic democratic requirements formulated in Article 20 (1) and (2) GG, protected by the *eternity clause*.[116] Notably, this entailed in the view of the Court that individuals elect a German

111 Schwerdtfeger, 'Europäisches Unionsrecht in der Rechtsprechung des Bundesverfassungsgerichts – Grundrechts-, ultra-vires- und Identitätskontrolle im gewaltenteiligen Mehrebenensystem' 304-305; Erich Vranes, 'German Constitutional Foundations of, and Limitations to, EU Integration: A Systematic Analysis' (2013) 14 German Law Journal 75, 108-109.

112 *Lisbon-judgment* para 174; *Maastricht-Judgment* para 61; Cf. as well: Klein, 'Art. 38 GG' para 145.

113 *Lisbon-judgment* paras 251-252; Cf. as well: Schwerdtfeger, 'Europäisches Unionsrecht in der Rechtsprechung des Bundesverfassungsgerichts – Grundrechts-, ultra-vires- und Identitätskontrolle im gewaltenteiligen Mehrebenensystem' 293-294; Martin Nettesheim, 'Verfassungsrecht und Politik in der Staatsschuldenkrise' (2012) 65 Neue Juristische Wochenschrift (NJW) 1409, 1412; Bogdandy and Schill, 'Die Achtung der nationalen Identität unter dem reformierten Unionsvertrag – Zur unionsrechtlichen Rolle nationalen Verfassungsrechts und zur Überwindung des absoluten Vorrangs' 723-724; Jan-Herman Reestman and Leonard F. M. Besselink, 'Editorial – On the Lissabon-Urteil: Democracy and a Democratic Paradox' (2009) 5 European Constitutional Law Review 341, 341.

114 *Quantitative Easing (PSPP) Final Judgment* para 113; *OMT-reference* para 19; *Maastricht-Judgment* paras 61-62.

115 Which would violate German 'political self-determination', cf. *Final OMT-Judgment* para 81; *OMT-reference* para 52; *Financial Support for Greece and EFSF* para 98.

116 *Maastricht-Judgment* paras 61-63; Cf. as well: Nettesheim, ''Euro-Rettung' und Grundgesetz – Verfassungsgerichtliche Vorgaben für den Umbau der Währungsunion' 768-769; Elmar Brok and Martin Selmayr, 'Per Popularklage zurück nach Nizza? Zu den Verfassungsklagen gegen den Reformvertrag von Lissabon' (2008) 19 Europäische Zeitschrift für Wirtschaftsrecht 487, 488.

Parliament that remains in charge of central, substantial policy decisions.[117] This constitutional interpretation was consolidated in the *Lisbon*-judgment[118] and subsequently specified in relation to Eurocrisis-measures, where the Court established that compliance with *overall budgetary responsibility* could be challenged by individuals based on Article 38 (1) GG.[119] Most recently, the Constitutional Court clarified that individuals can equally challenge the constitutionality of the applied parliamentary majority-requirement under Article 23 (1) GG based on their right to vote enshrined in Article 38 (1) GG, which has clear implications for EU fiscal integration ambitions.[120]

Hence, based on Article 38 (1) GG, private applicants can claim that EU integration measures impact parliamentary powers in an unconstitutional way,[121] specifically in budgetary matters.[122] In this case, applicants challenge the German act of approval and the accompanying national legislation. In the alternative, applicants may claim that German institutions did not take sufficient steps against an alleged *ultra vires* act committed by the EU.[123] In that case, applicants challenge the omission of the competent German institutions that did not intervene.[124] The formulated constitutional concern is that individuals should have been protected against a shift of core competences to the

117 Tomuschat, 'Lisbon – Terminal of the European Integration Process? The Judgment of the German Constitutional Court of 30 June 2009' 264.

118 *Lisbon-judgment* paras 172-175; Cf. as well: Tomuschat, 'Lisbon – Terminal of the European Integration Process? The Judgment of the German Constitutional Court of 30 June 2009' 269; Jürgen Schwarze, 'Die verordnete Demokratie – Zum Urteil des 2. Senats des BVerfG zum Lissabon-Vertrag' (2010) 45 Europarecht (EuR) 108, 114; Jörg Philipp Terhechte, 'Souveränität, Dynamik und Integration – Making Up the Rules As We Go Along? – Anmerkungen zum Lissabon-Urteil des Bundesverfassungsgerichts' (2009) 20 Europäische Zeitschrift für Wirtschaftsrecht (EuZW) 724, 726.

119 *Quantitative Easing (PSPP) Final Judgment* paras 102-104; *OMT-reference* paras 28, 102; *ESM-Treaty and Fiscal Compact (interim relief)* para 108; Cf. as well: Nettesheim, ''Euro-Rettung' und Grundgesetz – Verfassungsgerichtliche Vorgaben für den Umbau der Währungsunion' 770.

120 *Decision on the Unified Patent Court* paras 95-99; Cf. as well: Ruffert, 'Europarecht für die nächste Generation – Zum Projekt Next Generation EU' 1779; Schorkopf, 'Die Europäische Union auf dem Weg zur Fiskalunion – Integrationsfortschritt durch den Rechtsrahmen des Sonderhaushalts 'Next Generation EU'' 3089.

121 This claim can also be put forward in conjunction with another constitutional principle, for example the social state principle enshrined in Article 20 (1) GG, cf. *Lisbon-judgment* para 182.

122 *OMT-reference* paras 28, 102; *ESM-Treaty and Fiscal Compact (interim relief)* para 108; Cf. as well: Nettesheim, ''Euro-Rettung' und Grundgesetz – Verfassungsgerichtliche Vorgaben für den Umbau der Währungsunion' 771-772.

123 *Quantitative Easing (PSPP) Reference* paras 69-74; *Final OMT-Judgment* paras 76,78; Cf. as well: Carl Nägele, 'German Constitutional Law Cases 2012-2015' (2016) 22 European Public Law 439, 442.

124 *Quantitative Easing (PSPP) Final Judgment* paras 105-110; Cf. as well: Wolfgang Weiß, 'Die Integrationsverantwortung der Verfassungsorgane' (2018) 58 Juristische Schulung (JuS) 1046, 1047; Nettesheim, 'Die Integrationsverantwortung – Vorgaben des BVerfG und gesetzgeberische Umsetzung' 178-179.

EU-level beyond the reach of democratic legitimation as guaranteed by Article 38 (1) GG thereby guaranteeing the constitutional claim of the voter to democratic self-determination.[125] Overall, this enables individuals to challenge EU primary and secondary law based on their right to vote as enshrined in Article 38 (1) GG. Obviously, this would extend to EU fiscal integration steps, which will likely be challengeable by private individuals in light of the OMT- and the PSPP-proceedings.[126]

3.4.1.3 Emerging constitutional double standard

The following comparison between the internal interpretation and the EU-related interpretation of *subjective gravamen* is based on the assumption that legal systems have to apply a consistent interpretation of legal provisions.[127] Consistent interpretations generate predictability, minimize arbitrariness and contribute to legal certainty. In addition, German participation in the EU entails a responsibility towards the EU and the other 26 EU Member States.[128] It seems that this responsibility extends to the Constitutional Court – for example as an obligation under sincere cooperation, which might require the Court to apply a consistent interpretation of constitutional provisions. However, in the case law of the Constitutional Court significant discrepancies can be detected. Notably, the Court *internally* requires individuals to substantiate a violation of their specific subjective right. Although *subjective gravamen* equally applies to constitutional complaints against EU acts, the Court's interpretation of this requirement is less strict in these EU-related proceedings. Notably, every individual that is entitled to vote in the sense of Article 38 (1) GG can challenge EU-related measures, whereas individuals are unable to challenge the allocation of competences between the federal and the regional level, although this may also affect ones right to vote.

While traditionally limiting the admissibility of constitutional complaints internally by requiring that individuals are personally, immediately and directly affected in their subjective constitutional rights, applicants that initiate constitutional complaints against EU measures can rely on Article 38 (1) GG without demonstrating a particular subjective risk for their right to vote. In its jurisprudence, the Constitutional Court seemingly accepts that a general risk for the German constitutional order – namely that either measures taken

125 Friedemann Kainer, 'Aus der nationalen Brille: Das PSPP-Urteil des BVerfG' (2020) 31 Europäische Zeitschrift für Wirtschaftsrecht (EuZW) 533, 534; Klein, 'Art. 38 GG' paras 145-146; Hermann Butzer, 'Art. 38 GG – Wahl' in Volker Epping and Christian Hillgruber (eds), *Beck Online Kommentar zum Grundgesetz* (45th edn, C.H. Beck 2020) paras 38-39.

126 Both initiated by private individuals, cf. *Quantitative Easing (PSPP) Final Judgment* paras 97-104; *Final OMT-Judgment* paras 78-84.

127 Lon L. Fuller, *The Morality of Law* (Revised Edition edn, Yale University Press 1969) 38-40.

128 Particularly visible during the Eurocrisis, cf. Christopher Klotz, 'Die Machtbalance zwischen Politik und verfassungsgerichtlicher Rechtsprechung' (2012) 45 Zeitschrift für Rechtspolitik (ZRP) 5, 5.

by EU institutions,[129] or the conferral of additional competences[130] undermine constitutional law – entitles every individual who enjoys the general right to vote to proceed against that act.[131] The Court's lenient interpretation of standing in EU-based proceedings may be explained by the reluctance of constitutionally empowered institutional actors, such as the German Parliament or Government, which largely refrained from challenging EU integration steps, possibly leaving the Court without means to scrutinize EU integration.[132] The now adopted approach enables the Constitutional Court to adjudicate on the compatibility of EU integration with German constitutional benchmarks. Despite this possible functional explanation, it has to be pointed out that the adopted approach results in a situation where a wide range of applicants is empowered to proceed against EU matters.

This development raises two major conceptual concerns. First, the constitutional complaint is designed to protect subjective, individual rights. This is obvious from Article 93 (1) (4) (a) GG and was continuously advocated by the *Bundesverfassungsgericht* itself.[133] Although it cannot be disputed that EU integration affects the existing German constitutional framework, it is debatable whether such changes indeed directly affect individuals in their subjective rights. It seems that competence conferrals first and foremost affect institutional prerogatives. This conclusion resonates with the traditional internal jurisprudence. Notably, the Court declared, when confronted with a constitutional complaint against the dissolution of the *Bundestag* based on Article 38 (1) GG, that the dissolution of parliament affected institutional and not subjective rights as required to establish *subjective gravamen*.[134] More specifically, it concluded that the principle of democracy did not entail the subjective right to constitutionally review the dissolution of parliament.[135] Following this logic, it can be submitted that competence transfers to the EU primarily affect institutional rights. Therefore, it appears that the constitutional system intents to conceptually prevent the individual from protecting these institutional rights through constitutional complaints. Instead, it is for the entitled institutional actors to

129 Notably against the ECB, cf. *OMT-reference*; *Quantitative Easing (PSPP) Reference*.
130 Ratification of a new EU Treaty, cf. *Lisbon-judgment*; *Maastricht-Judgment*.
131 Which results in an increasing number of applicants, for example, obvious from the almost 12.000 applications in the *OMT*-case, cf. *OMT-reference*; Also observed by: Nägele, 'German Constitutional Law Cases 2012-2015' 439.
132 As for example observed by Nettesheim, ''Euro-Rettung' und Grundgesetz – Verfassungsgerichtliche Vorgaben für den Umbau der Währungsunion' 768-769.
133 Klein and Sennekamp, 'Aktuelle Zulässigkeitsprobleme der Verfassungsbeschwerde' 949.
134 2 BvQ 4/82 *Dissolution of the German Parliament* [1983] (German Federal Constitutional Court) as indicated in: BVerfG, 'Kein Rechtsschutz des Bürgers gegen Auflösung des Bundestages' (1983) 36 Neue Juristische Wochenschrift (NJW) 383, 383; Cf. as well: Franz Reimer, 'Vertrauensfrage und Bundestagsauflösung bei parlamentarischer Anscheinsgefahr' (2005) 45 Juristische Schulung (JuS) 680, 683.
135 BVerfG, 'Kein Rechtsschutz des Bürgers gegen Auflösung des Bundestages' 383.

apply for constitutional protection.[136] Yet, a different logic seems to apply to voters when challenging EU measures.

Second, it should be recalled that the purpose of the constitutional complaint is not to deliver general answers to abstract constitutional questions.[137] This is convincing, as the constitutional complaint is a subjective legal remedy. It entitles individuals to challenge state acts that violate their subjective rights.[138] However, now that every German citizen that enjoys the right to vote can challenge EU measures, the factual outcome seems to suggest the existence of a general constitutional procedure against EU matters. Ultimately, the constitutional complaint would become a legal remedy that delivers general answers to abstract legal questions. This arguably blurs the distinction between abstract judicial review – reserved to privileged institutional applicants – and subjective constitutional complaints on EU matters.[139]

The internal formalistic approach regarding standing requirements more generally was illustrated in a decision on the constitutional debt brake.[140] Here, the Court was confronted with an application for federal proceedings enshrined in Article 93 (1) (3) GG by the *Land* Schleswig-Holstein. The regional parliament initiated the proceedings against the debt brake, claiming that this mechanism interfered *inter alia* with regional budgetary rights.[141] However, the Constitutional Court declared the application inadmissible, explaining that regional parliaments could not be parties under Article 93 (1) (3) GG.[142] Here, it can be noted that the Court employed a formalistic approach, referring back to the constitutional text. Interestingly, and although budgetary rights are important for the democratic process in Germany, the Court was unwilling to widen the established standing criteria. Although this case was based on a different constitutional procedure, it confirms the tendency to – at least intern-

136 By initiating inter-institutional proceedings, cf. Schlaich and Korioth, *Das Bundesverfassungsgericht – Stellung Verfahren, Entscheidungen* para 79.

137 In contrast to the abstract judicial review of norms, cf. *Copyright-Law Amendment I* para 52; Cf. as well: Herbert Bethge, '§ 90 BVerfGG – Erhebung der Verfassungsbeschwerde' in Theodor Maunz and others (eds), *Kommentar zum Bundesverfassungsgerichtsgesetz* (60th edn, C.H. Beck 2020) para 336.

138 Which is clear expression of the legislator's choice not to include a *popular* constitutional complaint, cf. Patric Urbaneck, 'Die Zulässigkeitsprüfung im Verfassungsrecht' (2014) 54 Juristische Schulung (JuS) 896, 898; Klein and Sennekamp, 'Aktuelle Zulässigkeitsprobleme der Verfassungsbeschwerde' 949.

139 Namely, the Court allows for abstract constitutional review under the constitutional complaint, cf. Gärditz, 'Beyond Symbolism: Towards a Constitutional Actio Popularis in EU Affairs? A Commentary on the OMT Decision of the Federal Constitutional Court' 192; Tomuschat, 'Lisbon – Terminal of the European Integration Process? The Judgment of the German Constitutional Court of 30 June 2009' 269.

140 2 BvG 1/10 *Constitutionality of the German Debt Break* [2011] (German Federal Constitutional Court).

141 Ibid para 17; Cf. as well: Walter, 'Art. 93 GG' para 279; Maxi Koemm, *Eine Bremse für die Staatsverschuldung?* (Mohr Siebeck 2011) 274-277.

142 *Constitutionality of the German Debt Break* paras 30-34.

ally – rely on the traditional formalistic interpretation of the established standing requirements.

The result of this variable interpretation of the *subjective gravamen* requirement is a *de facto* 'EU constitutional complaint'.[143] *Gärditz* and also *Wendel* conclude that the result of this jurisprudence is a *popular action* in the name of democracy against EU integration.[144] Such an *actio popularis* is alien to the German constitutional order.[145] The wide interpretation of *subjective gravamen* in EU matters indeed triggered a major number of applications before the Constitutional Court. For example, more than 190.000 individuals initiated constitutional complaints against the envisaged TTIP-agreement based on their right to vote.[146] Ultimately, this could negatively impact the German Court itself in light of this significant inflow of constitutional complaints against EU-related measures. Although it is important that EU integration conforms with the German Constitution, it seems equally crucial that the Constitutional Court respects the applicable constitutional framework. If different standing requirements for EU-related proceedings were necessary,[147] it would be for the constitution-amending legislator to alter the current constitutional framework.[148]

143 For example, in relation to the constitutional challenges against the CETA-agreement, cf. 2 BvR 1368/16, 2 BvR 1444/16, 2 BvR 1482/16, 2 BvR 1823/16 and 2 BvE 3/16 *Interim Relief against Comprehensive Economic and Trade Agreement (CETA)* [2016] (German Federal Constitutional Court) paras 51, 66.

144 Gärditz, 'Beyond Symbolism: Towards a Constitutional Actio Popularis in EU Affairs? A Commentary on the OMT Decision of the Federal Constitutional Court' 192; Wendel, 'Kompetenzrechtliche Grenzgänge: Karlsruhes *Ultra-vires*-Vorlage an den EuGH' 641-642; Also, Article 38 GG does not contain a general subjective content, cf. Bethge, '§ 90 BVerfGG – Erhebung der Verfassungsbeschwerde' para 112.

145 Schlaich and Korioth, *Das Bundesverfassungsgericht – Stellung Verfahren, Entscheidungen* para 217; Epping, *Grundrechte* para 183; Ludwigs, 'Der Ultra-vires-Vorbehalt des BVerfG – Judikative Kompetenzanmaßung oder legitimes Korrektiv' 540; Gärditz, 'Beyond Symbolism: Towards a Constitutional Actio Popularis in EU Affairs? A Commentary on the OMT Decision of the Federal Constitutional Court' 197; Eckhard Pache, 'Das Ende der europäischen Integration? Das Urteil des Bundesverfassungsgerichts zum Vertrag von Lissabon, zur Zukunft Europas und der Demokratie' (2009) 36 Europäische Grundrechte-Zeitschrift (EuGRZ) 285, 287; Klein and Sennekamp, 'Aktuelle Zulässigkeitsprobleme der Verfassungsbeschwerde' 949.

146 The recent TTIP-application had 193.092 applicants, cf. 2 BvR 1368/16, 2 BvR 1444/16, 2 BvR 1482/16, 2 BvR 1823/16, 2 BvE 3/16 *Transatlantic Trade and Investment Partnership (TTIP)* [2016] (German Federal Constitutional Court); And the *OMT*-proceedings, as noted, almost 12.000 applicants, cf. Nägele, 'German Constitutional Law Cases 2012-2015' 439.

147 Henner Gött, 'Die ultra vires-Rüge nach dem OMT-Vorlagebeschluss des Bundesverfassungsgerichts' (2014) 49 Zeitschrift Europarecht (EuR) 514, 533.

148 Particularly, in light of the Court's own reasoning insisting that the German Parliament has to take central democratic decisions, cf. *Quantitative Easing (PSPP) Reference* paras 128-129; *Final OMT-Judgment* para 138; *Lisbon-judgment* para 250.

3.4.2 Institutional actors initiating constitutional proceedings

In addition to private actors, German institutions can initiate constitutional proceedings.[149] In relation to EU law, inter-institutional proceedings[150] enshrined in Article 93 (1) no. (1) GG and specified in §§ 63 ff. BVerfGG, are the most frequently employed proceedings.[151] They are adversarial in nature and occur between two institutions, which are in dispute about the extent of their constitutional powers.[152]

3.4.2.1 Constitutional requirements for initiating inter-institutional proceedings

Following Article 93 (1) no. (1) GG in conjunction with § 63 BVerfGG, the German President, Parliament, Federal Council, Government as well as parts of these organs that have own rights under the German Constitution, or the rules of procedure of the Parliament or the Federal Council, can initiate inter-institutional proceedings. For example, parliamentary committees,[153] parliamentary fractions[154] as well as single parliamentarians[155] have such own rights and can thus initiate proceedings.

Through these proceedings, the institutions can challenge an action or omission of another institution that allegedly violates the applicant's constitutional prerogatives. An example in EU matters is the parliamentary right to receive information on EU policies, following Article 23 (2) (2) GG. During the Eurocrisis, the parliamentary fraction BÜNDNIS 90/DIE GRÜNEN initiated inter-

149 Schlaich and Korioth, *Das Bundesverfassungsgericht – Stellung Verfahren, Entscheidungen* paras 77-78; Walter, 'Art. 93 GG' para 187; Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* paras 673-690.

150 In German: *Organstreitverfahren*.

151 The Member of the Bundestag of the political party 'DIE LINKE' initiated inter-institutional proceedings against the Lisbon Treaty, the ESM, and the OMT program, cf. *Lisbon-judgment*; *Right to Participation for German Parliament at the Occasion of ESM-Treaty and Euro-Plus-Pact*; *OMT-reference*.

152 Schlaich and Korioth, *Das Bundesverfassungsgericht – Stellung Verfahren, Entscheidungen* paras 79, 83; Constitutional Court only clarifies the interpretation of the challenged provisions, but leaves it to the institutions to act upon this, cf. Morgenthaler, 'Art. 93 GG – Bundesverfassungsgericht, Zuständigkeit' para 17; Walter, 'Art. 93 GG' para 188.

153 Parliamentary committees may initiate proceedings to warrant their own rights, cf. 2 BvE 11, 15/83 *Committee of Enquiry in the Flick-Matter* [1984] (German Federal Constitutional Court).

154 Parliamentary fractions may initiate proceedings on behalf of the *Bundestag*, cf. *OMT-reference* para 106; *Right to Participation for German Parliament at the Occasion of ESM-Treaty and Euro-Plus-Pact* para 77; *Lisbon-judgment* para 202.

155 Although ultimately not admissible, the possibility of parliamentarians to initiate inter-institutional proceedings was (implicitly) recognized in EU matters, cf. *Lisbon-judgment* paras 198-199; Cf. as well: Morgenthaler, 'Art. 93 GG – Bundesverfassungsgericht, Zuständigkeit' para 21; Walter, 'Art. 93 GG' para 213.

institutional proceedings against the government on behalf of the German Parliament claiming a violation of this parliamentary right.[156]

3.4.2.2 Application of adversarial nature of proceedings in EU matters

In EU-related proceedings, the German Constitutional Court adopted a specific interpretation of this requirement and accepted that parliamentary fractions can invoke parliamentary rights against the German Parliament itself.[157] According to this jurisprudence, parliamentary fractions are able to rely on parliamentary prerogatives where they see these prerogatives violated by a parliamentary majority decision. In the Lisbon-judgment, for example, the Court declared an application of the fraction DIE *LINKE* admissible, which claimed that the German act approving the Lisbon Treaty interfered with the parliamentary reservation to deploy the German army.[158] The result is, however, that a parliamentary fraction invoked prerogatives on behalf of the German Parliament against the German Parliament itself.[159] This alters the traditional understanding of the proceedings' adversarial character. Namely, fractions were previously entitled to invoke fraction or minority prerogatives, but not parliamentary prerogatives.[160] Instead, one-fourth of the members of the *Bundestag* were entitled to initiate these inter-institutional proceedings against another institution.[161] In comparison, a fraction may only represent

156 *Right to Participation for German Parliament at the Occasion of ESM-Treaty and Euro-Plus-Pact* para 79.

157 *Lisbon-judgment* paras 204-206; Cf. as well: Max-Emanuel Geis and Heidrun Meier, 'Grundfälle zum Organstreitverfahren, Art. 93 I Nr. 1 GG, §§ 13 Nr. 5, 63ff. BVerfGG' (2011) 51 Juristische Schulung (JuS) 699, 703.

158 As established by the *Bundesverfassungsgericht* based on Article 87a GG, cf. 2 BvE 3/92, 5/93, 7/93, 8/93 *German Participation in NATO Actions* [1994] (German Federal Constitutional Court) paras 321-339; Cf. as well: Volker Epping, 'Art. 87a GG – Streitkräfte' in Volker Epping and Christian Hillgruber (eds), *Beck Online Kommentar zum Grundgesetz* (45th edn, C.H. Beck 2020) para 24; Manuel Ladiges, 'Grenzen des wehrverfassungsrechtlichen Parlamentsvorbehalts' (2010) 29 Neue Zeitschrift für Verwaltungsrecht (NVwZ) 1075, 1076.

159 Which is criticized, cf. Schlaich and Korioth, *Das Bundesverfassungsgericht – Stellung Verfahren, Entscheidungen* para 94a; Schwerdtfeger, 'Europäisches Unionsrecht in der Rechtsprechung des Bundesverfassungsgerichts – Grundrechts-, ultra-vires- und Identitätskontrolle im gewaltenteiligen Mehrebenensystem' 305-306; Franz C. Mayer, 'Der Vertrag von Lissabon im Überblick' (2010) 50 Juristische Schulung (JuS) 189, 194; Critical in that regard also Constitutional Judge Gerhardt, cf. *OMT-reference* dissenting opinion Gerhardt para 24.

160 2 BvE 1/18 *Constitutional Challenge of German Migration Policy Initiated by the AfD* [2018] (German Federal Constitutional Court) para 18.

161 In light of the constitutional entitlement of 1/4 of the members of the *Bundestag* to initiate an investigation committee laid down in Article 44 (1) GG, the *Bundesverfassungsgericht* concluded that the intention of the inter-institutional proceedings was comparable, namely, to inquire into the legality of the parliamentary majority decision and accepted that attaining the 1/4 threshold is sufficient to initiate inter-institutional proceedings on behalf of the *Bundestag*, cf. *Committee of Enquiry in the Flick-Matter* para 134.

5% of parliamentarians,[162] which thus circumvents the initial procedural threshold.

Arguably, this wide interpretation transformed the inter-institutional proceedings into an *intra*-institutional proceeding. The apparent transformation was confirmed in the *ESM*-proceedings, where the Court found that fractions could invoke parliamentary budgetary prerogatives on behalf of parliament against the parliamentary approval of the *ESM*.[163] It reiterated this approach in the *OMT*-reference.[164] According to the Court's reasoning, this interpretation secures the rights awarded to parliamentary minorities, given that these can now judicially challenge governmental policies that are supported by the coalition majority in parliament.[165]

Although this wide standing requirement was developed in the context of EU law,[166] the Court highlighted that it equally applied this approach internally.[167] Importantly, this finding of the Court suggests that the Constitutional Court itself confirms the importance of applying the same interpretation of the constitutional standing requirements in internal and in EU-related proceedings. Considering the content of the proceedings that the Court referred to, the fraction *DIE LINKE* challenged the procedural requirements for minority and opposition rights in light of the then vast coalition majority of *CDU/CSU* and SPD. These two fractions united 503 of the 630 members of Parliament, whereas the opposition of *DIE LINKE* and *BÜNDNIS 90/DIE GRÜNEN* had only 127 seats.[168] Due to this small number, several constitutional minority rights were unavailable, including, for example, the initiation of a parliamentary 'committee of inquiry' which requires the support of one-fourth of the parliamentary members.[169] *DIE LINKE* proposed several constitutional amendments to alter the majority requirements, which were ultimately rejected and triggered the mentioned constitutional proceedings.[170] However, it seems that the opposition in these proceedings was indeed concerned about their minority rights including the possibility to initiate constitutional proceedings, and not about a genuine parliamentary prerogative. This appears to set this *internal* case apart from the highlighted understanding in EU-related proceedings and therefore to constitute a variable interpretation of the standing requirements.

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162 As enshrined in § 10 (1) GO-BT.

163 *ESM-Treaty and Fiscal Compact* para 125.

164 *Final OMT-Judgment* paras 106-107; *OMT-reference* para 54.

165 *Final OMT-Judgment* para 106.

166 Namely in the Lisbon-judgment for the first time, cf. Mayer, 'Der Vertrag von Lissabon im Überblick' 194.

167 As the Court references its EU-related jurisprudence in this 'internal' case concerning minority rights of the German Parliament, cf. 2 BvE 4/14 *Opposition Rights in the German Parliament* [2016] (German Federal Constitutional Court) para 67.

168 Ibid para 2.

169 Cf. Article 44 (1) GG; ibid paras 3-17.

170 Ibid paras 66-67.

3.4.2.3 Possible constitutional double standard

The above suggests that the traditional conception of inter-institutional proceedings as adversarial[171] is especially altered in EU-related cases. Yet, this adversarial character is essential as inter-institutional proceedings are not devised as abstract constitutional review of an institutional act, but rather to clarify the extent of institutional powers under the German Constitution.[172] For example, in the outlined *internal* proceedings, the fraction *DIE LINKE* was concerned about the extent of parliamentary minority rights guaranteed by the German Constitution. Thus, the challenge of the opposition concerned its own rights as parliamentary opposition and not an alleged violation of general rights of the entire parliament.[173] In contrast to this internal case, the proceedings against EU acts challenged parliamentary decisions, claiming that these would alter parliamentary prerogatives.[174] Therefore, it can be argued that these institutional challenges were not aimed to defend opposition rights, but essentially challenged the material decision made by a parliamentary majority claiming that the *Bundestag* was not entitled to confer the respective powers to the EU. This leads to the paradoxical situation that the opposition proceeds on the basis of the *Bundestag*'s rights against the *Bundestag* itself. The criticism one might raise is, that the chosen approach undermines the outlined constitutional framework and the applicable standing requirements to initiate, for example, abstract constitutional review.[175]

Overall, following the assessment, political fractions of the *Bundestag* can challenge EU (integration) measures on behalf of the *Bundestag* claiming that the *Bundestag* violated its own institutional rights. It appears that this new interpretation of the constitutional standing requirement[176] was developed in the context of[177] and is now only applied in relation to EU matters.[178] The result is that the standing requirements for institutional actors to initiate a constitutional review of legislative acts are lowered in EU-related proceedings.

171 *Deployment of Atomatic Weapons* para 109.

172 *NATO-Concept* paras 112-114; *Deployment of Atomatic Weapons* para 109.

173 Here, not the refusal as such was challenged, but rather the underlying question of rights granted to parliamentary minorities and the opposition, cf. *Opposition Rights in the German Parliament* paras 67-69, 76, 80.

174 More precisely, the budgetary prerogatives that the *Bundestag* enjoys following Art. 110 GG, cf. Herdegen, 'Art. 79 GG' paras 182-188; Dietlein, 'Art. 79 GG – Änderungen des Grundgesetzes' para 33.2.

175 As laid down in Article 93 (1) no. (2) GG, the status as a fraction is not required, cf. Walter, 'Art. 93 GG' para 235; enumeration in Article 93 (1) no. (2) GG is exhaustive, cf. Morgenthaler, 'Art. 93 GG – Bundesverfassungsgericht, Zuständigkeit' para 30.

176 As indicated, cf. *NATO-Concept* paras 112-114; *Deployment of Atomatic Weapons* para 109.

177 *Lisbon-judgment* paras 204-206; Cf. as well: Schwerdtfeger, 'Europäisches Unionsrecht in der Rechtsprechung des Bundesverfassungsgerichts – Grundrechts-, ultra-vires- und Identitätskontrolle im gewaltenteiligen Mehrebenensystem' 305-306; Mayer, 'Der Vertrag von Lissabon im Überblick' 194.

178 As pointed out, cf. *Opposition Rights in the German Parliament* paras 65-69.

As was obvious during the Eurocrisis,[179] the *Bundesverfassungsgericht* considers applications brought by (small) political groups against an erosion of parliamentary prerogatives in the framework of Article 93 (1) no. (1) GG admissible.

3.4.3 An apparent procedural double standard

The *internal-external-comparative* assessment of the standing requirements indicates that the German Constitutional Court applies a divergent interpretation of the established constitutional standing requirements, rendering the initiation of proceedings against EU acts comparably easier for both individuals and institutions. This raises concerns, as the constitutional framework does not distinguish between domestic and EU-related proceedings. Consequently, a consistent standard should be applied, which was equally confirmed by the Constitutional Court itself.[180] As the *traditional* applicants seemingly refrain from proceedings against EU acts, the broad interpretation of the established *standing requirements* could be seen as a means to ensure that the Court can adjudicate on the compatibility of German constitutional and EU law.[181] Yet, it is for the constitution-amending legislator to address these concerns and possibly modify the standing requirements for initiating constitutional proceedings. Applying the traditional interpretation of the standing requirements to proceedings that involve EU matters could thereby ensure that the Constitutional Court is not constantly confronted with highly political questions in the first place. Overall, a consistent application would result in higher admissibility hurdles for proceedings against EU acts, which corresponds to the underpinning choice of the constitution-amending legislator.

3.5 Applicable procedural and institutional framework for EU fiscal integration

Article 23 GG – together with Article 24 GG – comprehensively regulates German EU membership. The assessment illustrated that the provision applies to the conferral of additional competences to the EU. Depending on the impact

179 *OMT-reference* para 54; The Court also stressed that budgetary responsibility could be invoked by the fraction, cf. *ESM-Treaty and Fiscal Compact* para 125.

180 As highlighted in relation to the standing in *inter-institutional proceedings*, cf. *Opposition Rights in the German Parliament* para 67.

181 As noted, this approach is criticized, cf. Gärditz, 'Beyond Symbolism: Towards a Constitutional Actio Popularis in EU Affairs? A Commentary on the OMT Decision of the Federal Constitutional Court' 198; Matthias Ruffert, 'Europarecht: Vorlagebeschluss des BVerfG zum OMT-Programm – Die Europarechtswidrigkeit des Kaufs von Staatsanleihen durch die EZB im Rahmen des OMT-Programms ist vom EuGH zu prüfen.' (2014) 54 Juristische Schulung (JuS) 373, 374.

of the envisaged integration steps on the German Constitution, either a simple or a qualified two-thirds majority applies. Given that EU fiscal integration proposals will likely affect the German constitutional framework, in particular parliamentary budgetary prerogatives, such integration steps will likely require support by a qualified majority.[182] This is supported by evidence from the Eurocrisis, where the Fiscal Compact and the ESM-Treaty were held to have such effect and had to be approved by a constitution-amending two-thirds majority.[183] In addition, Article 23 GG regulates the German institutional interaction in EU matters. The enhanced involvement of parliament and federal council in EU affairs reflects the impact of EU cooperation, which increasingly affects internal domestic decisions.[184] Importantly, the participation of both institutions under Article 23 GG is not designed as a right but rather as an obligation,[185] which is emphasized by the Constitutional Court's integration responsibility doctrine.[186]

All this illustrates that the German Constitution contains a detailed procedural and institutional framework to address EU integration. This framework is complemented by the constitutional supervision of the *Bundesverfassungsgericht*, which frequently adjudicates on the relationship between German constitutional law and EU law. However, the identified double standard in the interpretation of the admissibility criteria raises concerns as it renders the initiation of EU-related proceedings comparably easier. One consequence of this more lenient interpretation of admissibility in EU-related proceedings is that the Court continues to further flesh out and define the *eternity clause*, one of the major obstacles for EU fiscal integration, which will be considered in the following.

182 As it will, most likely, affect the constitutionally enshrined budgetary prerogatives of the parliament, which will have *constitutional relevance* in the sense of Art. 23 (1) (3) GG and therefore trigger the parliamentary majority requirement enshrined in Article 79 (2) GG, cf. Scholz, 'Art. 23 GG' paras 117-118.

183 Richter, *Funktionswandel im Mehrebenensystem? Die Rolle der nationalen Parlamente in der Europäischen Union am Beispiel des Deutschen Bundestags* 176; Ketterer, *Zustimmungserfordernis beim Europäischen Stabilitätsmechanismus* 6, 277; Calliess, 'Finanzkrise als Herausforderung der internationalen, europäischen und nationalen Rechtsetzung' 160.

184 Heintschel von Heinegg and Frau, 'Art. 23 GG – Mitwirkung bei Entwicklung der EU' para 33; Scholz, 'Art. 23 GG' para 127.

185 Heintschel von Heinegg and Frau, 'Art. 23 GG – Mitwirkung bei Entwicklung der EU' para 35; In contrast to this view, it can also be argued that Article 23 (2) (1) GG is designed as a right for *Bundestag* and *Bundesrat* obligating the *Bundesregierung*, cf. Scholz, 'Art. 23 GG' para 128.

186 Cf. *Quantitative Easing (PSPP) Reference* para 47; *OMT-reference* para 31; Cf. also the responsibility of institutional actors to responsibly engage in EU matters: Heintschel von Heinegg and Frau, 'Art. 23 GG – Mitwirkung bei Entwicklung der EU' para 33.

4 SUBSTANTIVE FRAMEWORK APPLICABLE TO EU FISCAL INTEGRATION

EU integration has to comply with the German *eternity clause*, as clarified in Article 23 (1) (3) GG. However, as the *eternity clause* is framed in an abstract manner, the protected substantive content is determined by the jurisprudence of the German Constitutional Court. The constitutional jurisprudence on the Eurocrisis provides valuable insights into possible conflicts between the *eternity clause* and EU fiscal integration steps.[187] Based on this jurisprudence, the subsequent assessment will determine the protected constitutional content by deconstructing the overlapping layers employed by the Court. In a first step the underpinning constitutional mechanisms will be considered (4.1.) before subsequently assessing the protected constitutional principles (4.2.).

4.1 Underpinning mechanisms

The *eternity clause* provides the mechanism for the protection of core principles against constitutional change (4.1.1.). To operationalize this constitutional protection against EU cooperation, the Court introduced the fundamental rights, *ultra vires* and *constitutional identity* locks (4.1.2.) as well as the guiding concepts of EU law friendliness and integration responsibility (4.1.3.).

4.1.1 Eternity clause

The German *eternity clause* shields a set of constitutional principles against change. Notably, the provision states:

> '(3) Amendments to this Basic Law affecting the division of the Federation into Länder, their participation in principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.'

Systematically, Article 79 (3) GG forms an exception to the general rule in Article 79 (2) GG, which stipulates that constitutional amendments can be adopted by a two-thirds majority. It limits the power of the constitution-

187 Starting with the Lisbon-judgment and then in relation to all Eurocrisis-measures, cf. overview of the most important judgments on that matter in chronological order: *Lisbon-judgment* (issued in June 2009); *Financial Support for Greece and EFSF* (issued in September 2011); *Participation of Members of German Parliament in the EFSF* (February 2012); *Right to Participation for German Parliament at the Occasion of ESM-Treaty and Euro-Plus-Pact* (issued in June 2012); *ESM-Treaty and Fiscal Compact (interim relief)* (issued in July 2012); *OMT-reference* (issued in January 2014); *ESM-Treaty and Fiscal Compact*(issued in March 2014); *Final OMT-Judgment* (June 2016); *Quantitative Easing (PSPP) Reference* (issued in July 2017); cf. as well Ohler, 'Rechtliche Maßstäbe der Geldpolitik nach dem Gauweiler-Urteil des EuGH' 1005.

amending legislator by exempting core constitutional principles from the scope of constitutional amendments. Changes to this core[188] require the complete replacement of the German Constitution, following Article 146 GG.[189] Therefore, the *eternity clause* emerges as strict limit, which equally applies to EU fiscal integration steps.[190] Given the current rather limited likelihood of a replacement of the *Grundgesetz*, it seems that German institutions have to work with the *eternity clause*.[191] Therefore, the resulting questions relate to the nature of the limit, the covered EU-relevant content as well as the role of the German Constitutional Court in its interpretation.

When considering the provision its ambiguous design becomes obvious. Notably, on the one hand, its wording suggests that Article 79 (3) GG constitutes an absolute prohibition that excludes any interference. Hence, no balancing of different legal considerations is possible.[192] The mere fact that one of the covered principles is affected suffices to establish a violation of Article 79 (3) GG. On the other hand, the protected material content is restricted to the principles enumerated in Article 79 (3) as well as Articles 1 and 20 GG, without, however, prohibiting changes to these constitutional provisions themselves. Thus, Articles 1 and 20 GG could be changed, as long as the established principles are not altered.[193] This narrow conception of the material scope of the *eternity clause* corresponds to its function as an exception to the general possibility of constitutional amendments following Article 79 (2) GG. Thus, despite its absolute framing, the *eternity clause*'s substantive reach is limited to essential components of the protected principles.[194]

188 Referred to as core *constitutional identity*, cf. Polzin, 'Constitutional Identity, Unconstitutional Amendments and the Idea of Constituent Power: The Development of the Doctrine of Constitutional Identity in German Constitutional Law' 430; Ziller, 'The German Constitutional Court's Friendliness Towards European Law: On the Judgment of *Bundesverfassungsgericht* over the Ratification of the Treaty of Lisbon' 68.

189 Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 146; Herbst, 'Legale Abschaffung des Grundgesetzes nach Art. 146 GG?' 33; Schöbener, 'Das Verhältnis des EU-Rechts zum nationalen Recht der Bundesrepublik Deutschland' 892.

190 *Lisbon-judgment* para 216; As the German Court stressed, a balancing of the protected core principles is not possible, cf. *OMT-reference* para 29; Cf. as well: Jaggi, 'Revolutionary Constitutional Lawmaking in Germany – Rediscovering the German 1989 Revolution' 619.

191 Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 150.

192 Dietlein, 'Art. 79 GG – Änderungen des Grundgesetzes' para 21; Herdegen, 'Art. 79 GG' paras 74-76.

193 Cf. for example a 5% threshold for entering parliament is permissible to guarantee the functioning of the German Parliament, cf. Mayer, 'Rashomon in Karlsruhe: A Reflection on Democracy and Identity in the European Union' 760; Christoph Sennekamp, 'Alle Staatsgewalt geht vom Volke aus! – Demokratieprinzip und Selbstverwaltung der Justiz' (2010) 29 Neue Zeitschrift für Verwaltungsrecht (NVwZ) 213, 217.

194 Given the potential wide reach of Article 79 (3) GG, the scope is limited by only protecting core components of the protected principles, cf. Herdegen, 'Art. 79 GG' para 62.

Article 79 (3) GG covers the organization of the federation into *Länder*, the general participation of the *Länder* in the legislative process, as well as the principles laid down in Articles 1 and 20 GG, which include human dignity (Article 1 GG), as well as democracy (Article 20 (1) and (2) GG), the social state principle (Article 20 (1) GG), federalism (Article 20 (1) GG), the rule of law (Article 20 (3) GG) and the right to protest against violations of the principles established by Article 20 GG (Article 20 (4) GG). Combined, these principles form the unamendable core of the German Constitution, which is also referred to as the German *constitutional identity*.[195] As established by the Constitutional Court, this identity differs from the EU protection in Article 4 (2) TEU.[196] Notably, the *eternity clause* establishes an absolute limit, whereas the EU concept allows for the balancing of conflicting interests and it is defined by the CJEU.[197]

The covered principles are framed in an abstract manner and it thus has to be determined which elements of the principles fall under the *eternity clause* and which are merely ancillary.[198] This task is exercised by the Constitutional Court[199] and it has immediate implications for the constitution-amending legislator. Whatever the Court identifies as substantive part of the *eternity clause* is a direct off-limit, which underscores the powerful position of the Constitutional Court.[200] Although the Court appears to be aware of its constitutional responsibility and generally displayed a cautious application of the *eternity*

195 With particular importance for EU integration, cf. *Quantitative Easing (PSPP) Reference* para 54; *Final OMT-Judgment* paras 136-138; Interestingly, the concept of *constitutional identity* emerged in relation to EU and international measures, not in internal disputes, cf. Polzin, 'Constitutional Identity, Unconstitutional Amendments and the Idea of Constituent Power: The Development of the Doctrine of Constitutional Identity in German Constitutional Law' 431.

196 As highlighted by the Constitutional Court, cf. *OMT-reference* para 29; Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 145-146; Article 79 (3) GG falls under the exclusive jurisdiction of the Court, cf. Ohler, 'Rechtliche Maßstäbe der Geldpolitik nach dem Gauweiler-Urteil des EuGH' 1002.

197 Cf. the CJEU states that national identity can be considered as legitimate interest and subsequently balanced, cf.: C-208/09 *Sayn-Wittgenstein* [2010] (CJEU) para 83; Cf. as well: Schyff, 'Exploring Member State and European Union Constitutional Identity' 233-234.

198 Rolf Grawert, 'Homogenität, Identität, Souveränität – Positionen jurisdiktioneller Begriffsdogmatik' (2012) 51 Der Staat 189, 197-198.

199 Schlaich and Korioth, *Das Bundesverfassungsgericht – Stellung Verfahren, Entscheidungen* paras 34-35; Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 147; Through its jurisprudence in EU matters, the German Court underscores its constitutional 'referee position', cf. Kottmann and Wohlfahrt, 'Der gespaltene Wächter? Demokratie, Verfassungsidentität und Integrationsverantwortung im Lissabon-Urteil' 461-462.

200 Christoph Schönberger, 'Die Europäische Union zwischen 'Demokratiedefizit' und Bundesstaatsverbot – Anmerkungen zum Lissabon-Urteil des Bundesverfassungsgerichts' (2009) 48 Der Staat 535, 553; As the German constitutional court defines in its jurisprudence the limits for EU integration, cf. Everling, 'Europas Zukunft unter der Kontrolle der nationalen Verfassungsgerichte' 106.

clause,[201] it seems to follow a more active approach when confronted with EU cooperation.[202] Notably, the Court appears to be concerned that EU integration could undermine German statehood and the ultimate authority of the German Constitution,[203] which is why it continuously underscored the derived status of the EU and the authority of the German Constitution over EU cooperation.[204]

Historically, the *eternity clause* is a constitutional reaction to the *Hitler*-dictatorship.[205] It was designed as a constitutional security mechanism to prevent an anew erosion of constitutional values, as experienced between 1933 and 1945. Recalling this historic origin, one may question whether the *eternity clause* is designed to apply to a potential *external* erosion of core constitutional principles triggered by supranational cooperation as well as whether the EU constitutes a comparable existential threat. In fact, the EU is based on similar values as enshrined in the EU-Treaties in Article 2 TEU.[206] Given this substantive overlap, it appears that EU cooperation offers an external layer of constitutional protection for the principles covered by the *eternity clause*. The immediate benefits of this additional supranational protection can be seen in Poland or Hungary.[207] In both EU Member States the rule of law is at risk due to

201 2 BvR 1938, 2315/93 *Conception of Safe Third Countries* [1996] (German Federal Constitutional Court); 2 BvF 1/69, 2 BvR 629/68 und 308/69 *Wiretapping I* [1970] (German Federal Constitutional Court); Cf. as well: Schönberger, 'Die Europäische Union zwischen 'Demokratiedefizit' und Bundesstaatsverbot – Anmerkungen zum Lissabon-Urteil des Bundesverfassungsgerichts' 553.

202 By defining competence areas that form part of the essence of the principle of democracy, cf. *Lisbon-judgment* paras 251-252; Cf. as well: Schwerdtfeger, 'Europäisches Unionsrecht in der Rechtsprechung des Bundesverfassungsgerichts – Grundrechts-, ultra-vires- und Identitätskontrolle im gewaltenteiligen Mehrebenensystem' 293-294; Bogdandy and Schill, 'Die Achtung der nationalen Identität unter dem reformierten Unionsvertrag – Zur unionsrechtlichen Rolle nationalen Verfassungsrechts und zur Überwindung des absoluten Vorrangs' 723-724; Frank Schorkopf, 'Case Nos. 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, and 2 BvR 182/09 – 123 BVerfGE 267 (2009)' (2010) 104 The American Journal of International Law 259, 263-264.

203 Framed as Kompetenz-Kompetenz concern, cf. *Lisbon-judgment* para 233; Cf. as well: Nettesheim, 'Art. 1 AEUV – Regelungsbereich' para 18; Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 151.

204 *Quantitative Easing (PSPP) Reference* para 55; *OMT-reference* para 102; *Lisbon-judgment* para 231; Cf. as well Zwingmann, 'The Continuing Myth of Euro-Scepticism? The German Federal Constitutional Court Two Years After *Lisbon*' 667; Kottmann and Wohlfahrt, 'Der gespaltene Wächter? Demokratie, Verfassungsidentität und Integrationsverantwortung im Lissabon-Urteil' 452.

205 Ulrich Preuss, 'The Implications of 'Eternity Clauses': the German Experience' (2012) 44 Israel Law Review 429, 439.

206 Jan Wouters, 'Revisiting Art. 2 TEU: A True Union of Values?' (2020) 5 European Papers 255, 258-260.

207 Walter Rech, 'Some Remarks on the EU's Action on the Erosion of the Rule of Law in Poland and Hungary' (2018) 26 Journal of Contemporary European Studies 334, 334; Dimitry Kochenov and Laurent Pech, 'Better Late Than Never? On the European Commission's

national reforms.[208] Seemingly, the available national constitutional safeguards were insufficient to prevent the unfolding erosion of this core constitutional value.[209] The EU intervened to secure the compliance with the common foundational values.[210] Although one might question the effectiveness of the existing EU tools,[211] the benefit of securing core constitutional principles at the national *and* the supranational level is evident. Notably, the EU can act as an external mediator that identifies constitutional risks, confronts national governments and ultimately sanctions them[212] in case national safeguards fail. Although a comparable erosion of the rule of law appears less likely in Germany precisely because of the *eternity clause*, the diversification of constitutional safeguards seems to equally entail constitutional benefits. From that perspective, EU cooperation offers an additional layer of protection for German constitutional principles and thereby even supports the underlying intention of the *eternity clause*.[213]

This shows that the overall function of the *eternity clause* is to establish an outer, absolute limit for state action, which is why Article 79 (3) GG can be construed as a constitutional *ultima ratio*.[214] This means, that the *eternity*

Rule of Law Framework and its First Activation' (2016) 54 Journal of Common Market Studies 1062, 1067-1068.

208 The Polish Law and Justice (PiS) party has 235 of the 460 seats in the Polish Parliament (Sejm) and 61 of the 100 seats in the Senate, cf. Monika Moens De Fernig, 'Factsheet: The Polish Sejm' (*European Parliament – Directorate-General for the Presidency*, 2018) <http://www.epgencms.europarl.europa.eu/cmsdata/upload/0398faee-9664-4eb0-8e1b-ac615ab65a49/Factsheet_PL_-_Sejm.pdf> accessed 20 December 2020; Victor Orbán even attained a 2/3 majority with his Fidesz party in 2018, cf. Corinne Deloy, 'General Elections in Hungary: Viktor Orbán easily sweeps to victory for the third time running in the Hungarian elections' (*Fondation Robert Schuman*, 10 April 2018) <https://www.robert-schuman.eu/en/doc/oee/oee-1765-en.pdf> accessed 20 December 2020.

209 Rech, 'Some Remarks on the EU's Action on the Erosion of the Rule of Law in Poland and Hungary' 338-339; Jens Brauneck, 'Rettet die EU den Rechtsstaat in Polen?' (2018) 37 Neue Zeitschrift für Verwaltungsrecht (NVwZ) 1423, 1424-1425.

210 For example, through the order of the CJEU that required Poland to undo the retirement of supreme court judges, cf. C-619/18 R *Commission v. Poland* [2018] (CJEU).

211 Wouters, 'Revisiting Art. 2 TEU: A True Union of Values?' 269, 277; Luke Dimitrios Spieker, 'Breathing Life Into the Union's Common Values: On the Judicial Application of Article 2 TEU in the EU Value Crisis' (2019) 20 German Law Journal 1182, 1184-1185.

212 Either through infringement actions following Articles 258 ff. TFEU, or by initiating the Article 7 TEU procedure, cf. Craig and de Búrca, *EU Law Text, Cases, and Materials* 449-450; Uladzislau Belavusau, 'On age discrimination and beating dead dogs: *Commission v. Hungary*' (2013) 50 Common Market Law Review 1145, 1159-1160.

213 Mayer, 'Rashomon in Karlsruhe: A Reflection on Democracy and Identity in the European Union' 763; Stressing that the original intention of Article 79 (3) GG was to shield the state against drifting into another dictatorship, cf. Schönberger, 'Die Europäische Union zwischen 'Demokratiedefizit' und Bundesstaatsverbot – Anmerkungen zum Lissabon-Urteil des Bundesverfassungsgerichts' 553.

214 The *Bundesverfassungsgericht* established that Article 79 (3) GG had to be interpreted restrictively, cf. 1 BvR 2378/98 and 1 BvR 1084/99 *Wiretapping II* [2004] (German Federal Constitutional Court) paras 108-111; And highlighting the exceptional nature of Article 79 (3) GG

clause is designed as mechanism in case traditional means of constitutional dispute resolution fail. Such a case is given when constitutional values are blatantly disregarded.[215] Restricting the application of the eternity clause to such extreme cases corresponds to the original intention underlying this provision, namely to function as *ultima ratio*. In addition, a restrictive application of the eternity clause strengthens the provision's authority and mitigates the threat of watering down the provision's protective force through excessive use. In the internal constitutional jurisprudence such more restricted application can be observed. In contrast, the Court appears to increasingly employ Article 79 (3) GG in EU proceedings, at least since its *Lisbon*-judgment,[216] which challenges the eternity clause's original conception as constitutional *ultima ratio*.

4.1.2 The different limits employed by the German Constitutional Court

Furthermore, the Constitutional Court established different locks to address EU integration and to operationalize *inter alia* the outlined *eternity clause* in EU-related proceedings. These locks provide the Court with the framework for the substantive assessment of the German EU commitments.[217] The first lock was the *fundamental rights* review,[218] which was later complemented by the *ultra vires*[219] and the *constitutional identity* review.[220]

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and that it may not be interpreted in a manner that renders fundamental – yet compatible with the overall system – constitutional amendments *impossible,* cf. *Wiretapping I* paras 99-100; Cf. as well: Mayer, 'Rashomon in Karlsruhe: A Reflection on Democracy and Identity in the European Union' 763; Arguing that the Court seems to contradict this *ultima ratio* status in its EU-related jurisprudence, cf. Thomas M. J. Möllers and Katharina Redcay, 'Das Bundesverfassungsgericht als europäischer Gesetzgeber oder als Motor der Union?' (2013) 48 Europarecht (EuR) 409, 425-426.

215 2 BvB 1/13 *Procedure to Prohibit the Political Party NPD* [2017] (German Federal Constitutional Court) paras 536-537; Cf. as well: Schorkopf, 'Case Nos. 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, and 2 BvR 182/09 – 123 BVerfGE 267 (2009)' 263.

216 By defining this autonomous competence catalogue, cf. *Quantitative Easing (PSPP) Reference* paras 54-56; *Final OMT-Judgment* para 138; *Lisbon-judgment* paras 249, 252.

217 Schwerdtfeger, 'Europäisches Unionsrecht in der Rechtsprechung des Bundesverfassungsgerichts – Grundrechts-, ultra-vires- und Identitätskontrolle im gewaltenteiligen Mehrebenensystem' 292-294; Craig and de Búrca, *EU Law Text, Cases, and Materials* 279-289; Vranes, 'German Constitutional Foundations of, and Limitations to, EU Integration: A Systematic Analysis' 101-110.

218 *Solange II-Decision* para 132; *Solange I-Decision* para 43; Cf. as well: Schwerdtfeger, 'Europäisches Unionsrecht in der Rechtsprechung des Bundesverfassungsgerichts – Grundrechts-, ultra-vires- und Identitätskontrolle im gewaltenteiligen Mehrebenensystem' 292; Vranes, 'German Constitutional Foundations of, and Limitations to, EU Integration: A Systematic Analysis' 106.

219 *Quantitative Easing (PSPP) Final Judgment* paras 105-111; *Maastricht-Judgment* para 106; Cf. as well: Calliess, 'Konfrontation statt Kooperation zwischen BVerfG und EuGH? Zu den Folgen des Karlsruher PSPP-Urteils' 900-901; Everling, 'Europas Zukunft unter der Kontrolle der nationalen Verfassungsgerichte' 100-101.

4.1.2.1 Fundamental rights review

The fundamental rights review constitutes the Court's first lock.[221] Concerned about the lack of fundamental rights protection at EU-level, the German Court reserved itself the competence to assess whether EU measures complied with German fundamental rights in its infamous *Solange* I-decision.[222] Once the European Court of Justice established its own fundamental rights regime, the German Court declared that it would refrain from conducting a fundamental rights assessment of EU measures *as long as* the EU warranted a level of fundamental rights protection similar to the German one.[223]

This illustrates that the fundamental rights limit evolved over time, which could have implications for the *ultra vires* and the *identity* review, too.[224] It was submitted by *Payandeh* that the German Court seemingly followed a strategic agenda when introducing the fundamental rights review. Notably, the German Court indirectly invited the EU to improve the EU protection of fundamental rights.[225] Once the EU addressed this concern, the Court relaxed its scrutiny. Although, this evolution is specific to the fundamental rights review, a similar pattern could perhaps be envisaged in relation to the other

220 Which became particularly important during the Eurocrisis, cf. Ohler, 'Rechtliche Maßstäbe der Geldpolitik nach dem Gauweiler-Urteil des EuGH' 1001-1002; Schwerdtfeger, 'Europäisches Unionsrecht in der Rechtsprechung des Bundesverfassungsgerichts – Grundrechts-, ultra-vires- und Identitätskontrolle im gewaltenteiligen Mehrebenensystem' 292-293; Payandeh, 'Constitutional Review of EU Law After Honeywell: Contextualizing the Relationship Between the German Constitutional Court and the EU Court of Justice' 12, 17.

221 *Solange II-Decision* para 132; *Solange I-Decision* para 43.

222 *Solange I-Decision* para 56; Cf. as well: Calliess, '70 Jahre Grundgesetz und europäische Integration: 'Take back control' oder 'Mehr Demokratie wagen'?' 689-690; Polzin, 'Constitutional Identity, Unconstitutional Amendments and the Idea of Constituent Power: The Development of the Doctrine of Constitutional Identity in German Constitutional Law' 426-427; Craig and de Búrca, *EU Law Text, Cases, and Materials* 280-282; Schwerdtfeger, 'Europäisches Unionsrecht in der Rechtsprechung des Bundesverfassungsgerichts – Grundrechts-, ultra-vires- und Identitätskontrolle im gewaltenteiligen Mehrebenensystem' 292.

223 *Solange II-Decision* para 132; Vranes, 'German Constitutional Foundations of, and Limitations to, EU Integration: A Systematic Analysis' 99-100; Importantly, the Court retains the possibility to apply this limit, cf. Calliess, '70 Jahre Grundgesetz und europäische Integration: 'Take back control' oder 'Mehr Demokratie wagen'?' 689-690; Claus Dieter Classen, 'Europäische Rechtsgemeinschaft à l'allemande? Anmerkung zum Urteil des BVerfG vom 21.06.2016, 2 BvR 2728/13 u. a.' (2016) 51 Europarecht (EuR) 529, 535.

224 Andreas Voßkuhle, 'Der Wandel der Verfassung und seine Grenzen' (2019) 59 Juristische Schulung (JuS) 417, 419; Schwerdtfeger, 'Europäisches Unionsrecht in der Rechtsprechung des Bundesverfassungsgerichts – Grundrechts-, ultra-vires- und Identitätskontrolle im gewaltenteiligen Mehrebenensystem' 292; Payandeh, 'Constitutional Review of EU Law After Honeywell: Contextualizing the Relationship Between the German Constitutional Court and the EU Court of Justice' 28.

225 Payandeh, 'Constitutional Review of EU Law After Honeywell: Contextualizing the Relationship Between the German Constitutional Court and the EU Court of Justice' 28; Cf. as well: Schwerdtfeger, 'Europäisches Unionsrecht in der Rechtsprechung des Bundesverfassungsgerichts – Grundrechts-, ultra-vires- und Identitätskontrolle im gewaltenteiligen Mehrebenensystem' 308-309.

two limits mentioned.[226] Yet, it seems questionable whether the EU would so willingly address the concerns underpinning the *ultra vires* and the *constitutional identity* review, as this could limit the effect and reach of EU law.

4.1.2.2 Ultra vires review

In its *Maastricht*-judgment, the Constitutional Court then introduced its *ultra vires* review to determine whether EU institutions acted within their conferred mandate.[227] Hence, the *ultra vires* review constitutes the German supervision of the EU law principle of conferral.[228] In the recent PSPP-judgment, the Court for the first time declared EU acts *ultra vires*,[229] which possibly ushers into a new phase of a stricter enforcement of the constitutional limits.

Considering the design of the limit, since its Honeywell-judgment,[230] the Court follows a three-stepped approach.[231] First, the Court determines whether the challenged EU act potentially exceeds the limits of the conferred competences in an manifest way and whether this results in a '[...] structurally significant shift in the division of competences to the detriment of the Member States'[232].[233] Following this jurisprudence, a structurally significant over-

226 Payandeh, 'Constitutional Review of EU Law After Honeywell: Contextualizing the Relationship Between the German Constitutional Court and the EU Court of Justice' 28.

227 *Maastricht-Judgment* para 48; Cf. as well: Lang, 'Ultra Vires Review of the ECB's Policy of Quantitative Easing: An Analysis of the German Constitutional Court's Preliminary Reference Order in the PSPP case.' 929; Schwerdtfeger, 'Europäisches Unionsrecht in der Rechtsprechung des Bundesverfassungsgerichts – Grundrechts-, ultra-vires- und Identitätskontrolle im gewaltenteiligen Mehrebenensystem' 292-293; Ohler, 'Rechtliche Maßstäbe der Geldpolitik nach dem Gauweiler-Urteil des EuGH' 1001-1002; Wendel, 'Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference' 273-274; Wendel, 'Kompetenzrechtliche Grenzgänge: Karlsruhes *Ultra-vires*-Vorlage an den EuGH' 629-630.

228 *Maastricht-Judgment*; Cf. as well: Craig and de Búrca, *EU Law Text, Cases, and Materials* 282; Wendel, 'Kompetenzrechtliche Grenzgänge: Karlsruhes *Ultra-vires*-Vorlage an den EuGH' 628.

229 *Quantitative Easing (PSPP) Final Judgment* paras 105-111; Cf. as well: Calliess, 'Konfrontation statt Kooperation zwischen BVerfG und EuGH? Zu den Folgen des Karlsruher PSPP-Urteils' 900-901; Haltern, 'Ultra-vires-Kontrolle im Dienst europäischer Demokratie' 817; Kainer, 'Aus der nationalen Brille: Das PSPP-Urteil des BVerfG' 533.

230 *Honeywell-judgment* para 56; Cf. as well: Payandeh, 'Constitutional Review of EU Law After Honeywell: Contextualizing the Relationship Between the German Constitutional Court and the EU Court of Justice' 22-23.

231 Calliess, '70 Jahre Grundgesetz und europäische Integration: 'Take back control' oder 'Mehr Demokratie wagen'?' 690-691; Voßkuhle, 'Der Wandel der Verfassung und seine Grenzen' 419; Ohler, 'Rechtliche Maßstäbe der Geldpolitik nach dem Gauweiler-Urteil des EuGH' 1001-1002; Ludwigs, 'Der Ultra-vires-Vorbehalt des BVerfG – Judikative Kompetenzanmaßung oder legitimes Korrektiv' 538; Wendel, 'Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference' 273-274; Payandeh, 'Constitutional Review of EU Law After Honeywell: Contextualizing the Relationship Between the German Constitutional Court and the EU Court of Justice' 19-23.

232 *Quantitative Easing (PSPP) Final Judgment* para 110.

stepping is *inter alia* given in case a Treaty amendment would be required to allocate the disputed competence to the EU[234] or in case the challenged EU act conflicts with the *eternity clause*.[235]

Once the German Court identifies an excessive overstepping, it issues in a second step a preliminary reference to the CJEU.[236] Here, the Constitutional Court underscored that it was essential to provide the CJEU with the opportunity to address *ultra vires* concerns in order to preserve the unity of EU law and to respect the CJEU's mandate. At the same time, these considerations can never justify *ultra vires* acts, as the CJEU could otherwise extend the reach of the EU-Treaties beyond the intention of the Member States.[237] Therefore, the German Court will follow the CJEU's guidance on the interpretation of EU law *as long as* this interpretation is based on the traditional European methods of judicial interpretation, coherent and sufficiently motivated.[238]

Until now, the German Court initiated two preliminary references, notably in the OMT[239]- and PSPP-proceedings.[240] In the OMT-proceedings, the Court followed the CJEU's guidance. However, in the PSPP-proceedings the Court considered the CJEU's interpretation of EU law as 'manifestly incomprehensible' and therefore declared the CJEU's judgment partially *ultra vires* – the seemingly now third step under the *ultra vires* review – before then concluding that the initially challenged PSP-Program was *ultra vires*.[241] This suggests that the *ultra vires* finding always involves a close scrutiny of the CJEU's guiding judgment, and that declaring the initially challenged act *ultra vires* appears to always require declaring the CJEU's judgment *ultra vires*, too.

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233 *OMT-reference* para 37; Cf. as well: Lang, 'Ultra Vires Review of the ECB's Policy of Quantitative Easing: An Analysis of the German Constitutional Court's Preliminary Reference Order in the PSPP case.' 927; Schwerdtfeger, 'Europäisches Unionsrecht in der Rechtsprechung des Bundesverfassungsgerichts – Grundrechts-, ultra-vires- und Identitätskontrolle im gewaltenteiligen Mehrebenensystem' 292-293; Ludwigs, 'Der Ultra-vires-Vorbehalt des BVerfG – Judikative Kompetenzanmaßung oder legitimes Korrektiv' 538.

234 *Quantitative Easing (PSPP) Final Judgment* para 110.

235 *OMT-reference* para 37; *Honeywell-judgment* para 65.

236 *Quantitative Easing (PSPP) Final Judgment* para 111; *Honeywell-judgment* paras 60-61; Cf. as well: Payandeh, 'Constitutional Review of EU Law After Honeywell: Contextualizing the Relationship Between the German Constitutional Court and the EU Court of Justice' 23-24; Schöbener, 'Das Verhältnis des EU-Rechts zum nationalen Recht der Bundesrepublik Deutschland' 891.

237 *Quantitative Easing (PSPP) Final Judgment* para 111; Cf. as well: Kainer, 'Aus der nationalen Brille: Das PSPP-Urteil des BVerfG' 534; Haltern, 'Ultra-vires-Kontrolle im Dienst europäischer Demokratie' 818, 821.

238 *Quantitative Easing (PSPP) Final Judgment* para 112; Cf. as well: Kainer, 'Aus der nationalen Brille: Das PSPP-Urteil des BVerfG' 535; Haltern, 'Ultra-vires-Kontrolle im Dienst europäischer Demokratie' 819.

239 *OMT-reference*.

240 *Quantitative Easing (PSPP) Reference*.

241 Kainer, 'Aus der nationalen Brille: Das PSPP-Urteil des BVerfG' 536; Haltern, 'Ultra-vires-Kontrolle im Dienst europäischer Demokratie' 822; Calliess, 'Konfrontation statt Kooperation zwischen BVerfG und EuGH? Zu den Folgen des Karlsruher PSPP-Urteils' 901.

4.1.2.3 Constitutional identity review

Finally, the German Court introduced the *constitutional identity review*.[242] Based on the *eternity clause*, EU integration cannot undermine core constitutional values protected by Article 79 (3) GG.[243] According to the Constitutional Court, the limit requires that certain competence areas remain under the control of the German Parliament and may therefore not be conferred to the EU-level in order to preserve German democracy protected by Article 20 (1) and (2) GG.[244] In case a conflict between EU integration steps and the *eternity clause* occurs, the German legislator is precluded from engaging in these, as it is not competent to overcome Article 79 (3) GG.[245]

Hence, the identity review enforces the *eternity clause* and protects indispensable constitutional values, which can neither be altered at the German state level nor by engaging in EU integration.[246] In its assessment, the Court takes the German act of approval – and not EU law itself – as its reference point for the constitutional assessment. One could therefore conclude that the identity review is less invasive towards EU law compared to the *ultra vires* review, as argued by *Schwerdtfeger*.[247] At the same time, the *constitutional identity* review sets absolute substantive limits to EU integration. Therefore, the implications of the *constitutional identity limit* are more far-reaching, as it restricts the structural development of the EU.

4.1.2.4 Overlap of ultra vires and identity review

Ultra vires and *identity* review are independent limits safeguarding different constitutional interests. Notably, under the *ultra vires* review the German Constitutional Court supervises the principle of conferral as to measures adopted based on the EU-Treaties. In contrast, through the *constitutional identity* review the Court determines whether EU integration exceeds the available scope

242 *Lisbon-judgment*; Cf. as well: Murkens, 'Identity Trumps Integration – The Lisbon Treaty in the German Federal Constitutional Court' 519; Schwerdtfeger, 'Europäisches Unionsrecht in der Rechtsprechung des Bundesverfassungsgerichts – Grundrechts-, ultra-vires- und Identitätskontrolle im gewaltenteiligen Mehrebenensystem' 293-294.

243 *Lisbon-judgment* para 240; Cf. as well: Herdegen, 'Art. 79 GG' para 60; Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law – The Theory and Practice of Weimar Constitutionalism* 177.

244 *Final OMT-Judgment* para 138; *ESM-Treaty and Fiscal Compact* paras 107-109; *Lisbon-judgment* paras 251-252.

245 Cf. distinction between constituted power and constituting power, Herdegen, 'Art. 79 GG' paras 60-61; Grawert, 'Homogenität, Identität, Souveränität – Positionen jurisdiktioneller Begriffsdogmatik' 197; Bogdandy and Schill, 'Die Achtung der nationalen Identität unter dem reformierten Unionsvertrag – Zur unionsrechtlichen Rolle nationalen Verfassungsrechts und zur Überwindung des absoluten Vorrangs' 715.

246 Andreas Voßkuhle, 'Verfassungsgerichtsbarkeit und europäische Integration' (2013) 32 Neue Zeitschrift für Verwaltungsrecht (NVwZ) 27, 27.

247 Schwerdtfeger, 'Europäisches Unionsrecht in der Rechtsprechung des Bundesverfassungsgerichts – Grundrechts-, ultra-vires- und Identitätskontrolle im gewaltenteiligen Mehrebenensystem' 296-297.

under Article 79 (3) GG and it thus primarily applies when additional EU integration steps are considered.

Although both limits remain conceptually independent,[248] they can overlap. Since the German Court introduced its qualified *ultra vires* limit, which requires a manifest and structurally significant excess,[249] such overlap can in fact materialize. Notably, an excess of the conferred competences which conflicts with the *eternity clause* is considered as such structurally significant excess of the conferred powers.[250] Consequently, a violation of the German *constitutional identity* by EU institutions is always a structurally significant *ultra vires* act.[251] In this specific instance, an overlap of both limits can occur – but is not mandatory.[252]

4.1.3 Guiding concepts for constitutional jurisprudence on EU integration

Finally, the Constitutional Court developed further concepts that, in conjunction with the established locks, guide the interpretation of German constitutional law in order to adequately address EU cooperation.

4.1.3.1 EU law friendliness of the German Constitution

The concept[253] of *Europarechtsfreundlichkeit*[254] is based on the preamble read in conjunction with Article 23 GG[255] and Article 24 (1) GG.[256] It suggests

248 As emphasized by the *Bundesverfassungsgericht*, cf. *Final OMT-Judgment* para 153; Cf. as well Martin Nettesheim, 'Die "haushaltspolitische Gesamtverantwortung" in der Rechtsprechung des BVerfG' in Peter Brandt (ed), *Verfassung und Krise*, vol 16 (Berliner Wissenschafts-Verlag (BWV) 2015) 27.

249 *OMT-reference* para 37; *Honeywell-judgment* paras 60-61, 71.

250 *Final OMT-Judgment* para 153.

251 Cf. the slightly changed wording from ibid para 153 to *Quantitative Easing (PSPP) Reference* para 63, where the court limits the finding of a structurally significant competence overstepping to violations of the principle of democracy.

252 Schwerdtfeger, 'Europäisches Unionsrecht in der Rechtsprechung des Bundesverfassungsgerichts – Grundrechts-, ultra-vires- und Identitätskontrolle im gewaltenteiligen Mehrebenensystem' 294-295; Cf. for example the assessment in the *OMT*-reference, where the *Bundesverfassungsgericht* focused in the first place on the *ultra vires* review, only mentioning the *identity* review, cf. Ludwigs, 'Der Ultra-vires-Vorbehalt des BVerfG – Judikative Kompetenzanmaßung oder legitimes Korrektiv' 541; Wendel, 'Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference' 277-279; Gött, 'Die ultra vires-Rüge nach dem OMT-Vorlagebeschluss des Bundesverfassungsgerichts' 522.

253 *Honeywell-judgment* para 111; *Lisbon-judgment* para 225; cf. also Franz C. Mayer and Maja Walter, 'Die Europarechtsfreundlichkeit des BVerfG nach dem Honeywell-Beschluss' (2011) 33 Juristische Ausbildung (JURA) 532, 539; Daniel Thym, 'Europäische Integration im Schatten souveräner Staatlichkeit – Anmerkungen zum Lissabon-Urteil des Bundesverfassungsgerichts' (2009) 48 Der Staat 559, 559.

254 In English: *European law friendliness*.

255 *Quantitative Easing (PSPP) Reference* para 58; Cf. as well: Vranes, 'German Constitutional Foundations of, and Limitations to, EU Integration: A Systematic Analysis' 75-76.

that the German Constitution is generally open towards EU cooperation[257] and that German constitutional law will be interpreted – as far as possible – in conformity with EU law. It also requires that the Constitutional Court cooperates with the CJEU.[258] Furthermore, it entails that the compatibility assessment of EU law with the German Constitution is centralized with the German Constitutional Court[259] and that the different constitutional limits are applied in a favorable manner towards the EU.[260] Notably, as just outlined, the Court restricts its *ultra vires* review to structurally significant transgressions of the conferred competences and consults the CJEU.[261] Similarly, the *constitutional identity* review is exercised in an *EU-friendly manner* as well.[262]

One can detect clear similarities with obligations stemming directly from EU law itself, notably, the obligation to harmonious interpretation[263] and the obligation for last instance courts to refer preliminary questions to the CJEU.[264] However, it appears favorable, from a German constitutional perspective, to internalize these EU law obligations. This implies that the German Court remains *master* of the concept and can determine scope and requirements attached to it.

256 Both the Preamble and Article 24 (1) GG are expression of the original openness of the German Constitution, cf. Mayer and Walter, 'Die Europarechtsfreundlichkeit des BVerfG nach dem Honeywell-Beschluss' 539.

257 Voßkuhle, 'Verfassungsgerichtsbarkeit und europäische Integration' 28.

258 *Honeywell-judgment* paras 58-59; Cf. as well: Calliess, '70 Jahre Grundgesetz und europäische Integration: 'Take back control' oder 'Mehr Demokratie wagen'?' 691; Zwingmann, 'The Continuing Myth of Euro-Scepticism? The German Federal Constitutional Court Two Years After *Lisbon*' 676-677.

259 Dana Burchardt, 'Die Ausübung der Identitätskontrolle durch das Bundesverfassungsgericht – Zugleich Besprechung des Beschlusses 2 BvR 2735/14 des BVerfG vom 15.12.2015 ('Solange III'/'Europäischer Haftbefehl II')' (2016) 76 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV) 527, 540; Wendel, 'Kompetenzrechtliche Grenzgänge: Karlsruhes *Ultra-vires*-Vorlage an den EuGH' 628.

260 *Lisbon-judgment* para 240; Cf. as well: Voßkuhle, 'Der Wandel der Verfassung und seine Grenzen' 419-420; Voßkuhle, 'Verfassungsgerichtsbarkeit und europäische Integration' 29; Zwingmann, 'The Continuing Myth of Euro-Scepticism? The German Federal Constitutional Court Two Years After *Lisbon*' 678-679.

261 *Quantitative Easing (PSPP) Reference* para 63; *Final OMT-Judgment* paras 148-150; *Honeywell-judgment* para 61.

262 *Quantitative Easing (PSPP) Reference* para 58; *Final OMT-Judgment* paras 121, 154-155; Cf. as well: Burchardt, 'Die Ausübung der Identitätskontrolle durch das Bundesverfassungsgericht – Zugleich Besprechung des Beschlusses 2 BvR 2735/14 des BVerfG vom 15.12.2015 ('Solange III'/'Europäischer Haftbefehl II')' 533.

263 Craig and de Búrca, *EU Law Text, Cases, and Materials* 209-211; Jürgen Kühling, 'Die richtlinienkonforme und die verfassungskonforme Auslegung im Öffentlichen Recht' (2014) 54 Juristische Schulung (JuS) 481, 482.

264 Craig and de Búrca, *EU Law Text, Cases, and Materials* 468-469.

4.1.3.2 Continuous institutional responsibility for EU integration

EU law friendliness is complemented by the concept of *Integrationsverantwortung*,[265] which applies to German institutions when conferring competences to the EU and when supervising the exercise of conferred competences.[266] Its primary aim is to balance the constitutional obligation to participate in EU cooperation with continuous responsibilities under the constitution.[267] The concept is now codified.[268] Integration responsibility requires that the relevant institutional actors determine a specific and limited EU integration program.[269]

An increasingly important element deriving from integration responsibility is the continuous supervision of EU action, which gained relevance during the Eurocrisis.[270] Notably, the Constitutional Court requires German institutions to monitor EU action in order to ensure compliance with the determined integration program.[271] During the Eurocrisis, the German Court continuously employed integration responsibility in conjunction with the *ultra vires* review and the individuals' right to vote enshrined in Article 38 (1) GG.[272] Following this constitutional framework, the *Bundestag* has an obligation to shield individuals against potential *ultra vires* acts committed by EU institutions.[273] It suggests that integration responsibility requires German institutions to consider EU integration as a continuous institutional task and that they cannot discharge themselves from their constitutional obligations by adopting an EU integration step. Obviously, this concept equally enables the Constitutional Court to hold

265 In English: *Integration responsibility*.

266 *Quantitative Easing (PSPP) Final Judgment* paras 106-107; Cf. as well: Weiß, 'Die Integrationsverantwortung der Verfassungsorgane' 1047; Nettesheim, 'Die Integrationsverantwortung – Vorgaben des BVerfG und gesetzgeberische Umsetzung' 178-179.

267 Weiß, 'Die Integrationsverantwortung der Verfassungsorgane' 1046; Andreas Engels, 'Die Integrationsverantwortung des Deutschen Bundestags' (2012) 52 Juristische Schulung (JuS) 210, 210-211; Nettesheim, 'Die Integrationsverantwortung – Vorgaben des BVerfG und gesetzgeberische Umsetzung' 177.

268 In the direct aftermath of the Lisbon-judgment, the *Bundestag* adopted the integration responsibility law, cf. Nettesheim, 'Die Integrationsverantwortung – Vorgaben des BVerfG und gesetzgeberische Umsetzung' 178.

269 As the Court emphasised itself, cf. *Quantitative Easing (PSPP) Final Judgment* paras 106-107; *Quantitative Easing (PSPP) Reference* para 47; *OMT-reference* para 31; Also highlighted by: Mayer, 'Rashomon in Karlsruhe: A Reflection on Democracy and Identity in the European Union' 761; Nettesheim, 'Die Integrationsverantwortung – Vorgaben des BVerfG und gesetzgeberische Umsetzung'.

270 *Quantitative Easing (PSPP) Final Judgment* paras 106-107; *OMT-reference* paras 160 ff; Cf. as well: Weiß, 'Die Integrationsverantwortung der Verfassungsorgane' 1047; Engels, 'Die Integrationsverantwortung des Deutschen Bundestags' 212-213.

271 *Quantitative Easing (PSPP) Reference* paras 47-49; *Final OMT-Judgment* paras 164-165.

272 *Quantitative Easing (PSPP) Reference* para 50; *Final OMT-Judgment* para 166; Cf. as well: Weiß, 'Die Integrationsverantwortung der Verfassungsorgane' 1049; Engels, 'Die Integrationsverantwortung des Deutschen Bundestags' 213.

273 Weiß, 'Die Integrationsverantwortung der Verfassungsorgane' 1048.

German institutions directly accountable for power excesses of EU institutions, which could otherwise not be constitutionally scrutinized in Germany.

4.2 Constitutional principles

Based on this constitutional toolbox, the German Constitutional Court evaluates the effect of EU integration on substantive principles of the German Constitution. In this assessment, one may identify two tendencies that appear to render the application of the *eternity clause* to EU integration highly likely. First, the Court seems to perceive the EU-related transformation of decision-making processes that result in increasing EU control as a potential threat for the state structure. Resulting from this perception is a general tension between the aim of the *eternity clause* – namely the preservation of the German state structure – and the prospect of EU integration – namely the transformation of decision-making processes. And second, given the constitutional indeterminacy of the content protected by the *eternity clause*, EU integration can easily be portrayed as an interference when interpreting the *eternity clause* in light of EU integration.[274] This is particularly obvious in the Court's Eurocrisis-related jurisprudence, where the concept of *overall budgetary responsibility* was introduced in light of increasing EU budgetary commitments.[275]

The focus of the subsequent assessment will rest on the principle of democracy (4.2.1.), the concept of *overall budgetary responsibility* (4.2.2.) as well as German sovereignty (4.2.3.), as these are the main substantive limits relevant for EU fiscal integration.

4.2.1 Democracy

The principle of democracy is mentioned in several provisions of the German Constitution. It serves as a justification for limiting fundamental rights and

274 For example, from the developed competence catalogue developed by the Court, cf. *Lisbon-judgment* paras 251-252; Which was criticized as arbitrary, cf. Schwerdtfeger, 'Europäisches Unionsrecht in der Rechtsprechung des Bundesverfassungsgerichts – Grundrechts-, ultra-vires- und Identitätskontrolle im gewaltenteiligen Mehrebenensystem' 293-294; Bogdandy and Schill, 'Die Achtung der nationalen Identität unter dem reformierten Unionsvertrag – Zur unionsrechtlichen Rolle nationalen Verfassungsrechts und zur Überwindung des absoluten Vorrangs' 723-724.

275 Calliess, 'Konfrontation statt Kooperation zwischen BVerfG und EuGH? Zu den Folgen des Karlsruher PSPP-Urteils' 898-899; Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 152-153; Nettesheim, 'Verfassungsrecht und Politik in der Staatsschuldenkrise' 1410; Kottmann and Wohlfahrt, 'Der gespaltene Wächter? Demokratie, Verfassungsidentität und Integrationsverantwortung im Lissabon-Urteil' 460-461.

for police as well as security actions.[276] It is also connected to the constitutional role of political parties as established in Article 21 GG.[277] Furthermore, it is a structural requirement for EU integration measures under Article 23 (1) (1) GG,[278] a requirement for the constitutional organization of the *Länder* following Article 28 (1) GG,[279] and finally part of the core state structure following Articles 20 (1) and (2) GG.[280] Although all these provisions shape the current conception of democracy, Article 79 (3) GG only covers the core components of the principle laid down in Article 20 (1) and (2) GG.[281]

Considering the Court's EU-related jurisprudence on democracy in conjunction with the *eternity clause*, three core components appear vital to guarantee the overarching function of democracy, namely legitimizing the exercise of state powers (4.2.1.4.).[282] According to the Constitutional Court, the German people, as legitimizing subject under the German Constitution (4.2.1.1.), have to be able to determine through elections (4.2.1.2.), an institutional representation which takes political decisions (4.2.1.3.), as visually conceptualized in *Figure 7* below. Jointly these elements constitute the core

276 For example, in: Articles 10 (2), 11 (2), 18, 91 (1) GG, cf. Ulrich Jan Schröder, 'Das Demokratieprinzip des Grundgesetzes' (2017) 49 Juristische Arbeitsblätter (JA) 809, 809-810.

277 *Procedure to Prohibit the Political Party NPD* paras 515-518; Cf. as well: Martin Morlok, 'Kein Geld für verfassungsfeindliche Parteien?' (2017) 50 Zeitschrift für Rechtspolitik (ZRP) 66, 68; Daniel Volp, 'Parteiverbot und wehrhafte Demokratie – Hat das Parteiverbotsverfahren noch eine Berechtigung?' (2016) 69 Neue Juristische Wochenschrift (NJW) 459, 461.

278 Heintschel von Heinegg and Frau, 'Art. 23 GG – Mitwirkung bei Entwicklung der EU' paras 10-12; Scholz, 'Art. 23 GG' paras 73-75; Calliess, '70 Jahre Grundgesetz und europäische Integration: 'Take back control' oder 'Mehr Demokratie wagen'?' 685-686; Schröder, 'Das Demokratieprinzip des Grundgesetzes' 809.

279 Veith Mehde, 'Art. 28 Abs. 1 GG' in Theodor Maunz and Günter Düring (eds), *Grundgesetz-Kommentar* (92nd edn, C.H. Beck 2020) paras 52-55; Johannes Hellermann, 'Artikel 28 GG – Verfassung der Länder' in Volker Epping and Christian Hillgruber (eds), *Beck Online Kommentar zum Grundgesetz* (45th edn, C.H. Beck 2020) paras 5-6, 9; Klaus Ritge, 'Das Recht der kommunalen Selbstverwaltung in den Verfassungsräumen von Bund und Ländern' (2018) 37 Neue Zeitschrift für Verwaltungsrecht (NVwZ) 114, 115.

280 Stefan Huster and Johannes Rux, 'Art. 20 GG – Bundesstaatliche Verfassung; Widerstandsrecht' in Volker Epping and Christian Hillgruber (eds), *Beck Online Kommentar zum Grundgesetz* (45th edn, C.H. Beck 2020) paras 55-60; Bernd Grzeszick, 'Art. 20 GG' in Theodor Maunz and Günter Düring (eds), *Grundgesetz-Kommentar* (92nd edn, C.H. Beck 2020) paras 1, 11-15, 60-77; Schröder, 'Das Demokratieprinzip des Grundgesetzes' 809-810; Bodo Pieroth, 'Das Demokratieprinzip des Grundgesetzes' (2010) 50 Juristische Schulung (JuS) 473, 474.

281 Dietlein, 'Art. 79 GG – Änderungen des Grundgesetzes' paras 21-22; Herdegen, 'Art. 79 GG' paras 62-63; Schröder, 'Das Demokratieprinzip des Grundgesetzes' 816; Pieroth, 'Das Demokratieprinzip des Grundgesetzes' 474-475; Sennekamp, 'Alle Staatsgewalt geht vom Volke aus! – Demokratieprinzip und Selbstverwaltung der Justiz' 217.

282 Herdegen, 'Art. 79 GG' para 127; Dietlein, 'Art. 79 GG – Änderungen des Grundgesetzes' paras 35-36; Huster and Rux, 'Art. 20 GG – Bundesstaatliche Verfassung; Widerstandsrecht' para 63; Grzeszick, 'Art. 20 GG' paras 117-119; Schröder, 'Das Demokratieprinzip des Grundgesetzes' 814; Pieroth, 'Das Demokratieprinzip des Grundgesetzes' 479, 481; Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* paras 154-155.

of German democracy in the sense of Article 79 (3) GG, which has to be respected by EU fiscal integration steps (4.2.1.5.).

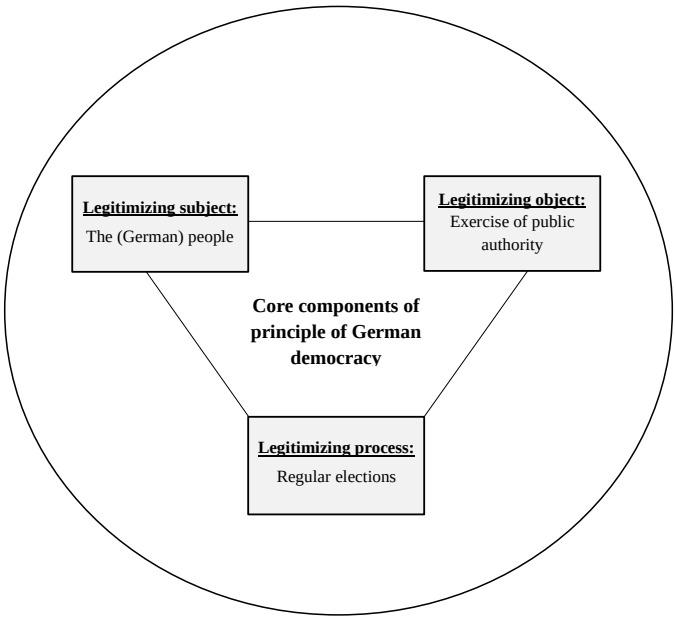

Figure 7: Core components of German democracy

4.2.1.1 Legitimizing subject ('Volkssouveränität')

The first element is the German people as origin and source of legitimacy for the exercise of (state) authority.[283] The people mandate a representative institution through regular elections to exercise state power and to take political decisions on behalf of them within the available constitutional framework.[284] Given that the people legitimize the exercise of state power, it must be possible

283 Cf. the explicit wording of Article 20 (2) (1) GG: 'All state authority derives from the people.'; Cf. as well: Huster and Rux, 'Art. 20 GG – Bundesstaatliche Verfassung; Widerstandsrecht' paras 62, 66-68a; Grzeszick, 'Art. 20 GG' para 61; Lars Vinx, 'The Incoherence of Strong Popular Sovereignty' (2013) 11 International Journal of Constitutional Law 101, 114-115; Sennekamp, 'Alle Staatsgewalt geht vom Volke aus! – Demokratieprinzip und Selbstverwaltung der Justiz'; Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* paras 130-133; Rudolf Weber-Fas, *Das Grundgesetz* (Duncker & Humblot 1983) 52-53.

284 *Lisbon-judgment* para 216; Cf. as well: Dietlein, 'Art. 79 GG – Änderungen des Grundgesetzes' para 16.1; Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 150.

to trace state actions back to the people.[285] The German Parliament is directly legitimized and can enact laws through which implementing powers can be conferred upon, for example, the government. The resulting governmental acts can then be traced back to the parliamentary law and ultimately the people. Here, a legitimization chain emerges, which constitutes the backbone of German representative democracy and which illustrates that the people form the conceptual starting point of state authority.[286]

This triggers the question *who* the people in the sense of Article 20 (2) (1) GG are. The Constitutional Court concluded that the term refers to the German people,[287] which corresponds to the scope of the German Constitution.[288] The Court highlighted that Article 20 (2) (1) GG refers to the 'people' and *not* to affected individuals, which implies a particular connection to the state. The German people have a particular bond with the German state, which distinguishes them from other individuals.[289] As this special bond is required, only German nationals can participate in the process of legitimizing state action under the German Constitution.[290] According to Article 38 (1) GG, only Germans, constitutionally defined as individuals with German nationality in the

285 2 BvF 3/89 *Right to Vote for Foreigners II* [1990] (German Federal Constitutional Court) para 39; Cf. as well: Schröder, 'Das Demokratieprinzip des Grundgesetzes' 814; Terhechte, 'Souveränität, Dynamik und Integration – Making Up the Rules As We Go Along? – Anmerkungen zum Lissabon-Urteil des Bundesverfassungsgerichts' 726; Christian Burkiczak, 'Die verfassungsrechtlichen Grundlagen der Wahl des Deutschen Bundestages' (2009) 49 Juristische Schulung (JuS) 805, 806.

286 Schröder, 'Das Demokratieprinzip des Grundgesetzes' 814; Andreas Voßkuhle and Anna-Bettina Kaiser, 'Grundwissen – Öffentliches Recht: Demokratische Legitimation' (2009) 49 Juristische Schulung (JuS) 803, 804; Matthias Jestaedt, 'Demokratische Legitimation – quo vadis?' (2004) 44 Juristische Schulung (JuS) 649, 650.

287 *Lisbon-judgment* para 281; Cf. as well: Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 148; Kottmann and Wohlfahrt, 'Der gespaltene Wächter? Demokratie, Verfassungsidentität und Integrationsverantwortung im Lissabon-Urteil' 446.

288 Hans H. Klein, 'Art. 145 GG' in Theodor Maunz and Günter Düring (eds), *Grundgesetz-Kommentar* (92nd edn, C.H. Beck 2020) para 13; Kottmann and Wohlfahrt, 'Der gespaltene Wächter? Demokratie, Verfassungsidentität und Integrationsverantwortung im Lissabon-Urteil' 446; On the scope of application of the German Constitution, cf. *Law on Direct (Financial) Support* paras 34-36; 1 BvR 102/51 *Decision on the Consumer Mortgage Law* [1953] (German Federal Constitutional Court) para 48.

289 2 BvF 2, 6/89 *Right to Vote for Foreigners I* [1990] (German Federal Constitutional Court) para 56; *Right to Vote for Foreigners II* para 59.

290 Cf. as well the additional categories included in Article 116 (1) GG for individuals with a special status under the German Constitution, Schröder, 'Das Demokratieprinzip des Grundgesetzes' 810; Ewgenij Sokolov, 'Wege zur Partizipation für Inländer – Volksbegriff und Einbürgerung im Lichte des Demokratieprinzips' (2016) 35 Neue Zeitschrift für Verwaltungsrecht (NVwZ) 649, 650.

sense of Article 116 GG,[291] enjoy the right to vote in federal and regional elections.[292]

Taken together, all state action has to be directly or indirectly legitimized by the people.[293] Under the current German Constitution, the legitimization subject is defined as German people.[294] However, the Constitutional Court highlighted that the German Parliament can modify the composition of the people by changing the nationality rules.[295] Nevertheless, it seems unlikely that a European people could emerge under the current German Constitution.[296]

4.2.1.2 Elections as mechanism to determine representation

The mandating of the exercise of public power by the people occurs through elections, which have to comply with the basic requirements established in Article 38 (1) (1) GG. These entail that elections are direct, regular, allow for free choice with secret ballot and that each vote casted has an equal success rate.[297] This equally impacts the composition of the German Parliament.[298]

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291 *Right to Vote for Foreigners II* para 38; Cf. as well: Herdegen, 'Art. 79 GG' para 135; Sokolov, 'Wege zur Partizipation für Inländer – Volksbegriff und Einbürgerung im Lichte des Demokratieprinzips' 653-654; Burkiczak, 'Die verfassungsrechtlichen Grundlagen der Wahl des Deutschen Bundestages' 806.

292 *Quantitative Easing (PSPP) Reference* paras 45-46; *Final OMT-Judgment* paras 122-126; *Lisbon-judgment* paras 130-133; Cf. as well: Schröder, 'Das Demokratieprinzip des Grundgesetzes' 810-811; Kottmann and Wohlfahrt, 'Der gespaltene Wächter? Demokratie, Verfassungsidentität und Integrationsverantwortung im Lissabon-Urteil' 444; Terhechte, 'Souveränität, Dynamik und Integration – Making Up the Rules As We Go Along? – Anmerkungen zum Lissabon-Urteil des Bundesverfassungsgerichts' 726.

293 Through legitimization chain, cf. *Procedure to Prohibit the Political Party NPD* para 545; *Right to Vote for Foreigners II* para 40; Cf. as well: Pieroth, 'Das Demokratieprinzip des Grundgesetzes' 481; Voßkuhle and Kaiser, 'Grundwissen – Öffentliches Recht: Demokratische Legitimation' 804.

294 Klein, 'Art. 38 GG' para 68.

295 Given that Article 116 GG is not covered by the *eternity clause*, as pointed out by the Court, cf. *Right to Vote for Foreigners I* para 56.

296 Huster and Rux, 'Art. 20 GG – Bundesstaatliche Verfassung; Widerstandsrecht' paras 136-137; Grzeszick, 'Art. 20 GG' para 268; Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 144-145; Schröder, 'Das Demokratieprinzip des Grundgesetzes' 812; Kottmann and Wohlfahrt, 'Der gespaltene Wächter? Demokratie, Verfassungsidentität und Integrationsverantwortung im Lissabon-Urteil' 464-465; Voßkuhle and Kaiser, 'Grundwissen – Öffentliches Recht: Demokratische Legitimation' 804-805; Terhechte, 'Souveränität, Dynamik und Integration – Making Up the Rules As We Go Along? – Anmerkungen zum Lissabon-Urteil des Bundesverfassungsgerichts' 728-729.

297 As highlighted by the *Bundesverfassungsgericht*, these election principles are rooted in Art. 20 (2) GG, cf. 2 BvR 1953/95 *Bavarian Municipal Elections* [1998] (German Federal Constitutional Court) paras 62-65; Cf. as well: Klein, 'Art. 38 GG' paras 82-86.

298 Meaning, for example, that every parliamentarian is representing a comparable number of voters, cf. 2 BvF 3/11, 2 BvR 2670/11, 2 BvE 9/11 *New Allocation of Seats in the German Parliament* [2012] (German Federal Constitutional Court) paras 52-57; Cf. as well Heiko

Namely, it requires that the *Bundestag* represents the vote and views of the people accurately.[299] The equal representation requirement renders degressive proportionality for a directly representative institution incompatible with German democracy.[300] Such degressive representation, for example employed within the European Parliament, is only permissible for indirectly representative bodies such as the German Federal Council.[301]

The only institution that is directly elected by the entire German people is the German Parliament.[302] It constitutes the primary institutional representation directly accountable to the people and enjoys the highest degree of democratic-political authority.[303] Although the Constitutional Court highlighted that democracy did not shield the existing German institutional set-up, it established that the process of determining a representing institution through free, equal and fair elections constituted a core component of German democracy.[304]

4.2.1.3 Legitimizing object: Components allowing for a political process

The final component of German democracy is state authority. Through elections the people mandate the exercise of state powers for a determined time. Yet, the exercise of public authority presupposes that state powers exist in the first

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Holste, 'Demokratie wieder flott gemacht: Das neue Sitzzuteilungsverfahren im Bundeswahlgesetz sichert das gleiche Wahlrecht' (2013) 32 Neue Zeitschrift für Verwaltungsrecht (NVwZ) 529, 529; Burkiczak, 'Die verfassungsrechtlichen Grundlagen der Wahl des Deutschen Bundestages' 808.

299 Martin Morlok and Hana Kühr, 'Wahlrechtliche Sperrklauseln und die Aufgaben einer Volksvertretung' (2012) 52 Juristische Schulung (JuS) 385, 388.

300 Schröder, 'Das Demokratieprinzip des Grundgesetzes' 813; Morlok and Kühr, 'Wahlrechtliche Sperrklauseln und die Aufgaben einer Volksvertretung' 387; Kottmann and Wohlfahrt, 'Der gespaltene Wächter? Demokratie, Verfassungsidentität und Integrationsverantwortung im Lissabon-Urteil' 453.

301 Cf. the logic employed by the German Constitutional Court in relation to the degressive proportionality that applies to the European Parliament, cf. *Lisbon-judgment* paras 281-286; Cf. as well Matthias Ruffert, Friederike Grischek and Moritz Schramm, 'Europarecht im Examen: Grundfragen und Organisationsstruktur' (2019) 59 Juristische Schulung (JuS) 974, 977; Burkiczak, 'Die verfassungsrechtlichen Grundlagen der Wahl des Deutschen Bundestages' 808; Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* paras 153-154.

302 Klein, 'Art. 38 GG' paras 30-31; Herdegen, 'Art. 79 GG' para 127; Schröder, 'Das Demokratieprinzip des Grundgesetzes' 814; Gött, 'Die ultra vires-Rüge nach dem OMT-Vorlagebeschluss des Bundesverfassungsgerichts' 516, 527; Pieroth, 'Das Demokratieprinzip des Grundgesetzes' 477; Voßkuhle and Kaiser, 'Grundwissen – Öffentliches Recht: Demokratische Legitimation' 804.

303 The government is indirectly legitimized through the parliament, cf. Schröder, 'Das Demokratieprinzip des Grundgesetzes' 814; Voßkuhle and Kaiser, 'Grundwissen – Öffentliches Recht: Demokratische Legitimation' 804.

304 Rooted in human dignity and the non-discrimination doctrine, cf. *Final OMT-Judgment* para 124; *New Allocation of Seats in the German Parliament* para 52; *Lisbon-judgment* para 211; *Bavarian Municipal Elections* paras 62-65.

place[305] and that the German Parliament can take political decisions.[306] Subsequently, representatives have to justify their political decisions in front of the voter in order to secure re-election.[307] During elections, political parties compete with ideas on how to fill the political space available. Two main conclusions result from this.

First, the Constitutional Court emphasizes the importance of a plural, party-political environment for the principle of democracy itself. Only if political parties offer alternatives do voters have a choice. Therefore, the protection of political parties occupies a crucial role in the German constitutional logic.[308] It is a precondition for the democratic political process. Second, the *Bundesverfassungsgericht* established that the elected institution has to preserve central political decision-making powers over time.[309] In other words, German democracy requires that the directly legitimized institution retains the ability to take decisions in core political areas, including citizenship rules, military operations, fiscal and budgetary decisions, criminal law and cultural questions according to the Constitutional Court.[310] It should be emphasized that this

305 *Lisbon-judgment* para 250: '[...] Democracy first and foremost lives on, and in, a viable public opinion that concentrates on central acts of determination of political direction and the periodic allocation of highest-ranking political offices in the competition of government and opposition. [...]'; *Quantitative Easing (PSPP) Reference* para 56; *Final OMT-Judgment* paras 124, 135-138; Cf. as well: Wolfram Cremer, 'Lissabon-Vertrag und Grundgesetz' (2010) 32 JURA – Juristische Ausbildung 296, 299-300; Kottmann and Wohlfahrt, 'Der gespaltene Wächter? Demokratie, Verfassungsidentität und Integrationsverantwortung im Lissabon-Urteil' 447-448.

306 Schröder, 'Das Demokratieprinzip des Grundgesetzes' 814; Gött, 'Die ultra vires-Rüge nach dem OMT-Vorlagebeschluss des Bundesverfassungsgerichts' 516, 527; Voßkuhle and Kaiser, 'Grundwissen – Öffentliches Recht: Demokratische Legitimation' 804.

307 As well as changing previous parliamentary decisions, cf. 2 BvL 1/12 *Relation Between International Law and the German Legal Order* [2015] (German Federal Constitutional Court) para 53.

308 Article 21 GG awards political parties with an explicit constitutional recognition, cf. *Procedure to Prohibit the Political Party NPD* paras 516-517; 2 BvF 1/65 *Party-Financing I* [1966] (German Federal Constitutional Court) paras 136-139; 1 BvB 1/51 *Procedure to Prohibit the Political Party SRP* [1952] (German Federal Constitutional Court) para 34; Cf. as well: Klein, 'Art. 21 GG' paras 5, 12-13.

309 *Final OMT-Judgment* paras 127-128; *Lisbon-judgment* paras 211-212; 2 BvF 1/92 *Participation Law Schleswig-Holstein* [1995] (German Federal Constitutional Court) paras 137, 141-143; Cf. as well: Dietlein, 'Art. 79 GG – Änderungen des Grundgesetzes' para 36.

310 *Lisbon-judgment* para 252; Although it is unclear whether these areas protect German democracy or statehood, cf. Herdegen, 'Art. 79 GG' paras 177-178.

selection of the Court was criticized as arbitrary[311] and the extent of required protection of the enlisted competence areas remains unclear.[312]

Overall, German democracy appears to presuppose a political space in which voters can chose between competing political programs and in which the elected institution can take own, political decisions. Hence, the principle of democracy contains a temporal dimension that secures decision-making powers at the parliamentary level over time, which limits the political space available to the current representatives.[313]

4.2.1.4 Delegation of public authority

As illustrated in *Figure 7* above, all outlined components are interrelated. The German people determine their representatives through elections which then exercise political authority. Thus, the core task of democracy is to secure the delegation of state authority to an institutional representation. Yet, the preservation of political discretion at the level of institutional representation does not prevent the delegation of public authority to the EU.[314]

Namely, Article 23 (1) (2) GG empowers parliament to engage in EU integration steps without putting parliamentary powers into question. Arguably, EU action is based on parliamentary approval and future parliaments retain the possibility to initiate EU Treaty-change or to withdraw from the EU.[315] Therefore, it can be argued that the German Parliament retains crucial political decision-making abilities, despite continuous EU integration. Nevertheless, parliament has to consider the impact of an envisaged conferral on the political

311 Particularly, given that the *Bundesverfassungsgericht* justifies the selected competence areas merely by stating that these areas where 'since always' part of a constitutional state, cf. *Lisbon-judgment* para 252; As for example criticized by: Schwerdtfeger, 'Europäisches Unionsrecht in der Rechtsprechung des Bundesverfassungsgerichts – Grundrechts-, ultra-vires- und Identitätskontrolle im gewaltenteiligen Mehrebenensystem' 293-294; Kottmann and Wohlfahrt, 'Der gespaltene Wächter? Demokratie, Verfassungsidentität und Integrationsverantwortung im Lissabon-Urteil' 460-461.

312 Particularly given the active position that the Court has taken in defining these competences, cf. Zwingmann, 'The Continuing Myth of Euro-Scepticism? The German Federal Constitutional Court Two Years After *Lisbon*' 690; Cremer, 'Lissabon-Vertrag und Grundgesetz' 300; Kottmann and Wohlfahrt, 'Der gespaltene Wächter? Demokratie, Verfassungsidentität und Integrationsverantwortung im Lissabon-Urteil' 460-461.

313 As highlighted by the Court, when emphasizing that political decision must be reversible, cf. *Relation Between International Law and the German Legal Order* para 53; Also raised during the Eurocrisis, cf. *Quantitative Easing (PSPP) Reference* para 56; *ESM-Treaty and Fiscal Compact (interim relief)* para 106; *Financial Support for Greece and EFSF* paras 121-124.

314 Herdegen, 'Art. 79 GG' paras 131-132; Calliess, '70 Jahre Grundgesetz und europäische Integration: 'Take back control' oder 'Mehr Demokratie wagen'?' 686; Schröder, 'Das Demokratieprinzip des Grundgesetzes' 816.

315 Alexander Thiele, 'Der Austritt aus der EU – Hintergründe und rechtliche Rahmenbedingungen eines 'Brexit'' (2016) 51 Europarecht (EuR) 281, 291-292; Although, Germany might be constitutionally required to engage in other forms of supranational European cooperation, cf. Thomas Groß, 'Erlaubt das Grundgesetz einen Austritt aus der EU?' (2018) 53 Europarecht (EuR) 387, 403-404.

space that remains at the disposition of future parliaments.[316] As it stands, the *Bundestag* represents the primary layer of legitimization and has to remain in charge of central political decisions. The primary aim of the German Constitutional Court in its conception of democracy seems to be to ensure that the political process remains centrally at the national level – insisting that an opening of this process to the EU is impossible, given that no comparable accountability and legitimation exists.[317]

4.2.1.5 Resulting challenge for EU (fiscal) integration

The Court's conception of German democracy leads to several points of conflict with EU fiscal integration.[318] A first challenge is the conception of the legitimization subject as the 'German people'.[319] The German Court negated that this 'German people' could evolve into a 'European people' based on various constitutional arguments. First, the German Constitution is limited in its scope to Germany.[320] Second, the German Constitution was constituted by the German people and is expression of their decision to organize the German state in its current manner.[321] As becomes obvious when considering the constitutions in other Member States, these fundamental constitutional

316 *ESM-Treaty and Fiscal Compact (interim relief)* paras 120, 124.

317 *Lisbon-judgment* para 213; As the European Parliament remains a representation of the Member States and not a European people, cf. Schorkopf, 'Case Nos. 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, and 2 BvR 182/09 – 123 BVerfGE 267 (2009)' 264; Kottmann and Wohlfahrt, 'Der gespaltene Wächter? Demokratie, Verfassungsidentität und Integrationsverantwortung im Lissabon-Urteil' 452-453.

318 Calliess, 'Konfrontation statt Kooperation zwischen BVerfG und EuGH? Zu den Folgen des Karlsruher PSPP-Urteils' 898-899; Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 152-153; Nettesheim, 'Verfassungsrecht und Politik in der Staatsschuldenkrise' 1410; Kottmann and Wohlfahrt, 'Der gespaltene Wächter? Demokratie, Verfassungsidentität und Integrationsverantwortung im Lissabon-Urteil' 460-461.

319 As was noted, the German Constitutional Court employed 'Deutsches Volk' written with a capital letter and therefore used as an established expression, as opposed to 'deutsches Volk', which was the previous way the Court employed the concept and as would be the case if 'German' functions grammatically as an adjective, cf. Kottmann and Wohlfahrt, 'Der gespaltene Wächter? Demokratie, Verfassungsidentität und Integrationsverantwortung im Lissabon-Urteil' 445.

320 Klein, 'Art. 145 GG' para 13; Kottmann and Wohlfahrt, 'Der gespaltene Wächter? Demokratie, Verfassungsidentität und Integrationsverantwortung im Lissabon-Urteil' 446; Weber-Fas, *Das Grundgesetz* 21-22; Walther Fürst and Günther Hellmuth, *Grundgesetz – Das Verfassungsrecht der Bundesrepublik Deutschland in den Grundzügen* (Studienbücher Rechtswissenschaft, 3. edn, Verlag W. Kohlhammer 1982) para 27.

321 Pieroth, 'Das Demokratieprinzip des Grundgesetzes' 476; Klaus Kröger, *Grundrechtsentwicklung in Deutschland – von ihren Anfängen bis zur Gegenwart* (Mohr Siebeck 1998) 78-83; Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law – The Theory and Practice of Weimar Constitutionalism* 177-178; Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* 17-21; Fürst and Hellmuth, *Grundgesetz – Das Verfassungsrecht der Bundesrepublik Deutschland in den Grundzügen* paras 26-27.

decisions vary based on national history and constitutional ambition.[322] As the Court highlighted, the people have to be construed as the collective of people with German nationality.[323] Although, the legislator can change the rules on nationality following Article 73 (1) No. (2) GG,[324] this does not entail an opening of democratic rights beyond the scope of the German Constitution. Yet, the German Parliament can confer competences to the EU.[325] When transferring such competences, the directly legitimized parliament mandates the EU with the exercise of specific powers. This initial parliamentary approval is the basis for EU action. Therefore, the EU act is based on the German parliamentary mandate, which establishes a link to the German people. Consequently, the 'German people' as core component of German democracy appear to only emerge as limiting factor for EU fiscal integration that challenges the Member States' (political) existence and that entails the creation of a 'European people' as new – not even partial – legitimizing-subject.[326]

The more immediate limiting factors for less far-reaching fiscal integration steps are the core material competences that the Constitutional Court portrayed as essential for the political process, which are summarized in *Figure 8*.[327] According to the Court, these competences are particularly relevant for the political process[328] and have to remain under direct control of the German

322 Cf. for example the variation in the concept of *constitutional identity*, Polzin, 'Constitutional Identity, Unconstitutional Amendments and the Idea of Constituent Power: The Development of the Doctrine of Constitutional Identity in German Constitutional Law' 433-438; Or in relation to the design of constitutional courts, cf. Vanberg, *The Politics of Constitutional Review in Germany* 17; Or in relation to the national enabling clauses, cf. Häberle, *Das Grundgesetz zwischen Verfassungsrecht und Verfassungspolitik* 448-456.

323 *Right to Vote for Foreigners I* para 56; Cf. as well: Sokolov, 'Wege zur Partizipation für Inländer – Volksbegriff und Einbürgerung im Lichte des Demokratieprinzips' 650; Pieroth, 'Das Demokratieprinzip des Grundgesetzes' 476; Voßkuhle and Kaiser, 'Grundwissen – Öffentliches Recht: Demokratische Legitimation' 803.

324 Following the procedure in Article 79 (2) GG, cf. *Right to Vote for Foreigners I* para 56.

325 *Lisbon-judgment* para 226; *Maastricht-Judgment* para 136; Cf. as well: Terhechte, 'Souveränität, Dynamik und Integration – Making Up the Rules As We Go Along? – Anmerkungen zum Lissabon-Urteil des Bundesverfassungsgerichts' 727.

326 Kottmann and Wohlfahrt, 'Der gespaltene Wächter? Demokratie, Verfassungsidentität und Integrationsverantwortung im Lissabon-Urteil' 448-449.

327 Möllers and Redcay, 'Das Bundesverfassungsgericht als europäischer Gesetzgeber oder als Motor der Union?' 415-417.

328 *Quantitative Easing (PSPP) Reference* para 56; *Final OMT-Judgment* para 214; *ESM-Treaty and Fiscal Compact (interim relief)* para 109; *Lisbon-judgment* paras 262-264; Cf. as well: Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 142-143; Möllers and Redcay, 'Das Bundesverfassungsgericht als europäischer Gesetzgeber oder als Motor der Union?' 415-417; Terhechte, 'Souveränität, Dynamik und Integration – Making Up the Rules As We Go Along? – Anmerkungen zum Lissabon-Urteil des Bundesverfassungsgerichts' 731.

Parliament.[329] Otherwise, the political powers of the German Parliament could be undermined by supranational decisions and the German people could no longer effectively scrutinized political decision-making.[330]

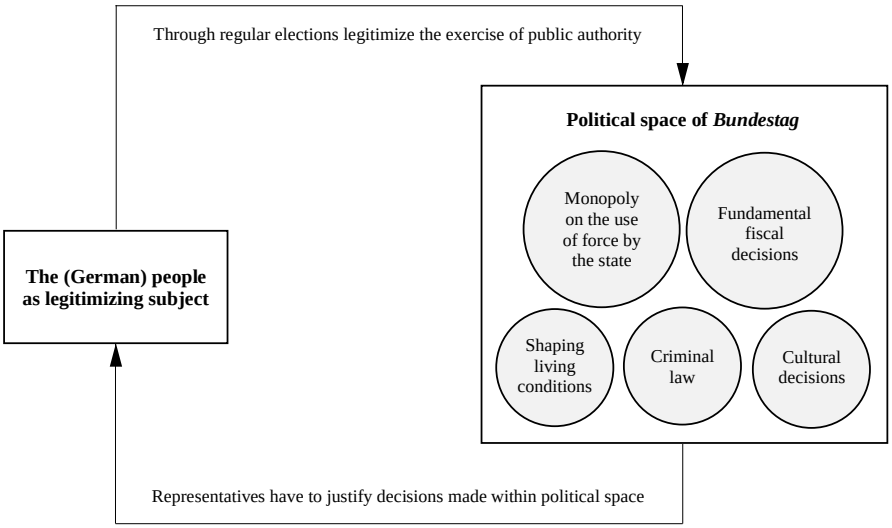

Figure 8: Democratic political space at disposition of Bundestag

Although the identification of particular material policy areas under Article 79 (3) GG is novel and, until now, only occurred towards EU integration proposals,[331] some similarity with the established internal constitutional jurisprudence can be observed. Notably, the German constitutional order contains so-called legislative[332] and parliamentary reservations.[333] According to these

329 *Lisbon-judgment* paras 250-252; Cf. as well: Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 142-143; Polzin, 'Constitutional Identity, Unconstitutional Amendments and the Idea of Constituent Power: The Development of the Doctrine of Constitutional Identity in German Constitutional Law' 429-431; Zwingmann, 'The Continuing Myth of Euro-Scepticism? The German Federal Constitutional Court Two Years After *Lisbon*' 689-691; Schorkopf, 'Case Nos. 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, and 2 BvR 182/09 – 123 BVerfGE 267 (2009)' 264; Cremer, 'Lissabon-Vertrag und Grundgesetz' 302-303.

330 *Lisbon-judgment* paras 262-264.

331 Extending to protecting German statehood, cf. Schröder, 'Das Demokratieprinzip des Grundgesetzes' 816; Schorkopf, 'Case Nos. 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, and 2 BvR 182/09 – 123 BVerfGE 267 (2009)' 264; Cremer, 'Lissabon-Vertrag und Grundgesetz' 304.

332 In German: *Vorbehalt des Gesetzes*.

reservations, central political decisions have to be taken by parliament in a legislative act.[334] Furthermore, certain decisions cannot be delegated and have to be taken by parliament, given their inherent political nature. The German Court applies a *case to case* assessment in order to determine whether measures fall under such reservation.[335] This assessment includes the primary question of whether a legislative act is required, but also subsequently how the matter has to be regulated.[336] The Court found, for example, that the peaceful use of nuclear energy,[337] the deployment of chemical weapons,[338] the conditions for the keeping of laying hens,[339] as well the German spelling reform,[340] fall within the ambit of particularly important decisions that require a legislative act. Furthermore, certain matters are considered to be so essential that only parliament can decide them. A prominent example is the deployment of the German army, which constitutes a historically rooted[341] parliamentary reservation.[342] Overall, the concepts of parliamentary and legislative reservation indicate that specific *internal* decisions require direct involvement of the German Parliament.

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333 In German: *Parlamentsvorbehalt*; The German constitution requires in certain areas that the legislator adopts a law that lays down all central (political) decision, which constitutes then a reservation of law (a formal legislative act is required in this case); in contrast, certain matters may not be delegated but have to be decided by the parliament, so they form a reservation of parliament, which the Constitutional Court described as a reservation of law without delegation possibility, cf. 2 BvF 4/98 *High Financial Authority* [2002] (German Federal Constitutional Court) paras 88-90; Cf. as well: Wissenschaftlicher Dienst des Deutschen Bundestages, *Reichweite der Wesentlichkeitslehre – Grenzfälle der Wesentlichkeit (WD 3 – 3000 – 043/15)* (Deutscher Bundestag, 2015) 4-5; Pieroth, 'Das Demokratieprinzip des Grundgesetzes' 477-478; Voßkuhle and Kaiser, 'Grundwissen – Öffentliches Recht: Demokratische Legitimation' 804.

334 Andreas Voßkuhle, 'Grundwissen – Öffentliches Recht: Der Grundsatz des Vorbehalts des Gesetzes' (2007) 47 Juristische Schulung (JuS) 118, 118.

335 2 BvL 8/77 *Peaceful Use of Nuclear Energy in Germany* [1978] (German Federal Constitutional Court) para 77; Cf. as well: Voßkuhle, 'Grundwissen – Öffentliches Recht: Der Grundsatz des Vorbehalts des Gesetzes' 119.

336 Based on the 'essentiality theory', cf. Pieroth, 'Das Demokratieprinzip des Grundgesetzes' 477-478; Voßkuhle, 'Grundwissen – Öffentliches Recht: Der Grundsatz des Vorbehalts des Gesetzes' 119.

337 *Peaceful Use of Nuclear Energy in Germany*.

338 2 BvR 624, 1080, 2029/83 *Deployment of Chemical Weapons* [1987] (German Federal Constitutional Court).

339 2 BvF 3/90 *Conditions for the Keeping of Laying Hens* [1999] (German Federal Constitutional Court).

340 1 BvR 1640/97 *German Spelling Reform* [1998] (German Federal Constitutional Court).

341 *German Participation in NATO Actions* para 330.

342 As established by the *Bundesverfassungsgericht*, cf. Ibid; Cf. as well: Mattias G. Fischer and Manuel Ladiges, 'Evakuierungseinsätze der Bundeswehr künftig ohne Parlamentsvorbehalt' (2016) 35 Neue Zeitschrift für Verwaltungsrecht (NVwZ) 32, 32; Terhechte, 'Souveränität, Dynamik und Integration – Making Up the Rules As We Go Along? – Anmerkungen zum Lissabon-Urteil des Bundesverfassungsgerichts' 730-731.

Interestingly, the Court refrains internally from defining entire competence areas under such reservations. Instead, it requires a *case-to-case* assessment in which the policy area as well as the concrete measures envisaged are evaluated in order to determine whether parliament was (and can be in the future) sufficiently involved.[343] This differs from the Court's EU approach, where entire competence areas were marked as particularly important for parliament. At least two explanations might be relevant here.

First, in contrast to *internal* shifts of competences, the conferral of competences to the EU is more difficult to reverse, simply because other Member States have to jointly agree on a possible Treaty-changes or the German Parliament could otherwise only decide to withdraw based on Article 50 TEU.[344] Also, the 'return' of competences from the supranational to the national level is not part of the EU logic that conceptualizes European integration as process that strives for an 'ever-closer Union'. Thus, even if the Constitutional Court would find that EU actions required additional legitimization by the German Parliament, it is questionable whether such a judicial view could be adequately respected. This risk does not emerge in the same manner internally, given that the German Court is the undisputed final arbiter and other German institutions have to implement its rulings.

Second, the protected areas are connected to competences that are traditionally attributed to a sovereign state.[345] Thus, by identifying these areas as components of the *eternity clause*, the Constitutional Court equally preserves German sovereignty and statehood, which ultimately secures the Court's own powerful position in the German constitutional order.[346]

Based on these findings it appears that EU fiscal integration steps should award a decisive role to national parliaments in the EU-level decision-making process. The central involvement of national parliaments could preserve the central position and final authority of Member States in decisions on the identified core state competences – which are closely linked with German democracy according to the jurisprudence of the German Constitutional Court. Moreover, the central involvement of national parliaments would ultimately preserve the national constitutional authorities' oversight, which seems to constitute a particularly important concern of the German Constitutional Court. Taken together, this indicates that EU fiscal integration is not necessarily incompatible with German democracy – rather specific forms of EU fiscal integration that merely aim at centralizing powers at the EU level appear

343 Given that the Court employs a flexible and open approach, cf. Bundestages, *Reichweite der Wesentlichkeitslehre – Grenzfälle der Wesentlichkeit (WD 3 – 3000 – 043/15)* 6-7.

344 Although this raises constitutional concerns in itself, cf. Groß, 'Erlaubt das Grundgesetz einen Austritt aus der EU?' 403-404.

345 Herdegen, 'Art. 79 GG' para 178; Schröder, 'Das Demokratieprinzip des Grundgesetzes' 816.

346 Mayer, 'Rashomon in Karlsruhe: A Reflection on Democracy and Identity in the European Union' 774.

incompatible with the current interpretation of German democracy. Thus, following the jurisprudence of the German Constitutional Court, it seems that the design of EU fiscal integration steps ultimately determines their constitutional attainability.

4.2.2 Overall budgetary responsibility

Based on the outlined competence-based core of German democracy, the Constitutional Court developed the concept of *overall budgetary responsibility*[347].[348] Since its first explicit formulation in the judgment on the Greek loan package and the EFSF,[349] the *Bundesverfassungsgericht* employed *overall budgetary responsibility* as the main constitutional vehicle to decide on the compatibility of various Eurocrisis-related measures with the German Constitution.[350] The underlying premise of *overall budgetary responsibility* is that central budgetary and fiscal decisions have to be made by the democratically legitimized representation of the German people, the German Parliament.[351]

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347 In German: *haushaltspolitische Gesamtverantwortung*.

348 Since defining budgetary and fiscal matters as part of the material core of the *eternity clause* in the *Lisbon*-decisions, cf. *Lisbon-judgment* paras 250-252 (issued in June 2009); subsequently refined in the Eurocrisis-related jurisprudence, cf. *Financial Support for Greece and EFSF* (issued in September 2011); *Participation of Members of German Parliament in the EFSF* (issued in February 2012); *Right to Participation for German Parliament at the Occasion of ESM-Treaty and Euro-Plus-Pact* (issued in June 2012); *ESM-Treaty and Fiscal Compact (interim relief)* (issued in July 2012); *OMT-reference* (issued in January 2014); *ESM-Treaty and Fiscal Compact*(issued in March 2014); *Final OMT-Judgment* (issued in June 2016); *Quantitative Easing (PSPP) Reference* (issued in July 2017); *Quantitative Easing (PSPP) Final Judgment* (issued in May 2020); Cf. as well Calliess, 'Constitutional Identity in Germany – One for Three or Three in One?' 164-165; Ohler, 'Rechtliche Maßstäbe der Geldpolitik nach dem Gauweiler-Urteil des EuGH' 1005.

349 *Financial Support for Greece and EFSF* para 120; Cf. as well: Wendel, 'Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference' 285; Zwingmann, 'The Continuing Myth of Euro-Scepticism? The German Federal Constitutional Court Two Years After *Lisbon*' 682-683; Antje von Ungern-Sternberg, 'Parliaments – Fig Leaf or Heartbeat of Democracy? German Constitutional Court – Judgment of 7 September 2011 – Euro Rescue Package' (2012) 8 European Constitutional Law Review 304, 314-315.

350 Jan-Herman Reestman, 'Legitimacy Through Adjudication: The ESM Treaty and the Fiscal Compact Before the National Courts' in Thomas Beukers, Bruno de Witte and Claire Kilpatrick (eds), *Constitutional Change through Euro-Crisis Law* (Cambridge University Press 2017) 259; Nettesheim, 'Die "haushaltspolitische Gesamtverantwortung" in der Rechtsprechung des BVerfG' 12.

351 *Quantitative Easing (PSPP) Final Judgment* para 104; *Lisbon-judgment* paras 252, 256; Cf. as well: Calliess, 'Constitutional Identity in Germany – One for Three or Three in One?' 164-165; Pilz, 'Ein Schatzamt für die Eurozone? – Überlegungen zu den Vorschlägen des Europäischen Parlaments und der Kommission zu einer Reform der Wirtschaftsunion' 643-644; Payandeh, 'The OMT Judgment of the German Federal Constitutional Court – Repositioning the Court within the European Constitutional Architecture' 408; Calliess, 'The Future of the Eurozone and the Role of the German Federal Constitutional Court' 407.

Based on this premise, the Constitutional Court introduced a competence-specific, absolute – given its partial constitutional basis in Article 79 (3) GG – limit for the conferral of fiscal and budgetary competences to the EU.[352]

The subsequent analysis focuses on the underpinning democracy-theoretical considerations (4.2.2.1.), before then considering its constitutional conditions (4.2.2.2.) as well as their concrete application (4.2.2.3.).

4.2.2.1 Underpinning democracy-theoretical considerations

Overall budgetary responsibility requires that fundamental fiscal and budgetary decisions remain under the direct control of the German Parliament.[353] The concept aims at preserving an open, democratic political process on revenue and expenditure in Germany.[354] Traditionally, budgetary and fiscal competences are characterized as core powers of modern parliaments,[355] given that most political decisions are intertwined with decisions on revenue and expenditure. Political parties campaign based on their budgetary and fiscal planning, which may include proposals on taxation or social welfare. These fiscal proposals then impact the voter's choice and consequently influence the final election result. Given this crucial link, one may conclude that budgetary and fiscal decisions are highly important competences of the German Parliament, which is reflected in the parliamentary work. For example, the annual budgetary deliberations in the parliamentary plenary are characterized by the Constitutional Court as general debates on the political work of the governing

352 Herdegen, 'Art. 79 GG' paras 182, 185; Pilz, 'Ein Schatzamt für die Eurozone? – Überlegungen zu den Vorschlägen des Europäischen Parlaments und der Kommission zu einer Reform der Wirtschaftsunion' 643-644; Franz C. Mayer, 'Rebels Without a Cause? Zur OMT-Vorlage des Bundesverfassungsgerichts' (2014) 49 Europarecht (EuR) 473, 497.

353 *Quantitative Easing (PSPP) Final Judgment* para 104; *Final OMT-Judgment* para 212; Cf. as well: Herdegen, 'Art. 79 GG' para 185; Calliess, '70 Jahre Grundgesetz und europäische Integration: 'Take back control' oder 'Mehr Demokratie wagen'?' 688; Pilz, 'Ein Schatzamt für die Eurozone? – Überlegungen zu den Vorschlägen des Europäischen Parlaments und der Kommission zu einer Reform der Wirtschaftsunion' 644; Calliess, 'Der Kampf um den Euro: Eine "Angelegenheit der Europäischen Union" zwischen Regierung, Parlament und Volk' 6-7; Herrmann, 'Die Bewältigung der Euro-Staatsschulden-Krise an den Grenzen des deutschen und europäischen Währverfassungsrechts' 807-808.

354 *ESM-Treaty and Fiscal Compact (interim relief)* para 118; Referred to as discretionary decision-making space, cf. Pilz, 'Ein Schatzamt für die Eurozone? – Überlegungen zu den Vorschlägen des Europäischen Parlaments und der Kommission zu einer Reform der Wirtschaftsunion' 644; Nettesheim, 'Die "haushaltspolitische Gesamtverantwortung" in der Rechtsprechung des BVerfG' 19.

355 Schneider, 'Exkurs: Die Rolle des Haushaltsausschusses des Bundestages bei Aufstellung und Vollzug des Haushalts – ein Praxisbericht' 295; Described as 'crown jewels' of modern parliaments by former German constitutional judge Udo di Fabio; cf. Puntscher Riekmann and Wydra, 'Representation in the European State of Emergency: Parliaments Against Governments?' 567; Traditionally, also referred to as 'regalian' powers or rights of the crown, cf. Baranger, 'The Apparition of Sovereignty' 61; Bonnie, 'The Constitutionality of Transfers of Sovereignty: the French Approach' 527.

coalition.[356] Given the importance of these competences for the political sphere, the Court concluded that a sitting parliament must be able to autonomously reverse budgetary and fiscal decisions taken by preceding parliaments.[357] Hence, the underpinning objective of *overall budgetary responsibility* is the protection of the interconnection between the democratic and the political process, which ultimately protects the 'democratic self-determination' of the people.[358]

In addition, preserving the democratic decision-making abilities of the German Parliament requires that fiscal and budgetary competences remain permanently within its powers.[359] The so-called future openness of the German budget guarantees that a newly elected *Bundestag* has the ability to take self-responsible budgetary decisions.[360] Here, the *Bundesverfassungsgericht* identified a negative obligation, namely to refrain from pre-empting budgetary powers through, for example, supranational commitments.[361] This general reversibility of fiscal decisions also requires political parties to continuously justify their fiscal decisions and budgetary planning before the voters.[362] At

356 *Financial Support for Greece and EFSF* para 123; *Lisbon-judgment* para 256; Cf. as well: Sven Simon, *Grenzen des Bundesverfassungsgerichts im europäischen Integrationsprozess*, vol 253 (Jus Publicum, Mohr Siebeck 2016) 69; De Sadeleer, 'The New Architecture of European Economic Governance' 36.

357 *Financial Support for Greece and EFSF* para 124; Cf. as well: Calliess, 'The Future of the Eurozone and the Role of the German Federal Constitutional Court' 404-405; Nettesheim, ''Euro-Rettung' und Grundgesetz – Verfassungsgerichtliche Vorgaben für den Umbau der Währungsunion' 772.

358 *Quantitative Easing (PSPP) Final Judgment* paras 99-101; *Final OMT-Judgment* paras 126, 129; *Financial Support for Greece and EFSF* para 120; *Lisbon-judgment* paras 233, 264; Cf. as well: De Sadeleer, 'The New Architecture of European Economic Governance' 36.

359 *Quantitative Easing (PSPP) Reference* para 56; *ESM-Treaty and Fiscal Compact (interim relief)* para 106; *Financial Support for Greece and EFSF* paras 121-124; Cf. as well: Herdegen, 'Art. 79 GG' paras 182, 185; Herrmann, 'Die Bewältigung der Euro-Staatsschulden-Krise an den Grenzen des deutschen und europäischen Währverfassungsrechts' 808; Nettesheim, ''Euro-Rettung' und Grundgesetz – Verfassungsgerichtliche Vorgaben für den Umbau der Währungsunion' 770.

360 *Financial Support for Greece and EFSF* para 127; *Lisbon-judgment* para 256; Cf. as well: Wendel, 'Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference' 285; Nettesheim, ''Euro-Rettung' und Grundgesetz – Verfassungsgerichtliche Vorgaben für den Umbau der Währungsunion' 772.

361 *Financial Support for Greece and EFSF* para 127; Cf. as well: Simon, *Grenzen des Bundesverfassungsgerichts im europäischen Integrationsprozess* 70; Nettesheim, 'Die "haushaltspolitische Gesamtverantwortung" in der Rechtsprechung des BVerfG' 13; Calliess, 'The Future of the Eurozone and the Role of the German Federal Constitutional Court' 411.

362 *Final OMT-Judgment* para 130; *ESM-Treaty and Fiscal Compact (interim relief)* para 122; *Financial Support for Greece and EFSF* para 127; *Lisbon-judgment* para 256.

the same time, the Court accepted parliamentary discretion to make limited budgetary and fiscal commitments at the EU-level.[363]

Finally, the German Constitution establishes the German Parliament as the central institutional decision-maker on budgetary matters.[364] Given its institutional position, it carries the overall responsibility for revenue and expenditure as well as for achieving a viable annual state budget.[365] The *Bundestag* is the institution that exercises comprehensive control over all budgetary commitments, which are cumulated in the annual budget. This annual budget serves then as legal basis for governmental and administrative measures.[366] Moreover, the German Parliament has to include in its appraisal of the annual budget broader constitutional considerations imposed by the German Constitution.[367] Hence, allocating overall responsibility for budgetary planning to the *Bundestag* ensures that the budget is both viable and compatible with wider constitutional requirements.

4.2.2.2 Requirements of budgetary responsibility

Based on these underpinning considerations, the Court identified various requirements which derive from *overall budgetary responsibility*. These can be broadly distinguished into procedural and institutional characteristics, on the one hand, and substantive characteristics, on the other hand.

On the procedural side, the German Court underscored that the constitutive approval of the German Parliament is compulsory for all budgetary and fiscal commitments that impact the German state budget.[368] Consequently, no finan-

363 The Court identified two extreme positions here, namely: No limits for the budgetary decisions taken by the current parliament, non-regarding the implications of these decisions for future parliaments and generations; the other extreme being full limitation of budgetary decisions to retain future decision possibilities, which would pre-empt all decisions by a currently sitting parliament; Cf. as well: Herdegen, 'Art. 79 GG' para 182.

364 As established in Article 110 (2) Basic Law, the annual budget has to be approved by the parliament through a legislative act, cf. Schneider, 'Exkurs: Die Rolle des Haushaltsausschusses des Bundestages bei Aufstellung und Vollzug des Haushalts – ein Praxisbericht' 295-296; Ekkehard Moeser, *Die Beteiligung des Bundestages an der staatlichen Haushaltsgewalt* (Duncker & Humblot 1978) 114-116.

365 *ESM-Treaty and Fiscal Compact (interim relief)* para 109; Cf. as well: Herrmann, 'Die Bewältigung der Euro-Staatsschulden-Krise an den Grenzen des deutschen und europäischen Währverfassungsrechts' 808.

366 *Financial Support for Greece and EFSF* para 122; *Lisbon-judgment* para 256; In fact, governmental and administrative actions are based on the budgetary planning made by the German, Parliament, cf. Moeser, *Die Beteiligung des Bundestages an der staatlichen Haushaltsgewalt* 114-116.

367 For example, the social state principle, cf. *Lisbon-judgment* para 252; Cf. as well: Herdegen, 'Art. 79 GG' para 157; Nigel Foster and Satish Sule, *German Legal System and Laws* (4. edn, Oxford University Press 2010) 188.

368 *Quantitative Easing (PSPP) Reference* para 48; *Final OMT-Judgment* para 214; *ESM-Treaty and Fiscal Compact (interim relief)* para 107; *Participation of Members of German Parliament in the EFSF* paras 109-111; *Financial Support for Greece and EFSF* para 124; Cf. as well: Reestman, 'Legitimacy Through Adjudication: The ESM Treaty and the Fiscal Compact Before the

cial burden for the German state can arise without prior parliamentary approval. This entails that the German state cannot be liable for budgetary decisions taken by third parties.[369] Instead, the German Parliament has to debate commitments with budgetary implications and evaluate possible financial benefits or risks. Furthermore, large financial commitments might require subsequent constitutive parliamentary approvals at various occasions, in case they are not sufficiently specific and financial risks are not entirely foreseeable.[370] This procedural requirement was decisive in the Court's judgments on the EFSF and ESM, where it concluded that the German Parliament's approval of the general scheme was not sufficient, but instead constitutive approvals of every country-specific financial support program drafted under these schemes were required in order to safeguard *overall budgetary responsibility*.[371] At the same time, the Court acknowledged and accepted that factual circumstances especially in crisis moments might limit parliamentary choices when approving such budgetary and fiscal commitments.[372]

In order to enable the German Parliament to comprehensively evaluate the financial benefits and risks of supranational commitments,[373] the *Bundestag* has to have all relevant information at its disposal.[374] This requirement corresponds to the internally applicable Article 114 (1) Basic Law, which requires the German Minister of Finances to inform parliament on all budgetary matters, including revenue, expenditure and possible debts.[375] Following Article 23 (2) Basic Law, the parliamentarian's right to be informed applies

National Courts' 259.

369 According to the Court, the Basic Law prohibits such automatic liability, cf. *Quantitative Easing (PSPP) Final Judgment* paras 226-227; *Quantitative Easing (PSPP) Reference* para 129; *Final OMT-Judgment* para 213.

370 Nettesheim, 'Die "haushaltspolitische Gesamtverantwortung" in der Rechtsprechung des BVerfG' 23.

371 Particularly, in order to guarantee that all essential budgetary decisions are made by parliament, cf. *Participation of Members of German Parliament in the EFSF* para 112; Cf. as well: Herdegen, 'Art. 79 GG' para 183; Calliess, 'Der Kampf um den Euro: Eine "Angelegenheit der Europäischen Union" zwischen Regierung, Parlament und Volk' 4.

372 Nettesheim, 'Die "haushaltspolitische Gesamtverantwortung" in der Rechtsprechung des BVerfG' 23; Calliess, 'Der Kampf um den Euro: Eine "Angelegenheit der Europäischen Union" zwischen Regierung, Parlament und Volk' 6-7.

373 Calliess, '70 Jahre Grundgesetz und europäische Integration: 'Take back control' oder 'Mehr Demokratie wagen'?' 688; Calliess, 'Der Kampf um den Euro: Eine "Angelegenheit der Europäischen Union" zwischen Regierung, Parlament und Volk' 4; Herrmann, 'Die Bewältigung der Euro-Staatsschulden-Krise an den Grenzen des deutschen und europäischen Währverfassungsrechts' 808.

374 *ESM-Treaty and Fiscal Compact (interim relief)* para 111; Cf. as well: Hanno Kube, 'Art. 114 GG' in Theodor Maunz and Günter Düring (eds), *Grundgesetz-Kommentar* (92nd edn, C.H. Beck 2020) paras 17-19; Gött, 'Die ultra vires-Rüge nach dem OMT-Vorlagebeschluss des Bundesverfassungsgerichts' 515.

375 *ESM-Treaty and Fiscal Compact (interim relief)* para 111.

to supranational matters, including budgetary-related decisions.[376] Based on the received information, parliament can then independently decide whether or not to engage in a proposed supranational financial commitment, warranted that this commitment is specific and limited. Thus, the Court formulated qualitative requirements for the act of approval, which mirror the constitutional requirements imposed for the transfer of competences to the EU. Namely, the conferred budgetary or fiscal competences have to be limited in their extent and the conferral has to be specific concerning the substantive and procedural conditions attached to it.[377] Therefore, the German Parliament cannot confer a so-called *carte blanche* which would empower EU institutions to determine autonomously to what extent national budgetary or fiscal powers are to be exercised at the supranational level.[378] Finally, the German Parliament is obliged to continuously monitor the exercise of the conferred powers.[379] As a general rule, the Court indicated that the parliamentary intervention and veto possibilities during the monitoring process have to be proportionate to the financial commitment made.[380] Thus, the bigger a financial commitment the more extensive parliamentary intervention possibilities have to be.

On the substantive side, the Court's jurisprudence remains abstract and broad, given that it only conducts a limited constitutional review of the inherently political decisions taken. The Court established that only an 'evident overstepping of the inner boundaries' of the principle of democracy would qualify as a violation of *overall budgetary responsibility* under Article 79 (3) Basic Law.[381] It seems that the limited review reflects the constitutionally enshrined political discretion that the German Parliament enjoys when evaluating the impact of financial commitments,[382] including possible financial risk attached to them.

When applying this limited constitutional review, the Court so far has refrained from defining any fixed sum of money or a specific percentage of the overall budget as an absolute limit for supranational financial commit-

376 Ibid para 111; *Right to Participation for German Parliament at the Occasion of ESM-Treaty and Euro-Plus-Pact* paras 116-117.

377 *ESM-Treaty and Fiscal Compact (interim relief)* paras 108, 130.

378 Which the Court termed 'blanket empowerments', cf. *ESM-Treaty and Fiscal Compact* para 160; *Lisbon-judgment* para 236; Cf. as well: Simon, *Grenzen des Bundesverfassungsgerichts im europäischen Integrationsprozess* 297.

379 Inherent in *integration responsibility* that applies to the German Parliament, cf. Nettesheim, 'Die "haushaltspolitische Gesamtverantwortung" in der Rechtsprechung des BVerfG' 23.

380 *ESM-Treaty and Fiscal Compact (interim relief)* para 110; Cf. as well: Nettesheim, 'Die "haushaltspolitische Gesamtverantwortung" in der Rechtsprechung des BVerfG' 21.

381 *Participation of Members of German Parliament in the EFSF* para 131; *ESM-Treaty and Fiscal Compact (interim relief)* para 112; Cf. as well: Simon, *Grenzen des Bundesverfassungsgerichts im europäischen Integrationsprozess* 188-189.

382 As established in Article 110 Basic Law, cf. Schneider, 'Exkurs: Die Rolle des Haushaltsausschusses des Bundestages bei Aufstellung und Vollzug des Haushalts – ein Praxisbericht' 295-296; Moeser, *Die Beteiligung des Bundestages an der staatlichen Haushaltsgewalt* 114-116.

ments.[383] Instead, it conducted the substantive assessment of the parliamentary decision based on broad guiding principles. From this jurisprudence, it can be deduced in the first place, that the Court accepted that a conferral of budgetary competences to or the engagement in financial commitments at the EU-level, as well as in relation to its Member States, can be reconciled with the German Constitution. This is illustrated by the fact that the different Eurocrisis-measures were all ultimately deemed compatible with the German Constitution.[384] This conclusion is also not altered by the recent decision on the ECB's PSP-Program. Although, the program was declared *ultra vires*, the constitutional concerns related to a procedural error in the ECB's proportionality assessment.[385] The German Court allowed for a three-month transitional period during which the ECB could remedy this error.[386] Awarding this transitional period implies that the Court considered that the ECB had the general competence to conduct such program and thus, no direct substantive incompatibility between the program and the German Constitution was established. However, within these decisions, the Court established that the *Bundestag* may not surrender to:

- either financial obligations as well as liabilities that would factually suspend German budgetary autonomy for a considerable time;[387]
- or a permanent transfer of essential budgetary powers to the EU-level, which would enable the EU to determine the type and level of German spending to a considerable degree.[388]

In case one of these two substantive conditions is violated, the German Court would likely conclude that the German Parliament would lose its ability to modify the budgetary planning and make independent fiscal decisions. By imposing these two substantive limits, the Court intends to ensure that the German Parliament remains autonomous in essential budgetary decisions.

383 *Financial Support for Greece and EFSF* paras 131-135; Cf. Payandeh, 'The OMT Judgment of the German Federal Constitutional Court – Repositioning the Court within the European Constitutional Architecture' 416.

384 *Final OMT-Judgment* paras 218-219; Cf. as well: Reestman, 'Legitimacy Through Adjudication: The ESM Treaty and the Fiscal Compact Before the National Courts' 260-261; Armin Steinbach, 'All's Well That Ends Well? Crisis Policy After the German Constitutional Court's Ruling in Gauweiler' (2017) 24 Maastricht Journal of European and Comparative Law 140, 142.

385 *Quantitative Easing (PSPP) Reference* para 232.

386 Ibid para 235.

387 *ESM-Treaty and Fiscal Compact (interim relief)* para 113; *Financial Support for Greece and EFSF* para 135; In particular no automatic liability for political decisions made by other actors, cf. *Quantitative Easing (PSPP) Final Judgment* paras 226-227; *Quantitative Easing (PSPP) Reference* para 129; *Final OMT-Judgment* para 213.

388 *Quantitative Easing (PSPP) Final Judgment* para 104; *Final OMT-Judgment* para 210-213; *ESM-Treaty and Fiscal Compact* para 163; Cf. as well: Claes and Reestman, 'The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the *Gauweiler* Case' 927.

Ultimately, the German Court saw this requirement sufficiently reflected in the EU-Treaties. Namely, the no-bail-out clause in Article 125 TFEU as well as the various requirements imposed for sustainable national budgeting and the prohibition of monetary financing presuppose that national parliaments remain responsible for their own national state budgets.[389]

4.2.2.3 Application of these requirements by the Bundesverfassungsgericht

In the concrete application of these procedural and substantive characteristics, the Constitutional Court engaged in a detailed assessment albeit mainly focusing on the procedural elements. Notably, when assessing the different Eurocrisis-related measures, the Court determined whether the supranational financial commitments were limited in volume, sufficiently specific and whether the German Parliament was able to take a free, informed decision.

In its first comprehensive Eurocrisis-related decision, the Court considered volume, purpose, objective and the specific rules attached to the first Greek loan package as well as the EFSF, in order to determine whether the German commitments complied with the outlined constitutional requirements.[390] In its assessment, the Court distinguished between the Greek loan package, which it considered sufficiently detailed and specific, and the EFSF, which only provided for a general framework for financial stabilization measures. The Court insisted that every specific program initiated under the EFSF required constitutive approval of the German Parliament. The Court noted that the German act of approval merely stated that the German Government should aim at reaching a common position on specific EFSF-programs with the German Parliament, which was deemed insufficient to warrant parliamentary budgetary prerogatives.[391] Therefore, it interpreted the act of approval as prescribing the constitutive parliamentary approval, except for emergency situations in which case the government has to seek parliamentary approval immediately after taking

389 *Quantitative Easing (PSPP) Final Judgment* paras 226-227; *Quantitative Easing (PSPP) Reference* para 56; *OMT-reference* para 28; *ESM-Treaty and Fiscal Compact (interim relief)* para 110; In his assessment, Nettesheim identifies five core components of the principle of *overall budgetary responsibility*, which correspond in main parts with the previous outline. Namely the concept requires according to his analysis: (1) no external determination of budgetary commitments; (2) the precise determination of any fiscal commitment by the German Parliament; (3) the limitation of any such commitment with predictable consequences; (4) the preservation of continuous influence of as well as the reversibility by German actors; and finally (5) the proportionality of the overall amount of the commitments, cf. Nettesheim, ''Euro-Rettung' und Grundgesetz – Verfassungsgerichtliche Vorgaben für den Umbau der Währungsunion' 773-776.

390 *Financial Support for Greece and EFSF* paras 131, 139.

391 Ibid para 128; Cf. as well: Thomas Beukers, 'The Eurozone Crisis and the Autonomy of Member States in Economic Union: Changes and Challenges' in Panos Koutrakos and Jukka Snell (eds), *Research Handbook on the Law of the EU's Internal Market* (Edward Elgar Publishing Limited 2017) 274; Ketterer, *Zustimmungserfordernis beim Europäischen Stabilitätsmechanismus* 308; Calliess, 'Der Kampf um den Euro: Eine "Angelegenheit der Europäischen Union" zwischen Regierung, Parlament und Volk' 4.

a decision.[392] Thus, the Court strengthened the position of the German Parliament in the EFSF framework and indicated that approving a general scheme, even if including a maximum volume, general conditions and objectives, was not sufficient to comply with *overall budgetary responsibility*. Instead, the German Parliament was required to approve all specific programs, assess possible financial risks and conduct an overall financial assessment. The Court further clarified that these central decisions could not be delegated to a parliamentary committee but instead, given the right of parliamentarians to equally participate in important parliamentary decisions, these decisions had to be taken in the plenary.[393]

A similar approach was followed in the examination of the ESM-Treaty, where the Court investigated in detail whether the German financial commitment of up to € 190 billion could be increased without the *Bundestag*'s approval.[394] The Court concluded that in case the ESM-Treaty would be read as to allowing the increase of the overall German liability without German parliamentary approval, such reading would violate *overall budgetary responsibility*.[395] It can be deduced from this approach that the German Parliament cannot approve an unspecific entitlement clause, according to which the EU could determine German financial commitments. The requirement that the German legislator has to take all central budgetary decision itself, which prevents it from divesting unspecified and unlimited fiscal competences to the EU-level, constitutes a specific case of *Kompetenz-Kompetenz*,[396] and was translated into the prohibition to issue a supranational blanket empowerment ('*carte blanche*').[397]

When assessing the substantive components of *overall budgetary responsibility*, the Court restricts its assessment to a highly limited 'obviousness' review of the taken measures. Namely, only a manifest and evident overstepping of German democracy is scrutinized. In relation to the EFSF and the first Greek

392 *Financial Support for Greece and EFSF* para 141.

393 *Participation of Members of German Parliament in the EFSF* paras 131, 136; Cf. as well: Christian Bumke and Andreas Voßkuhle, *German Constitutional Law – Introduction, Cases, and Principles* (Oxford University Press 2019) paras 1634-1636.

394 Calliess, 'Der Kampf um den Euro: Eine "Angelegenheit der Europäischen Union" zwischen Regierung, Parlament und Volk' 4.

395 Ohler, 'Rechtliche Maßstäbe der Geldpolitik nach dem Gauweiler-Urteil des EuGH' 1005; Instead, the German Parliament has to approve all bigger financial supports, cf. Beukers, 'The Eurozone Crisis and the Autonomy of Member States in Economic Union: Changes and Challenges' 274; Claes and Reestman, 'The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the *Gauweiler* Case' 928; Wendel, 'Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference' 267.

396 *Quantitative Easing (PSPP) Reference* para 48; *Final OMT-Judgment* paras 130-131; *ESM-Treaty and Fiscal Compact (interim relief)* para 105.

397 *ESM-Treaty and Fiscal Compact* para 160; *Lisbon-judgment* para 236; Cf. as well: Simon, *Grenzen des Bundesverfassungsgerichts im europäischen Integrationsprozess* 297.

loan package, the Court concluded that the combined commitment of up to € 170 billion did not pre-empt the budgetary autonomy of the German Parliament for a considerable time, even though this amount was considerably bigger than half of the then enacted annual federal budget.[398] In relation to the ESM-Treaty, the German Court applied a similarly limited review. It found that the ESM commitment amounting to € 190 billion constituted a predictable financial risk compared to the hardly predictable financial consequences for future parliaments in case no supranational steps were taken.[399]

A similar reasoning was employed by the Court in its constitutional appraisal of the German debt break, which was introduced into Article 109 (3) GG in 2009. Notably, the Court highlighted that the immediate limitation of budgetary autonomy through constitutionally enshrined debt limits was required to preserve the ability of future parliaments to take autonomous budgetary decisions.[400] This implies that not establishing such a debt limit could negatively affect the political space for budgetary decisions. Overall, this highlights that the Court conducts a limited material review of the decisions and tends to follow the assessment made by the competent German institution.

In its more recent jurisprudence, the Constitutional Court established that *overall budgetary responsibility* might also be at risk through commitments made by the European Central Bank and the Eurosystem.[401] The Court identified two particularly contentious constitutional matters. First, the distinction between monetary and economic policies, which according to the Court ultimately relates to the compliance of EU institutions with the principle of conferral.[402] And second, the possible implications of ECB monetary programs

398 The annual federal budget was about €307 billion for the year 2012, cf. German Federal Ministry of Finance, 'Haushaltsrechnung des Bundes für das Haushaltsjahr 2012' (*German Government*, 2013) <https://www.bundesfinanzministerium.de/Content/DE/Standardartikel/Themen/Oeffentliche_Finanzen/Bundeshaushalt/Haushalts_und_Vermoegensrechnungen_des_Bundes/2013-06-13-haushaltsrechnung-des-bundes-2012.pdf?__blob=publicationFile&v=1> accessed 20 December 2020 2.

399 *ESM-Treaty and Fiscal Compact (interim relief)* para 167.

400 *Financial Support for Greece and EFSF* para 131; *ESM-Treaty and Fiscal Compact (interim relief)* para 120.

401 Polzin, 'Constitutional Identity, Unconstitutional Amendments and the Idea of Constituent Power: The Development of the Doctrine of Constitutional Identity in German Constitutional Law' 430-431; Particularly, compared with the original reference, where the Constitutional Court suggested that the ECB exceeded its competences, cf. *OMT-reference* paras 87-94; Cf. as well: Lang, 'Ultra Vires Review of the ECB's Policy of Quantitative Easing: An Analysis of the German Constitutional Court's Preliminary Reference Order in the PSPP case.' 927.

402 *Quantitative Easing (PSPP) Final Judgment* paras 138, 159-160; *Final OMT-Judgment* paras 144-145; Cf. as well: Steinbach, 'All's Well That Ends Well? Crisis Policy After the German Constitutional Court's Ruling in Gauweiler' 142.

for the German state budget – and thus parliamentary *overall budgetary responsibility*.[403]

Regarding the distinction between monetary and economic policies, which triggered considerable academic debate,[404] suffice it here to point to the possible repercussions of an unclear, unspecific conferral of competences to the EU-level. Following the German Court, the competence distinction between monetary and economic policies is crucial, given that Member States attached different (procedural) modalities to these competence areas.[405] Thus, the Court invoked the principle of conferral and highlighted that the allocation of competences established in the EU-Treaties had to be respected by EU institutions. Otherwise, the national principles of democracy and sovereignty could be undermined.[406] The *OMT*- and the *PSPP*-proceedings clearly illustrate the importance of a workable and judicially controllable conferral of powers. Given that EU fiscal integration will necessarily affect important national competences, a legally clear-cut, unambiguous conferral seems a fundamental first step to reduce the potential risk of *ultra vires* proceedings before the *Bundesverfassungsgericht*.

In relation to the possible budgetary implications of the ECB's programs, the German Court argued that due to the participation of the German Central Bank in the implementation of the ECB's monetary policies, the German federal budget might potentially be affected. As the Court highlighted, the German Parliament might be constitutionally obliged to refinance the German Central Bank in case of losses which could result from such ECB programs, given that Article 88 Basic Law presupposes the credibility and functioning of the *Bundesbank*.[407] In such a situation a risk for the budgetary autonomy of the German Parliament could materialize, specifically in light of the volume of the PSP-Program. The Court emphasized that such a program could under no circumstances be employed to 'redistribute sovereign debt' of other Member States and thereby create an automatic liability for budgetary decisions of third parties.[408] It however accepted that the '[...] scheme for the allocation of risk

403 *Quantitative Easing (PSPP) Final Judgment* paras 222, 227; *Quantitative Easing (PSPP) Reference* para 126; *Final OMT-Judgment* paras 216-217; Cf. as well: Takis Tridimas and Napoleon Xanthoulis, 'A Legal Analysis of the Gauweiler Case – Between Monetary Policy and Constitutional Conflict' (2016) 23 Maastricht Journal of European and Comparative Law 17, 20.

404 Payandeh, 'The OMT Judgment of the German Federal Constitutional Court – Repositioning the Court within the European Constitutional Architecture' 410; Tridimas and Xanthoulis, 'A Legal Analysis of the Gauweiler Case – Between Monetary Policy and Constitutional Conflict' 23-26; Thomas Beukers, 'The Bundesverfasungsgericht Preliminary Reference on the OMT Program: "In the ECB We Do Not Trust. What About You?"' (2014) 15 German Law Journal 343, 345-354.

405 *Quantitative Easing (PSPP) Final Judgment* para 142; *Final OMT-Judgment* paras 193-196.

406 *Quantitative Easing (PSPP) Final Judgment* paras 138, 159-160.

407 Ibid paras 222, 227; *Quantitative Easing (PSPP) Reference* para 126; *Final OMT-Judgment* paras 216-217.

408 *Quantitative Easing (PSPP) Final Judgment* paras 222, 227; *Final OMT-Judgment* paras 213-214.

between the national central banks provided for in Art. 6 (3) of Decision 2015/774 [...]' constituted a sufficient safeguard for *overall budgetary responsibility*.[409] On the one hand, this emphasizes the importance of the constitutive, informed approval of the German Parliament regarding budgetary commitments. On the other hand, it indicates that the Court is willing to accept safeguards implemented at EU-level to preserve German budgetary autonomy. And finally, the German Court established through its decisions on the *OMT*- and the *PSP*-Program, that such programs can be validly initiated on the basis of the ECB's monetary policy prerogative without conflicting with German *overall budgetary responsibility*.

4.2.2.4 Conclusion on overall budgetary responsibility

Taken together, *overall budgetary responsibility* appears to be a strict substantive limit which could reduce the constitutional space available for EU fiscal integration. Yet, in the concrete application of this limit, the German Constitutional Court confirmed the broad political discretion of the German Parliament when deciding on supranational financial commitments. Notably, as to substantive limits, the Court only conducts a limited review restricted to 'manifest oversteppings'.[410]

Furthermore, *overall budgetary responsibility* requires that the German Parliament can take central budgetary decisions autonomously from supranational obligations. Therefore, the parliamentary approval for supranational financial commitments or liabilities has to be constitutive.[411] It also entails that financial commitments remain limited in volume and specific in their objectives. In short, the German Parliament has to remain the central institution that decides on whether and how to commit. This can occur by either attaching strict conditions, as the case with the first Greek loan package,[412] or by requiring additional subsequent parliamentary approvals when deciding on the use of the committed funds, as visible in relation to the ESM.[413] Given these requirements, the Constitutional Court continuously emphasized that Germany cannot automatically assume liability for political decisions made by other Member States. Such automatism would neither be specific and unlimited, nor would it presuppose parliamentary approval. This suggests for EU fiscal integration steps that national parliaments must retain a central role in the administration of fiscal powers and be able to effectively oppose decisions, to guarantee that the democratic self-determination of the national people is warranted.

409 *Quantitative Easing (PSPP) Final Judgment* para 222.

410 As highlighted by the Court in the OMT- and the Quantitative Easing-cases, it tries to avoid interfering in the political decision-making process, cf. *Quantitative Easing (PSPP) Reference* paras 53, 58; *Final OMT-Judgment* paras 155-156; It was however question whether the Court achieved this, cf. *OMT-reference* dissenting opinion Lübbe-Wolff para 2.

411 *Quantitative Easing (PSPP) Final Judgment* paras 222, 227; *Final OMT-Judgment* paras 213-214.

412 *Financial Support for Greece and EFSF* para 139.

413 *ESM-Treaty and Fiscal Compact (interim relief)* paras 168-171.

4.2.2.5 Possible double standard in conception of overall budgetary responsibility
When comparing the internal and the EU-related constitutional assessment of budgetary decisions or fiscal commitments a variable benchmark for the appraisal can again be identified. As with the previous double standard in the interpretation of the standing requirements and the *eternity clause*, the exclusive application of *overall budgetary responsibility* to EU matters can be questioned, given that the concept's underlying intention to preserve parliamentary budgetary prerogatives as well as its constitutional basis in Articles 20 (1) and (2) GG in conjunction with Article 79 (3) GG equally apply internally.[414]

– *Constitutional scrutiny of the German budget*
The German Constitution contains a specific section on public finances in Articles 104a to 115 GG. Of particular importance are Article 109 GG, which establishes general principles of public budgeting including the constitutional debt break, Article 110 GG, which establishes the requirements for the annual budgetary planning, as well as Article 115 GG on the conditions for public borrowing. Despite the interconnection between budgetary and fiscal matters with the principle of democracy, the Constitutional Court refrained from connecting the *eternity clause* to this internal financial constitutional framework. Instead, it relied on the specific constitutional financial framework when assessing *internal* budgetary or fiscal commitments. In addition, the Court emphasized the discretion of the constitution-amending legislator when modifying the constitutional financial framework,[415] without indicating that this discretion could possibly be limited by the *eternity clause*. Given that internal financial and budgetary commitments are only assessed on the basis of this specific framework, the Court therefore refrained from identifying potentially absolute constitutional limits to such commitments and focused on procedural constitutional requirements.

Notably, internally the German Constitutional Court established that the principles of completeness and punctuality of the annual German federal state budget are fundamental features of the parliamentarian budgetary rights.[416] First, this entails that all federal expenditure and revenue is included in the annual budget to enable parliament to undertake an accurate budgetary

414 Nettesheim, 'Die "haushaltspolitische Gesamtverantwortung" in der Rechtsprechung des BVerfG' 13-14.

415 2 BvF 1/04 *Statute on the Federal Supplementary Budget* [2007] (German Federal Constitutional Court) paras 132-133; 2 BvF 1/82 *Public Debt Level* [1989] (German Federal Constitutional Court) paras 75, 88.

416 *Statute on the Federal Supplementary Budget* para 75; determined in Article 115 (1) (1) GG, cf. Ekkehart Reimer, 'Art. 110 GG – Haushaltsplan des Bundes' in Volker Epping and Christian Hillgruber (eds), *Beck Online Kommentar zum Grundgesetz* (45th edn, C.H. Beck 2020) paras 24-25; Kube, 'Art. 110 GG' paras 91-95.

planning.[417] In essence, the *Bundestag* has to be fully informed by the government on all fiscal and budgetary commitments before approving the annual budgetary planning.[418] Second, parliament has to be informed on planned spending in advance.[419] Here, a temporal dimension is added to the principle of completeness enabling the *Bundestag* in return to predict the development of the German state budget. This ensures the accuracy of the fiscal planning and it is crucial for the democratic process. In EU-related cases, similar procedural guarantees apply. Before engaging in any supranational financial commitment, parliament has to be fully informed and debate the implications of such commitment.[420] Furthermore, *overall budgetary responsibility* establishes that parliament is 'master of its decisions', which requires that EU fiscal and budgetary commitments are limited and that parliament retains a continuous influence on the decision-making process.[421] Contrasting the internal and the external approach, it is striking that both require parliament to be fully informed, which cements the institutional position of the German Parliament as guardian of the state budget externally and internally. Yet, as the Court relies internally on Article 110 GG and externally on Article 20 (1) and (2) GG in conjunction with Article 79 (3) GG,[422] different constitutional conditions apply. Whereas Article 110 GG may be modified,[423] the external approach is protected against constitutional changes through the *eternity clause*.

Furthermore, public borrowing appears relevant given its implications for future parliaments which is a core element of *overall budgetary responsibility*. In relation to the *internally* applicable Article 115 (1) GG, the Constitutional Court highlighted that the rules on borrowing relate to the principle of democracy[424] as they guarantee that future parliaments can decide independently on revenue and expenditure.[425] Therefore, any current decision should take the fiscal choices of future parliaments into due account. Obviously, the Court adds a negative obligation to the parliamentary budgetary rights within its internal jurisprudence. This negative obligation is reflected externally in *overall budgetary responsibility*. Here, the Court established that a pre-emption of fiscal

417 *Statute on the Federal Supplementary Budget* para 75; Including possible risks, cf. 2 BvL 1, 4, 6, 16, 18/99, 2 BvL 1/01 *Obligatory Information Concerning Extra Public Charge* [2003] (German Federal Constitutional Court) para 121; 2 BvL 12, 13/88, 2 BvR 1436/87 *Constitutionality of Establishing a Marketing Fund* [1990] (German Federal Constitutional Court) para 83; Cf. as well Kube, 'Art. 110 GG' paras 91-92.

418 *Statute on the Federal Supplementary Budget* paras 132-133; *Public Debt Level* paras 75, 88.

419 *Statute on the Federal Supplementary Budget* para 79.

420 *ESM-Treaty and Fiscal Compact (interim relief)* para 111.

421 Ibid para 170; *Financial Support for Greece and EFSF* para 120.

422 *Financial Support for Greece and EFSF* para 127.

423 As it is not explicitly covered by the *eternity clause*, cf. for example Herdegen, 'Art. 79 GG' para 14.

424 *Statute on the Federal Supplementary Budget* para 211; *Public Debt Level* para 90.

425 *Statute on the Federal Supplementary Budget* para 211; *Public Debt Level* para 90.

competences is not compatible with the German Constitution.[426] In both cases, the principle of democracy contains an obligation to refrain from excessively diminishing future budgetary abilities, either by engaging in too high debts or by transferring too far-reaching fiscal competences to the EU. Therefore, fiscal competences have to be utilized whilst respecting the rights of future parliaments. However, it should be emphasized that neither the Constitutional Court nor the constitution-amending legislator have so far been able to effectively limit an increasing debt burden and to guarantee decision-making space for future parliaments. As will be illustrated subsequently, most of the German state budget is predetermined by long-term political decisions.[427] Yet, this factual 'reduction' of direct budgetary decision-making abilities is not characterized as unconstitutional internally, although a comparable loss of budgetary autonomy through EU commitments would be likely interpreted as a violation of the *eternity clause* externally.[428] Again, this varying constitutional conclusion appears to be affected by the constitutional framework that the German Constitutional Court considers applicable. Whereas the Court seemingly relies *internally* on the (mainly procedural) framework provided by the German Constitution which awards great discretion to the parliament in its fiscal decisions, the German Court employs *overall budgetary responsibility* to define absolute limitations to the European integration process. The Court, thus, appears to formulate fewer substantive limitations *internally* compared to its EU-related approach.

Albeit this divagating appraisal might stem from the different nature of the inherent risk of the financial commitment for the German constitutional order, it raises concerns regarding the continuous application of the *eternity clause*. As shown, the *eternity clause* aims to protect democracy regardless of the state level that is affected. However, in its assessment of budgetary and fiscal matters, the Constitutional Court appears to differentiate between *internal* and *EU-related* situations. Notably, in EU-related cases the Court relies on the *eternity clause* to determine the compatibility of fiscal and budgetary decisions with the German Constitution. Internally the Court relies on the specific framework provided for in Articles 104a to 115 GG. And although the Constitutional Court connected this financial framework to democracy and federalism,[429] both protected by the *eternity clause*, it refrained from pronouncing similarly strict limits for *internal* decisions. Following the Court's conclusion that budgetary matters are central for the democratic process,[430] it would

426 *ESM-Treaty and Fiscal Compact* para 169.

427 Kube, 'Art. 110 GG' para 41; Wolfgang Streeck and Daniel Mertens, 'An Index of Fiscal Democracy (2010)' MPIfG Working Paper <https://www.mpifg.de/pu/workpap/wp10-3.pdf> accessed 20 December 2020 9-12.

428 *Financial Support for Greece and EFSF* paras 121, 135.

429 Herdegen, 'Art. 79 GG' paras 140-144, 162; Dietlein, 'Art. 79 GG – Änderungen des Grundgesetzes' paras 33-49, 52.

430 *Lisbon-judgment* paras 244, 250.

appear imperative to similarly relate the internal financial framework directly to the *eternity clause*.

– *Reduced budgetary space*

The factual development of the German budget is equally illustrative of an apparent double standard in the conception of budgetary decision-making. Research shows that the German Parliament is increasingly constrained in budgetary decisions. These constraints mainly result from long-term political decisions, which were taken in the past but continue to have considerable impact on the current budgeting. Although parliament has to approve the entire budget for a budgetary year, these long-term decisions continue to affect the discretion of the budgetary legislator.[431] The research conducted by *Streeck* and *Mertens* suggests that the share of so-called discretionary spending decreased from about 40% in 1970 to less than 20% in 2010.[432] Accordingly, the German Parliament had only some form of discretion in relation to 20% of the annual German federal state budget in 2010. The other 80% were predetermined by decisions taken by former parliaments.[433] The share of discretionary spending is even lower when including social security contribution into this calculation. If included, the share of discretionary spending reduces to about 8% in 2008. This corresponds to the findings of *Kube* which indicate that the German budgetary legislator has less than 10% of the annual budget at its discretionary disposition.[434] It also reflects a global trend,[435] for example visible in the research conducted by *Steuerle* on the US,[436] where the share of discretionary revenue available to US budgetary legislator decreased from about 60% in 1970 to no discretion for the collected revenue in 2009.[437] The figures indicate that in 2009 all revenue was absorbed by long-term policy decisions taken by previous legislators. Given these long-term

431 Streeck and Mertens, 'An Index of Fiscal Democracy (2010)' 8; Cf. as well: Lobna Abdellatif and others, 'Transparency of law making and fiscal democracy in the Middle East' (2019) 43 Public Sector Economics 49, 53.

432 Streeck and Mertens, 'An Index of Fiscal Democracy (2010)' 7-8.

433 Ibid 10-11.

434 Kube, 'Art. 110 GG' para 41.

435 Other examples include, for example, the Czech Republic, where the share of discretionary spending dropped from about 28% in 1995 to about 8% in 2009, cf. Vojtěch Roženský, 'Mandatory Expenditure and the Flexibility of Fiscal Policy in the Czech Republic (in Czech: Mandatorní Výdaje A Flexibilita Fiskální Politiky V Čr)' (2012) 60 Politická ekonomie 40, 47, 57; Similar trends were also observed in the Middle East, cf. Abdellatif and others, 'Transparency of law making and fiscal democracy in the Middle East' 53-54, 71.

436 C. Eugene Steuerle, 'America's Related Fiscal Problems' (2010) 29 Journal of Policy Analysis and Management 876, 878; Streeck and Mertens, 'An Index of Fiscal Democracy (2010)' 6-8; Cf. as well: Abdellatif and others, 'Transparency of law making and fiscal democracy in the Middle East' 52-53.

437 Steuerle, 'America's Related Fiscal Problems' 877; Streeck and Mertens, 'An Index of Fiscal Democracy (2010)' 7.

policy decisions, all revenue was factually spent before the budgetary legislator even started debating the budget for 2009.[438]

Considering the research on Germany, the general trend suggests that the German Parliament is increasingly constraint in its budgetary decisions.[439] Although it could be submitted that the German Parliament remains formally in charge, as it has to approve the annual budget,[440] the factual development suggests that this approval does not equal a free decision on budgetary commitments. An illustrative example is German social expenditure, which increased from a share of 24,1% of the annual federal budget in 1970 to a peak of 53,9% in 2010 – as illustrated in *Figure 9*. The current trend suggests that social expenditure stabilized at around 50% to 52% of the annual federal expenditure. One explanation for this increase is the rise in the median age in Germany to 45,9 years in 2017,[441] which puts considerable pressure on the welfare system. The increased median age results for example in higher costs for health care and lower contributions, given the decreasing number of working taxpayers that sustain the system.[442] Also, changing governments have seemingly inflated social expenditure by establishing additional social benefits, as *Thiele* points out.[443]

Figure 9 depicts an almost steady increase in social expenditure which arguably contributes to the reduced parliamentary discretion when adopting the German federal state budget. Social expenditure is a policy area which relies on long-term policy decisions given that legal entitlements derive from social policy commitments. These commitments can be characterized as short-term mandatory expenditure,[444] as a newly elected parliament is bound by these commitments. And although over half of the German budget is committed to long-term social welfare policy, no constitutional violation of the parliamentary budgetary prerogatives was established by the German Constitutional Court as these commitments remain formally reversible.

438 Abdellatif and others, 'Transparency of law making and fiscal democracy in the Middle East' 52.

439 Streeck and Mertens, 'An Index of Fiscal Democracy (2010)' 8-11.

440 Kube, 'Art. 110 GG' para 54; Reimer, 'Art. 110 GG – Haushaltsplan des Bundes' paras 7-8.

441 Together with Italy, Germany had the highest median age in 2017, cf. Eurostat Online Publications, 'Population Structure and Ageing' (*Eurostat*, 2019) <https://ec.europa.eu/eurostat/statistics-explained/pdfscache/1271.pdf> accessed 20 December 2020 3-4.

442 Ibid 5.

443 Alexander Thiele, 'The 'German Way' of Curbing Public Debt: The Constitutional Debt Brake and the Fiscal Compact – Why Germany Has to Work on Its Language Skills' (2015) 11 European Constitutional Law Review 30, 30-31.

444 Streeck and Mertens, 'An Index of Fiscal Democracy (2010)' 11.

Fiscal Year[445]	Total fed. expenditure (in Mio. EURO)	Social expenditure in Mio. EURO)	Social Expenditure in relation to total fed. expenditure (in %)
1970	44.985	10.861	24,1
1980	110.291	27.291	24,7
1990	194.381	40.676	20,9
2000	244.405	94.802	38,8
2005	259.849	129.064	49,7
2010	303.700	163.612	53,9
2015	311.400	153.571	49,3
2016	317.100	159.964	50,4
2017	330.700	167.707	50,7
2018	343.600	172.137	50,1
2019	356.400	179.537	50,4
2020	363.200	183.065	50,4
2021	369.300	189.927	51,4
2022	375.500	194.160	51,7

Figure 9: Total German Federal Expenditure and Social Expenditure 1970-2022

Consequently, a core premise underlying the proclaimed *overall budgetary responsibility* can be challenged, notably that the German Parliament directly controls all central budgetary decisions. As became apparent from the previous assessment, major parts of the budget are predetermined by long-term policy decisions, which reduces parliamentary possibilities. Two points of reflection should be raised here. First, the German Parliament seems factually not to control all central budgetary decisions. Instead, it approves annually financial commitments that largely stem from previous parliamentary decisions.[446]

445 The author would like to thank W. Streeck and D. Mertens for providing their data set on the German Fiscal Democracy Index, which served as a basis for the calculations; Furthermore, the budgetary planning 2011-2015, 2016-2020, 2017-2021 and 2018-2022 of the German Ministry of Finance was consulted for the additional fiscal years from 2010-2022; social expenditure corresponds to the budgetary position 'Soziale Sicherung' in the budgetary planning; Cf. for the document: German Government, *Unterrichtung durch die Bundesregierung – Finanzplan des Bundes 2018 bis 2022 (Drucksache 19/3401)* (German Government 2018); German Government, *Unterrichtung durch die Bundesregierung – Finanzplan des Bundes 2017 bis 2021 (Drucksache 18/13001)* (German Government 2017); German Government, *Unterrichtung durch die Bundesregierung – Finanzplan des Bundes 2016 bis 2020 (Drucksache 18/9201)* (German Government 2016); German Government, *Unterrichtung durch die Bundesregierung – Finanzplan des Bundes 2011 bis 2015* (German Government 2011).

446 Kube, 'Art. 110 GG' para 41; Streeck and Mertens, 'An Index of Fiscal Democracy (2010)' 10-11.

This observation challenges the very conception of *overall budgetary responsibility*, which presupposes that the German Parliament is taking all central budgetary decisions itself. Second, the internal experience indicates that it might be necessary to make long-term policy decisions, which then necessarily impact budgetary discretion of future parliaments. One example is pension policy, where long-term commitments are essential to provide individuals with long-term stability. It can be argued that the same logic applies to EU commitments, which require a dedicated (budgetary) commitment to create long-term social, economic and political stability at the supranational level.

– *Interim conclusion: Relaxed approach towards overall budgetary responsibility?*
Overall, both observations support the hypothesis that the German Constitutional Court conducts a partially inconsistent assessment of budgetary and fiscal commitments. As highlighted, *internally* the Court is reluctant to scrutinize parliamentary budgetary decisions and thereby tends to respect the underpinning political choices. Although the Court emphasized that the applicable budgetary constitutional framework is closely related to the principle of democracy, it refrained from employing the *eternity clause*. This could be explained by the more specialized constitutional framework that the Court has at its disposition in order to adjudicate on budgetary and fiscal matters *internally*. Namely, Articles 104a to 115 GG provide a comprehensive framework for internal budgeting. In contrast, in EU matters the Court has no comparable constitutional framework, which could explain the fallback to Article 79 (3) GG.

Moreover, the assessment illustrates that the Court awards a wide discretion in fiscal and budgetary matters *internally* which is apparent in the decreasing discretionary share of the annual German federal state budget.[447] Facing the factual impact of these long-term decisions on the German state budget, the Constitutional Court emphasized that these decisions did not legally limit the discretion of parliament and were therefore permissible.[448] Yet, the factual limitations challenges the underlying claim of *overall budgetary responsibility*, namely that the German Parliament has to remain in charge of all central budgetary decisions. The previous assessment highlights that, although one might claim that parliament is formally taking all these decisions, the political decision-making space is clearly reduced. Possibly, the application of a similar approach in EU affairs could result in a more relaxed constitutional approach to additional fiscal EU commitments.

447 Streeck and Mertens, 'An Index of Fiscal Democracy (2010)' 10-11; Cf. as well: Kube, 'Art. 110 GG' para 41.

448 *Statute on the Federal Supplementary Budget* para 144.

4.2.3 German sovereignty

The assessment of democracy and *overall budgetary responsibility* indicates that the Court seems to construe these principles together with sovereignty. This is apparent from the concept of *popular sovereignty* and in the Court's emphasis that fiscal decision-making powers constitute core sovereign competences. However, German sovereignty constitutes a historically disputed constitutional concept. When enacting the *Grundgesetz* in 1949, the Federal Republic of Germany was still formally occupied by the Allied Forces.[449] Only the 'Bonn-Paris Conventions' ended the occupation status and recognized Germany's general rights as a sovereign state. Therefore, the concept of sovereignty was not included in the original text of the *Grundgesetz* and is until today not explicitly mentioned.[450] Not introducing an explicit provision on sovereignty appears to have been a deliberate choice of the constitution-giving committee.[451] Yet, certain constitutional principles imply the existence of sovereignty. For example, the preamble identifies the German people as constituting power which presupposes that the German people can constitute sovereign power in the first place. The same logic applies to the *eternity clause*, which distinguishes between the constituting and the constituted powers, as well as Article 20 (2) (1) GG which states that all state power derives from the people.[452] In these examples, sovereignty is an underlying component or prerequisite for the constitutional claim.

A similar understanding can be observed in the constitutional jurisprudence. In a first step, the Court clarified that the *Grundgesetz*'s conception of sovereignty differed significantly from 'a self-serving and self-glorifying concept of sovereign statehood'.[453] Instead, it subscribed to an open conception of statehood that allowed for supranational and international cooperation, which it derived from the preamble as well as Articles 23 and 24 GG.[454]

449 Groß, 'Erlaubt das Grundgesetz einen Austritt aus der EU?' 393-394; Klaus Kröger, 'Die Entstehung des Grundgesetzes' (1989) 42 Neue Juristische Wochenschrift (NJW) 1318, 1319.

450 Groß, 'Erlaubt das Grundgesetz einen Austritt aus der EU?' 392, 397; Mayer, 'Rashomon in Karlsruhe: A Reflection on Democracy and Identity in the European Union' 761; Terhechte, 'Souveränität, Dynamik und Integration – Making Up the Rules As We Go Along? – Anmerkungen zum Lissabon-Urteil des Bundesverfassungsgerichts' 728; Which is also visible in the terms employed by the Court, when referring to 'sovereignty', cf. Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 148, 153-154.

451 Given that other states, including France and Italy, explicitly referred to sovereignty, cf. Groß, 'Erlaubt das Grundgesetz einen Austritt aus der EU?' 392-393.

452 Paul Konertz, 'Historische und philosophische Grundlagen der Rechtsordnung im Überblick – Am Beispiel von BGB, GG und StGB' (2019) 59 Juristische Schulung (JuS) 201, 203

453 *Lisbon-judgment* para 223.

454 Also referred to as 'cooperatives understanding of sovereignty', cf. Thym, 'Europäische Integration im Schatten souveräner Staatlichkeit – Anmerkungen zum Lissabon-Urteil des Bundesverfassungsgerichts' 560.

Based on this conception, the Court underscored that the conferral of sovereign competences to the EU was permissible under the German Constitution. Yet, the creation of a European state, and with it the renouncement of German democracy and state sovereignty, would require a constitutive vote of the German people following the prescribed procedure in Article 146 GG.[455]

As becomes obvious from its case law, the German Court conceptualizes sovereignty in conjunction with the principle of democracy when considering supranational cooperation.[456] This interrelation was accentuated by the Court in its *Lisbon*-judgment, where it characterizes sovereignty as 'a right of the people to take constitutive decisions concerning fundamental questions' regarding their own identity.[457] This shows the close interrelation of democracy and sovereignty, which is further emphasized by the Court when it speaks of the 'safeguarding of sovereignty, demanded by the principle of democracy'.[458] Resulting from the Court's jurisprudence are two fundamental requirements for EU cooperation. Firstly, the EU has to remain a derived legal order and its Member States the Masters of the Treaty.[459] Secondly, the German legislator cannot confer *Kompetenz-Kompetenz* to the EU.[460] Ultimately, both structural requirements for EU cooperation resonate with the conditions established in relation to the principle of democracy and under *overall budgetary responsibility*.

Consequently, it appears that *sovereignty* does not emerge as independent constitutional limit towards EU fiscal integration proposals. Instead, sovereignty can be characterized as an underlying component of German democracy, *overall budgetary responsibility* and the German constitutional order more generally. In addition, as sovereignty is not explicitly mentioned as *eternally protected principle* under Article 79 (3) GG, the Court will, most likely, continue to construe sovereignty in conjunction with the enumerated principles under the *eternity clause*.

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455 *Lisbon-judgment* 232; Cf. as well: Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 144-145; Vinx, 'The Incoherence of Strong Popular Sovereignty' 115; Cremer, 'Lissabon-Vertrag und Grundgesetz' 299; Thym, 'Europäische Integration im Schatten souveräner Staatlichkeit – Anmerkungen zum Lissabon-Urteil des Bundesverfassungsgerichts' 561.

456 Kottmann and Wohlfahrt, 'Der gespaltene Wächter? Demokratie, Verfassungsidentität und Integrationsverantwortung im Lissabon-Urteil' 445-446.

457 *Lisbon-judgment* para 340.

458 Ibid para 248; Although it is debatable whether sovereignty or statehood are a precondition for democracy, cf. Erik Oddvar Eriksen and John Erik Fossum, 'Bringing European Democracy Back in – or How to Read the German Constitutional Court's Libson Treaty Ruling' (2011) 17 European Law Journal 153, 166.

459 *Lisbon-judgment* para 231; Cf. as well: Cremer, 'Lissabon-Vertrag und Grundgesetz' 302-303; Thym, 'Europäische Integration im Schatten souveräner Staatlichkeit – Anmerkungen zum Lissabon-Urteil des Bundesverfassungsgerichts' 561.

460 *Lisbon-judgment* para 231; Cf. as well: Cremer, 'Lissabon-Vertrag und Grundgesetz' 303; Thym, 'Europäische Integration im Schatten souveräner Staatlichkeit – Anmerkungen zum Lissabon-Urteil des Bundesverfassungsgerichts' 561.

5 Resulting German constitutional space for EU fiscal integration steps

Overall, the assessment above illustrates that the German Constitution contains an explicit framework for EU cooperation. This framework establishes the constitutional requirements for the conferral of competences as well as a procedural framework for the engagement of German institutions in the exercise of conferred competences at EU-level. Following Article 23 (1) (2) GG, the German legislator can decide to confer budgetary and fiscal competences on the EU. Depending on the impact of such conferral on the German Constitution, a qualified majority might be required. During the Eurocrisis, the various measures with significant budgetary and financial implications were considered to require such a two-thirds majority.[461] For the envisaged EU fiscal integration steps, this suggests that the qualified majority requirement will likely apply.

In addition, EU integration has to comply with the *eternity clause*,[462] which seemingly constitutes the most significant limitation to EU fiscal integration steps in Germany.[463] Of particular relevance are German democracy and *overall budgetary responsibility*.[464] These require that all central decisions on revenue and expenditure are made by the German Parliament as demo-

461 As established in relation to the Fiscal Compact and the ESM-Treaty, cf. FDP, *Drucksache 17/9046 – Gesetzentwurf der Fraktionen der CDU/CSU und FDP: Entwurf eines Gesetzes zu dem Vertrag vom 2. März 2012 über Stabilität, Koordinierung und Steuerung in der Wirtschafts- und Währungsunion*; Cf. as well: Ketterer, *Zustimmungserfordernis beim Europäischen Stabilitätsmechanismus* 359.

462 Gärditz, 'Glaubwürdigkeitsprobleme im Unionsverfassungsrecht' 505; Calliess, '70 Jahre Grundgesetz und europäische Integration: 'Take back control' oder 'Mehr Demokratie wagen'?' 686; Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 150; Voßkuhle, 'Verfassungsgerichtsbarkeit und europäische Integration' 27.

463 Given the *eternity clause*'s conception as absolute limit, cf. *Quantitative Easing (PSPP) Final Judgment* paras 114-115; *Final OMT-Judgment* para 153; *OMT-reference* para 29; *Lisbon-judgment* para 230; Cf. as well: Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 144; Ohler, 'Rechtliche Maßstäbe der Geldpolitik nach dem Gauweiler-Urteil des EuGH' 1002.

464 The conceptual foundation of this concept was developed in the *Lisbon*-judgment, cf. *Lisbon-judgment* paras 252, 256; And most recently reiterated: *Quantitative Easing (PSPP) Final Judgment* paras 103-104; Cf. as well: Calliess, 'Constitutional Identity in Germany – One for Three or Three in One?' 164-165; Pilz, 'Ein Schatzamt für die Eurozone? – Überlegungen zu den Vorschlägen des Europäischen Parlaments und der Kommission zu einer Reform der Wirtschaftsunion' 643-644; Payandeh, 'The OMT Judgment of the German Federal Constitutional Court – Repositioning the Court within the European Constitutional Architecture' 408; Calliess, 'The Future of the Eurozone and the Role of the German Federal Constitutional Court' 407.

cratically elected representation of the German people.[465] This presupposes that all budgetary and fiscal commitments at the EU-level are approved and administered by the *Bundestag*.[466] During the Eurocrisis, the Constitutional Court, however, accepted that even major financial commitments equaling more than half of the annual German federal budget were compatible with German democracy and did not question parliament's position as the main decider on the German budget.[467] However, supranational budgetary and fiscal commitments may not put into question the overall budgetary autonomy of parliament. Finally, given that the Court connected this material limit with the *eternity clause*, the outlined limit imposes an absolute restriction to the constitutional space available to parliament when considering EU fiscal integration.[468] At the same time, the concrete application of the limit reveals judicial reluctance to scrutinize highly political decisions and an apparent focus on the procedural components of *overall budgetary responsibility*. For EU fiscal integration proposals this implies that the German Parliament has to be integrated as central decision-maker into the supranational institutional architecture. Furthermore, the recent *PSPP*-judgment illustrates the importance of an unambiguous conferral of competences, in order to pre-empt national constitutional challenges under the *ultra vires* review.[469] Ultimately, in case the Constitutional Court declares such fiscal integration steps incompatible with Article 79 (3) GG, the German legislator is prevented from participating in them.[470]

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465 *Quantitative Easing (PSPP) Final Judgment* para 104; *Final OMT-Judgment* para 212; cf. as well: Herdegen, 'Art. 79 GG' para 182; Calliess, '70 Jahre Grundgesetz und europäische Integration: 'Take back control' oder 'Mehr Demokratie wagen'?' 688; Pilz, 'Ein Schatzamt für die Eurozone? – Überlegungen zu den Vorschlägen des Europäischen Parlaments und der Kommission zu einer Reform der Wirtschaftsunion' 644; Calliess, 'Der Kampf um den Euro: Eine "Angelegenheit der Europäischen Union" zwischen Regierung, Parlament und Volk' 6-7; Herrmann, 'Die Bewältigung der Euro-Staatsschulden-Krise an den Grenzen des deutschen und europäischen Währverfassungsrechts' 807-808.

466 *Participation of Members of German Parliament in the EFSF* para 112; Cf. as well: Herdegen, 'Art. 79 GG' para 183; Calliess, 'Der Kampf um den Euro: Eine "Angelegenheit der Europäischen Union" zwischen Regierung, Parlament und Volk' 4.

467 Pilz, 'Ein Schatzamt für die Eurozone? – Überlegungen zu den Vorschlägen des Europäischen Parlaments und der Kommission zu einer Reform der Wirtschaftsunion' 644; Nettesheim, 'Die "haushaltspolitische Gesamtverantwortung" in der Rechtsprechung des BVerfG' 19.

468 *OMT-reference* para 29; *Lisbon-judgment* para 216; Cf. as well: Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 150; Wendel, 'Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference' 286; Preuss, 'The Implications of 'Eternity Clauses': the German Experience' 440.

469 *Quantitative Easing (PSPP) Final Judgment* paras 138, 159-160; *Final OMT-Judgment* paras 144-145; Cf. as well: Steinbach, 'All's Well That Ends Well? Crisis Policy After the German Constitutional Court's Ruling in Gauweiler' 142.

470 Calliess, 'Konfrontation statt Kooperation zwischen BVerfG und EuGH? Zu den Folgen des Karlsruher PSPP-Urteils' 902; Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 144-146; Wendel, 'Lisbon Before the

However, the assessment also demonstrated that the approach taken in EU matters and the interpretation of constitutional provisions – including first, the constitutionally enshrined standing requirements to initiate constitutional review, second, the *eternity clause* itself and third, the concept of *overall budgetary responsibility* developed under German democracy – result in an apparent constitutional double standard. It seems that the constitutional requirements for EU integration steps are stricter, compared to the internally adopted requirements. For example, it is more likely that constitutional proceedings against EU-related measures will be admissible compared to internal proceedings. Also, the Constitutional Court only developed a competence-based understanding of the *eternity clause* when considering EU integration steps, which it did not apply to similar internal decisions. Taken together, this indicates that additional *constitutional flexibility* for EU fiscal integration can be located and activated by applying a consistent constitutional assessment both *internally* and in EU-related situations, as will be proposed in the following.

6 Additional constitutional space by applying consistent constitutional standard

As indicated, the constitutional jurisprudence appears to entail multiple constitutional double standards at the disadvantage of EU cooperation. The German Constitutional Court seems to distinguish EU-related disputes from internal disputes, which the research detected in three different instances.

First, the assessment illustrated that it is easier to initiate constitutional proceedings against EU matters, compared to *internal* proceedings. Arguably, this resulted in the introduction of a specific EU *actio popularis* for individuals and in *intra*-institutional proceedings for institutional actors when challenging EU integration. Given that the Constitutional Court relies on the same procedural framework for both *internal* and *external* cases, the varying interpretation of this constitutional framework raises consistency concerns.

Second, considering the application of the *eternity clause*, it was argued that this constitutional mechanism is designed as *ultima ratio*, shielding the German constitutional order against fundamental structural changes.[471] In light of its historic origin, the intentional design as ultimate constitutional protection suggests the restrictive application of Article 79 (3) GG, which can

Courts: Comparative Perspectives' 125.

471 Mayer, 'Rashomon in Karlsruhe: A Reflection on Democracy and Identity in the European Union' 763; Schorkopf, 'Case Nos. 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, and 2 BvR 182/09 – 123 BVerfGE 267 (2009)' 263; Pointing out that the Court itself seems to contradict this ultima ratio status in its EU-related jurisprudence, cf. Möllers and Redcay, 'Das Bundesverfassungsgericht als europäischer Gesetzgeber oder als Motor der Union?' 425-426.

be observed in the *internal* case law of the Constitutional Court. However, in EU-related constitutional challenges the Court consistently applies Article 79 (3) GG mainly through its *constitutional identity* review. When considering for example the Eurocrisis-related case law, the proceedings involved Article 79 (3) GG, without, however, ultimately finding any EU measure in breach of the *eternity clause*.[472] One consequence of this approach is, arguably, that the clause's function as ultimate constitutional shield is weakened and it might even project the impression that the constitutional mechanism is ineffective. After all, German institutions might not perceive the *eternity clause* as a real constitutional obstacle, given that ultimately all EU integration steps taken were ultimately declared compatible with the German Constitution. A potential risk is that the *eternity clause* is watered down through this continuous application. As highlighted, the *eternity clause* is intended to apply when other constitutional protection mechanisms failed.[473] It seems that the Constitutional Court is not implementing the same range of constitutional mechanisms when confronted with EU integration matters. Applying a modified constitutional approach towards the EU would also emphasize the additional benefit that EU integration offers, namely, to shield the structural requirements included in Article 79 (3) GG through supranational cooperation. This diversification of the protection could help to stabilize the German constitutional core beyond the German Constitution.

Finally, the constitutional benchmark applied for the judicial assessment of budgetary and fiscal commitment differs. As indicated, the Court relies *internally* on the financial constitutional framework. In contrast, it relies on the principle of democracy – in conjunction with the *eternity clause* – in EU-related cases. This generates an inconsistent constitutional appraisal of such commitments. As was illustrated, the reluctant and flexible approach *internally* appears to have contributed to a factual erosion of parliamentary budgetary prerogatives. Today, the German Parliament is only taking active political decisions in relation to less than 10% of the annual federal budget.[474] Two separate conclusions were drawn on the basis of this development. First, the development of the German state budget suggests that central parts of the German budget are shaped by commitments made by previous parliaments. In its *internal* jurisprudence, the Constitutional Court relied on the fact that

472 For example, in relation to the *OMT*-reference, cf. Markus Ludwigs, 'Die Krisenpolitik der EZB zwischen Verfassungs- und Unionsrecht' (2017) 70 Neue Juristische Wochenschrift (NJW) 3563, 3563; Captured again in the metaphor of the barking dog, cf. Weiler, 'The 'Lisbon Urteil' and the Fast Food Culture' 505.

473 Underscored by the *ultima ratio* character, cf. Mayer, 'Rashomon in Karlsruhe: A Reflection on Democracy and Identity in the European Union' 763; Schorkopf, 'Case Nos. 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, and 2 BvR 182/09 – 123 BVerfGE 267 (2009)' 263.

474 Streeck and Mertens, 'An Index of Fiscal Democracy (2010)' 7-8; Cf. as well: Kube, 'Art. 110 GG' para 41.

parliament was at least theoretically able to modify such commitments. If this reasoning is accepted, one could equally indicate that EU fiscal commitments remain changeable, as the German Parliament can always withdraw from EU cooperation. Second, the *internal* developments challenge the underlying conceptual claim of *overall budgetary responsibility*. In case one accepts, indeed, that factually the German Parliament is not controlling central parts of the German state budget because of the outlined long-term decisions taken by previous parliaments, the question emerges whether the German Parliament can actually violate its budgetary responsibility through EU budgetary commitments. Thus, in case the German Parliament is factually not controlling all central budgetary commitments *internally* it is questionable whether EU fiscal commitments can actually challenge parliamentary prerogatives in the first place.

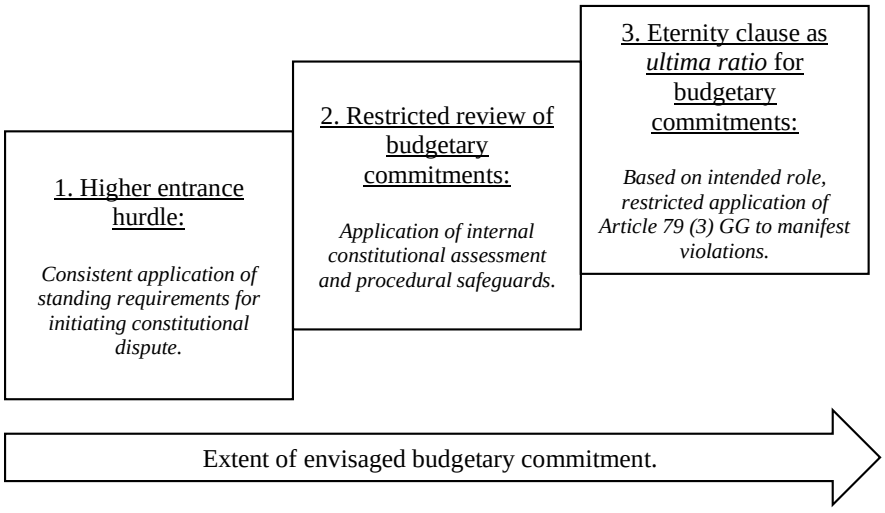

Figure 10: Roadmap to locate flexible constitutional space in Germany

The assessment has identified double standards in relation to these three points. These double standards suggest that the Constitutional Court has additional constitutional space when adjudicating on EU (integration) measures. This additional space is generated through a consistent application of the applicable constitutional framework. Concretely, a three-stepped *roadmap* is proposed to address the emerging inconsistency, which is visualized in *Figure 10.*

In the first place, the Constitutional Court could apply the constitutional standing requirements consistently. This would entail that individuals had to demonstrate how the challenged EU-related act is affecting them in their subjective constitutional rights. Clearly, the application of this requirement cannot result in a situation where every German individual that enjoys the

right to vote following Article 38 (1) GG is entitled to initiate a constitutional complaint. Instead, the Court would have to require that a specific subjective risk emerges for the applicant. Furthermore, it implies that the adversarial nature of inter-institutional proceedings is required by the Court in EU matters. In both situations, the consistent application of the constitutional standing requirements would reduce the number of admissible proceedings. Ultimately, the Constitutional Court could avoid addressing complex political questions, which the constitution-amending legislator did not intend the Court to rule on, as reflected in the constitutionally enshrined standing requirements.

Second, the Court could carefully extend the internally applicable financial constitutional framework to EU budgetary and fiscal commitments. This framework mainly relies on procedural safeguards that secure parliament's position as central budgeting authority. Relying on these procedural safeguards provides the Constitutional Court with a comprehensive constitutional framework. It would ensure compliance with the applicable procedural rules that secure parliamentary prerogatives and parliament's general political discretion. Ultimately, this would enable the Constitutional Court to reserve the application of the *eternity clause* to extreme cases, which would preserve the protective force of this important constitutional mechanism. Moreover, the limited application of Article 79 (3) GG would avoid an impossible conflict between law and politics as well as strengthen parliament in the exercise of its democratic mandate. Taken together, addressing the identified inconsistencies could ultimately generate additional constitutional space for EU fiscal integration steps by yet respecting core features of the German constitutional system and allowing for a more flexible and effective defense of German democracy than the current rigid but abstract substantive limits.