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Preliminary Version

Headnotes

to the judgment of the Second Senate of 30 June 2009

- 2 BvE 2/08 -

- 2 BvE 5/08 -

- 2 BvR 1010/08 -

- 2 BvR 1022/08 -

- 2 BvR 1259/08 -

- 2 BvR 182/09 -

1. **With its Article 23, the Basic Law grants powers to participate and develop a European Union which is designed as an association of sovereign national states (*Staatenverbund*). The concept of *Verbund* covers a close long-term association of states which remain sovereign, an association which exercises public authority on the basis of a treaty, whose fundamental order, however, is subject to the disposal of the Member States alone and in which the peoples of their Member States, i.e. the citizens of the states, remain the subjects of democratic legitimisation.**

2. **a) To the extent that the Member States elaborate the law laid down in the Treaties in such a way that, with the principle of conferral fundamentally continuing to apply, an amendment of the law laid down in the Treaties can be brought about without a ratification procedure, a special responsibility is incumbent on the legislative bodies, apart from the Federal Government, as regards participation; in Germany, participation must, on the national level, comply with the requirements under Article 23.1 of the Basic Law (responsibility for integration) and can, if necessary, be asserted in proceedings before the Federal Constitutional Court.**

   b) A law within the meaning of Article 23.1 sentence 2 of the Basic Law is not required to the extent that special bridging clauses are restricted to areas which are already sufficiently determined by the Treaty of Lisbon. Also in these cases, however, it is incumbent on the *Bundestag* and - to the extent that the legislative competences of the *Länder* are affected, on the *Bundesrat* - to comply with its responsibility for integration in another suitable manner.

3. **European unification on the basis of a union of sovereign states under the Treaties may not be realised in such a way that the Member States do not retain sufficient room for the political formation of the economic, cultural and social circumstances of life. This applies in particular to areas which shape the citizens' circumstances of life, in particular the private space of their own responsibility and of political and social security, which is protected by the fundamental rights, and to political decisions that particularly depend on previous understanding as regards culture,**

history and language and which unfold in discourses in the space of a political public that is organised by party politics and Parliament.

4. **The Federal Constitutional Court reviews whether legal instruments of the European institutions and bodies, adhering to the principle of subsidiarity under Community and Union law (Article 5.2 ECT; Article 5.1 sentence 2 and 5.3 of the Treaty on European Union in the version of the Treaty of Lisbon <TEU Lisbon>), keep within the boundaries of the sovereign powers accorded to them by way of conferred power (see BVerfGE 58, 1 <30-31>; 75, 223 <235, 242>; 89, 155 <188>: see the latter concerning legal instruments transgressing the limits). Furthermore, the Federal Constitutional Court reviews whether the inviolable core content of the constitutional identity of the Basic Law pursuant to Article 23.1 sentence 3 in conjunction with Article 79.3 of the Basic Law is respected (see BVerfGE 113, 273 <296>). The exercise of this competence of review, which is rooted in constitutional law, follows the principle of the Basic Law's openness towards European Law (*Europarechtsfreundlichkeit*), and it therefore also does not contradict the principle of loyal cooperation (Article 4.3 TEU Lisbon); with progressing integration, the fundamental political and constitutional structures of sovereign Member States, which are recognised by Article 4.2 sentence 1 TEU Lisbon, cannot be safeguarded in any other way. In this respect, the guarantee of national constitutional identity under constitutional and the one under Union law go hand in hand in the European legal area.**

FEDERAL CONSTITUTIONAL COURT

- 2 BvE 2/08 -
- 2 BvE 5/08 -
- 2 BvR 1010/08 -
- 2 BvR 1022/08 -
- 2 BvR 1259/08 -
- 2 BvR 182/09 -

Pronounced
30 June 2009
Herr
Registrar
of the Court Registry

IN THE NAME OF THE PEOPLE

In the proceedings

I. on the application to find, in *Organstreit* proceedings,

a) that the Act of 8 October 2008 on the Treaty of Lisbon of 13 December 2007 (*Gesetz vom 8. Oktober 2008 zum Vertrag von Lissabon vom 13. Dezember 2007*, Federal Law Gazette <*Bundesgesetzblatt* - BGBl> 2008 II page 1038) infringes Article 20.1 and 20.2, Article 23.1 and Article 79.3 of the Basic Law (*Grundgesetz* - GG) and violates the applicant's rights under Article 38.1 of the Basic Law,

b) that Article 1 number 1 and number 2 of the Act Amending the Basic Law (Articles 23, 45 and 93) (*Gesetz zur Änderung des Grundgesetzes <Artikel 23, 45 und 93>*) of 8 October 2008 (Federal Law Gazette I page 1926) and Article 1 § 3.2, § 4.3 number 3 and § 4.6 as well as § 5 of the Act Extending and Strengthening the Rights of the Bundestag and the Bundesrat in European Union Matters (*Gesetz über die Ausweitung und Stärkung der Rechte des Bundestages und des Bundesrates in Angelegenheiten der Europäischen Union, Bundestag* document <*Bundestags-Drucksache* - BTDrucks> 16/8489) infringe Article 20.1 and 20.2, Article 23.1 and Article 79.3 of the Basic Law and violate the applicant's rights under Article 38.1 of the Basic Law

applicant: Dr. G...,

- authorised representatives:

1. Prof. Dr. Dietrich Murswiek,
   Lindenaustraße 17, 79199 Kirchzarten,
2. Prof. Dr. Wolf-Rüdiger Bub,
   Promenadeplatz 9, 80333 Munich -

respondents: 1. German Bundestag,
represented by its President,
Platz der Republik 1, 11011 Berlin,

- authorised representative:
Prof. Dr. Dr. h.c. Ingolf Pernice,
Laehrstraße 17a, 14165 Berlin -

2. Federal Government,
represented by the Federal Chancellor,
Bundeskanzleramt, Willy-Brandt-Straße 1, 10557 Berlin,

- authorised representative:
Prof. Dr. Dr. h.c. Christian Tomuschat,
Odilostraße 25a, 13467 Berlin -

and application for a temporary injunction

and application for other remedies

- 2 BvE 2/08 -,

II. on the application to find, in *Organstreit* proceedings, that the Act of 8 October 2008 on the Treaty of Lisbon of 13 December 2007 (Federal Law Gazette 2008 II page 1038) violates the German *Bundestag*'s rights as a legislative body and is therefore incompatible with the Basic Law

applicant: DIE LINKE parliamentary group in the German Bundestag,
represented by its chairmen
Dr. Gregor Gysi, Member of the German Bundestag, and Oskar Lafontaine, Member of the German Bundestag,
Platz der Republik 1, 11011 Berlin,

- authorised representative:
Prof. Dr. Andreas Fisahn,
Universität Bielefeld,
Postfach 10 01 31, 33501 Bielefeld -

respondent: German Bundestag,
represented by its President,
Platz der Republik 1, 11011 Berlin,

- authorised representative:
Prof. Dr. Franz Mayer,
Lettestraße 3, 10437 Berlin -

and application for a temporary injunction

- 2 BvE 5/08 -,

III. on the constitutional complaint

of Dr. G...,

- authorised representatives:

1. Prof. Dr. Dietrich Murswiek,
   Lindenaustraße 17, 79199 Kirchzarten,
2. Prof. Dr. Wolf-Rüdiger Bub,
   Promenadeplatz 9, 80333 Munich -

against a) the Act of 8 October 2008 on the Treaty of Lisbon of 13 December 2007 (Federal Law Gazette 2008 II page 1038),

b) Article 1 number 1 and number 2 of the Act Amending the Basic Law (Articles 23, 45 and 93) of 8 October 2008 (Federal Law Gazette I page 1926),

c) Article 1 § 3.2, § 4.3 number 3 and § 4.6 as well as § 5 of the Act Extending and Strengthening the Rights of the Bundestag and the Bundesrat in European Union Matters (Bundestag document 16/8489)

and application for a temporary injunction

and application for other remedies

- 2 BvR 1010/08 -,

IV. on the constitutional complaint

of Prof. Dr. Dr. B...,

- authorised representatives:
Lawyers Tempel & Kollegen,
Sternstraße 21, 80538 Munich -

against the Act of 8 October 2008 on the Treaty of Lisbon of 13 December 2007 (Federal Law Gazette 2008 II page 1038)

and application for a temporary injunction

- 2 BvR 1022/08 -,

V. on the constitutional complaint of the Members of the German *Bundestag*

1. Mr. A...,

2. Dr. B...,
3. Ms B...,
4. Prof. Dr. B...,
5. Ms B...,
6. Ms B...,
7. Dr. B...,
8. Mr. C...,
9. Ms D...,
10. Dr. D…,
11. Mr. D...,
12. Dr. E...,
13. Mr. E...,
14. Mr. G...,
15. Ms G...,
16. Dr. G...,
17. Ms H...,
18. Mr. H...,
19. Mr. H...,
20. Ms H...,
21. Ms H...,
22. Dr. H...,
23. Ms J...,
24. Dr. J...,
25. Prof. Dr. K...,
26. Ms K...,
27. Ms K...,
28. Mr. K...,
29. Ms K...,
30. Mr. L...,
31. Mr. L...,
32. Ms L...,
33. Dr. L...,
34. Mr. M...,
35. Ms M...,
36. Ms M...,
37. Ms N...,
38. Mr. N...,
39. Prof. Dr. P...,
40. Ms P...,
41. Mr. R...,
42. Ms R...,
43. Mr. S...,
44. Mr. S...,
45. Prof. Dr. S...,
46. Dr. S...,
47. Dr. S...,
48. Mr. S...,
49. Dr. T...,
50. Dr. T...,
51. Mr. U...,
52. Mr. W...,
53. Ms Z...,

- authorised representative:
Prof. Dr. Andreas Fisahn,
Universität Bielefeld,
Postfach 10 01 31, 33501 Bielefeld -

against the Act of 8 October 2008 on the Treaty of Lisbon of 13 December 2007 (Federal Law Gazette 2008 II page 1038)

and application for a temporary
injunction

- 2 BvR 1259/08 -,

VI. on the constitutional complaint

1. of Prof. Dr. Dr. S...,
2. of Mr. Graf von S...,
3. of Prof. Dr. Dr. S...
4. of Prof. Dr. K...,

- authorised representative of applicants 1 to 3:
Lawyer Prof. Dr. Markus C. Kerber,
Hackescher Markt 4, 10178 Berlin -

against a) the Act of 8 October 2008 on the Treaty of Lisbon of 13 December 2007 (Federal Law Gazette 2008 II page 1038),

b) the Act Amending the Basic Law (Articles 23, 45 and 93) of 8 October 2008 (Federal Law Gazette I page 1926) and the Act Extending and Strengthening the Rights of the Bundestag and the Bundesrat in European Union Matters (Bundestag document 16/8489)

- 2 BvR 182/09 -

the Second Senate of the Federal Constitutional Court, with the participation of Judges

Voßkuhle (Vice-President),
Broß,
Osterloh,
Di Fabio,
Mellinghoff,
Lübbe-Wolff,
Gerhardt, and
Landau

issued the following

Judgment

on the basis of the oral hearing of 10 and 11 February 2009:

1. The proceedings are consolidated for joint adjudication.
2. The application made by the applicant re I. in the Organstreit proceedings is dismissed as inadmissible.
3. The application made by the applicant re II. in the Organstreit proceedings is rejected as unfounded.
4. a) The Act Extending and Strengthening the Rights of the Bundestag and the Bundesrat in European Union Matters (Bundestag document 16/8489) infringes Article 38.1 in conjunction with Article 23.1 of the Basic Law insofar as rights of participation of the German Bundestag and the Bundesrat have not been elaborated to the extent required taking into account the provisos that are specified under C. II. 3.

b) Before the entry into force of the constitutionally required legal elaboration of the rights of participation, the Federal Republic of Germany's instrument of ratification of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 (Federal Law Gazette 2008 II page 1039) may not be deposited.

5. In other respects, the constitutional complaints are rejected as unfounded.
6. The Federal Republic of Germany is ordered to reimburse the complainant re III. one half, the complainants re IV. and VI., respectively, one fourth, and the complainants re V. and the applicant re II., respectively, one third of their necessary expenses of these proceedings.

Grounds:

A.

1

The subject-matter of the *Organstreit* proceedings and constitutional complaints, which have been consolidated for joint adjudication, is the ratification of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 (OJ no. C 306/1). The proceedings relate to the German Act Approving the Treaty of Lisbon and – partly – the accompanying laws to the Act Approving the Treaty of Lisbon: The Act Amending the Basic Law (Articles 23, 45 and 93), which has already been promulgated, but not yet entered into force, and the Act Extending and Strengthening the Rights of the Bundestag and the Bundesrat in European Union Matters, which has been adopted, but not yet signed and promulgated.

I.

2

1. Like the Single European Act and the Treaties of Maastricht, Amsterdam and Nice, the Treaty of Lisbon is an international agreement. Like the Treaties of Amsterdam and Nice, it is based on Article 48 of the Treaty on European Union (TEU) of 7 February 1992 (OJ no. C 191/1; see for the latest, consolidated version OJ 2002 no. C 325/5); this means that it has come into being according to the amendment procedure provided for since the entry into force of the Treaty of Maastricht. Unlike the Single European Act and the Treaties of Amsterdam and Nice, the Treaty of Lisbon provides for a fundamental change of the existing treaty system. It dissolves the pillar structure of the European Union and formally confers legal personality to the Union. As regards its significance for the development of the European Union, it hence resembles the Treaty of Maastricht.

3

2. The Treaty of Lisbon replaces the Treaty establishing a Constitution for Europe (Constitutional Treaty) of 29 October 2004 (OJ no. C 310/1), which has not been ratified by all Member States. While the Treaty of Lisbon adopts its contents for the most part, there are differences.

4

a) aa) The entry into force of the Treaty establishing the European Coal and Steel Community from the year 1951 (Federal Law Gazette 1952 II p. 445), which had been signed in Paris, initiated the process of European integration.

5

After 1945, the European idea of a political unification of Europe had grown considerably stronger (see Loth, Der Weg nach Europa. Geschichte der europäischen Integration 1939-1957, 1990; Niess, Die europäische Idee - aus dem Geist des Widerstands, 2001; Wirsching, Europa als Wille und Vorstellung, Die Geschichte der

europäischen Integration zwischen nationalem Interesse und großer Erzählung, ZSE 2006, pp. 488 et seq.; Haltern, Europarecht, 2nd ed. 2007, marginal nos. 48 et seq.). Efforts were directed towards the foundation of United States of Europe and towards the creation of a European nation. It was intended to establish a European federal state through a Constitution. This was already made clear by the Congress of Europe, held in The Hague in 1948, with its appeal to create a federated Europe, through the formation of the European Movement which developed from it, and finally by the "Action Committee for the United States of Europe", which counted influential politicians such as Fanfani, Mollet, Wehner, Kiesinger and later on Heath, Brandt, and Tindemans among its members (see Oppermann, Europarecht, 3rd ed. 2005, § 1, marginal no. 14). From within the Council of Europe, the "Draft for a European Federal Constitution" of 6 May 1951 that had been drawn up under the chairmanship of Count Coudenhove-Kalergi, the leader of the Pan-European movement, which had already been active in the 1920s, was submitted. The draft was worked out by 70 members of the Consultative Assembly of the Council of Europe for the foundation of the "Constitutional Committee for the United States of Europe". It took as its orientation the structure of the constitutional bodies of Switzerland, with a two-chamber parliament and a governing federal council. The peoples of the Federation were intended to be represented in the House of Representatives, in proportion to their number of inhabitants, by one deputy for each million, or fraction of a million, of inhabitants (Article 9.3 of the Draft for a European Federal Constitution, reproduced in: Mayer-Tasch/Contiades, Die Verfassungen Europas: mit einem Essay, verfassungsrechtlichen Abrissen und einem vergleichenden Sachregister, 1966, pp. 631 et seq.).

6

bb) From the beginning, the idea of a Constitution for the United States of Europe was confronted with strong nation-state orientations, which directed their view mainly towards the necessary reconstruction and hence towards the domestic level. The political constraints of a common foreign and defence policy in view of the situation of threat in the Cold War were powerful forces acting in the opposite direction. Particularly the United States of America, as the protecting power of Western Europe, pressed for a substantial European contribution to defence, which made it seem advisable to also look for ways of bringing about an integrated and controlled German rearmament. What stood at the beginning were therefore the Europeanisation of the coal and steel industry, which was important for economy and armament at that time, by means of the European Coal and Steel Community, and the foundation of a European Defence Community, i.e. the creation of European armed forces with a decisive French and German participation. The Treaty establishing the European Defence Community that was negotiated at the same time as the Treaty establishing the European Coal and Steel Community, which provided for an integration on the security-policy level, failed, however, due to the refusal of the French National Assembly (see von Puttkamer, Vorgeschichte und Zustandekommen der Pariser Verträge vom 23. Oktober 1954, ZaöRV 1956/1957, pp. 448 et seq.). Political union, which originally had already been a subject of negotiation as well, had already failed during the negotiations and had been postponed indefinitely. The refusal of the European Defence Community and the failure of the European Political Community made it clear that a European federal state could not be achieved immediately.

7

cc) Therefore economic integration by the European Coal and Steel Community, which had been initiated all the same, was at first the only concrete step made to practically materialise the European vision. In the following decades, the detour to political integration via the interlinking and communitarisation of economic facts that had become necessary due to forces wanting to maintain the nation states determined the character of European development. An economic intertwining which should be as far-reaching as possible, a Common Market, was intended to result in the practical necessity of political communitarisation, and conditions for trade and economy were intended to come into being which would make political unity, also in the areas of foreign and security policy, appear as the only logical conclusion (see Stikker, The Functional Approach to European Integration, Foreign Affairs 1951, pp. 436 et seq.; Küsters, Die Gründung der Europäischen Wirtschaftsgemeinschaft, 1982, pp. 55 et seq. and 79 et seq.). This functional approach was the basis of the "Treaties of Rome", which were signed in 1957 - the Treaty establishing the European Atomic Energy Community (Federal Law Gazette 1957 II p. 753) and the Treaty establishing the European Economic Community (EECT); (Federal Law Gazette 1957 II p. 766; see for the latest, consolidated version of the Treaty establishing the European Community <ECT> OJ 2002 no. C 325/1). In the subsequent decades, these treaties were further developed step by step; as regards the structure of their institutions, they were partly adapted to structures existing in states. What is known as the Direct Election Act made it possible to conduct the first direct elections of the European Parliament in 1979 (Act Concerning the Election of the Members of the European Parliament by Direct Universal Suffrage, Council Decision of 20 September 1976 <Federal Law Gazette 1977 II p. 733>; last amended by the Council Decision of 22 June 2002 and 23 September 2002 <Federal Law Gazette 2003 II p. 810>).

8

dd) After the Merger Treaty of 1965 (OJ 1967 no. L 152/1), which dealt with organisational and technical issues, and the amendment in the 1970s of the financial provisions contained in the Treaties (OJ 1971 no. L 2/1 and OJ 1977 no. L 359/1), the Single European Act of 28 February 1986 (OJ 1987 no. L 169/1) was the first major amendment of the Treaties. This treaty clearly showed the willingness to take up again the original objective of a political union of Europe. It brought about an extension of qualified majority voting in the Council, an increase of the European Parliament's competences by the introduction of the cooperation procedure, the introduction of European Political Cooperation, which was based on an intergovernmental procedure, and the formal institutionalisation of the European Council as steering body for the broad outline of policy ("impetus" within the meaning of Article 4 TEU; see Bulmer/Wessels, The European Council: Decision-making in European Politics, 1987).

9

The Community treaties were further developed in a fundamental fashion by the Treaty on European Union (Treaty of Maastricht) of 7 February 1992 (OJ no. C 191/1). It was intended to achieve a "new stage in the process of creating an ever closer union among the peoples of Europe" (Article 1.2 TEU; see also Decisions of the Federal Constitutional Court <Entscheidungen des Bundesverfassungsgerichts - BVerfGE> 89, 155 <158 et seq.>). The European Union (EU) was founded. Its basis was constituted by the Communities - formerly three, now two since the expiration of the Treaty establishing the European Coal and Steel Community. They are complemented by two forms of intergovernmental cooperation: the Common Foreign and Security Policy (CFSP) and cooperation in the fields of justice and home affairs (the so-called "three-pillar concept"). The European Economic Community was renamed European Community (EC). Over and above this, the Treaty of Maastricht introduced the principle of subsidiarity, the citizenship of the Union and the economic and monetary union; it created new competences of the European Community (education, culture, health, consumer protection, trans-European networks), and extended the European Parliament's competences by introducing the codecision procedure for lawmaking in some areas. In this procedure, acts of secondary legislation can no longer be adopted without the consent of the European Parliament. Also as regards the architecture of the European institutions, the treaty of Maastricht provided for a revision of the Treaties (Article N.2 of the Treaty of Maastricht), which appeared to be of increasing urgency due to an enlargement of the European Union that could be seen to emerge on the political level. The composition and functioning of the European institutions had hardly been changed since the 1950s although the number of Member States had increased from originally six to twelve at that time and the European Union performed considerably more duties than the European Communities at the beginning of European integration.

10

The Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts (Treaty of Amsterdam) of 2 October 1997 (OJ no. C 340/1) again extended the competences of the European Union and of the European Community, like for instance for Community employment policy. It incorporated areas which had until then been subject-matters of intergovernmental cooperation, such as asylum, immigration and visa issues, as well as judicial cooperation in civil matters, into the area of application of the supranational Treaty establishing the European Community and created the possibility of an increased cooperation of certain Member States. Apart from this, the Treaty of Amsterdam introduced a High Representative for the Common Foreign and Security Policy, streamlined the codecision procedure and strengthened the European Parliament's rights of control vis-à-vis the Commission. What the Treaty left open, however, were the institutional issues connected with the enlargement of the European Union, in particular the size of the institutions, the allotment of seats and the extent of majority decision-making.

11

When the Treaty of Amsterdam was signed and came into force, another amending treaty was therefore deemed necessary. It came into being as the Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts (Treaty of Nice) of 26 February 2001 (OJ no. C 80/1). It further extended the number of subject-matters which are subject to qualified majority voting in the Council and adapted the composition of the Commission, the number of Members of the European Parliament and the weighting of votes in the Council to the enlargement of the European Union by up to ten states from East and South East Europe, which had now been decided on the political level. In addition, the government representatives agreed that the Member States which adopt a decision in the Council have to represent at least

62 per cent of the entire population of the European Union. Furthermore, the Nice Intergovernmental Conference solemnly proclaimed the Charter of Fundamental Rights of the European Union (EU Charter of Fundamental Rights - Charter, OJ 2000 no. C 364/1), which had been drafted by a Convention, as a political declaration by the European Parliament, the Council and the Commission without the Charter being incorporated into the Treaty of Nice.

12

b) aa) When it emerged that the Treaty of Nice would only make the adaptations of the institutional structure of the European Union that had been deemed necessary, it was contemplated taking up again the project of a Constitution that had failed in the early 1950s. The German Foreign Minister Fischer, for instance, proposed a European Constitution (see Fischer, Vom Staatenverbund zur Föderation - Gedanken über die Finalität der europäischen Integration, integration 2000, pp. 149 et seq.), and thus initiated a far-reaching constitutional debate (see on this Laffan, Der schwierige Weg zur Europäischen Verfassung: Von der Humboldt-Rede Außenministers Fischer bis zum Abschluss der Regierungskonferenz, in: Jopp/Matl, Der Vertrag über eine Verfassung für Europa, Analysen zur Konstitutionalisierung der EU, 2005, pp. 473 et seq.). The Nice Intergovernmental Conference included the project of a European Constitution in its Declaration no. 23 on the Future of the Union (OJ 2001 no. C 80/85) but expressly wanted to continue only the institutional reform of the Union. The Laeken Declaration on the Future of the European Union of 15 December 2001 (Bulletin EU 12-2001, I.27 <Annex I>) laid down four objectives of the reform:

13

- Firstly: “A better division and definition of competence in the European Union” - here the focus was intended to be above all on greater transparency in the delimitation of the division of competence between the Union and the Member States and on a possible enhancement of the principle of subsidiarity, and it was intended to examine on the one hand which competences were to be newly assigned to the Union but on the other hand also which tasks that had been performed by the Community until then could be restored to the Member States.

14

- Secondly: “Simplification of the Union’s instruments” - to achieve this, a distinction between legislative and executive measures and a reduction of the number of legislative instruments was intended to be considered.

15

- Thirdly: “More democracy, transparency and efficiency in the European Union” - as regards this objective, organisational and procedural questions of the structure of the Union’s institutions and the role of the national Parliaments were intended to be comprehensively thought over.

16

- Fourthly: “Towards a Constitution for European citizens” - with this perspective, the Treaties were intended to be reorganised, the inclusion of the Charter of Fundamental Rights in the basic treaty and the adoption of a constitutional text in the Union were to be considered.

17

The third objective dealt above all with the question of how the democratic legitimacy and transparency of the existing institutions could be increased and how the President of the Commission should be appointed: by the European Council, by the European Parliament or - by means of direct elections - by the citizens. The Laeken Declaration asked whether and how the way in which the members of the European Parliament were elected and the functioning of the European Parliament as well as the activities of the Council should be reviewed.

18

bb) With the Laeken Declaration, the European Council convened a Convention for drafting the text of a Constitution (on the Convention, see in general terms Wessels, Der Konvent: Modelle für eine innovative Integrationsmethode, integration 2002, pp. 83 et seq.). The Convention was intended to examine the four above-

mentioned objectives of reform, with the then accession candidate countries being fully involved. The Constitutional Treaty, which was drafted by the Convention and revised by the Intergovernmental Conference, contained far-reaching amendments, albeit not a complete revision of the Treaties. The Constitutional Treaty provided for integrating the Treaty on European Union and the Treaty establishing the European Community into a single treaty, dissolving the pillar structure and vesting the European Union with its own legal personality. The primacy of Community law over national law, which has been based on the case-law of the Court of Justice of the European Communities, was intended to be explicitly established in the Constitution, and the symbols of the European Union - flag, anthem, motto, currency and Europe day - were intended to be codified for the first time. The following other essential amendments were provided for:

19

- the incorporation of the Charter of Fundamental Rights into the Constitutional Treaty,

20

- the categorisation and classification of the Union's competences,

21

- the further development of the institutions of the Union, in particular by creating the offices of a President of the Council and of a Union Minister for Foreign Affairs,

22

- the introduction of the double majority principle for Council voting,

23

- a new typology of the Union's legal instruments, with terms such as "law" and "framework law",

24

- the introduction of a European citizens' initiative,

25

- the establishment of a neighbourhood policy,

26

- the establishment of a right for the Member States to withdraw from the Union,

27

- different and facilitated amendment procedures for individual parts and aspects of the Constitutional Treaty as well as

28

- the involvement of the national Parliaments in the legislative process to monitor subsidiarity in the form of an early warning system and a subsidiarity action.

29

After the negative outcome of the referenda which were held in France and the Netherlands on the Constitutional Treaty on 29 May and on 1 June 2005, the European Council agreed on embarking on a "phase of reflection".

The Member States that had not yet ratified the Constitutional Treaty were intended to be given the opportunity, after a comprehensive public discourse, to ratify the Constitutional Treaty without any time pressure or to postpone its ratification (Declaration by the Heads of State or Government of the Member States of the European Union on the Ratification of the Treaty establishing a Constitution for Europe <European Council, 16 and 17 June 2005>, Bulletin EU 6-2005, I.30). It was not possible, however, to get the ratification process going again.

30

c) In the Berlin Declaration of 25 March 2007 on the Occasion of the 50th Anniversary of the Signature of the Treaties of Rome (Bulletin EU 3-2007, II.1) the Member States agreed on making another attempt at a reform treaty (see Maurer, Nach der Referendenzäsur: Deutsche Europapolitik in und nach der Denkpause über den Verfassungsvertrag, in: Müller-Graff, Deutschlands Rolle in der Europäischen Union, 2008, pp. 11 et seq.). On 22 June 2007, the Brussels European Council gave an Intergovernmental Conference the mandate to draw up a so-called Reform Treaty amending the existing Treaties (Presidency Conclusions of the Brussels European Council <21/22 June 2007>, Bulletin EU 6-2007, I.37 <Annex I>).

31

The mandate for the Intergovernmental Conference was different from earlier mandates in that the European Council laid down the form and the content of the text of the new treaty, almost completely, in some parts even its wording (see the linguistically revised version of the mandate in Council Document 11218/07, Annex). In doing so, it relied on the Constitutional Treaty, the substance of which as regards its content was intended to be incorporated into the new Reform Treaty to the greatest extent possible. On 13 December 2007, the Reform Treaty was signed as the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (Treaty of Lisbon).

32

3. a) The Preamble of the Treaty of Lisbon does not make reference to the failed Constitutional Treaty but establishes a direct line between the Treaty of Lisbon and the Treaties of Amsterdam and Nice. It repeats the objective of the Intergovernmental Conference's mandate - enhancing the efficiency and democratic legitimacy of the Union, as well as the improvement of the coherence of its action - but it not longer specifically emphasises the coherence of the Union's external action. While all former amending treaties served to enhance the efficiency and the coherence of the European Communities or the European Union, the Treaty of Lisbon for the first time explicitly pursues the objective of enhancing the Union's democratic legitimacy (see also Fischer, Der Vertrag von Lissabon, 2008, pp. 91-92).

33

Unlike the Constitutional Treaty, the Treaty of Lisbon according to the mandate for the Intergovernmental Conference expressly renounces the constitutional concept "which consisted in repealing all existing treaties and replacing them by a single text called 'Constitution'" (Council Document 11218/07, Annex, marginal no. 1). The treaties are merely amended, and the concepts on which the amended treaties are based reflect the renouncement of the constitutional concept. The terminology which is commonly used at state level is abandoned. The term "Constitution" is not used (a different opinion is advanced, however, by Pernice, Der Vertrag von Lissabon - Das Ende des Verfassungsprozesses der EU?, EuZW 2008, p. 65; Schiffauer, Zum Verfassungszustand der Europäischen Union nach Unterzeichnung des Vertrags von Lissabon, EuGRZ 2008, pp. 1 et seq.), the "Union Minister for Foreign Affairs" is called "High Representative of the Union for Foreign Affairs and Security Policy", and the terms "law" and "framework law" are not maintained, unlike the less symbolically charged term "decision". The codecision procedure, however, is renamed "ordinary legislative procedure" and is distinguished from a "special legislative procedure". The acts adopted in a legislative procedure are referred to as "legislative acts". The symbols of the European Union - flag, anthem, motto, currency and Europe day - are not mentioned. However, 16 of the 27 Member States, among them the Federal Republic of Germany, emphasise in Declaration no. 52 on the symbols of the European Union, which is annexed to the Final Act of the Treaty of Lisbon, that these symbols "will for them continue as symbols to express the sense of community of the people in the European Union and their allegiance to it". The primacy of Union and Community law over national law is still not explicitly regulated (as regards the declaration on the matter, see A. I. 3. i below). Apart from this, however, the Treaty of Lisbon incorporates essential elements of the content of the Constitutional Treaty into the existing treaty system and contains additional provisions that are specifically tailored to individual Member States (see Mayer, Die Rückkehr der Europäischen Verfassung? Ein Leitfaden zum Vertrag von Lissabon, ZaöRV 2007,

pp. 1141 et seq.; as regards the provisions concerning the national Parliaments, see specifically Barrett, “The king is dead, long live the king”. The Recasting by the Treaty of Lisbon of the Provisions of the Constitutional Treaty Concerning National Parliaments, E.L.Rev. 2008, pp. 66 et seq.).

34

b) The Treaty of Lisbon dissolves the European Union’s “three-pillar concept” (Article 1.3 sentence 1 TEU). The Treaty on European Union retains its name (see for a consolidated version <TEU Lisbon> OJ 2008 no. C 115/13); the Treaty establishing the European Community is renamed Treaty on the Functioning of the European Union (TFEU) (see for a consolidated version OJ 2008 no. C 115/47). The European Union replaces and succeeds the European Community (Article 1.3 sentence 3 TEU Lisbon), and it attains legal personality (Article 47 TEU Lisbon). The European Atomic Energy Community is removed from the former umbrella organisation of the European Union, and it continues to exist - apart from an institutional linkage to the European Union - as an independent international organisation.

35

c) According to the Treaty of Lisbon, the fundamental-rights protection in the European Union is based on two foundations: the Charter of Fundamental Rights of the European Union in its revised version of 12 December 2007 (OJ no. C 303/1; Federal Law Gazette 2008 II pp. 1165 et seq.), which shall have the same legal value as the Treaties (Article 6.1 sentence 1 TEU Lisbon) and thus becomes legally binding, and the Union’s unwritten fundamental rights, which continue to apply as general principles of the Union’s law (Article 6.3 TEU Lisbon). These two foundations of European fundamental-rights protection are complemented by Article 6.2 TEU Lisbon, which authorises and obliges the European Union to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (Federal Law Gazette 2002 II p. 1054).

36

d) Title II of the new version of the Treaty on European Union contains “provisions on democratic principles”. Accordingly, the functioning of the European Union shall be founded on representative democracy (Article 10.1 TEU Lisbon), complemented by elements of participative, associative and direct democracy, in particular by a citizens’ initiative (Article 11 TEU Lisbon). The principle of representative democracy makes reference to two tracks of legitimisation: The European Parliament, which “directly” represents the citizens of the Union, and the Heads of State or Government, represented in the European Council, and the Member States’ members of government represented in the Council, “themselves democratically accountable either to their national Parliaments, or to their citizens” (Article 10.2 TEU Lisbon).

37

The national Parliaments “contribute actively to the good functioning of the Union” (Article 12 TEU Lisbon). Draft legislative acts of the European Union must be made available to the national Parliaments eight weeks before they are placed on the Council’s agenda (Article 4 of Protocol no. 1 on the Role of National Parliaments in the European Union). In the context of what is known as the early warning system provided for by Protocol no. 2 on the Application of the Principles of Subsidiarity and Proportionality (Subsidiarity Protocol), any national Parliament or any chamber of a national Parliament may, within this eight-week period, state in a reasoned opinion why it considers that the drafts in question do not comply with the principle of subsidiarity (Article 6 of the Subsidiarity Protocol). Reasoned opinions, however, only establish an obligation to review the drafts where they represent a certain proportion of all the votes allocated to the national Parliaments (Article 7.2 and 7.3 of the Subsidiarity Protocol). Furthermore, any national Parliament or a chamber thereof may bring an action to have declared an act void according to Article 263 TFEU via their Member States if they deem a legislative act incompatible with the principle of subsidiarity (Article 8 of the Subsidiarity Protocol).

38

Moreover, the national Parliaments are involved in the political monitoring of Europol and Eurojust (Article 12 lit c TEU Lisbon; Article 88.2(2), Article 85.1(3) TFEU), and they are entitled in what is known as the bridging procedure, a treaty amendment procedure generally introduced by the Treaty of Lisbon, to make known their opposition to the treaty amendment proposed by the Commission within six months after their being notified of

it (Article 48.7(3) TEU Lisbon; Article 81.3(3) TFEU). Opposition by a single national Parliament is sufficient for making the proposed treaty amendment fail.

39

e) The Treaty of Lisbon also reforms the institutions and proceedings.

40

aa) The European Parliament's competences in the area of lawmaking are further developed. The codecision procedure, in which the European Parliament acts on a par with the Council, is streamlined, renamed "ordinary legislative procedure" and declared the norm (Article 14.1 sentence 1 TEU Lisbon; Article 289.1 TFEU). The cooperation procedure is abolished. The consultation procedure and the assent procedure are united under the term "special legislative procedure" and are only applied in specific cases provided for by the Treaties (Article 289.2 TFEU). The stronger role of the European Parliament in lawmaking also affects the conclusion of agreements under international law by the European Union. The Council shall adopt the decision concluding the agreement under international law covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required, only after obtaining the consent of the European Parliament (Article 218.6(2) lit a no. v TFEU).

41

Apart from this, the European Parliament decides about the draft budget on a par with the Council (Article 14.1 sentence 1 TEU Lisbon; Article 314 TFEU) and exercises functions of political control. It elects the President of the Commission upon a proposal by the European Council by a majority of its component members (Article 14.1 sentence 3, Article 17.7 TEU Lisbon). The proposal must take into account the result of the elections to the European Parliament (Article 17.7(1) sentence 1 TEU Lisbon). If the proposed candidate does not obtain the required majority, the European Council must within one month propose a new candidate to the European Parliament (Article 17.7(1) sentence 3 TEU Lisbon). Furthermore, the European Parliament, just like the national Parliaments, scrutinises Europol's activities and is involved in the evaluation of Eurojust's activities (Article 88.2(2), Article 85.1(2) TFEU).

42

The Treaty of Lisbon changes the composition of the European Parliament, which shall be elected "by direct universal suffrage in a free and secret ballot" (Article 14.3 TEU Lisbon). It shall no longer be composed of representatives "of the peoples of the States brought together in the Community" (Article 189.1 ECT), but of representatives of "the Union's citizens" (Article 14.2(1) sentence 1 TEU Lisbon). The allocation of seats in the European Parliament shall be determined by secondary law for the first time (Article 14.2(2) TEU Lisbon). According to the procedure provided for, the European Council shall adopt by unanimity, on the initiative of the European Parliament and with its consent, a decision establishing the composition of the European Parliament. The decision must respect the content-related principles laid down in Article 14.2(1) sentences 2 to 4 TEU Lisbon, i.e. a total number of members that shall not exceed 750, "plus the President", with representation of the citizens of the Union being degressively proportional, with a minimum threshold of six members per Member State, and no Member State being allocated more than 96 seats.

43

bb) By the Treaty of Lisbon, the European Council is upgraded to an institution of the European Union (Article 13.1(2) TEU Lisbon), which is a single entity vested with legal personality. Accordingly, the European Council's acts are placed under the jurisdiction of the Court of Justice of the European Union, but only to the extent that they are intended to produce legal effects vis-à-vis third parties (Article 263.1, Article 265.1 TFEU), and in the context of the common foreign and security policy to the extent that the Court of Justice is exceptionally competent (Article 275.2 TFEU).

44

Apart from this, the Treaty of Lisbon introduces the office of the (permanent) President of the European Council. The President of the European Council shall be elected by the European Council, by a qualified majority, for a

term of two and a half years (Article 15.5 TEU Lisbon). The President of the European Council shall perform the tasks connected with the preparation and the chairing of the European Council, which include driving forward its work, and the external representation of the Union on issues concerning its common foreign and security policy "at his level" and "without prejudice to" the powers of the High Representative of the Union for Foreign Affairs and Security Policy (Article 15.6(1)(2) TEU Lisbon). The office of the President of the European Council is compatible with other European offices, but not with national offices (Article 15.6(3) TEU Lisbon).

45

cc) The Treaty of Lisbon declares qualified majority voting in the Council the norm (Article 16.3 TEU Lisbon), just as it does concerning the ordinary legislative procedure (Article 16.1 TEU Lisbon; Article 289.1 TFEU), in which the Council in principle decides by a qualified majority as well (Article 294.8 and 294.13 TFEU). The current system of weighted votes is intended to be replaced in the long run by the "double majority" system, according to which a qualified majority requires in principle a "double majority" of 55 per cent of the Member States and 65 per cent of the population of the Union (Article 16.4 TEU Lisbon; Article 3 of Protocol no. 36 on Transitional Provisions). Where the Council does not act on a proposal from the Commission or from the High Representative of the Union for Foreign Affairs and Security Policy, the qualified majority shall require in the long run a "double majority" of 72 per cent of the Member States and 65 per cent of the population of the European Union (Article 238.2 TFEU; Article 3 of Protocol no. 36 on Transitional Provisions). Restrictions are made following what is known as the "Ioannina compromise" (Declaration on Article 16(4) of the Treaty on European Union and Article 238(2) of the Treaty on the Functioning of the European Union). For the first time, deliberations and voting on draft legislative acts in the Council take place in public (Article 16.8 TEU Lisbon).

46

dd) As from 1 November 2014, the Commission shall consist of a number of members corresponding to two thirds of the number of Member States, unless the European Council, acting unanimously, decides to alter this number (Article 17.5 TEU Lisbon; see also Article 244 TFEU). After the entry into force of the Treaty of Lisbon, however, a decision could be taken, "in accordance with the necessary legal procedures", to the effect that the Commission shall continue to include one national of each Member State (see Presidency Conclusions of the Brussels European Council of 11 and 12 December 2008 in Brussels, Bulletin EU 12-2008, I.4, marginal no. 2).

47

Moreover, the Treaty of Lisbon reorganises the Commission's autonomous, executive lawmaking and identifies it by giving it its own legal form, that of "non-legislative acts" (see currently Article 202 indent 3 sentence 1, Article 211 indent 4 ECT). A legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act (Article 290.1(1) TFEU). Legislative acts shall explicitly lay down the objectives, content, scope and duration of the delegation of power (Article 290.1(2) TFEU) and the conditions to which the delegation is subject (Article 290.2(1) TFEU). These so-called delegated acts (Article 290.3 TFEU) must be distinguished from implementing acts. Where uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission or, exceptionally, on the Council (Article 291.2 TFEU). The measures enacted on the basis of the implementing powers conferred are called implementing acts (Article 291.4 TFEU).

48

ee) The office of the "High Representative of the Union for Foreign Affairs and Security Policy", which has been newly introduced by the Treaty of Lisbon, merges different offices that are at present competent for the external relations of the European Union and the European Community (Article 18.2 to 18.4 TEU Lisbon). The High Representative "shall conduct" the Union's common foreign and security policy, including the common security and defence policy (Article 18.2 sentences 1 and 3 TEU Lisbon). This means that he has the right to make proposals to the Council and that he conducts the Union's common foreign and security policy "as mandated by the Council" (Article 18.2 sentence 2, Article 27.1 TEU Lisbon). The High Representative of the Union for Foreign Affairs and Security is "appoint[ed]" by the European Council, acting by a qualified majority, with the agreement of the President of the Commission (Article 18.1 sentence 1 TEU Lisbon). Apart from this, he shall be subject to a vote of consent by the European Parliament as one of the Commission's Vice-Presidents (Article 17.4 sentence 1 and 17.7(3) TEU Lisbon). The duration of his term of office is not regulated (see, however, Article 18.1 sentence 2, Article 17.8 sentence 3 TEU Lisbon).

49

“In fulfilling his mandate”, the High Representative shall be assisted by a European External Action Service, which shall work in cooperation with the diplomatic services of the Member States and shall comprise officials from relevant departments of the General Secretariat of the Council and of the Commission as well as staff seconded from national diplomatic services of the Member States (Article 27.3 sentences 1 and 2 TEU Lisbon). Further details, in particular the organisation and functioning of the European External Action Service, shall be established by a decision of the Council (Article 27.3 sentence 3 TEU Lisbon; see also *Bundestag* document 16/9316).

50

ff) The provisions concerning the Court of Justice of the European Communities, which is renamed Court of Justice of the European Union, are also further developed by the Treaty of Lisbon. In principle, the Court of Justice does not have jurisdiction in the area of the common foreign and security policy. Exceptions apply to the monitoring of compliance with Article 40 TEU Lisbon and to actions to have declared an act void brought in connection with the review of the legality of decisions providing for restrictive measures against natural or legal persons (Article 24.1(2) sentence 5 TEU Lisbon; Article 275 TFEU). In the field of the area of freedom, security and justice, however, the Court of Justice of the European Union does have, in principle, jurisdiction. Exceptions apply to the review of the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security (Article 276 TFEU). Furthermore, the Treaty of Lisbon modifies the types of bringing action, in particular the action to have declared an act void.

51

f) In principle, the Treaty of Lisbon provides for three types of procedure according to which the Treaties may be amended: the ordinary revision procedure (Article 48.2 to 48.5 TEU Lisbon), the simplified revision procedure (Article 48.6 TEU Lisbon) and what is known as the bridging procedure (Article 48.7 TEU Lisbon). Amendments in the ordinary revision procedure, which may serve either to increase or to reduce the European Union’s competences (Article 48.2 sentence 2 TEU Lisbon), shall as before be agreed by a conference of representatives of the governments of the Member States, possibly after involving a Convention composed of representatives of the national Parliaments, of the Heads of State or Government of the Member States, of the European Parliament and of the Commission (Article 48.3 TEU Lisbon). The amendments shall enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements (Article 48.4(2) TEU Lisbon).

52

Amendments according to the simplified revision procedure require a unanimous decision by the European Council, which enters into force after being “approved by the Member States in accordance with their respective constitutional requirements” (Article 48.6(2) sentence 3 TEU Lisbon; see on the legal situation established in the Treaties to date Article 17.1(1), Article 42 TEU; Article 22.2, Article 190.4, Article 229a, Article 269.2 ECT). The scope of application of the simplified revision procedure is restricted to amendments of Part Three of the Treaty on the Functioning of the European Union relating to the internal policies and action of the European Union (Article 48.6(1) TEU Lisbon). The amendments may not increase the competences conferred on the Union in the Treaties (Article 48.6(3) TEU Lisbon). In their respective forms such as they have been further developed by the Treaty of Lisbon, the Treaties contain further provisions that have been modelled according to Article 48.6 TEU Lisbon but are each restricted to a certain subject area and slightly extended by the Treaty of Lisbon (see Article 42.2(1) TEU Lisbon - introduction of a common defence; Article 25.2 TFEU - extension of the rights of the citizens of the Union; Article 218.8(2) sentence 2 TFEU - accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms; Article 223.1(2) TFEU - introduction of a uniform procedure for the elections of the European Parliament; Article 262 TFEU - competence of the European Union for the creation of European intellectual property rights; Article 311.3 TFEU - determination of the European Union’s own resources).

53

Amendments in the general bridging procedure are also based on a unanimous decision of the European Council, which however, can only be adopted after obtaining the consent of the European Parliament (Article 48.7(4) TEU Lisbon). Such adoption requires that no national Parliament makes known its opposition to the proposal within six months (Article 48.7(3) TEU Lisbon). Unlike the ordinary and the simplified revision procedures, the general bridging procedure concerns selective amendments, which refer to voting in the Council or the legislative procedure. Where the Treaty on the Functioning of the European Union or Title V of the Treaty on European Union provides for the Council to act by unanimity in a given area or case, the European Council may adopt a decision authorising the Council to act by a qualified majority in that area or in that case (Article 48.7(1) sentence 1 TEU Lisbon). Decisions with military implications or those in the area of defence are excluded (Article 48.7(1) sentence 2 TEU Lisbon). Furthermore, the European Council may adopt a decision allowing for the adoption of legislative acts within the scope of application of the Treaty on the Functioning of the European Union in accordance with the ordinary legislative procedure instead of the special legislative procedure (Article 48.7(2) TEU Lisbon; see already Article 67.2, Article 137.2(2) sentence 2, Article 175.2(1) ECT). Both alternatives of the general bridging procedure do not apply to Article 311.3 and 311.4, Article 312.2(1), Article 352 and Article 354 TFEU (see Article 353 TFEU). The general bridging procedure is complemented by special bridging clauses (see Article 31.3 TEU Lisbon - decisions on the common foreign and security policy in cases other than those mentioned in Article 31.2 TEU Lisbon; Article 81.3(2)(3) TFEU - measures concerning family law with cross-border implications; Article 153.2(4) TFEU - measures in certain areas of labour law; Article 192.2(2) TFEU - measures in the area of environmental policy; Article 312.2(2) TFEU - determination of the multiannual financial framework; Article 333.1 and 333.2 TFEU - voting procedures in the context of enhanced cooperation in accordance with Articles 326 et seq. TFEU). A right for national Parliaments to make known their opposition that corresponds to Article 48.7(3) TEU Lisbon is provided only for measures concerning family law with cross-border implications (Article 81.3(3) TFEU).

54

g) Article 50 TEU Lisbon introduces the right for each Member State to withdraw from the European Union.

55

h) The Treaty of Lisbon pursues the objective of achieving more transparency concerning the division of competence between the Union and the Member States (see Laeken Declaration on the Future of the European Union of 15 December 2001, Bulletin EU 12-2001, I.27 <Annex I>), and it extends the European Union's competences.

56

aa) It confirms the principles of the distribution and exercise of the European Union's competences, in particular the principle of conferral (Article 5.1 sentence 1 and 5.2 sentence 1 TEU Lisbon; see also Article 1.1, Article 3.6, Article 4.1, Article 48.6(3) TEU Lisbon; Article 2.1 and 2.2, Article 4.1, Article 7, Article 19, Article 32, Article 130, Article 132.1, Article 207.6, Article 337 TFEU; Declaration no. 18 in Relation to the Delimitation of Competences; Declaration no. 24 Concerning the Legal Personality of the European Union) and the principles of subsidiarity (Article 5.1 sentence 2 and 5.3 TEU Lisbon) and of proportionality (Article 5.1 sentence 2 and 5.4 TEU Lisbon). The latter are complemented on the procedural level by the Subsidiarity Protocol.

57

Furthermore an obligation of the European Union is established to respect, apart from the Member States' national identities, "inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government", the "equality of Member States before the Treaties" and their "essential State functions" (Article 4.2 sentences 1 and 2 TEU Lisbon). By way of example, "ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security" are mentioned.

58

bb) The Treaty of Lisbon categorises and classifies the European Union's competences for the first time. Article 2 TFEU starts by specifying different categories of competence. Depending on the intensity of European action, and its effects on the Member State levels, a fundamental distinction is made between exclusive competence (paragraph 1), competence shared with the Member States, which corresponds to the category of concurrent

competence valid to date (paragraph 2), and competence to carry out actions to support, coordinate or supplement [the actions of the Member States] (paragraph 5). Beyond this competence triad, Article 2 TFEU indicates two areas which are no competence categories. The coordination of economic and employment policies (paragraph 3) and the common foreign and security policy (paragraph 4) are regulated independently. Articles 3 et seq. TFEU then assign individual areas to the competence categories, albeit not as a complete enumeration in terms of a list of competences.

59

cc) The Treaty of Lisbon establishes additional competences of the European Union, extends the content of existing competences and supranationalises areas which have been subject to intergovernmental cooperation.

60

(1) In the former “First Pillar”, the Treaty of Lisbon establishes new competences of the European Union for neighbourhood policy (Article 8 TEU Lisbon), services of general economic interest (Article 14 TFEU), energy (Article 194 TFEU), tourism (Article 195 TFEU), civil protection (Article 196 TFEU) and administrative cooperation (Article 197 TFEU). Furthermore, it extends the content of existing competences of the European Union, which are incorporated from the Treaty establishing the European Community into the Treaty on the Functioning of the European Union. This particularly concerns the provisions of the common commercial policy that extend the content of competence to foreign direct investment and the nature of competence to trade in services and the commercial aspects of intellectual property (Article 207.1 sentence 1 in conjunction with Article 3.1 lit e TFEU). The flexibility clause (Article 352 TFEU) loses its restriction to the Common Market (see however Article 352.3 and 352.4 TFEU); its exercise is subject to the consent of the European Parliament for the first time (Article 352.1 TFEU).

61

(2) The common foreign and security policy of the former “Second Pillar” is regulated in Title V of the Treaty on European Union (see also Article 40 TEU Lisbon; Article 2.4 TFEU). Accordingly, specific rules and procedures (Article 24.1(2) TEU Lisbon) apply that “will not affect the existing legal basis, responsibilities, and powers of each Member State in relation to the formulation and conduct of its foreign policy” (Declaration no. 14 Concerning the Common Foreign and Security Policy). Decisions shall be taken in principle by the European Council and the Council acting unanimously (Article 31.1 TEU Lisbon). Via the special bridging clause in Article 31.3 TEU Lisbon, however, the European Council may unanimously adopt a decision stipulating that the Council may act by a qualified majority in cases other than those referred to in Article 31.2 TEU Lisbon. Decisions having military or defence implications are excluded (Article 31.4 TEU Lisbon). The adoption of legislative acts shall be excluded (Article 24.1(2) sentence 2, Article 31.1(1) sentence 2 TEU Lisbon). The European Parliament is consulted and informed on the essential issues and developments; it is to be ensured that its views are duly taken into consideration (Article 36 TEU Lisbon).

62

The common security and defence policy, which is mentioned in Article 17 TEU, is further elaborated by the Treaty of Lisbon as an integral part of the common foreign and security policy (Articles 42 to 46 TEU Lisbon). The Council is granted powers to adopt decisions relating to missions “in the course of which the Union may use civilian and military means” (Article 43.1 and 43.2 TEU Lisbon). Over and above this, an obligation of mutual assistance is introduced for the Member States. In the case of armed aggression on the territory of a Member State, “the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter” (Article 42.7(1) sentence 1 TEU Lisbon). This shall not prejudice the specific character of the security and defence policy of certain Member States (Article 42.7(1) sentence 2 TEU Lisbon). The permanent structured cooperation of Member States, which is codified by the Treaty of Lisbon for the first time, is intended to contribute to making the common security and defence policy more flexible (Article 42.6, Article 46 TEU Lisbon; Protocol no. 10 on Permanent Structured Cooperation).

63

(3) The field of police and judicial cooperation in criminal matters, which was the only one remaining in the former “Third Pillar” after the Treaties of Amsterdam and Nice, is incorporated into the area of application of the Treaty on the Functioning of the European Union by the Treaty of Lisbon. Under the heading “Area of Freedom, Security and Justice”, Title V of the Treaty on the Functioning of the European Union now comprises the entire field of justice and home affairs, which according to the Treaty of Maastricht was still completely subject to intergovernmental cooperation.

64

(a) The Treaty of Lisbon extends the competences in the fields of policy specified in Title V of the Treaty on the Functioning of the European Union.

65

(aa) In the context of judicial cooperation in criminal matters, the Treaty of Lisbon grants powers to the European Union to adopt “minimum rules” in the area of the law of criminal procedure “to the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension” (Article 82.2(1) TFEU). These rules shall concern “mutual” admissibility of evidence between Member States, the rights “of individuals” in criminal procedure, the rights of victims of crime and any other specific aspects of criminal procedure which the Council has identified in advance by a unanimous decision after obtaining the consent of the European Parliament (Article 82.2(2) TFEU).

66

Moreover, the Treaty of Lisbon extends the content of the European Union’s competence for the approximation of laws in the field of criminal law (see Article 31.1 lit e TEU). The European Union is granted powers to establish by means of directives “minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis” (Article 83.1(1) TFEU). The enumeration of these areas of crime, which ranges from terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment and computer crime to organised crime is not complete. “On the basis of developments in crime”, it may be extended by a decision of the Council acting unanimously after obtaining the consent of the European Parliament (Article 83.1(3) TFEU). In addition to this competence for the approximation of laws in the field of criminal law, the Treaty of Lisbon introduces an annex competence of the European Union in criminal law for all areas which have “been subject to harmonisation measures” to the extent that “the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy” in these areas (Article 83.2 sentence 1 TFEU).

67

Finally, the Treaty of Lisbon makes it possible to extend the competences of Eurojust, a body of the European Union with legal personality with the task to coordinate the national authorities competent for investigations and prosecutions in cases of serious cross-border crime (see Council Decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime, OJ no. L 63/1). In accordance with the ordinary legislative procedure, Eurojust can be entrusted in particular with the task of initiating and coordinating criminal investigations (Article 85.1(2) lit a TFEU), with formal acts of judicial procedure remaining the competence of the national prosecuting authorities (Article 85.2 TFEU). Moreover, the Council may, acting unanimously after obtaining the consent of the European Parliament, establish a European Public Prosecutor’s Office from Eurojust in order to combat crimes affecting the financial interests of the Union (Article 86.1(1) TFEU). In this case, the European Public Prosecutor’s Office would be responsible for investigating and prosecuting such crimes and bringing them to judgment before the national courts (Article 86.2 TFEU).

68

(bb) In the context of police cooperation, the European police office Europol, with its cross-border activity, can be entrusted, in an ordinary legislative procedure, not only the collection, storage, processing, analysis and exchange of information (see already Article 3.1 of the Convention of 26 July 1995 on the establishment of a

European Police Office, OJ no. C 316/2), but also the powers to coordinate, organise and implement investigative and operational action jointly with the Member States' competent authorities or in the context of joint investigative teams (Article 88.2 TFEU). Any such operational action by Europol must, however, be carried out in liaison and in agreement with the authorities of the Member States whose territory is concerned (Article 88.3 sentence 1 TFEU). The application of coercive measures shall be the exclusive responsibility of the competent national authorities (Article 88.3 sentence 2 TFEU).

69

(b) Specific procedural provisions apply to the exercise of the competences. In different fields of policy, decisions in the Council must be adopted unanimously (see Article 77.3, Article 81.3(1), Article 86.1(1), Article 87.3(1), Article 89 TFEU).

70

(aa) In the field of judicial cooperation in civil matters, the Council, on a proposal from the Commission and after consulting the European Parliament, may adopt a decision determining those aspects of family law with cross-border implications which may be the subject of acts adopted by the ordinary legislative procedure (Article 81.3(2) TFEU). The proposal shall be notified to the national Parliaments, which can make known their opposition to the proposal within six months (Article 81.3(3) TFEU).

71

(bb) In the fields of judicial cooperation in criminal matters and police cooperation, apart from the Commission, a quarter of the Member States is entitled to initiate the adoption of an act (Article 76 lit b TFEU). Moreover, the exercise of specific competences of the European Union is linked with what is known as an emergency brake mechanism (Article 82.3, Article 83.3, Article 86.1(2)(3), Article 87.3(2)(3) TFEU; see already Article 23.2(2) TEU). Accordingly, a member of the Council that considers that a draft directive to approximate laws in the areas of criminal law or law of criminal procedure affects "fundamental aspects of its criminal justice system" may request that the draft directive be referred to the European Council (Article 82.3(1), Article 83.3(1) TFEU). In case of a consensus within this institution, the European Council shall, within four months of the suspension of the legislative procedure, refer the draft back to the Council. In case of disagreement, alleviated conditions concerning enhanced cooperation apply. If at least nine Member States wish to establish enhanced cooperation on the basis of the draft, the authorisation shall, after notification of the European Parliament, the Council and the Commission (Article 20.2 TEU Lisbon; Article 329 TFEU) be deemed to be granted (Article 82.3(2), Article 83.3(2) TFEU). A slightly modified emergency brake mechanism applies to the establishment of the European Public Prosecutor's Office and the adoption of measures that concern police cooperation involving national police, customs and other specialised law enforcement services. Accordingly, a group of at least nine Member States may request that the draft of the legislative act be referred to the European Council in case of the absence of unanimity in the Council (Article 86.1(2) sentence 2, Article 87.3(2) sentence 1 TFEU).

72

i) Declaration no. 17 on Primacy annexed to the Final Act of the Treaty of Lisbon reads as follows:

73

The Conference recalls that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law.

74

The Conference has also decided to attach as an Annex to this Final Act the Opinion of the Council Legal Service on the primacy of EC law as set out in 11197/07 (JUR 260):

75

"Opinion of the Council Legal Service of 22 June 2007

76

It results from the case-law of the Court of Justice that primacy of EC law is a cornerstone principle of Community law. According to the Court, this principle is inherent to the specific nature of the European Community. At the time of the first judgment of this established case law (Costa/ENEL, 15 July 1964, Case 6/641(1) there was no mention of primacy in the treaty. It is still the case today. The fact that the principle of primacy will not be included in the future treaty shall not in any way change the existence of the principle and the existing case-law of the Court of Justice.

77

(1) It follows (…) that the law stemming from the treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question."

78

4. On 24 April 2008, the German *Bundestag* adopted the Act Approving the Treaty of Lisbon by 515 of 574 votes cast (Minutes of *Bundestag* plenary proceedings - BTPlenarprot 16/157, p. 16483 A). On 23 May 2008, the *Bundesrat* approved the Act Approving the Treaty of Lisbon by a two-thirds majority (Minutes of *Bundesrat* plenary proceedings - BRPlenarprot 844, p. 136 B). On 8 October 2008, the Federal President signed the Act Approving the Treaty of Lisbon. It was promulgated in the Federal Law Gazette Part II of 14 October 2008 (pp. 1038 et seq.) and entered into force on the following day (Article 2.1 of the Act Approving the Treaty of Lisbon).

79

5. Furthermore, the German *Bundestag*, on 24 April 2008, adopted the accompanying laws, the Act Amending the Basic Law (Articles 23, 45 and 93) (Amending Act - Minutes of *Bundestag* plenary proceedings 16/157, p. 16477 A) and the Act Extending and Strengthening the Rights of the Bundestag and the Bundesrat in European Union Matters (Extending Act - Minutes of *Bundestag* plenary proceedings 16/157, p. 16482 D). On 23 May 2008, the *Bundesrat* adopted both Acts (BRPlenarprot 844, p. 136 D).

80

a) The Act Amending the Basic Law (Articles 23, 45 and 93) of 8 October 2008 was promulgated in the Federal Law Gazette I of 16 October 2008 (p. 1926) and will enter into force on the day on which the Treaty of Lisbon will enter into force for the Federal Republic of Germany pursuant to its Article 6.2 (Article 2 of the Amending Act).

81

Pursuant to Article 1 no. 1 of the Amending Act, Article 23.1a of the Basic Law, new version, has the following wording:

82

The *Bundestag* and the *Bundesrat* shall have the right to bring action before the Court of Justice of the European Union on account of a legislative act of the European Union infringing the principle of subsidiarity. The *Bundestag* shall be obliged to do so on the application of one fourth of its Members. An Act requiring the approval of the *Bundesrat* may admit of exceptions to Article 42.2 sentence 1 and Article 52.3 sentence 1 for the exercise of the rights granted to the *Bundestag* and the *Bundesrat* in the Treaties constituting the basis of the European Union.

83

Article 45 of the Basic Law is complemented by the following sentence (Article 1 no. 2 of the Amending Act):

84

It may also empower it to exercise the rights granted to the *Bundestag* in the Treaties constituting the basis of the European Union.

85

In Article 93.1 no. 2 of the Basic Law the words “one third” are replaced by the words „one fourth” (Article 1 no. 3 of the Amending Act).

86

b) The Act Extending and Strengthening the Rights of the Bundestag and the Bundesrat in European Union Matters (*Bundestag* document 16/8489), has not yet been signed and promulgated because its content requires the amendment of Article 23 and Article 45 of the Basic Law, and for the time being, the entry into force of the constitution-amending Act must be waited for (see BVerfGE 34, 9 <22 et seq.>; 42, 263 <283 et seq.>). It will enter into force on the day following promulgation, at the earliest, however, on the day following the day on which the Amending Act will have entered into force (Article 3 of the Extending Act).

87

Article 1 of the Extending Act contains the Act on the Exercise of the Rights of the Bundestag and the Bundesrat under the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 (*Gesetz über die Ausübung der Rechte des Bundestages und des Bundesrates aus dem Vertrag von Lissabon vom 13. Dezember 2007 zur Änderung des Vertrags über die Europäische Union und des Vertrags zur Gründung der Europäischen Gemeinschaft*). The Act is intended to create the national preconditions for the exercise of the rights of participation that are granted to the *Bundestag* and to the *Bundesrat*, which is to be deemed a chamber of a National Parliament in this context, by the Treaty of Lisbon (*Bundestag* document 16/8489, p. 7). These are the right to give a reasoned opinion (“subsidiarity objection”) pursuant to Article 6.1 of the Subsidiarity Protocol (Article 1 § 2 of the Extending Act), the right to bring action pursuant to Article 8 of the Subsidiarity Protocol (“subsidiarity action”), via the Federal Government, on account of a legislative act of the European Union infringing the principle of subsidiarity (Article 1 § 3 of the Extending Act), and the right to make known its opposition to a draft legislative act of the European Union pursuant to Article 48.7(3) TEU Lisbon and Article 81.3(3) TFEU (Article 1 § 4 of the Extending Act).

88

In its paragraph 1, Article 1 § 2 of the Extending Act essentially provides that as regards draft legislative acts of the European Union, the Federal Government shall submit to the *Bundestag* and the *Bundesrat* detailed information “at the earliest possible date”, at the latest, however, two weeks after the beginning of the eight-week period. Paragraph 2 grants the *Bundestag* and the *Bundesrat* powers to regulate in their rules of procedure the adoption of decisions concerning subsidiarity objections. Paragraph 3 sets out that the President of the *Bundestag* or respectively the President of the *Bundesrat* sends such a decision to the presidents of the European Parliament, the Council and the Commission and informs the Federal Government about it.

89

Article 1 § 3 of the Extending Act regulates the procedure of the subsidiarity action. The *Bundestag* is obliged, in particular pursuant to its paragraph 2 in analogy to Article 44.1 sentence 1 and Article 93.1 no. 2 of the Basic Law, new version, to bring action upon the application of one fourth of its Members; pursuant to paragraph 3, the *Bundesrat* can regulate in its Rules of Procedure how to bring about the adoption of a decision on a subsidiarity action. Pursuant to paragraph 4, the Federal Government sends the action on behalf of the body that adopted the decision of bringing such action “without delay” to Court of Justice of the European Union.

90

In its paragraph 3, Article 1 § 4 of the Extending Act regulates the interaction of *Bundestag* and *Bundesrat* when exercising the right to make known their opposition pursuant to Article 48.7(3) TEU Lisbon taking into account the national allocation of responsibilities:

91

1. If an initiative essentially affects exclusive legislative competences of the Federation, opposition to the initiative shall be made known if the *Bundestag* so decides by a majority of votes cast.

92

2. If an initiative essentially affects exclusive legislative competences of the *Länder*, opposition to the initiative shall be made known if the *Bundesrat* so decides by a majority of its votes.

93

3. In all other cases, the *Bundestag* or the *Bundesrat* may, within four months after notification of the initiative of the European Council, decide to make known their opposition against this initiative. In these cases, opposition to the initiative shall only be made known if such a decision has not been rejected two weeks before the expiry of the time-limit of six months pursuant to Article 48.7(3 sentence 2 of the Treaty on European Union by the other body. Opposition to an initiative shall also not be made known if one body rejects the other body's decision insofar as it holds the view that there is not a case under number 1 or number 2. If the *Bundestag* adopted its decision on making known its opposition to the initiative by a majority of two thirds, rejection by the *Bundesrat* requires a majority of at least two thirds of its votes. If the *Bundesrat* adopted its decision on making known its opposition to the initiative by a majority of at least two thirds of its votes, rejection by the *Bundestag* shall require a majority of two thirds, at least the majority of the Members of the *Bundestag*.

94

According to paragraph 6, paragraph 3 sentence 1 no. 3 shall apply *mutatis mutandis* to the right of opposition pursuant to Article 81 paragraph 3(3) TFEU. Paragraph 4 provides that the Presidents of the *Bundestag* and the *Bundesrat* shall jointly send a decision reached pursuant to paragraph 3 to the Presidents of the European Parliament, of the Council and the Commission, and that they shall inform the Federal Government accordingly.

95

Article 1 § 5 of the Extending Act makes it possible for the plenary sitting of the *Bundestag* to grant the Committee on European Union Affairs, appointed by it pursuant to Article 45 of the Basic Law, powers to exercise the rights of the *Bundestag* pursuant to Article 1 of the Extending Act. With a view to the provided requirements placed on the adoption of decisions, however, the right to bring a subsidiarity action via the Federal Government (Article 1 § 3.2 of the Extending Act), and the right of opposition (Article 1 § 4.3 of the Extending Act) may not be delegated (*Bundestag* document 16/8489, p. 8). Article 1 § 6 of the Extending Act determines that details about information according to this Act shall be regulated in the Agreement between the Bundestag and the Federal Government Pursuant to § 6 of the Act on the Cooperation of the Federal Government and the German Bundestag in European Union Affairs (*Vereinbarung zwischen Bundestag und Bundesregierung nach § 6 des Gesetzes über die Zusammenarbeit von Bundesregierung und Deutschem Bundestag in Angelegenheiten der Europäischen Union*) of 28 September 2006 (Federal Law Gazette I p. 2177) and according to the Agreement between the Federal Government and the Länder Pursuant to § 9 of the Act on the Cooperation of the Federation and the Länder in European Union Matters (*Vereinbarung zwischen Bundesregierung und den Ländern nach § 9 des Gesetzes über die Zusammenarbeit von Bund und Ländern in Angelegenheiten der Europäischen Union*).

96

Article 2 of the Extending Act contains amendments of other Act, in particular of the last-mentioned Acts.

97

6. The Treaty of Lisbon requires ratification under international law by the Member States of the European Union in accordance with their respective constitutional requirements (Article 6.1 sentence 1 of the Treaty of Lisbon). The instruments of ratification are to be deposited with the Government of the Italian Republic (Article 6.1 sentence 2 of the Treaty of Lisbon).

98

After the complainants re III., IV. and V. and the applicants had applied for a temporary injunction to prevent a commitment under international law to the Treaty of Lisbon by the Federal Republic of Germany by depositing the instrument of ratification, the Federal President declared via the Head of the Office of the Federal President that he would not sign the instrument of ratification until the Federal Constitutional Court had passed a final decision in the main proceedings.

II.

99

1. The complainants in the constitutional complaint proceedings challenge the Act Approving the Treaty of Lisbon. Apart from this, the constitutional complaints of the complainants re III. and VI. concern the Act Amending the Basic Law (Articles 23, 45 and 93) as well as the Act Extending and Strengthening the Rights of the Bundestag and the Bundesrat in European Union Matters.

100

a) The complainants concur in submitting that their right under Article 38 of the Basic Law is violated. They argue as follows: Article 38 of the Basic Law grants them, as Germans entitled to vote, the individually assertable right to participate in the election to the German *Bundestag*, to thereby take part in the legitimisation of state authority on the federal level and to influence its exercise. The transfer of sovereign powers to the European Union that is effected in the Act Approving the Treaty of Lisbon encroaches upon this right because the legitimisation and the exercise of state authority is withdrawn from their influence. The encroachment transgresses the boundaries of the powers granted with a view to European integration pursuant to Article 23.1 sentence 3 in conjunction with Article 79.3 of the Basic Law and is therefore not justified. To the extent that it is inviolable pursuant to Article 79.3 of the Basic Law in conjunction with Article 20.1 and 20.2 of the Basic Law, the principle of democracy is infringed in two different respects: by the competences of the German *Bundestag* being undermined on the one hand and by a lack of democratic legitimisation of the European Union on the other hand.

101

aa) The complainant re III. challenges the violation of the principle of democracy under both aspects. To the extent that he claims the competences of the German *Bundestag* being undermined, he submits that the European Union is no longer a sectoral economic community. Instead, it has taken on tasks in all politically relevant areas of life and can close remaining competence gaps itself. With a view to the democratic legitimisation of the European Union, he argues that Europe's democratic deficit is not reduced but aggravated by the Treaty of Lisbon. The Council can no longer provide sufficient legitimacy that is derived from the state peoples of the Member States. The chain of legitimacy to the national parliaments is broken in particular by the majority principle, which is applied as a norm. Also the application of the principle of unanimity cannot be justified any longer. Once adopted, legislative acts cannot be repealed as long as only a single state intends to maintain the legislative act. Regardless of its being strengthened, the European Parliament is not democratically legitimised as long as it is not elected on the basis of democratic equality.

102

Apart from this, according to the complainant re III., numerous individual provisions of the Treaty of Lisbon infringe the principle of democracy. He counts among them first of all Article 14.2 TEU Lisbon, which is said to place the people of the Union (*Unionsvolk*), comprising all the Union's citizens, on a par with the peoples of the Member States of the European Union, thereby constituting a new subject of democratic legitimisation; secondly, provisions such as Article 48.6 TEU Lisbon and Article 311 TFEU, which are said to make amendments of the Treaties possible without the approval of the German *Bundestag*, thirdly provisions such as

Article 48.7 TEU Lisbon, which are said to permit passing over from unanimous decisions, which are provided for in the Treaties, to majority decisions in the Council, without the German *Bundestag* sufficiently participating in such transition, and, fourthly, the flexibility clause of Article 352 TFEU, which is said to be almost universally applicable now.

103

bb) The complainant re IV. submits that the "threshold to the insignificance of the original German legislative competences" has been passed by the transfer of sovereign powers to the European Union by the Treaty of Lisbon. A "sellout of the state's very own competences" is said to have taken place. The common foreign and security policy is said to be supranationalised because measures in this area are assigned to the European Union, which is vested with its own legal personality and is no longer represented on the international level by the foreign ministers of the Member States but by the High Representative of the Union for Foreign Affairs and Security Policy. The common security and defence policy is said to deliberately adopt the course of a "European defence under the European flag". The Member States are said to be forced to engage in a military buildup. Police and judicial cooperation in criminal matters is also said to be supranationalised. Finally, the flexibility clause is said to make an amendment of the Treaties possible without a formal amendment procedure.

104

The complainant re IV. puts forward at the same time the European Union's lack of democratic legitimisation. He argues as follows: Admittedly, the Treaty of Lisbon strongly upgrades the European Parliament's competences. This, however, can only legitimise the exercise of public authority by the European Union if electoral equality would be respected. Member States with a low number of inhabitants, however, are still granted a disproportionally high number of votes in comparison to Member States with a high number of inhabitants.

105

cc) The complainants re V. solely challenge the lack of democratic legitimisation of the European Union. They take the view that no commensurate enlargement and deepening of the European Union's democratic legitimisation corresponds to the extension of its competences. Here, the required level of democratic legitimisation is said not to depend on the European Union's being a state but to be determined by the extent of the European Union's competences and the relevance of European decisions to fundamental rights. The complainants re V. argue that the European Union's exercise of sovereign powers is not sufficiently legitimised by the national parliaments. The powers conferred by the Treaty of Lisbon are said not to be sufficiently determined, the subsidiarity objection is said to entitle the national parliaments only to challenge draft legislative acts on the European level. It, however, does not make it possible for them to make drafts fail, and also treaty extensions are said to be possible without the participation of the national parliaments.

106

The complainants further argue as follows: The exercise of the European Union's sovereign powers is not sufficiently legitimised by the European institutions. The Council can from the outset only provide a restricted legitimisation. The principle of democracy requires essential decisions to be adopted by Parliament. The feedback between the state bodies and the people, which is decisive in a democratic state, is not limited to the act of the election of Parliament, which only recurs at certain intervals. The state's opinion-forming process can instead be described as a process to which the different views, ideologies and interests of the people contribute. The Council as the representative of national interests can fulfil this function only to a restricted extent. Firstly, it is not a representative body, which means that the formation of the people's opinion is so strongly filtered and reduced as regards the persons involved that the consultative function that is incumbent on Parliament can only be fulfilled to a restricted extent. Secondly, the national opposition is not represented in the Council. The European Parliament also does not sufficiently legitimise the European Union's exercise of its sovereign powers because the principle of electoral equality does not apply to the election of the European Parliament, the European Parliament does not sufficiently legitimise the Commission and the level of the legitimisation of European decisions does not correspond to the level of democratic legislation which is required according to the principle of democracy and which is accepted by the developed democratic states. The codecision procedure, which has been renamed "ordinary legislative procedure", only becomes the norm at first sight because many special provisions that establish derogations can be found in the individual fields of policy. Essential decisions

which encroach on fundamental rights - for instance in the areas of application of Article 87.3, Article 89, Article 113 TFEU - can be adopted without the consent of the European Parliament.

107

Finally, the Treaty of Lisbon violates the democratic principle of changing majorities. The democratic process includes competition for political power, i.e. the interplay of minority and majority. Such competition, however, does not take place on the European level. The European institutions are not grouped around the central issue of political conflict. The fact that lines of political conflict cannot be identified leads to political apathy in the form of abstentions in the elections of the European Parliament.

108

dd) The complainants re VI. also assert that the democratic foundations of the European Union have not kept pace with the process of integration. They call upon the Federal Constitutional Court to examine, in light of sovereign powers that have already been transferred and sovereign powers that still are to be transferred, whether the expectations in the European Union's democratic development under the rule of law, laid down in its judgment on the Treaty of Maastricht (see BVerfGE 89, 155 et seq.), have been fulfilled. The complainants re VI. maintain that this is not the case. The Commission's practice of lawmaking and decision-making is said to have developed into a "regime of self-authorisation". The Stability Pact is said to be deprived of its substance due to the exemptions granted in the past. It is therefore said to be impossible to speak of Germany consenting to the European Monetary Union any longer.

109

The Treaty of Lisbon is said to make, apart from this, qualified-majority voting in the Council the norm, thereby depleting the competences of the German *Bundestag*. Due to the excessive structural demands placed on the national parliaments, the procedures for enforcing the principle of subsidarity provided for in the Subsidiarity Protocol are said to be unsuited to effectively assert the principles of conferral, of subsidiarity and of proportionality. Moreover, the procedures are said to result in smaller Member States being taken into account to the same extent as Germany as regards the number of reasoned opinions of national parliaments that establish an obligation to review a draft legislative act (Article 7 of the Subsidiarity Protocol). The national parliaments' right to make known their opposition in the context of the bridging procedure is said to also not ensure democratic consent, and the extension of the material area of application of the flexibility clause is said to result in an "unrestricted competence to extend competences".

110

In the opinion of the complainants re VI., it need not to be decided, however, whether the allocation of seats in the European Parliament is compatible with the principle of democratic representativeness. They argue that what is decisive instead is that the European Parliament does not have the possibility of countering the Commission's monopoly of the right of initiative by the competence to make the Commission refrain from legislative initiatives. Moreover, the Commission's competence to for tertiary lawmaking is said to curtail the European Parliament's right of codecision in the process of lawmaking (see Articles 290 and 291 TFEU).

111

b) Apart from this, the complainants re III. and IV. take the view that the Act Approving the Lisbon Treaty results in the Federal Republic of Germany losing its statehood. They also base this challenge on Article 38 of the Basic Law.

112

aa) In the view of the complainant re III., the Treaty of Lisbon transgresses the boundary of what the principle of sovereign statehood permits as regards the transfer of sovereign powers. The complainant argues that the European Union becomes a subject of international law and can act like a state on the level of international law. It is said to be provided with a foreign-policy machinery that has a quasi-state nature to the outside, and with far reaching foreign-policy competences. European Union law is said to have unrestricted primacy over the law of the Member States, also over the Basic Law, with the consequence that review by the Federal Constitutional

Court is excluded. The European Union is provided with the competence to decide on its own competence (*Kompetenz-Kompetenz*) (Article 48.6 and 48.7 TEU Lisbon; Article 311, Article 352 TFEU) and with the competences for internal security and prosecution, it has entered core areas of statehood. This loss of sovereignty on the part of the Member States is said to be countered neither by the principle of conferral, which is said not to have an effectively restricting function any longer, nor by the principle of subsidiarity. This situation could be remedied only by concrete elaboration in the form of final, limited competences or negative competence lists and the establishment of an independent monitoring body, for instance of a court of justice that rules on conflicts of competence.

113

Apart from state authority, the European Union is said to also have a state territory, namely the area of freedom, security and justice, and a state people. The European Parliament is said to no longer be composed of representatives of its Member States, but of representatives of the Union's citizens. The evolution of the European Union into a federal state is said to transgress the responsibilities and competences of the Federal Republic of Germany. Only a Constitutional Act that the German people must give itself pursuant to Article 146 of the Basic Law can be the foundation that is required for such an integration.

114

bb) In the opinion of the complainant re IV., the polity that has been created by the Treaty of Lisbon is factually not an association of sovereign national states (*Staatenverbund*) based on international agreement. Instead it is said to be a "large federation with its own legal personality", which acts like a state of its own, with its own legislative bodies, its own authorities and its own citizenship of the Union. The competence for the approximation of laws in the fields of criminal law and law of criminal procedure is said to concern a core area of state authority because nothing embodies the exercise of sovereign competences more strongly than the right to shape substantive criminal law and to enforce it procedurally. The question of whether and how a state defends itself is also said to be a decisive aspect of a state's statehood.

115

c) The complainants re IV., V. and VI. moreover challenge, on the basis of Article 38 of the Basic Law, the violation of other structural principles of the state by the Act Approving the Treaty of Lisbon.

116

aa) The complainant re IV. asserts a violation of the principle of the rule of law to the extent that it has been declared inviolable by Article 79.3 of the Basic Law in conjunction with Article 20.3 of the Basic Law. In view of the extensive competences of the European Union, fundamental-rights control is said to be insufficient. In particular, the Treaty of Lisbon has not introduced a fundamental-rights action before the Court of Justice of the European Union.

117

bb) In the view of the complainants re V., the democratic possibilities of the German *Bundestag* of shaping social policy are restricted by the Treaty of Lisbon to the extent that the European Union is committed to engage in a competition-oriented "open market economy". It is true that the Basic Law does not contain a commitment to a specific economic system. The principle of the social state, however, is said to oblige the legislature to ensure the balancing of social differences, even though it leaves the legislature broad latitude for doing so. According to the complainants, allegedly competition-promoting European lawmaking and case-law can annul the principle of the social state contrary to Article 23.1 sentence 3 in conjunction with Article 79.3 of the Basic Law. Pursuant to the Treaty of Lisbon, the European Union has extensive competences for instance in all issues of economic policy, but not in the area of tax law and social security. According to recent judgments of the Court of Justice, the right to strike only applies if its exercise does not disproportionately restrict the fundamental freedoms (see Court of Justice of the European Communities, judgment of 11 December 2007, Case C-438/05, Viking, ECR 2007, p. I-10779 marginal no. 90; Court of Justice of the European Communities, judgment of 18 December 2007, Case C-341/05, Laval, ECR 2007, p. I-11767 marginal no. 111).

118

cc) The complainants re VI. challenge a violation of the principle of the separation of powers. They argue as follows: As the sovereign powers transferred to the European Union increase in quantity, the quality requirements placed on the internal legal organisation of the European Union under the aspect of the separation of powers had to increase accordingly. With the exception of the Court of Justice of the European Union, which is clearly assigned a judicial function, the other institutions of the Union mix executive and legislative functions. Contrary to the Commission, the European Parliament does not have a right of initiative, but only codecision rights in the area of lawmaking.

119

d) The complainants re III. and V. make other challenges that concern the Act Approving the Treaty of Lisbon, which are not based on Article 38 of the Basic Law but on other provisions of the Basic Law.

120

aa) In the pleading of his constitutional complaint of 23 May 2008, the complainant re III. challenges a violation of Article 20.4 and Article 2.1 of the Basic Law. In a pleading of 21 October 2008, he partly withdraws this complaint - to the extent that Article 2.1 of the Basic Law had been referred to the violation of objective constitutional principles - and additionally asserts a violation of Article 1.1, Article 2.1 and 2.2, Article 3, Article 4.1 and 4.2, Article 5.1 and 5.3, Articles 8 to 14, Article 16, Article 19.4, Article 101, Article 103 and Article 104 of the Basic Law.

121

(1) He puts forward the following: A right preceding the right of resistance results from Article 20.4 of the Basic Law which is directed against all actions that wholly or partly abolish the foundations of the constitution which are non-amendable pursuant to Article 79.3 of the Basic Law. A constitutional complaint which is based on this right is not subsidiary to constitutional complaints which are based on other fundamental rights. Admittedly, Article 38 and Article 20.4 of the Basic Law are violated if the boundaries of the transfer of sovereign powers to the European Union resulting from the principle of democracy and the principle of sovereign statehood are transgressed. However, the violation of the other constitutional principles that are protected by Article 79.3 of the Basic Law, in particular of the principle of the separation of power, only results in the violation of Article 20.4 of the Basic Law. As regards the separation of powers, the Act Amending the Treaty of Lisbon falls short of the required minimum that must be respected in the area of application of Article 23 of the Basic Law pursuant to Article 79.3 in conjunction with Article 20.2 of the Basic Law. In its lawmaking function, the Federal Government dominates the German *Bundestag* on the European level. As part of the Council, it can make higher-ranking law, which supersedes the law adopted by the German *Bundestag*. Via this “indirect route”, the Federal Government can bypass Parliament and can get provisions accepted via the European level for which it would not obtain a majority in the *Bundestag*.

122

The complainant re III. takes the view that “other remedies” within the meaning of Article 20.4 of the Basic Law are to be granted in constitutional complaint proceedings. He argues that Article 20.4 of the Basic Law also can be construed to mean that the provision guarantees an extraordinary legal remedy in terms of a “right to other remedies”, which is to be granted in analogy to the constitutional complaint proceedings.

123

(2) The complainant re III. substantiates the allegation of a violation of Article 1.1, Article 2.1 and 2.2, Article 3, Article 4.1 and 4.2, Article 5.1 and 5.3, Articles 8 to 14, Article 16, Article 19.4, Article 101, Article 103 and Article 104 of the Basic by making reference to the binding effect of the Charter of Fundamental Rights pursuant to the Treaty of Lisbon. The complainant argues that the binding effect not only leads to human dignity being subject to weighing against other legal interests, in particular against the economic fundamental freedoms, in the framework of the European Union. The Charter of Fundamental Rights is said to moreover largely exempt the German state bodies from their obligation to respect the fundamental rights of the Basic Law not only in those areas in which they implement mandatory provisions of Union law but also in areas in which they are not bound by Union law. Finally, the Charter of Fundamental Rights is said to abolish the position of guarantor which the

Federal Constitutional Court has for the protection of fundamental rights pursuant to what is known as the "Solange II" case-law (see BVerfGE 73, 339 et seq.).

124

bb) The complainants re V. also challenge a violation of Article 1.1 of the Basic Law. They are of the opinion that in view of the general requirement of the enactment of a statute pursuant to Article 52.1 of the Charter, the Treaty of Lisbon lacks a contractual clarification according to which human dignity may not be weighed against other legal interests, in particular against the economic fundamental freedoms.

125

e) The complainants re III. and VI. further argue that the accompanying laws, the Amending Act and the Extending Act, violate their rights under Article 38 of the Basic Law. Furthermore, the complainant re III. challenges a violation of Article 2.1 and Article 20.4 of the Basic Law.

126

aa) In the pleading of his constitutional complaint of 23 May 2008, the complainant re III. initially makes an application to find that the accompanying laws as such violate his right under Article 38 of the Basic Law. In his pleading of 21 October 2008, he restricts his application to individual provisions of the accompanying laws, namely Article 1 nos. 1 and 2 of the Amending Act and Article 1 § 3.2, § 4.3 no. 3 and 4.6 as well as § 5 of the Extending Act. The complainants re VI. also restrict their application to the above-mentioned provisions.

127

bb) The complainants re III. and VI. concurringly state that Article 1 no. 1 of the Amending Act and Article 1 § 3.2 of the Extending Act violate the democratic principle of majority because the German *Bundestag* is forced to bring a subsidiarity action against the will of its majority. Article 1 § 4.3 no. 3 and 4.6 of the Extending Act are said to also be incompatible with the principle of democracy to the extent that Article 79.3 of the Basic Law in conjunction with Article 20.1 and 20.2 of the Basic Law declare it inviolable. The German *Bundestag* is said to be deprived of its right of opposition pursuant to Article 48. 7(3) TEU Lisbon in those cases in which the focus of the European Council's initiative refers to concurring legislation or in which no clear focus can be ascertained. Finally, Article 1 no. 2 of the Amending Act and Article 1 § 5 of the Extending Act are said to violate the principle of democratic representation by establishing the possibility that the rights of participation of the German *Bundestag* which have been introduced by the Treaty of Lisbon might be transferred to the Committee on European Union Affairs.

128

The complainant re III. states that the Federal Constitutional Court's judgment on the Treaty of Maastricht at least does not rule out that an individually assertable right to respect the principle of democracy within the Federal Republic of Germany results from Article 38 of the Basic Law. The right is said to exist at any rate to the extent that the right to take part in the democratic legitimisation of state authority, which is guaranteed by Article 38 of the Basic Law, is indirectly affected. The complainants re VI. argue that the right to lodge a constitutional complaint against the accompanying laws results from the factual context. Without the Act Approving the Treaty of Lisbon, the separate laws are said to lose their meaning. As regards the proceedings relating to constitutional law, the Act Approving the Treaty of Lisbon and the separate laws are therefore said to have to be deemed a unity. It is said to follow from this *inter alia* that the accompanying laws, like the Act Approving the Treaty of Lisbon, could exceptionally be challenged already before their being signed and promulgated.

129

cc) In the pleading of his constitutional complaint of 23 May 2008, the complainant finally asserts a violation of Article 20.4 and Article 2.1 of the Basic Law by the accompanying laws. In his pleading of 21 October 2008, he restricts his application to individual provisions of the accompanying laws, namely Article 1 nos. 1 and 2 of the Amending Act and Article 1 § 3.2, § 4.3 no. 3 and 4.6 as well as § 5 of the Extending Act and refrains from challenging a violation of Article 2.1 of the Basic Law. He substantiates this by stating that the incompatibility

of the above-mentioned provisions of the accompanying laws with the principle of democracy can also be asserted via Article 20.4 of the Basic Law.

130

2. The applicants in the *Organstreit* proceedings challenge the Act Approving the Treaty of Lisbon, the applicant re I. additionally challenges the accompanying laws.

131

a) The applicant re I. is a Member of the German *Bundestag* and at the same time the complainant re III. In the pleading of his application of 23 May 2008, he initially makes an application to find that the Act Approving the Treaty of Lisbon and the accompanying laws infringe the Basic Law, in particular its Article 20.1 and 20.2, Article 2.1, Article 38.1 sentence 2 in conjunction with Article 79.3 as well as Article 23.1 of the Basic Law and are hence void. He indicates as respondents the Federal President, the German *Bundestag* and the Federal Republic of Germany. In his pleading of 21 October 2008, he reformulates his application. He now makes an application to find that the Act Approving the Treaty of Lisbon, Article 1 nos. 1 and 2 of the Amending Act and Article 1 § 3.2, § 4.3 no. 3 and 4.6 as well as § 5 of the Extending Act infringe Article 20.1 and 20.2, Article 23.1 and Article 79.3 of the Basic Law and violate the applicant's rights under Article 38.1 of the Basic Law. He refrains from challenging an infringement also of Article 2.1 of the Basic Law. The German *Bundestag* and the Federal Government are indicated as respondents.

132

The applicant re I. argues that the Act Approving the Treaty of Lisbon and the accompanying laws violate his status right as a Member of the German *Bundestag* under Article 38.1 of the Basic Law. He further argues that if Article 38.1 of the Basic Law grants the individual citizen the individually assertable right to participate in the election to the German *Bundestag* and to thereby take part in the legitimisation of state authority by the people on the federal level and to influence its exercise, this must apply all the more to the Members of the German *Bundestag*. Their status is also said to be regulated by Article 38.1 of the Basic Law. If the responsibilities and competences of the German *Bundestag* are undermined by the transfer of sovereign powers to the European Union, this is said to affect not only the individual voter's possibility of taking part in the democratic legitimisation of state authority. It is said to affect to a much greater extent the possibility of a Member of Parliament of representing the people in the exercise of state authority and of bringing about democratic legitimisation in legislation and when controlling the government. As an alternative, the applicant re I. substantiates the violation of his status right under Article 38.1 of the Basic Law by arguing that he, "performing the functions of a constitutional body", is responsible for the German *Bundestag* not acting *ultra vires*. The *Bundestag* may not enact laws that transgress its competences. At any rate, it may not adopt such decisions if these laws contribute to abandoning the state that is founded on the Basic Law as its constitution or to significantly restricting its statehood.

133

Apart from this, the applicant re I. asserts, in a general sense, that his rights of participation as a Member of the German *Bundestag* pursuant to Article 38.1 of the Basic Law were curtailed in the legislative procedure. He argues that there was no sign of an opinion-forming on the basis of the force of arguments, which would have made it possible for Member of Parliament to assume responsibility for their decision. It was said not to do sufficient justice to the status of a member of Parliament to have the opportunity of voicing one's constitutional reservations in a *Bundestag* debate by a question put to the speaker in the course of his speech pursuant to § 27.2 of the Rules of Procedure of the German *Bundestag* (*Geschäftsordnung des Deutschen Bundestags - GOBT*). It was said to be just as insufficient to have the opportunity of reading out a declaration on the unconstitutionality of the Act Approving the Treaty of Lisbon.

134

b) The applicant re II., a parliamentary group of the German *Bundestag*, makes an application, acting on behalf of the German *Bundestag*, to find that the Act Approving the Treaty of Lisbon violates the German *Bundestag*'s rights as a legislative body and is therefore incompatible with the Basic Law. It does not indicate a respondent in the pleading of its application.

135

The applicant re II. substantiates its application by stating that the Act Approving the Treaty of Lisbon transfers democratic decision-making competences beyond the extent permissible pursuant to Article 23.1 sentence 3 in conjunction with Article 79.3 of the Basic Law. The principle of democracy is said to be infringed in several respects to the extent that it is inviolable pursuant to Article 79.3 of the Basic Law. Reference is made to the line of argument of the complainants re V., which is identical in this respect (see above A. II. 1. c) bb). Moreover, the applicant re II. asserts that the principle of the parliamentary army, which follows from the principle of democracy, is undermined by the German *Bundestag*'s losing its competence to decide on the deployment of the German armed forces for the area of European crisis intervention. Pursuant to Article 42.4 TEU Lisbon, decisions initiating a mission, for which the Member states have to make available their own armed forces pursuant to Article 42.3 TEU Lisbon, shall be adopted by the Council acting unanimously. What is said to be lacking, however, is an indication that the decision shall be adopted in accordance with the respective constitutional requirements of the Member States. According to the complainant, it could, admittedly, be argued that the requirement of parliamentary approval under the provisions of the Basic Law which concern defence is not repealed by the Act Approving the Treaty of Lisbon and that the representatives of the German government in the Council must obtain the approval of the German *Bundestag* before committing themselves in the Council to a participation of German armed forces in a mission. This, however, would lead to a break with the system because as a general rule, the representation of the Federal Republic of Germany in the Council falls under the competence of the government.

III.

136

1. The German *Bundestag* (a), the Federal Government (b) and the *Bundesrat* (c) have given written opinions concerning the constitutional complaints re III. and V. In addition, the Federal Government and the *Bundesrat* included the constitutional complaint re IV. in their opinion. The *Landtag* (state parliament) of Baden-Württemberg (d) restricts its opinion to the constitutional complaints re III. and IV.

137

a) The German *Bundestag* takes the view that the constitutional complaints re III. and V. are inadmissible (aa) and unfounded (bb). It argues as follows:

138

aa) The entitlement to lodge a constitutional complaint, which is based on Article 38 of the Basic Law, to oppose acts of integration pursuant to Article 23.1 of the Basic Law is restricted to cases in which the principle of democracy, to the extent protected by Article 79.3 of the Basic Law, is manifestly and grievously violated. The complainants re III. and V. did not state this in a substantiated manner. The constitutional complaint re III. can also not be based on Article 20.4 of the Basic Law. Because an evident failure regarding the protection and defence of the constitution by the competent state bodies cannot be established, there is said to be no resistance situation. An independent legal remedy existing in parallel to the constitutional complaint cannot be derived from Article 20.4 of the Basic Law. Moreover, a violation of the complainants re III. and V. under Article 1.1 of the Basic Law is not apparent. The inviolability of human dignity is said to be guaranteed also on the European level. Moreover, the Charter of Fundamental Rights does not invalidate the fundamental rights of the Basic Law. Finally, the complainant re III. did not state the possibility of a violation of rights by the accompanying laws in a sufficiently substantiated manner.

139

bb) The German *Bundestag* argues that the constitutional complaints re III. and V. are at any rate unfounded because the Treaty of Lisbon is compatible with the Basic Law. Accordingly, the German *Bundestag* takes the view that the factual extent of review of the constitutional complaints is restricted to the new elements introduced by the Treaty of Lisbon. According to the German *Bundestag*, the integration process as such cannot be the subject-matter of the proceedings. With the Federal Constitutional Court's judgment on the Treaty of Maastricht, a *res iudicata* is said to exist, and a decision with a view to the evolution of the Treaties of

Amsterdam and Nice is said to be ruled out due to § 93 of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz - BVerfGG*).

140

(1) Article 38 of the Basic Law is said not to be violated by the Act Approving the Treaty of Lisbon. To the extent that the Treaty of Lisbon establishes new competences of the European Union or transfers individual policy areas from intergovernmental cooperation to the Community method, the boundaries of the transferability of sovereign powers drawn by Article 79.3 of the Basic Law are said not to be transgressed. The Member States are said to suffer only a slight loss of competences and to be granted in return new freedom to operate and new political scope of action. According to the German *Bundestag*, the fact that qualified majority voting becomes the normal decision-making procedure in the Council is not objectionable. Majority voting, and thus the possibility of being overruled in the Council, is said to have been accepted by the Federal Constitutional Court in its judgment on the Treaty of Maastricht (see BVerfGE 89, 155 et seq.). The Member States are said to retain substantial competences. The fields of internal and external security, as well as defence policy, are said to entirely remain within the Member States' area of competence, just like economic, financial and employment policy.

141

Also a possible claim under Article 38 of the Basic Law to the democratic legitimisation of the European Union is said not to be violated. The democratic legitimisation of the Council is said to be based on the one hand on the constitutional-law foundation that regulates the Council's decision-making procedures, on the other hand on the discourse taking place in the Council. The European Parliament is also said to provide democratic legitimisation. The lack of equal contribution towards success in the election of the European Parliament is said not to be contrary to this; the lack of equal contribution towards success is said to rather be the consequence of the special structure of the European Union, which is built on the Member States, and which contains special forms of democratic representation. The Treaty of Lisbon is said to strengthen democratic legitimisation not only by enhancing the role of the European Parliament but also by an increased public nature of the Council meetings and by the introduction of the early warning system to monitor adherence to the principle of subsidiarity. Apart from this, the Treaty of Lisbon is said to enhance the position of the German *Bundestag*.

142

The German *Bundestag* further argues as follows: The Treaty of Lisbon does not grant the European Union *Kompetenz-Kompetenz*. The flexibility clause under Article 352 TFEU cannot be understood as an unrestricted competence to extend competences; Article 311 TFEU does not go beyond the current provision on the procurement of own resources. The provisions on the simplified Treaty revision procedure and the provisions that concern the passing over to majority decisions in the Council also do not establish a *Kompetenz-Kompetenz* of the European Union. Rather, the provisions anticipate the respective Treaty amendments. Content and modalities of the decision-making procedures are laid down in a sufficiently determined manner.

143

(2) In the view of the German *Bundestag*, there is also no violation of the principle of sovereign statehood. The Basic Law is said to guarantee the statehood of the Federal Republic of Germany in the form of open statehood as laid down *inter alia* in the Preamble of the Basic Law and in Articles 23 to 25 of the Basic Law. Consequently, European integration is not only permitted by the Basic Law but wanted by it. The Treaty of Lisbon is said not to establish a statehood of its own for the European Union. Such statehood is said to be contained neither in the recognition of the European Union's legal personality nor in the linkage of Community law and Union law. Apart from this, the separation of supranational and intergovernmental fields of activity is said not to be abandoned. The reference to the Union's citizens in Article 14.2 TEU Lisbon is said to emphasise their position as the subject of legitimisation of the European Union without constituting a European people. The primacy of application of Union Law, which is the subject-matter of Declaration no. 17, is said not to confer statehood on the Union but to solely emphasise the character of the European Union as a legal community. The declaration, which does not form part of the normative part of the Treaty, is said not to change the existing legal situation and not to result in a fundamental priority of Union law over the national constitution. The right to withdraw from the European Union is said to be contrary to the assumption of the European Union's statehood; the European Union is said to have no competence to perform coercive or enforcement measures.

144

(3) According to the German *Bundestag*, there is also no violation of the principle of the separation of powers. The Treaty of Lisbon is said to neither establish an executive legislation on the part of the Federal Government nor to open up new possibilities of what the complainant has called an “indirect route”. Exactly such conduct can be better prevented due to the new provisions on the public nature of Council meetings and the increased monitoring rights of the national parliaments pursuant to the Subsidiarity Protocol.

145

(4) Finally, the constitutional complaint re III. is said to be unfounded also as regards the challenged accompanying laws. The fact that pursuant to Article 1 no. 1 of the Amending Act and Article 1 § 3.2 of the Extending Act, the German *Bundestag* might be obliged, upon the application of one fourth of its Members, to bring a subsidiarity action is said not to violate the principle of democracy. The provision is said to be an expression of the protection of minorities inherent in every functioning democracy. The provision set out in Article 1 no. 1 of the Amending Act as well as in Article 1 § 4.3 and 4.6 of the Extending Act concerning the exercise of the right to make known one’s opposition pursuant to Article 48.7(3) TEU is said to correspond to the national allocation of responsibilities between the *Bundestag* and the *Bundesrat* and to the principle of the federal state. The possibility provided in Article 1 no. 2 of the Amending Act and Article 1 § 5 of the Extending Act of transferring decision-making competences to the Committee on European Union Affairs is not able to establish the violation of a right for the sole reason that no transfer of competences takes place by these provisions alone because rather, they merely grant the *Bundestag* powers to do so.

146

b) The Federal Government also takes the view that the constitutional complaints re III., IV. and V. are inadmissible (aa), at any rate, however, unfounded (bb).

147

aa) According to the Federal Government, the constitutional complaints are already inadmissible because the Act Approving the Treaty of Lisbon and the accompanying laws do not personally, presently and directly affect the complainants re III., IV. and V. under Article 38 of the Basic Law. Before their entry into force, the accompanying laws are also said to be an unsuitable object of a challenge because they, unlike the Act Approving the Treaty of Lisbon, can only be the subject-matter of a constitutional complaint after the completion of the parliamentary legislative procedure. The challenges made by the complainants re III. and V. under Article 1.1 of the Basic Law and by the complainant re III. under the other fundamental rights relating to freedom, equality and the judicial procedure are said to be without substance. Human dignity is said to be inviolable pursuant to the Charter of Fundamental Rights, and the fundamental rights of the Union in the area of application of the Charter of Fundamental Rights are said to be applied in parallel to the fundamental rights of the Basic Law.

148

bb) (1) The Act Approving the Treaty of Lisbon is said to be compatible in particular with the principle of democracy. The position of the Council in the lawmaking procedure and the limited representation of the actual numbers of inhabitants that goes with it are said to be unobjectionable. They are said to be due to the special nature of the European Union as a *Staatenverbund*. The European Parliament is said to play an important role in the context of European legislation, which is said to be further strengthened by the extension of the area of application of the ordinary legislative procedure. The fact that the principle of the equality of all citizens is only insufficiently realised in the election to the European Parliament is said to follow from the necessity of adapting this principle in light of the equality of all states.

149

The Federal Government argues that the Treaty of Lisbon does not make a treaty amendment possible without the approval of the Federal Republic of Germany. A decision of the European Council pursuant to Article 48.6(2) TEU Lisbon is said to require, pursuant to Article 59.2 of the Basic Law, an Act approving it which is adopted by the *Bundestag*. The Federal Republic of Germany is said to have a right of veto also in the context of

the transition from unanimity to the qualified majority procedure, which is made possible under Article 48.7 TEU Lisbon.

150

(2) The Treaty of Lisbon is said to neither result in the creation of a Union state nor to weaken the statehood of the Federal Republic of Germany. It is said to avoid any terminological allusion to statehood, and also the recognition of the legal personality of the European Union is said not to provide any indication for this. The free right of withdrawal is said to confirm the continued existence of state sovereignty. The Member States are said to remain the "masters of the Treaties" and are said not to have granted the European Union *Kompetenz-Kompetenz*. The principle of conferral is said to continue to apply. The use of the flexibility clause is said to be subjected to substantive requirements and procedural safeguarding mechanisms by the Treaty of Lisbon.

151

The European Union is said to be transferred hardly any substantial competences. Measures in the context of the common foreign and security policy are said to have no supranational quality even after the abolition of the division between European Union and European Community. The area of freedom, security and justice is said not to impair the territorial sovereignty of the Member States but to guarantee cooperation between Member States, which is said to be necessary in an area without internal borders. A "people of the Union" is also not established. Neither the Charter of Fundamental Rights nor the primacy of Community law are said to result in the establishment of a European state.

152

(3) Apart from this, the institutional structure created by the Treaty of Lisbon is said to be compatible with the principle of the separation of powers. A stronger decision-making power of the state executive is said to go along with the elaboration of the European Union as a *Staatenverbund*. Apart from this, the Federal Constitutional Court is said to have deemed compatible with the Basic Law the institutional system of the European Union valid to date, and the Treaty of Lisbon is said to result in a strengthening of the national parliaments.

153

c) The *Bundesrat* regards the challenged Acts as being in conformity with the constitution. The Treaty of Lisbon is said to strengthen the democratic legitimisation of the European Union in particular by enhancing the position of the European Parliament and of the national parliaments. The Treaty is said not to result in a loss of statehood of the Federal Republic of Germany. The delimitation of competences is said to be improved; additional competences are said to be transferred only to a limited extent. The safeguarding of state sovereignty is said to be clearly expressed in the explicit recognition of the respect of national identity pursuant to Article 4.2 TEU Lisbon and in the right to withdraw from the Union pursuant to Article 50 TEU Lisbon.

154

d) The *Landtag* of Baden-Württemberg regards the constitutional complaints re III. and IV. as unfounded.

155

2. In the *Organstreit* proceedings, the German *Bundestag* (a), the Federal Government (b), the *Bundesrat* and the *Landtag* of Baden-Württemberg (c) have given written opinions.

156

a) The German *Bundestag* takes the view that the applications made in the *Organstreit* proceedings are inadmissible (aa), at any rate, however, unfounded (bb).

157

aa) (1) To the extent that the applicant in the *Organstreit* proceedings re I. makes an application to find that the Act Approving the Treaty of Lisbon and the accompanying laws are declared void, this is said to be the typical content of an application for the abstract review of a statute pursuant to Article 93.1 no. 2 of the Basic Law, which the applicant, as an individual Member of Parliament, is not entitled to make. The German *Bundestag* does not make a statement on the application that has been amended by the applicant re I. in his pleading of 21 October 2008. To the extent that the applicant re I. challenges shortcomings of the opinion-forming during the debate in the German *Bundestag*, his submissions are said to be unsubstantiated. Moreover, the applicant re I. is said not to be entitled to be a party to the proceedings to the extent that he, as part of the German *Bundestag* as a body, wants to assert its rights acting on behalf of it in the proceedings. The Federal Constitutional Court is said to have explicitly rejected the entitlement of an individual Member of the German *Bundestag* to act on behalf of the German *Bundestag* in proceedings. The applicant is finally said not to assert the rights of the body of which he is a part but to challenge a decision of this very body. This is said to result in *inter se* proceedings, which are impermissible in proceedings relating to constitutional law.

158

(2) Also the application made in the *Organstreit* proceedings re II. is said to be inadmissible. The applicant is said not to be entitled to make such application because it did not plausibly substantiate that its rights as a parliamentary group were violated. It is said neither to have, vis-à-vis the *Bundestag*, a right to the boundaries of integration being respected nor a general right to the Basic Law being respected. A right of the parliamentary group to the decision-making competence of the *Bundestag* being maintained also does not exist. The applicant also cannot assert, acting on behalf of the *Bundestag*, rights of the *Bundestag* against the *Bundestag*. Apart from this it is said to lack the need for legal protection because its application is factually said to be tantamount to one applying for the abstract review of statutes; as a parliamentary group, it is said not to be entitled to be a party to proceedings involving the abstract review of statutes.

159

bb) The German *Bundestag* points out that the extent of review of the *Organstreit* proceedings re I. and II. is restricted to the specific situation under constitutional law. The objective constitutionality of the challenged Acts cannot be examined. As regards the unfoundedness of the *Organstreit* proceedings re I. and II., the German *Bundestag* makes reference to its statements made concerning the constitutional complaints re III. and V. (see A. III. 1. a) bb) above).

160

b) The Federal Government also takes the view that the applications in the *Organstreit* proceedings are inadmissible (aa), at any rate, however, unfounded (bb).

161

aa) (1) The applicant in the *Organstreit* proceedings re I. is said not to be entitled to make an application. He is said not to be affected as regards his legal position, which is granted to him pursuant to Article 38.1 of the Basic Law as a member of a constitutional body but to try to achieve a general review of the constitutionality of the challenged Acts by the Federal Constitutional Court via the *Organstreit* proceedings. Therefore an abstract review of constitutionality is said to be permissible at most, which the applicant, however, is said not to be entitled to institute. The challenged accompanying laws are said to only strengthen the rights of the German *Bundestag* so that a violation of the applicant's rights is said to be ruled out.

162

The Federal Government argues that insofar as the applicant asserts that he did not have sufficient opportunity in the *Bundestag* to state his dissenting opinion, it not apparent in what respect a measure of the German *Bundestag* is challenged. Furthermore, the corresponding provisions of the Rules of Procedure of the German *Bundestag* are said to restrict the status right of the Member of Parliament in a constitutionally admissible manner. Apart from this, the applicant is said to have had, pursuant to § 31.1 of the Rules of Procedure of the German *Bundestag*, the possibility of submitting a written statement or making a short oral statement.

163

(2) Also the application made in the *Organstreit* proceedings re II. is said to be inadmissible. A suitable respondent is not said to exist. The mere challenge of an Act is said to be impermissible in the context of *Organstreit* proceedings. Moreover, it is said not to be apparent how the status rights of the applicant parliamentary group were violated. The applicant also cannot, acting on behalf of the *Bundestag*, assert rights of the *Bundestag* against the *Bundestag*. As the applicant does not achieve the quorum required pursuant to Article 93.1 no. 2 of the Basic Law, interpreting the relief sought as an application for the abstract review of statutes is also said to be ruled out.

164

bb) As regards the unfoundedness of the applications in the *Organstreit* proceedings re I. and II., the Federal Government makes reference to its statements on the unfoundedness of the constitutional complaints re III. and V. (see A. III. 1. b) bb above). To the extent that the Act Approving the Treaty of Lisbon is challenged, it additionally points out that the Treaty of Lisbon only contains few new elements in the area of the common security and defence policy. The German *Bundestag*'s rights of participation are said to be safeguarded because no Member State can be obliged against its will to take part in military measures.

165

c) The *Bundesrat* and the *Landtag* of Baden-Württemberg regard the applications made in the *Organstreit* proceedings as unfounded for the same reasons that they put forward regarding the constitutional complaints (see A. III. 1. c) and d) above).

IV.

166

On 10 and 11 February 2009, an oral hearing was held in which the parties to the proceedings explained and elaborated their legal points of view.

B.

167

The constitutional complaints lodged against the Act Approving the Treaty of Lisbon are admissible to the extent that they challenge, on the basis of Article 38.1 sentence 1 of the Basic Law, a violation of the principle of democracy, the loss of statehood of the Federal Republic of Germany and a violation of the principle of the social state. The constitutional complaints re III. and VI. lodged against the accompanying laws are admissible to the extent that they are based on Article 38.1 sentence 1 of the Basic Law (I.). The application made in the *Organstreit* proceedings re II. is admissible to the extent that the applicant asserts a violation of the competences of the German *Bundestag* to decide on the deployment of the German armed forces (II.). In other respects, the constitutional complaints and the applications made in *Organstreit* proceedings are inadmissible.

I.

168

The constitutional complaints are admissible to the extent that the complainants challenge, on the basis of Article 38.1 sentence 1 of the Basic Law, a violation of the principle of democracy, the loss of statehood of the Federal Republic of Germany and a violation of the principle of the social state by the Act Approving the Treaty of Lisbon and the accompanying laws.

169

1. The complainants are entitled to lodge a constitutional complaint. They belong to the group of persons who can lodge a constitutional complaint as "any person" within the meaning of § 90.1 of the Federal Constitutional Court Act. This also applies to the complainants re III. and V., who are Members of the German *Bundestag* but lodge the constitutional complaint as citizens of the Federal Republic of Germany. They do not invoke their

status under constitutional law vis-à-vis a body entitled to be a party in *Organstreit* proceedings but assert a violation of their fundamental rights by public authority (see BVerfGE 64, 301 <312>; 99, 19 <29>; 108, 251 <267>).

170

2. The Act Approving the Treaty of Lisbon and the accompanying laws thereto can, as measures of German public authority, be a suitable subject-matter of a complaint in constitutional complaint proceedings. This applies regardless of the fact that these Acts have not yet entered into force. Because the binding character of the Treaty of Lisbon under international law at the present stage only depends on the Federal President signing the instrument of ratification and depositing it with the depositary, the Act Approving the Treaty of Lisbon can, exceptionally, be the subject-matter of the constitutional complaints before its entry into force (see BVerfGE 108, 370 <385>). This applies *mutatis mutandis* to the accompanying laws, whose entry into force is linked to the entry into force of the Treaty of Lisbon. Article 2 of the Amending Act makes reference to the entry into force of the Treaty of Lisbon, Article 3 of the Extending Act makes reference to the entry into force of the Amending Act.

171

3. The entitlement to lodge a constitutional complaint requires the complainants' allegation to be personally, directly and presently violated by the challenged measures of public authority as regards a fundamental right, or right equivalent to a fundamental right, which may be the subject-matter of a constitutional complaint lodged pursuant to Article 93.1 no. 4a of the Basic Law and § 90.1 of the Federal Constitutional Court Act. The complainants must state in a sufficiently substantiated manner that such violation appears possible (§ 23.1 sentence 2, § 92 of the *Bundesverfassungsgerichtsgesetz* – Federal Constitutional Court Act; see BVerfGE 99, 84 <87>; 112, 185 <204>). The complainants meet this requirement to varying degrees.

172

a) To the extent that the complainants assert the violation of their right under Article 38.1 sentence 1 of the Basic Law, which is equivalent to a fundamental right, by the Act Approving the Treaty of Lisbon, the entitlement to lodge a constitutional complaint depends on the content of the individual challenges.

173

aa) As regards their challenge that the principle of democracy is violated under the aspect of the competences of the German *Bundestag* being undermined, the complainants re III., IV. and VI. state a violation of their right under Article 38.1 sentence 1 of the Basic Law, which is equivalent to a fundamental right, in a sufficiently substantiated manner.

174

Article 38.1 and 38.2 of the Basic Law grants the individually assertable right to take part in the election of the Members of the German *Bundestag* (see BVerfGE 47, 253 <269>; 89, 155 <171>). The individualised safeguard set out in the substance of this Article ensures that the citizen is entitled to the right to elect the German *Bundestag* and that in the election, the constitutional principles of electoral law will be upheld. The safeguard also extends to the fundamental democratic content of that right (see BVerfGE 89, 155 <171>). The election not only legitimises state authority at the federal level pursuant to Article 20.1 and 20.2 of the Basic Law but also exerts a directing influence on how it is exercised (see BVerfGE 89, 155 <172>). For those entitled to vote can choose between competing candidates and parties, which stand for election with different political proposals and concepts.

175

The act of voting would lose its meaning if the elected state body did not have a sufficient degree of responsibilities and competences in which the legitimised power to act can be realised. In other words: Parliament has not only an abstract "safeguarding responsibility" for the official action of international or supranational associations but bears specific responsibility for the action of its state. The Basic Law has declared this legitimising connection between the person entitled to vote and state authority inviolable by Article 23.1

sentence 3 in conjunction with Article 79.3 and Article 20.1 and 20.2 of the Basic Law. Article 38.1 sentence 1 of the Basic Law excludes the possibility, in the area of application of Article 23 of the Basic Law, of depleting the content of the legitimisation of state authority, and the influence on the exercise of that authority provided by the election, by transferring the responsibilities and competences of the *Bundestag* to the European level to such an extent that the principle of democracy is violated (see BVerfGE 89, 155 <172>).

176

bb) To the extent that the complainants re III., IV., V. and VI. assert that the European Union is not sufficiently democratically legitimised, they are entitled to lodge a constitutional complaint pursuant to Article 38.1 sentence 1 of the Basic Law.

177

Those entitled to vote can challenge constitutionally relevant shortcomings concerning the democratic legitimisation of the European Union under the same right as shortcomings of democracy on the national level, which is affected by European integration as regards the extent of its competences. The interrelation between Article 38.1 sentence 1 and Article 20.1 and 20.2 of the Basic Law, which originally was only significant on the national level, is gradually extended by the progressing European integration. As a consequence of the transfer of sovereign powers pursuant to Article 23.1 sentence 2 of the Basic Law, decisions which directly affect the citizen are shifted to the European level. Against the backdrop of the principle of democracy, which is made a possible subject-matter of a challenge by Article 38.1 sentence 1 of the Basic Law as an individually assertable right under public law, it can, however, not be insignificant, where sovereign powers are transferred to the European Union, whether the public authority exercised on the European level is democratically legitimised. Because the Federal Republic of Germany may, pursuant to Article 23.1 sentence 1 of the Basic Law, only participate in a European Union which is committed to democratic principles, a legitimising connection must exist in particular between those entitled to vote and European public authority, a connection to which the citizen has a claim according to the original constitutional concept, which continues to apply, set out in Article 38.1 sentence 1 of the Basic Law in conjunction with Article 20.1 and 20.2 of the Basic Law.

178

cc) To the extent that the complainants re III. and IV. allege the loss of statehood of the Federal Republic of Germany by the Act Approving the Treaty of Lisbon, their entitlement to lodge a constitutional complaint also results from Article 38.1 sentence 1 of the Basic Law.

179

According to the Basic Law, those entitled to vote have the right to decide “by a free decision” on the change of identity of the Federal Republic of Germany that would be effected by its becoming a constituent state of a European federal state, and the replacement of the Basic Law which would go with it. Like Article 38.1 sentence 1 of the Basic Law, Article 146 of the Basic Law creates a right of participation of the citizen entitled to vote. Article 146 of the Basic Law confirms the pre-constitutional right to give oneself a constitution from which the state authority founded on the constitution emerges and by which such authority is bound. Article 38.1 sentence 1 of the Basic Law guarantees the right to take part in the legitimisation of the state authority founded on the constitution and to influence its exercise. Article 146 of the Basic Law sets out, in addition to the substantive requirements laid down in Article 23.1 sentence 1 of the Basic Law, the ultimate limit of the participation of the Federal Republic of Germany in European integration. It is the constituent power alone, and not the state authority founded on the constitution, which is entitled to release the state that is founded on the Basic Law as its constitution.

180

The fact that Article 146 of the Basic Law does not establish an individual right that can be challenged individually, and can thus be asserted by a constitutional complaint within the meaning of Article 93.1 no. 4a of the Basic Law (see BVerfGE 89, 155 <180>), is not contrary to the possibility of lodging a constitutional complaint against the “loss of statehood”. For this does not rule out that a violation may be challenged of Article 146 of the Basic Law in conjunction with the fundamental rights, and rights equivalent to fundamental rights, mentioned in Article 93.1 no. 4a of the Basic Law - here Article 38.1 sentence 1 of the Basic Law. The

submissions of the complainants re III. and IV. is also not directly aimed at for instance holding a referendum. The submissions of the complainants re III. and IV. are rather directed against the alleged loss of statehood of the Federal Republic of Germany by the Act Approving the Treaty of Lisbon and thus also against the tacit replacement of the Basic Law.

181

dd) To the extent that the complainants re IV., V. and VI., challenge, on the basis of Article 38.1 sentence 1 of the Basic Law, the violation of other structural principles of the state, the constitutional complaints are only admissible as regards the alleged violation of the principle of the social state.

182

The complainants re V. establish the necessary connection to the principle of democracy, which can directly be the subject-matter of a constitutional complaint via Article 38.1 sentence 1 of the Basic Law, by submitting in a sufficiently determined manner that the democratic possibilities of the German *Bundestag* of shaping social policy would be restricted by the competences of the European Union pursuant to the Treaty of Lisbon to such an extent that the German Bundestag would no longer be able to fulfil the minimum requirements of the principle of the social state that result from Article 23.1 sentence 3 in conjunction with Article 79.3 of the Basic Law.

183

To the extent that the complainants re IV. and VI. assert the violation of the principles of the rule of law and of the separation of powers, they do not show a comparable connection. In this respect, the constitutional complaints are inadmissible.

184

b) The constitutional complaints of the complainants re III. and V. against the Act Approving the Treaty of Lisbon are inadmissible to the extent that they are not based on Article 38.1 sentence 1 of the Basic Law.

185

aa) To the extent that the complainant re III. relies on the right under Article 20.4 of the Basic Law, which is equivalent to a fundamental right, he is not entitled to lodge a constitutional complaint. He does not state in a sufficiently determined manner that the preceding right postulated by him to refrain from any action that would bring about a resistance situation, which may be derived from Article 20.4 of the Basic Law and against which a constitutional complaint may be lodged, or the extraordinary remedy for obtaining “other remedies”, which in his opinion is granted by Article 20.4 of the Basic Law, could become relevant here.

186

The right of resistance pursuant to Article 20.4 of the Basic Law is a subsidiary exceptional right, which from the outset may only be considered, as *ultima ratio*, if all legal remedies provided by the legal order only provide so little prospect of effective remedy that the exercise of resistance is the last resort for maintaining or re-establishing the law (see on the right of resistance already BVerfGE 5, 85 <377>). Accordingly, a violation of Article 20.4 of the Basic Law cannot be challenged in proceedings in which judicial remedy is being sought against the alleged abolition of the constitutional order. The fact that Article 20.4 of the Basic Law is mentioned in Article 93.1 no. 4a of the Basic Law does not alter this. The subsidiary character of this right remains unaffected by its being designed as a right that is, also procedurally, equivalent to a fundamental right.

187

bb) Apart from this, the complainants re III. and V. are not entitled to lodge a constitutional complaint as regards other fundamental rights and rights equivalent to fundamental rights by the Act Approving the Treaty of Lisbon.

188

(1) In their allegation that the Charter of Fundamental Rights, which is legally binding pursuant to Article 6.1 sentence 1 TEU Lisbon, makes human dignity a legal interest that may be weighed against other legal interests, the complainants re III. and V. do not state in a sufficiently substantiated manner that a violation of their fundamental right under Article 1.1 of the Basic Law is possible.

189

The general provision concerning limitations under Article 52.1 of the Charter can at most restrict the human dignity guaranteed in Article 1 of the Charter, but not Article 1.1 of the Basic Law. For the European and the national levels of fundamental rights must be distinguished. The complainants do not even make submissions that sufficiently differentiate the levels of fundamental rights. What is more, Article 52.1 of the Charter might be at all relevant to the national level of fundamental rights only to the extent that due to it, a level of protection of fundamental rights on the European level that is essentially comparable to that afforded by the Basic Law within the meaning of Article 23.1 sentence 1 of the Basic Law would no longer be guaranteed. Such shortcomings cannot be inferred from the complainants' submissions. The general curtailment of human dignity that is alleged by them does not follow without further ado from the Charter of Fundamental Rights or from the case-law of the Court of Justice of the European Communities that is cited by them. It will be for future proceedings to clarify whether and to what extent a decline of the protection of fundamental rights by changes in primary law can at all be admissibly challenged on the basis of Article 1.1 of the Basic Law and what requirements as to substantiation may be placed on such a challenge (see on the violation of fundamental rights of the Basic Law by secondary Union law BVerfGE 102, 147 <164>).

190

(2) To the extent that the complainant re III. moreover asserts that in the area of application of the Charter of Fundamental Rights, which is legally binding pursuant to Article 6.1 sentence 1 TEU Lisbon, the German state bodies are largely exempted from their obligation to respect the fundamental rights of the Basic Law, he also does not state in a sufficiently determined manner that a violation of his fundamental rights and rights equivalent to fundamental rights is possible.

191

Regardless of the range of the area of application of the Charter of Fundamental Rights pursuant to Article 51 of the Charter, the fundamental rights of the Basic Law are part of the core contents of the constitution that restrict the transfer of sovereign powers to the European Union pursuant to Article 23.1 sentence 2 of the Basic Law (see BVerfGE 37, 271 <279-280>; 73, 339 <376>). The Federal Constitutional Court no longer exercises its jurisdiction to decide on the applicability of secondary Union law and other acts of the European Union cited as the legal basis for any acts of German courts or authorities within the sovereign sphere of the Federal Republic of Germany merely as long as the European Union guarantees an application of fundamental rights which in substance and effectiveness is essentially similar to the protection of fundamental rights required unconditionally by the Basic Law (see BVerfGE 73, 339 <376, 387>; 102, 147 <164>).

192

c) The challenges of the complainants re III. and VI. that the principle of democracy is also violated by the accompanying laws are admissible to the extent that they are based on Article 38.1 sentence 1 of the Basic Law.

193

The complainants re III. and VI. state in a sufficiently substantiated manner that a violation of Article 38.1 sentence 1 of the Basic Law by the accompanying laws is possible. The entitlement to lodge a constitutional complaint under Article 38.1 sentence 1 of the Basic Law can also extend to Acts that are directly connected with a law approving an international agreement pursuant to Article 23.1 sentence 2 of the Basic Law. In this respect, the complainants plausibly submit that as regards the proceedings relating to constitutional law, the Act Approving the Treaty of Lisbon and the accompanying laws are a unity. The challenge, made in a general sense, that the accompanying laws do not create sufficient conditions for the exercise of the rights of participation on the national level which have been accorded to the German *Bundestag* and the *Bundesrat* by the Treaty of Lisbon concerns the democratic content of Article 38.1 of the Basic Law. As regards the Amending Act, the

complainants re III. and VI. moreover make sufficient reference to the special standard of review for constitution-amending laws from Article 79.3 in conjunction with Article 20.1 and 20.2 of the Basic Law.

II.

194

The application made in the *Organstreit* proceedings re I. is inadmissible (1.). The application made in the *Organstreit* proceedings re II. is admissible to the extent that the applicant asserts a violation of the competences of the German *Bundestag* to decide on the deployment of the German armed forces (2.).

195

1. The application made in the *Organstreit* proceedings re I., which has to be assessed according to the version submitted the pleading of the applicant re I. of 21. October 2008, is inadmissible.

196

a) The application is inadmissible to the extent that it is directed towards the Federal Government. The measures criticised - the decisions of the German *Bundestag* on the adoption of the Act Approving the Treaty of Lisbon and of the accompanying laws - can only be attributed to the German *Bundestag*, and not to the Federal Government (see BVerfGE 84, 304 <320-321>; 86, 65 <70>; 99, 332 <336>). The Federal Government merely introduced the Bills of the Act Approving the Treaty of Lisbon and of the accompanying laws in the German *Bundestag* (Article 76.1 of the Basic Law).

197

b) The application is inadmissible also in other respects.

198

aa) In his allegation that his right to participate in the work of the *Bundestag* were curtailed, the applicant re I. does not sufficiently state that this right (see BVerfGE 80, 188 <218>; 90, 286 <343>) might be violated or endangered by the challenged legislation (§ 64.1, § 23.1 sentence 2 of the Federal Constitutional Court Act). The adoption of the Act Approving the Treaty of Lisbon and the decisions on the accompanying laws may, as the applicant re I. maintains, be based on an insufficient discussion in the *Bundestag*; the legislative acts themselves, however, do not violate rights of participation of the applicant re I.

199

bb) To the extent that the applicant re I. submits that his right as a Member of the German *Bundestag* to represent the people in the exercise of state authority and to bring about democratic legitimisation has been violated, the existence of such a right, which is derived by the applicant from Article 38.1 of the Basic Law, as well as its possible violation by the challenged legislation, need not be decided. As a citizen of the Federal Republic of Germany, the applicant re I. can lodge a constitutional complaint and has done so. The constitutional complaint permits to assert all rights that may be derived from Article 38.1 of the Basic Law on whose violation the application in the *Organstreit* proceedings is based. As regards the application, no independent status-specific interest of legal protection exists for it in addition to the constitutional complaint.

200

cc) The applicant re I. is also not entitled to assert rights of the German *Bundestag* in his own name, bringing action on behalf of the German *Bundestag* or “performing [its] functions of a constitutional body”. The possibility of bringing action in one’s own name but on another’s behalf is an exception from the general procedural principle that parties to an action may only assert their own rights. Someone who brings action in his own name but on another’s behalf therefore requires an explicit statutory permission (see BVerfGE 60, 319 <325>; 90, 286 <343>). Such permission does not exist because § 63 and § 64.1 of the Federal Constitutional Court Act only refer to sections of a body acting on behalf of the entire body and a Member of the *Bundestag* is

no such section of the *Bundestag* as a body (see BVerfGE 2, 143 <160>; 67, 100 <126>; 90, 286 <343-344>; 117, 359 <367-368>). As sections of the Bundestag as a body, only the permanent components of the German *Bundestag* are entitled to assert rights of the *Bundestag*. The individual Member is no such "component" of the *Bundestag*.

201

2. The application made in the *Organstreit* proceedings re II. is partly admissible.

202

a) As a parliamentary group of the German *Bundestag*, the complainant re II. is entitled to be a party to *Organstreit* proceedings (§ 13 no. 5, §§ 63 et seq. of the Federal Constitutional Court Act). As one of the permanent components pursuant to the Rules of Procedure of the German *Bundestag*, it can assert rights in its own name that are due to the *Bundestag* (see BVerfGE 1, 351 <359>; 2, 143 <165>; 104, 151 <193>; 118, 244 <255>). The German *Bundestag*, against which the application is directed according to the interpretation of the submissions made in the application, is a possible respondent (§ 63 of the Federal Constitutional Court Act).

203

b) The applicant re II. is partly entitled to make an application.

204

aa) In its challenge of the violation of the requirement of parliamentary approval under the provisions of the Basic Law which concern defence (see BVerfGE 90, 286 <383>) by the Act Approving the Treaty of Lisbon, the applicant re II. sufficiently states that rights of the German *Bundestag* might be violated or directly endangered by the Act Approving the Treaty of Lisbon (§ 23.1 sentence 2, § 64.1 of the Federal Constitutional Court Act). The applicant re II. states that the *Bundestag* will lose its competence to decide on the deployment of the German armed forces for the area of European crisis intervention by the provisions of the Treaty of Lisbon because pursuant to Article 42.4 TEU Lisbon, decisions "initiating a mission" shall be adopted by the Council. Because such decision need not be adopted in accordance with the respective constitutional requirements of the Member States, the question arises, according to the applicant, whether the representative of the German government in the Council is obliged to obtain the approval of the German *Bundestag* before voting in the Council takes place.

205

The entitlement to make the application cannot be negated arguing that this would constitute prohibited *inter se* proceedings. The possibility of bringing action in one's own name but on another's behalf that is provided for in § 64.1 of the Federal Constitutional Court Act places the *Organstreit* proceedings in the reality of the interplay of political forces, in which the separation of powers is not realised mainly in the classical confrontation of the holders of power as monolithic bodies but first and foremost in the establishment of rights of the opposition and minority rights. The purpose of bringing action in one's own name but on another's behalf is therefore to preserve to the parliamentary opposition and minority the competence to assert the rights of the *Bundestag* not only where the latter does not wish to exercise its rights, in particular in relation to the Federal Government carried by it (see BVerfGE 1, 351 <359>; 45, 1 <29-30>; 121, 135 <151>), but also where the parliamentary minority wishes to assert rights of the *Bundestag* against the parliamentary majority that politically carries the Federal Government (see Lorenz, in: Festgabe aus Anlass des 25jährigen Bestehens des Bundesverfassungsgerichts, vol. 1, 1976, p. 225 <253-254>). The award of the competence of acting on behalf of the *Bundestag* is an expression of the controlling function of Parliament and as well an instrument of the protection of minorities (see BVerfGE 45, 1 <29-30>; 60, 319 <325-326>; 68, 1 <77-78>; 121, 135 <151>; Schlaich/Korioth, Das Bundesverfassungsgericht, 7th ed. 2007, marginal no. 94).

206

bb) The applicant re II. is not entitled to make an application to the extent that it asserts that the Act Approving the Treaty of Lisbon transfers democratic decision-making competences beyond the extent permissible pursuant to Article 23.1 sentence 3 in conjunction with Article 79.3 of the Basic Law. The applicant re II. does not sufficiently state that rights of the German *Bundestag* might be violated or directly endangered by the Act

Approving the Treaty of Lisbon (§ 23.1 sentence 2, § 64.1 of the Federal Constitutional Court Act). The principle of democracy, which is guaranteed in Articles 20.1 and 20.2 of the Basic Law, is, also to the extent that it is declared inviolable by Article 79.3 of the Basic Law, not a right of the *Bundestag*. In *Organstreit* proceedings, there is no room for a general review that is detached of the rights of the *Bundestag* of the constitutionality of a challenged measure (see BVerfGE 68, 1 <73>; 73, 1 <30>; 80, 188 <212>; 104, 151 <193-194>).

C.

I.

207

To the extent that they are admissible, the constitutional complaints re III. and VI. are well-founded in part. The Act Extending and Strengthening the Rights of the Bundestag and the Bundesrat in European Union Matters (*Gesetz über die Ausweitung und Stärkung der Rechte des Bundestages und des Bundesrates in Angelegenheiten der Europäischen Union*) does not contain provisions which are required and is unconstitutional to that extent. In other respects, the constitutional complaints lodged and the application made in *Organstreit* proceedings by the applicant re II. are unfounded to the extent that they are admissible. Taking into account the provisos that are specified in the grounds, there are no decisive constitutional objections to the Act Approving the Treaty of Lisbon (*Zustimmungsgesetz zum Vertrag von Lissabon*) and the Act Amending the Basic Law (Articles 23, 45 and 93) (*Gesetz zur Änderung des Grundgesetzes <Artikel 23, 45 und 93>*).

208

1. The standard of review of the Act Approving the Treaty of Lisbon is determined by the right to vote as a right that is equivalent to a fundamental right (Article 38.1 sentence 1 in conjunction with Article 93.1 no. 4a of the Basic Law <*Grundgesetz - GG*>). The right to vote establishes a right to democratic self-determination, to free and equal participation in the state authority exercised in Germany and to compliance with the principle of democracy including the respect of the constituent power of the people. In the present combination of procedural circumstances, the review of a violation of the right to vote also comprises encroachments on the principles which are codified in Article 79.3 of the Basic Law as the identity of the constitution (see Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 37, 271 (<279>; 73, 339 <375>).

209

a) Article 38.1 of the Basic Law guarantees every citizen entitled to vote the right to elect the Members of the German *Bundestag*. In the general, free and equal election of the Members of the German *Bundestag* the people of the Federation directly exercises its political will. As a general rule, it governs itself via a majority (Article 42.2 of the Basic Law) in the representative assembly which has come into being in this manner. From within the assembly, the Chancellor - and thus the Federal Government - is determined; this is where the Chancellor is accountable. On the federal level of the state that is founded on the Basic Law as its constitution, the election of the Members of the German *Bundestag* is the source of state authority - with the periodically repeated elections, state authority time and again newly emanates from the people (Article 20.2 of the Basic Law).

210

The right to vote is the citizens' most important individually assertable right to democratic participation guaranteed by the Basic Law. In the state system that is shaped by the Basic Law, the election of the Members of the German *Bundestag* is of major importance. Without the free and equal election of the body that has a decisive influence on the government and the legislation of the Federation, the mandatory principle of personal freedom remains incomplete. Invoking the right to vote, the citizen can therefore challenge the violation of democratic principles by means of a constitutional complaint (Article 38.1 sentence 1, Article 20.1 and 20.2 of the Basic Law). The right to equal participation in democratic self-determination (democratic right of participation), to which every citizen is entitled, can also be violated by the organisation of state authority being changed in such a way that the will of the people can no longer effectively form within the meaning of Article 20.2 of the Basic Law and the citizens cannot rule according to the will of a majority. The principle of the representative rule of the people can be violated if in the structure of bodies established by the Basic Law, the

rights of the *Bundestag* are essentially curtailed and thus a loss of substance of the democratic freedom of action of the constitutional body occurs which has directly come into being according to the principles of free and equal election (see BVerfGE 89, 155 <171-172>).

211

b) The citizens' right to determine, in equality and freedom, public authority with regard to persons and subject-matters through elections and other votes is the fundamental element of the principle of democracy. The right to free and equal participation in public authority is anchored in human dignity (Article 1.1 of the Basic Law). It belongs to the principles of German constitutional law that are laid down as non-amendable by Article 20.1 and 20.2 of the Basic Law in conjunction with Article 79.3 of the Basic Law.

212

aa) To the extent that in the public sphere, binding decisions, in particular as regards encroachments on fundamental rights, are taken for the citizen, these decisions must go back to a freely formed majority will of the people. The order that is founded on the Basic Law as its constitution assumes that human beings, who are able to avail themselves of freedom, have their own value and their dignity. This order is power under the rule of law on the basis of the self-determination of the people according to the will of the respective majority in freedom and equality (see BVerfGE 2, 1 <12>). Accordingly, the citizens are not subject to a political power which they cannot escape and which they are fundamentally incapable to determine in liberty, with equal regard to persons and subject-matters.

213

bb) For the state order which is founded on the Basic Law as its constitution, a self-determination of the people according to the majority principle, brought about by elections and other votes, is mandatory. It acts in the sphere of public, free opinion-forming and in the organised competition of political forces in the relation between the responsible government and the parliamentary opposition. The exercise of public authority is subject to the majority principle with a regular formation of the responsible government and an unhindered opposition, which has the chance to come into power. In particular as regards the representative assembly of the people, or the election of highest-ranking offices at government level, it must be possible for a generalised will of the majority with regard to persons or subject-matters to be articulated and for decisions on political direction to be brought about as a result of the election.

214

This central requirement of democracy can be fulfilled on the basis of different models. As provided by German electoral law, the constitutionally required parliamentary rule is achieved by reflecting the will of the electorate as proportionally as possible in the allocation of seats. A majority decision in Parliament represents at the same time the majority decision of the people. Every Member of Parliament is a representative of the whole people and thus member in an assembly of equals (Article 38.1 of the Basic Law) who have gained their mandate under conditions that do justice to equality. The Basic Law requires that every citizen be free and in the legal sense equal (i.e. equal before the law). As regards the requirement of democracy, this means that an equal part in the exercise of state authority is due to every citizen who is entitled to vote due to his or her age and has not lost his or her right to vote (see BVerfGE 112, 118 <133-134>). The equality of the citizens entitled to vote must then continue to apply on further levels of the development of democratic opinion-forming, in particular as regards the status of a Member of Parliament. The status of a Member of Parliament therefore includes the right, guaranteed in Article 38.1 sentence 2 of the Basic Law, to equal participation in the process of parliamentary opinion-forming (see BVerfGE 43, 142 <149>; 70, 324 <354>; 80, 188 <218>; 96, 264 <278>; 112, 118 <133>).

215

In presidential systems or under a first-past-the-post electoral system, the concrete elaboration of the central requirement of democracy may, however, be different. One thing, however, is common to all systems of representative democracy: a will of the majority that has come about freely and taking due account of equality is formed, either in the constituency or in the assembly which has come into being proportionally, by the act of voting. The decision on political direction which is taken by the majority of the voters is intended to be reflected

in Parliament and in the government; the losing part remains visible as a political alternative and remains active in the sphere of free opinion-forming as well as in formal decision-making procedures, as the opposition that will, in subsequent elections, have the chance to become the majority.

216

c) The principle of democracy is not amenable to weighing with other legal interests; it is inviolable (see BVerfGE 89, 155 <182>). The constituent power of the Germans which gave itself the Basic Law wanted to set an insurmountable boundary to any future political development. Amendments of the Basic Law affecting the principles laid down in Article 1 and Article 20 of the Basic Law shall be inadmissible (Article 79.3 of the Basic Law). The so-called eternity guarantee takes the disposal of the identity of the free constitutional order even out of the hands of the constitution-amending legislature. The Basic Law thus not only assumes sovereign statehood but guarantees it.

217

It may remain open whether, due to the universal nature of dignity, freedom and equality alone, this commitment even applies to the constituent power, i.e. for the case that the German people, in free self-determination, but in a continuity of legality to the Basic Law's system of rule, gives itself a new constitution (see Isensee, in: Isensee/Kirchhof, HStR VII, 1992, § 166, marginal nos. 61 et seq.; Moelle, Der Verfassungsbeschluss nach Art. 146 GG, 1996, pp. 73 et seq.; Stückrath, Art. 146 GG: Verfassungsablösung zwischen Legalität und Legitimität, 1997, pp. 240 et seq.; see also BVerfGE 89, 155 <180>). Within the order of the Basic Law, at any rate the structural principles of the state laid down in Article 20 of the Basic Law, i.e. democracy, the rule of law, the principle of the social state, the republic, the federal state, as well as the substance of elementary fundamental rights that is indispensable to the respect of human dignity are, in their fundamental quality, not amenable to any amendment.

218

From the perspective of the principle of democracy, the violation of the constitutional identity codified in Article 79.3 of the Basic Law is at the same time an infringement of the constituent power of the people. In this respect, the constituent power has not granted the representatives and bodies of the people a mandate to dispose of the identity of the constitution. No constitutional body has been accorded the competence to amend the constitutional principles which are essential pursuant to Article 79.3 of the Basic Law. The Federal Constitutional Court watches over this. With what is known as the eternity guarantee, the Basic Law reacts on the one hand to the historical experience of the free substance of a democratic fundamental order being slowly or abruptly undermined. However, it makes clear as well that the Constitution of the Germans, in correspondence with the international development which has taken place in particular since the existence of the United Nations, has a universal foundation which is not supposed to be amendable by positive law.

219

2. The elaboration of the principle of democracy by the Basic Law is open to the objective of integrating Germany into an international and European peaceful order. The new shape of political rule which is thereby made possible is not schematically subject to the requirements of a constitutional state applicable on the national level and may therefore not be measured without further ado against the concrete manifestations of the principle of democracy in a Contracting State or Member State. The empowerment to embark on European integration permits a different shaping of political opinion-forming than the one that is determined by the Basic Law for the German constitutional order. This applies as far as the limit of the inalienable constitutional identity (Article 79.3 of the Basic Law). The principle of democratic self-determination and of participation in public authority with due account being taken of equality remains unaffected also by the Basic Law's mandate of peace and integration and the constitutional principle of the openness towards international law (*Völkerrechtsfreundlichkeit*) (see BVerfGE 31, 58 <75-76>; 111, 307 <317>, 112, 1 <26>; Chamber Decisions of the Federal Constitutional Court (Kammerentscheidungen des Bundesverfassungsgerichts - BVerfGK 9, 174 <186>).

220

a) The German constitution is oriented towards opening the state system of rule to the peaceful cooperation of the nations and towards European integration. Neither the integration *pari passu* into the European Union nor the integration into peacekeeping systems such as the United Nations is tantamount to submission to alien powers. Instead, it is a voluntary, mutual commitment *pari passu*, which secures peace and strengthens the possibilities of shaping policy by joint coordinated action. The Basic Law does not protect individual freedom, as the self-determination of the individual, with the objective of promoting uncommitted high-handedness and the ruthless enforcement of interests. The same applies to the sovereign right of self-determination of the political community.

221

The constitutional state commits itself to other states which are standing on the same foundation of values of freedom and equal rights and which, like itself, make human dignity and the principles of equal entitlement to personal freedom the focal point of their legal order. Democratic constitutional states can gain a formative influence on an increasingly mobile society, which is increasingly linked across borders, only by sensible cooperation which takes account of their own interest as well as of their common interest. Only those who commit themselves because they realise the necessity of a peaceful balancing of interests and the possibilities provided by joint concepts gain the measure of possibilities of action that is required for being able to responsibly shape the conditions of a free society also in the future. With its openness to European integration and to commitments under international law, the Basic Law takes account of this.

222

b) The Preamble of the Basic Law emphasises, after the experience of devastating wars in particular between the European peoples, not only the moral basis of responsible self-determination but also the willingness to serve world peace as an equal partner in a united Europe. This willingness is lent concrete shape by the empowerments to integrate into the European Union (Article 23.1 of the Basic Law), to participate in intergovernmental institutions (Article 24.1 of the Basic Law) and to join systems of mutual collective security (Article 24.2 of the Basic Law) as well as by the ban on wars of aggression (Article 26 of the Basic Law). The Basic Law wants the participation of Germany in international organisations, an order of mutual peaceful balancing of interests that is established between the states and organised cooperation in Europe.

223

In the objectives laid down in the Preamble, this understanding of sovereignty becomes visible. The Basic Law abandons a high-handed concept of sovereign statehood that is sufficient unto itself and returns to a view of the state authority of the individual state which regards sovereignty as “freedom that is organised by international law and committed to it” (von Martitz, Internationale Rechtshilfe in Strafsachen, vol. I, 1888, p. 416). It breaks with all forms of political Machiavellianism and with a rigid concept of sovereignty which until the beginning of the 20th century regarded the right to wage a war - even a war of aggression - as a right that is due to a sovereign state as a matter of course (see Starck, Der demokratische Verfassungsstaat, 1995, pp. 356-357; Randelzhofer, Use of Force, in: Bernhardt, Encyclopedia of Public International Law, vol. IV, 2000, pp. 1246 et seq.), even if a gradual proscription of force between states set in with the Conventions, which still confirmed the *ius ad bellum*, signed at the Hague Peace Conference on 29 July 1899.

224

In contrast, the Basic Law codifies the maintenance of peace and the overcoming of the destructive antagonism between the European states as outstanding political objectives of the Federal Republic of Germany. Accordingly, sovereign statehood stands for a pacified area and the order guaranteed therein on the basis of individual freedom and collective self-determination. The state is neither a myth nor an end in itself but the historically grown and globally recognised form of organisation of a viable political community.

225

The constitutional mandate to realise a united Europe, which follows from Article 23.1 of the Basic Law and its Preamble (see Schorkopf, Grundgesetz und Überstaatlichkeit, 2007, p. 247) means in particular for the German constitutional bodies that it is not left to their political discretion whether or not they participate in European integration. The Basic Law wants European integration and an international peaceful order. Therefore not only

the principle of openness towards international law, but also the principle of openness towards European law (*Europarechtsfreundlichkeit*) applies.

226

c) It is true that the Basic Law grants the legislature powers to engage in a far-reaching transfer of sovereign powers to the European Union. However, the powers are granted under the condition that the sovereign statehood of a constitutional state is maintained on the basis of an integration programme according to the principle of conferral and respecting the Member States' constitutional identity, and that at the same time the Member States do not lose their ability to politically and socially shape the living conditions on their own responsibility.

227

aa) The objective of integration that has been laid down for the German people by the Preamble and by Article 23.1 of the Basic Law does not say anything about the final character of the political organisation of Europe. In its Article 23, the Basic Law grants powers to participate in a supranational system of cooperation that promotes peace. This does not include the obligation to realise democratic self-determination on the supranational level in the exact forms which the Basic Law prescribes for the Federation and, via Article 28.1 sentence 1 of the Basic Law, also for the *Länder* (states); instead, it permits derogations from the organisational principles of democracy applying on the national level which are due to the requirements of a European Union that is based on the principle of the equality of states and has been negotiated under the law of international agreements.

228

Integration requires the willingness to joint action and the acceptance of an autonomous common opinion-formation. However, integration into a free community neither requires submission that is removed from constitutional limitation and control nor forgoing one's own identity. The Basic Law does not grant the bodies acting on behalf of Germany powers to abandon the right to self-determination of the German people in the form of Germany's sovereignty under international law by joining a federal state. Due to the irrevocable transfer of sovereignty to a new subject of legitimisation that goes with it, this step is reserved to the directly declared will of the German people alone.

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bb) The current constitution shows a different way: it aims for Germany's integration *pari passu* into state systems of mutual security such as that of the United Nations or that of the North Atlantic Treaty Organisation (NATO) and for Germany's participation in the European unification. Article 23.1 of the Basic Law underlines, like Article 24.1 of the Basic Law, that the Federal Republic of Germany takes part in the development of a European Union which is designed as an association of sovereign national states (*Staatenverbund*) to which sovereign powers are transferred. The concept of *Verbund* covers a close long-term association of states which remain sovereign, an association which exercises public authority on the basis of a treaty, whose fundamental order, however, is subject to the disposal of the Member States alone and in which the peoples of their Member States, i.e. the citizens of the states, remain the subjects of democratic legitimisation.

230

This connection is made clear by Article 23.1 sentence 1 of the Basic Law, which lays down a binding structure for Germany's participation in the development of the European Union. Pursuant to Article 23.1 sentence 3 of the Basic Law, the Basic Law can be adapted to the development of the European Union; at the same time, this possibility is set an ultimate limit by Article 79.3 of the Basic Law, to which the provision makes reference. The minimum standard which is protected by Article 79.3 of the Basic Law may not be fallen short of even by Germany's integration into supranational structures.

231

cc) The empowerment to transfer sovereign powers to the European Union or other intergovernmental institution permits a shift of political rule to international organisations. The empowerment to exercise supranational competences comes, however, from the Member States of such an institution. They therefore permanently

remain the masters of the Treaties. In a functional sense, the source of Community authority, and of the European constitution that constitutes it, are the peoples of Europe with their democratic constitutions in their states. The “Constitution of Europe”, the law of international agreements or primary law, remains a derived fundamental order. It establishes a supranational autonomy which is quite far-reaching in political everyday life but is always limited factually. Here, autonomy can only be understood - as is usual regarding the law of self-government - as an autonomy to rule which is independent but derived, i.e. is accorded by other legal entities. In contrast, sovereignty under international law and public law requires independence of an alien will particularly for its constitutional foundations (see Carlo Schmid, Generalbericht in der Zweiten Sitzung des Plenums des Parlamentarischen Rates am 8. September 1948, in: Deutscher Bundestag/ Bundesarchiv, Der Parlamentarische Rat 1948-1949, Akten und Protokolle, vol. 9, 1996, p. 20-21). It is not decisive here whether an international organisation has legal personality, i.e. whether it for its part can bindingly act as a subject in legal relations under international law. What is decisive is how the fundamental legal relation between the international organisation and the Member States and Contracting States which have created the organisation and have vested it with legal personality is elaborated.

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In accordance with the powers granted with a view to European integration under Article 23.1 of the Basic Law in conjunction with the Preamble, Article 20, Article 79.3 and Article 146 of the Basic Law, there can be no independent subject of legitimisation for the authority of the European Union which constitutes itself, so to speak, on a higher level, without being derived from an alien will, and thus out of its own right.

233

d) The Basic Law does not grant the German state bodies powers to transfer sovereign powers in such a way that their exercise can independently establish other competences for the European Union. It prohibits the transfer of competence to decide on its own competence (*Kompetenz-Kompetenz*) (see BVerfGE 89, 155 <187-188, 192, 199>; see also BVerfGE 58, 1 <37>; 104, 151 <210>). Also a far-reaching process of independence of political rule for the European Union brought about by granting it steadily increased competences and by gradually overcoming existing unanimity requirements or rules of state equality that have been decisive so far can, from the perspective of German constitutional law, only take place as a result of the freedom of action of the self-determined people. According to the constitution, such steps of integration must be factually limited by the act of transfer and must, in principle, be revocable. For this reason, withdrawal from the European union of integration (*Integrationsverband*) may, regardless of a commitment for an unlimited period under an agreement, not be prevented by other Member States or the autonomous authority of the Union. This is not a secession from a state union (*Staatsverband*), which is problematical under international law (Tomuschat, Secession and Self-Determination, in: Kohen, Secession - International Law Perspectives, 2006, pp. 23 et seq.), but merely the withdrawal from a *Staatenverbund* which is founded on the principle of the reversible self-commitment.

234

The principle of conferral is therefore not only a principle of European law (Article 5.1 ECT; Article 5.1 sentence 1 and 5.2 TEU Lisbon; see Kraußer, Das Prinzip begrenzter Ermächtigung im Gemeinschaftsrecht als Strukturprinzip des EWG-Vertrages, 1991); just like the European Union’s obligation to respect the Member States’ national identity (Article 6.3 TEU; Article 4.2 sentence 1 TEU Lisbon), it takes up constitutional principles from the Member States. In this respect, the principle of conferral under European law and the duty, under European law, to respect identity, are the expression of the foundation of Union authority in the constitutional law of the Member States.

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What corresponds to the non-transferable identity of the constitution (Article 79.3 of the Basic Law), which is not amenable to integration in this respect, is the obligation under European law to respect the constituent power of the Member States as the masters of the Treaties. Within the boundaries of its competences, the Federal Constitutional Court is to review, if necessary, whether these principles are adhered to.

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e) The integration programme of the European Union must be sufficiently precise. To the extent that not the people itself is directly called upon to decide, only what Parliament can take the responsibility for may be democratically legitimised (see BVerfGE 89, 155 <212>). A blanket empowerment for the exercise of public authority, in particular one which has a direct binding effect on the national legal system, may not be granted by the German constitutional bodies (see BVerfGE 58, 1 <37>; 89, 155 <183-184, 187>). To the extent that the Member States elaborate the law laid down in the Treaties in such a way that, with the principle of conferral fundamentally continuing to apply, an amendment of the law laid down in the Treaties can be brought about without a ratification procedure solely or to a decisive extent by the institutions of the Union, albeit under the requirement of unanimity, a special responsibility is incumbent on the legislative bodies, apart from the Federal Government, as regards participation; in Germany, participation must, on the national level, comply with the requirements under Article 23.1 of the Basic Law (responsibility for integration) and can, if necessary, be asserted in proceedings before the Federal Constitutional Court.

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aa) Every integration into peacekeeping systems, in international or supranational organisations opens up the possibility for the institutions thus created of developing independently, and showing, in doing so, a tendency of political self-enhancement, even, and particularly if, their bodies act according to their mandate. An Act that grants powers to embark on integration, like the Act Approving the Treaty of Lisbon, can therefore, in spite of the principle of conferral, only outline a programme in whose boundaries a political development will take place which cannot be determined in advance in every respect. Whoever relies on integration must expect the independent opinion-formation of the institutions of the Union. What must therefore be tolerated is a tendency towards maintaining the *acquis communautaire* and to effectively interpreting competences along the lines of the US American doctrine of implied powers (see also International Court of Justice, Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion of 11 April 1949, ICJ Reports 1949, p. 174 <182 et seq.>) or the principle of *effet utile* under the law of international agreements (see on the good sense of this principle Gill, The League of Nations from 1929 to 1946, 1996; Rouyer-Hameray, Les compétences implicites des organisations internationales, 1962, p. 90 et seq.; especially as regards European law Pescatore, Monisme, dualisme et “effet utile” dans la jurisprudence de la Cour de justice de la Communauté européenne, in: Festschrift für Rodríguez Iglesias, 2003, pp. 329 et seq.; see on the corresponding development of the case-law of the Court of Justice of the European Communities Höreth, Die Selbstautorisierung des Agenten, Der Europäische Gerichtshof im Vergleich zum US Supreme Court, 2008, pp. 320 et seq.). This is part of the mandate of integration which is wanted by the Basic Law.

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bb) Under the constitution, however, the trust in the constructive force of the mechanism of integration cannot be unlimited. If in the process of European integration primary law is amended, or interpreted in an extending sense, by institutions, a tension that is constitutionally important will occur towards the principle of conferral and towards the individual Member State’ constitutional responsibility for integration. If legislative or administrative competences are only transferred in an undetermined manner or with the intention of their being further developed dynamically, or if the institutions are allowed to newly establish competences, to round them off in an extending manner or to factually extend them, they risk transgressing the predetermined integration programme and acting beyond the powers which they have been granted. They move on a path at the end of which there is the power of disposition of their foundation laid down in the Treaties, i.e. the competence of freely disposing of their competences. There is the risk of a transgression of the mandatory principle of conferral and of the conceptual responsibility for integration which is due to the Member States if institutions of the European Union may unrestrictedly, i.e. without any outside control - such control being very moderate and regarding itself as an exceptional one - decide about how the law under the Treaties is interpreted.

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It is therefore constitutionally required not to agree dynamic treaty provisions with a blanket character or if they can still be interpreted in a manner that respects the national responsibility for integration, to establish, at any rate, suitable national safeguards for the effective exercise of such responsibility. Accordingly, the Act approving an international agreement and the national accompanying laws must therefore be such that European integration continues to take place according to the principle of conferral without the possibility for the European Union of taking possession of *Kompetenz-Kompetenz* or to violate the Member States’ constitutional identity which is not amenable to integration, in this case, that of the Basic Law. For borderline cases of what is still constitutionally

admissible, the German legislature must, if necessary, make arrangements with its laws that accompany approval to ensure that the responsibility for integration of the legislative bodies can sufficiently develop.

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Apart from this, it must be possible within the German jurisdiction to assert the responsibility for integration if obvious transgressions of the boundaries take place when the European Union claims competences - this has also been emphasised by the authorised representatives of the German *Bundestag* and of the Federal Government in the oral hearing - and to preserve the inviolable core content of the Basic Law's constitutional identity by means of a identity review (see BVerfGE 75, 223 <235, 242>; 89, 155 <188>; 113, 273 <296>). The Federal Constitutional Court has already opened up the way of the *ultra vires* review for this, which applies where Community and Union institutions transgress the boundaries of their competences. If legal protection cannot be obtained at the Union level, the Federal Constitutional Court reviews whether legal instruments of the European institutions and bodies, adhering to the principle of subsidiarity under Community and Union law (Article 5.2 ECT; Article 5.1 sentence 2 and 5.3 TEU Lisbon), keep within the boundaries of the sovereign powers accorded to them by way of conferred power (see BVerfGE 58, 1 <30-31>; 75, 223 <235, 242>; 89, 155 <188>: see the latter concerning legal instruments transgressing the limits). Furthermore, the Federal Constitutional Court reviews whether the inviolable core content of the constitutional identity of the Basic Law pursuant to Article 23.1 sentence 3 in conjunction with Article 79.3 of the Basic Law is respected (see BVerfGE 113, 273 <296>). The exercise of this competence of review, which is rooted in constitutional law, follows the principle of the Basic Law's openness towards European Law (*Europarechtsfreundlichkeit*), and it therefore also does not contradict the principle of loyal cooperation (Article 4.3 TEU Lisbon); with progressing integration, the fundamental political and constitutional structures of sovereign Member States, which are recognised by Article 4.2 sentence 1 TEU Lisbon, cannot be safeguarded in any other way. In this respect, the guarantee of national constitutional identity under constitutional and the one under Union law go hand in hand in the European legal area. The identity review makes it possible to examine whether due to the action of European institutions, the principles under Article 1 and Article 20 of the Basic Law, which are declared inviolable in Article 79.3 of the Basic Law, are violated. This ensures that the primacy of application of Union law only applies by virtue of, and in the context of, the constitutional empowerment that continues in effect.

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The *ultra vires* review as well as the identity review can result in Community law or Union law being declared inapplicable in Germany. To preserve the viability of the legal order of the Community, an application of constitutional law that is open to European law requires, taking into account the legal concept expressed in Article 100.1 of the Basic Law, that the *ultra vires* review as well as the establishment of a violation of constitutional identity is incumbent on the Federal Constitutional Court alone. It need not be decided here in which specific types of proceedings the Federal Constitutional Court's jurisdiction may be invoked for such review. Availing oneself to types of proceedings that already exist, i.e. the abstract review of statutes (Article 93.1 no. 2 of the Basic Law) and the concrete review of statutes (Article 100.1 of the Basic Law), *Organstreit* proceedings (Article 93.1 no. 1 of the Basic Law), disputes between the Federation and the *Länder* (Article 93.1 no. 3 of the Basic Law) and the constitutional complaint (Article 93.1 no. 4a of the Basic Law) is a consideration. What is also conceivable, however, is the creation by the legislature of an additional type of proceedings before the Federal Constitutional Court that is especially tailored to *ultra vires* review and identity review to safeguard the obligation of German bodies not to apply in Germany, in individual cases, legal instruments of the European Union that transgress competences or that violate constitutional identity.

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If the treaty law determines the competences of the European Union in a manner that is fundamentally amenable to consent but if the competences may be further developed beyond the possibilities offered by an interpretation by the principle of *effet utile* or by an implicit filling of the lacunas of the competences which have been transferred, i.e. if titles of competence are only provided with a clear content by special legal instruments on the Union level and if decision-making procedures may be autonomously changed there, Germany may only participate in this if it is ensured on the national level that the constitutional requirements are complied with. The ratification of treaties which regulate the political relations of the Federation (Article 59.2 of the Basic Law) generally guarantees the participation of the legislative bodies in sovereign decisions relating to foreign affairs (see BVerfGE 104, 151 <194>) and give the order to apply the law on the national level for the law of international treaties that has been agreed by the executive (see BVerfGE 99, 145 <158>; Decisions of the Federal Administrative Court <Entscheidungen des Bundesverwaltungsgerichts - BVerwGE> 110, 363 <366>).

243

As regards European integration, the special constitutional requirement of the enactment of a statute under Article 23.1 sentence 2 of the Basic Law applies, pursuant to which sovereign powers may only be transferred by a law and with the approval of the *Bundesrat.* To respect the responsibility for integration and to protect the constitutional structure, this constitutional requirement of the specific enactment of a statute is to be interpreted in such a way that it covers any amendment of the texts that form the basis of European primary law. The legislative bodies of the Federation thus exercise their political responsibility, which is comparable to the ratification procedure, also in case of simplified revision procedures or the rounding off of the Treaties, in the case of competence changes whose bases are already existing but which require concretisation by further legal instruments, and in case of a change of the provisions that concern decision-making procedures. In doing so, legal protection that corresponds to the situation of ratification is ensured.

244

3. The shape of the European Union must comply with democratic principles as regards the nature and the extent of the transfer of sovereign powers and also as regards the organisational and procedural elaboration of the Union authority acting autonomously (Article 23.1, Article 20.1 and 20.2 in conjunction with Article 79.3 of the Basic Law). European integration may neither result in the system of democratic rule in Germany being undermined (a) nor may the supranational public authority as such fail to fulfil fundamental democratic requirements (b).

245

a) A permanent responsibility for integration is incumbent upon the German constitutional bodies. It is aimed at ensuring, as regards the transfer of sovereign powers and the elaboration of the European decision-making procedures, that in an overall view, the political system of the Federal Republic of Germany as well as that of the European Union comply with democratic principles within the meaning of Article 20.1 and 20.2 in conjunction with Article 79.3 of the Basic Law.

246

The election of the Members of the German *Bundestag* by the people only fulfils its central role in the system of the federal and supranational intertwining of power if the German *Bundestag*, which represents the people, and the Federal Government borne by it, retain a formative influence on the political development in Germany. This is the case if the German *Bundestag* retains responsibilities and competences of its own of substantial political importance or if the Federal Government, which is answerable to it politically, is in a position to exert a decisive influence on European decision-making procedures (see BVerfGE 89, 155 <207>).

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aa) Inward federalisation and outward supranationalisation can open up new possibilities of civic participation. An increased cohesion of smaller or larger units and better chances of a peaceful balancing of interests between regions and states grow from them. Federal or supranational intertwining creates possibilities of action which otherwise would encounter practical or territorial limits, and they make the peaceful balancing of interests easier. At the same time, they make it more difficult to create a will of the majority that can be asserted and that directly goes back to the people (Article 20.2 sentence 1 of the Basic Law). The transparency of the assignment of decisions to specific responsible actors decreases, with the result that the citizens can hardly take any tangible contexts of responsibility as an orientation for their vote. The principle of democracy therefore sets content-related limits to the transfer of sovereign powers, limits which do not result already from the inalienability of the constituent power and of state sovereignty.

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bb) The safeguarding of sovereignty, demanded by the principle of democracy in the valid constitutional system, in the manner prescribed by the Basic Law, i.e. in a manner that is open to integration and to international law, does not mean *per se* that a number of sovereign powers which can be determined from the outset or specific types of sovereign powers must remain in the hands of the state. The participation of Germany in the development of the European Union, which is permitted by Article 23.1 sentence 1 of the Basic Law, comprises,

apart from the formation of an economic and monetary union, also a political union. Political union means the joint exercise of public authority, including the legislative authority, which even reaches into the traditional core areas of the state's area of competence. This is rooted in the European idea of peace and unification especially where it deals with the coordination of cross-border aspects of life and with guaranteeing a single economic area and area of justice in which citizens of the Union can freely develop (Article 3.2 TEU Lisbon).

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cc) European unification on the basis of a union of sovereign states under the Treaties may, however, not be realised in such a way that the Member States do not retain sufficient space for the political formation of the economic, cultural and social circumstances of life. This applies in particular to areas which shape the citizens' circumstances of life, in particular the private space of their own responsibility and of political and social security, which is protected by the fundamental rights, and to political decisions that particularly depend on previous understanding as regards culture, history and language and which unfold in discourses in the space of a political public that is organised by party politics and Parliament. Essential areas of democratic formative action comprise, *inter alia*, citizenship, the civil and the military monopoly on the use of force, revenue and expenditure including external financing and all elements of encroachment that are decisive for the realisation of fundamental rights, above all as regards intensive encroachments on fundamental rights such as the deprivation of liberty in the administration of criminal law or the placement in an institution. These important areas also include cultural issues such as the disposition of language, the shaping of circumstances concerning the family and education, the ordering of the freedom of opinion, of the press and of association and the dealing with the profession of faith or ideology.

250

dd) Democracy not only means respecting formal principles of organisation (see BVerfGE 89, 155 <185>) and not only a cooperative involvement of interest groups. 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. Only this public opinion makes visible the alternatives for elections and other votes and continually calls them to mind also as regards decisions relating to individual issues so that they may remain continuously present and effective in the political opinion-formation of the people via the parties, which are open to participation for all citizens, and in the public space of information. To this extent, Article 38 and Article 20.1 and 20.2 of the Basic Law also protect the connection between political decisions on facts and the will of the majority that has been constituted by elections, and the dualism between government and opposition that results from it, in a system of a variety of competing parties and of the observing and controlling formation of public opinion.

251

Even if due to the great successes of European integration, a joint European public that engages in an issue-related cooperation in the rooms of resonance of their respective states is evidently growing (see on this already BVerfGE 89, 155 <185>; Trenz, Europa in den Medien, Die europäische Integration im Spiegel nationaler Öffentlichkeit, 2005), it cannot be overlooked, however, that the public perception of factual issues and of political leaders remains connected to a considerable extent to patterns of identification which are related to the nation-state, language, history and culture. The principle of democracy as well as the principle of subsidiarity, which is structurally demanded by Article 23.1 sentence 1 of the Basic Law as well, therefore require to factually restrict the transfer and exercise of sovereign powers to the European Union in a predictable manner particularly in central political areas of the space of personal development and the shaping of the circumstances of life by social policy. In these areas, it particularly suggests itself to draw the limit where the coordination of circumstances with a cross-border dimension is factually required.

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What has always been deemed especially sensitive for the ability of a constitutional state to democratically shape itself are decisions on substantive and formal criminal law (1), on the disposition of the police monopoly on the use of force towards the interior and of the military monopoly on the use of force towards the exterior (2), the fundamental fiscal decisions on public revenue and public expenditure, with the latter being particularly motivated, *inter alia*, by social-policy considerations (3), decisions on the shaping of circumstances of life in a social state (4) and decisions which are of particular importance culturally, for instance as regards family law, the school and education system and dealing with religious communities (5).

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(1) As regards the preconditions of criminal liability as well as the concepts of a fair and appropriate trial, the administration of criminal law depends on cultural processes of previous understanding that are historically grown and also determined by language, and on the alternatives which emerge in the process of deliberation which and which move the respective public opinion (see on this Weigend, Strafrecht durch internationale Vereinbarungen - Verlust an nationaler Strafrechtskultur?, ZStW 1993, p. 774 <785>). The common characteristics in this regard, but also the differences, between the European nations is shown by the relevant case-law of the European Court of Human Rights concerning the procedural guarantees in criminal proceedings (see the contributions by Bank <chapter 11>; Grabenwarter/Pabel <chapter 14> and Kadelbach <chapter 15> in: Grote/Marauhn, EMRK/GG, 2006; Gollwitzer, Menschenrechte im Strafverfahren: MRK und IPBPR, 2005). The penalisation of social behaviour can, however, only to a limited extent be normatively derived from values and moral premises that are shared Europe-wide. Instead, the decision on punishable behaviour, on the rank of legal interests and the sense and the measure of the threat of punishment, is to a particular extent left to the democratic decision-making process (see BVerfGE 120, 224 <241-242>). In this context, which is of importance as regards fundamental rights, a transfer of sovereign powers beyond intergovernmental cooperation may only under restrictive preconditions lead to harmonisation for certain cross-border circumstances; the Member States must, in principle, retain substantial space of action in this context see BVerfGE (113, 273 <298-299>).

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(2) A similarly determined limit is drawn by the Basic Law as regards decisions on the deployment of the German *Bundeswehr*. With the exception of the state of defence, the deployment of the *Bundeswehr* abroad is only permitted in systems of mutual collective security, with the specific deployment mandatorily depending on the approval of the German *Bundestag* (see BVerfGE 90, 286 <381-382>; 100, 266 <269>; 104, 151 <208>; 108, 34 <43>; 121, 135 <153-154>*;* established case-law*).* The *Bundeswehr* is a “parliamentary army” (BVerfGE 90, 286 <382>), on whose deployment the representative body of the people must decide (see BVerfGE 90, 286 <383 et seq.>). The deployment of armed forces is essential to individual legal interests of the soldiers and of other persons affected by military measures and involves the danger of far-reaching implications.

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Even if the European Union were further developed into a peacekeeping regional system of mutual collective security within the meaning of Article 24.2 of the Basic Law, a supranationalisation with a primacy of application with a view to the specific deployment of German armed forces would be inadmissible in this area due to the precept of peace and democracy, which precedes the empowerment for integration of Article 23.1 of the Basic Law in this respect. The mandatory requirement of parliamentary approval for the deployment of the *Bundeswehr* abroad is not amenable to integration. This, however, does not set an insurmountable boundary under constitutional law to a technical integration of a European deployment of armed forces via joint command staffs, for the formation of joint sets of forces or for a concertation and coordination of joint European weapons procurement. Only the decisions on the respective specific deployment depend on the mandatory approval of the German *Bundestag*.

256

(3) A transfer of the right of the *Bundestag* to adopt the budget and control its execution by the government which would violate the principle of democracy and the right to elect the German *Bundestag* in its essential content would take place if the determination of the character and the amount of the levies affecting the citizen were supranationalised to a considerable extent. The German *Bundestag* must decide in a manner that may be accounted for vis-à-vis the people, on the total amount of the burdens placed on the citizens. The same applies correspondingly as regards essential expenditure of the state. In this area, it is particularly the responsibility concerning social policy is subject to the democratic decision-making process, on which the citizens want to exert an influence through free and equal elections. Budget sovereignty is the place of conceptual political decisions on the connection of economic burdens and privileges granted by the state. Therefore the parliamentary debate on the budget, including the extent of public debt, is regarded as a general debate on policy. Not every European or international obligation that has an effect on the budget endangers the viability of the *Bundestag* as the legislature that is responsible for approving the budget. The opening up of the legal and social order, which is aimed for by the Basic Law, and European integration, include the adaption to parameters laid down and commitments made, which the legislature that is responsible for approving the budget must integrate into its own planning as factors which it cannot itself directly influence. What is decisive is, however, that the

overall responsibility, with sufficient space for political discretion, can still be assumed in the German *Bundestag*.

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(4) The principle of the social state establishes the obligation on the part of the state to ensure a just social order (see BVerfGE 59, 231 <263>; 100, 271 <284>). The state must fulfil this mandatory responsibility on the basis of a broad scope of discretion; for this reason, concrete constitutional obligations to act have only been derived from this principle in very few cases. The state must merely create the minimum conditions for a life of its citizens that is in line with human dignity (see BVerfGE 82, 60 <80>; 110, 412 <445>). The principle of the social state sets the state a task, but it does not say anything about the means with which the task is to be accomplished in the individual case.

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The requirements placed on the European Union under constitutional law as regards social integration or a "social union" are clearly limited. It is true that pursuant to Article 23.1 sentence 1 of the Basic Law, Germany's participation in the process of integration depends, *inter alia*, on the European Union's commitment to social principles. Accordingly the Basic Law not only safeguards social tasks for the German state union against supranational demands in a defensive manner but wants to commit the European public authority to social responsibility in the spectrum of tasks accorded to it (see Heinig, Der Sozialstaat im Dienst der Freiheit, 2008, pp. 531 et seq.). What applies, however, also to the institutions of the European Union is that to be able to have an affect, the principle of the social state necessarily requires political and legal concretisation.

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Accordingly, the essential decisions in social policy must be made by the German legislative bodies on their own responsibility. In particular the securing of the individual's livelihood, which is a responsibility of the state that is based not only on the principle of the social state but also on Article 1.1 of the Basic Law, must remain a primary task of the Member States, even if coordination which goes as far as gradual approximation is not ruled out. This corresponds to the legally and factually limited possibilities of the European Union for shaping structures of a social state.

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(5) Finally, democratic self-determination especially depends on the possibility of realising oneself in one's own cultural area as regards decisions that are made in particular concerning the school and education system, family law, language, part of the provisions governing the media, and the status of churches and religious and ideological communities. The activities of the European Union in these areas that are already perceivable intervene in society on a level that is the primary responsibility of the Member States and their component parts. The manner in which curricula and the content of education and, for instance, the structure of a multi-track school system are organised, are fundamental policy decisions which bear a strong connection to the cultural roots and values of every state. Like the law on family relations and decisions on issues of language and the integration of the transcendental into public life, the manner in which school and education are organised particularly affects grown convictions and concepts of values which are rooted in specific historical traditions and experiences. Here, democratic self-determination requires that the respective political community that is connected by such traditions and convictions remain the subject of democratic legitimisation.

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b) The structure-securing clause of Article 23.1 sentence 1 of the Basic Law restricts the objective of participation laid down in the determination of the objective of the state to a European Union which corresponds, in its elementary structures, to the core principles that are protected by Article 79.3 of the Basic Law also from amendment by the constitution-amending legislature. The elaboration of the European Union with a view to sovereign powers, institutions and decision-making procedures must correspond to democratic principles (Article 23.1 sentence 1 of the Basic Law). The specific requirements placed on the democratic principles depend on the extent of the sovereign powers that have been transferred and on the degree of independence that European decision-making procedures have reached.

262

aa) The constitutional requirements placed by the principle of democracy on the organisational structure and on the decision-making procedures of the European Union depend on the extent to which sovereign responsibilities are transferred to the Union and how great the extent of political independence in the exercise of the sovereign powers transferred is. An increase of integration can be unconstitutional if the level of democratic legitimisation is not commensurate to the extent and the weight of supranational power of rule. As long as, and to the extent to which, the principle of conferral is adhered to in an association of sovereign states with marked traits of executive and governmental cooperation, the legitimisation provided by national parliaments and governments, which is complemented and carried by the directly elected European Parliament is, in principle, sufficient (see BVerfGE 89, 155 <184>).

263

If however, the threshold to the federal state and to the waiver of national sovereignty were transgressed, which would in Germany require a free decision of the people beyond the present applicability of the Basic Law, democratic requirements would have to be complied with on a level which would have to completely fulfil the requirements placed on the democratic legitimisation of a union of rule organised by a state. This level of legitimisation could no longer be prescribed by national constitutional orders.

264

A structural democratic deficit that would be unacceptable pursuant to Article 23 in conjunction with Article 79.3 of the Basic Law would exist if the extent of competences, the political freedom of action and the degree of independent formation of opinion on the part of the institutions of the Union reached a level corresponding to the federal level in a federal state, i.e. a level analogous to that of a state, because for instance the legislative competences, which are essential for democratic self-determination, were exercised mainly on the level of the Union. If an imbalance between character and the extent of the sovereign powers exercised and the degree of democratic legitimisation arises in the course of the development of the European integration, it is for the Federal Republic of Germany due to its responsibility for integration, to work towards a change, and if the worst comes to the worst, even to refuse to further participate in the European Union.

265

bb) To safeguard democratic principles, it may be necessary to clearly emphasise the principle of conferral in the Treaties and in their application and interpretation in order to maintain the equilibrium of the political forces of Europe between the Member States and the level of the Union as the precondition of the allocation of sovereign powers in the association.

266

With a view to compliance with democratic principles on the part of the European Union, Article 23.1 sentence 1 of the Basic Law, however does not demand “structural congruence” (see on this concept Kruse, Strukturelle Kongruenz und Homogenität, in: Mensch und Staat in Recht und Geschichte, Festschrift für Herbert Kraus, 1954, p. 112 <123>) or even the correspondence of the institutional order of the European Union to the order that the principle of democracy of the Basic Law prescribes for the national level. What is required, however, is a democratic elaboration which is commensurate to the status and the function of the Union (see Hobe, Der offene Verfassungsstaat zwischen Souveränität und Interdependenz, 1998, p. 153; Pernice, in: Dreier, GG, vol. II, 2nd ed. 2006, Art. 23, marginal no. 48; Rojahn, in: von Münch/Kunig, GG, vol. 2, 5th ed. 2001, Art. 23, marginal no. 21; Röben, Außenverfassungsrecht, 2007, p. 321: „strukturelle Kompatibilität”). It follows from the sense and purpose of the structure-securing clause that the Basic Law’s principle of democracy need not be realised on the European level in the same way in which this had been demanded in the 1950s and early 1960s for intergovernmental institutions within the meaning of Article 24.1 of the Basic Law (see for instance Kruse, loc cit., p. 112 <123>; Friauf, Zur Problematik rechtsstaatlicher und demokratischer Strukturelemente in zwischenstaatlichen Gemeinschaften, DVBl. 1964, p. 781 <786>).

267

In principle, the principle of democracy is open to the requirements of a supranational organisation, not in order to adapt the normative content of its provisions to the respective factual situation of the organisation of political rule but to preserve the same effectiveness under changed circumstances (see BVerfGE 107, 59 <91>). Consequently, Article 23.1 sentence 1 of the Basic Law assumes that in the European Union, the democratic principles cannot be realised in the same manner as in the Basic Law (see *Bundestag* document 12/3338, p. 6).

268

cc) In modern territorial states, the self-determination of a people is mainly realised in the election of bodies of a union of rule, which exercise public authority. The formation of the bodies must take place by the majority decision of the citizens, who can periodically exert an influence on the fundamental direction of policy with regard to persons and subject-matters. A free public opinion and a political opposition must be able to critically observe the decision-making process in its essential outline and to sensibly assign this process to those responsible, i.e. normally to a government (see Article 20.2 sentence 2 of the Basic Law; BVerfGE 89, 155 <185>; 97, 350 <369>; with a comparative-law approach Cruz Villalón, Grundlagen und Grundzüge staatlichen Verfassungsrechts: Vergleich, in: von Bogdandy/Cruz Villalón/Huber, Handbuch Ius Publicum Europaeum, vol. I, 2007, § 13, marginal nos. 102 et seq., with further references).

269

The practical manifestations of democracy lend concrete shape to these guidelines, with account being taken of the principles of freedom and electoral equality either in a single parliamentary body of representation, with the duty of the formation of government being fulfilled there - like for instance in Great Britain, Germany, Belgium, Austria and Spain - or in a presidential system with the highest level of the executive power being directly elected in addition - like, for instance in the United States of America, France, Poland and Bulgaria. The direct will of the people can express itself by electing a (parliamentary) representation of the people or by electing the highest-ranking representative of the executive (President) as well as by majority decisions in referenda about factual issues. Presidential systems like the ones in the United States of America or in France are dually constituted representative democracies, while Great Britain or Germany stand for systems of monistic parliamentary representation. In Switzerland, on the other hand, parliamentary monism is complemented by strong plebiscitary elements, which also fulfil part of the functions of a parliamentary opposition (see Loewenstein, Verfassungslehre, 2nd ed. 1959, provided with a supplement 1969, pp. 67 et seq.; Sommermann, Demokratiekonzepte im Vergleich, in: Bauer/Huber/Sommermann, Demokratie in Europa, 2005, pp. 191 et seq.; Mastronardi, Verfassungslehre, Allgemeines Staatsrecht als Lehre vom guten und gerechten Staat, 2007, pp. 268-269).

270

In a democracy, the people must be able to determine government and legislation in free and equal elections. This core content may be complemented by plebiscitary voting on factual issues; such voting could be made possible also in Germany by an amendment of the Basic Law. In a democracy, the decision of the people is the focal point of the formation and retention of political power: Every democratic government knows the fear of losing power by being voted out of office. In its judgment banning the Communist Party of Germany, the Federal Constitutional Court in 1956 described democracy as the procedurally regulated “battle for political power” that is waged to gain the majority. According to the Federal Constitutional Court, this battle is about the will of the actual majority of the people, which is ascertained in carefully regulated procedures, and which is preceded by a free discussion. It was regarded as mandatory for the democratic organisation of state authority that a majority “can always change”, that a multiparty system and the right to “organised political opposition” exist (see BVerfGE 5, 85 <198-199>).

271

The European Union itself acknowledges this democratic core concept as a general European constitutional tradition (see Article 3.1 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms of 20 March 1952 <First Protocol to the ECHR> <Federal Law Gazette 2002 II p. 1072>; CSCE, Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, EuGRZ 1990, pp. 239 et seq., marginal no. 7) by placing corresponding structural requirements on the Member States and declaring their factual continued existence a precondition for participating in the European integration (Article 6.1 TEU; Article 2 TEU Lisbon; see already Presidency Conclusions of the Copenhagen European Council <21/22 June 1993>, Bulletin EU 6-1993, I.13; Agenda 2000, COM(97) 2000 final, vol. I, p. 52). As and to the

extent that the European Union itself only exercised derived public authority, it need not fully comply with the requirements. On the European level, the Council is not a second chamber as it would be in a federal state but the representative body of masters of the Treaties; correspondingly, it is not constituted according to proportional representation but according to the image of the equality of states. As a representative body of the peoples that is directly elected by the citizens of the Union, the European Parliament is an additional independent source of democratic legitimisation (see BVerfGE 89, 155 <184-185>). As a representative body of the peoples in a supranational community, which as such is characterised by a limited willingness to unite, it cannot, and need not, as regards its composition, comply with the requirements that arise on the state level from the citizens' equal political right to vote. As a supranational special body, also the Commission need not extensively fulfil the conditions of a government that is fully accountable either to Parliament or to the majority decision of the electorate because the Commission itself is not obliged to the will of the electorate in a comparable manner.

272

As long as the European order of competences according to the principle of conferral in cooperatively shaped decision-making procedures, exists taking into account the states' responsibility for integration, and as long as a well-balanced equilibrium of the competences of the Union and the competences of the states is retained, the democracy of the European Union cannot, and need not, be shaped in analogy to that of a state. Instead, the European Union is free to look for its own ways of democratic supplementation by means of additional, novel forms of transparent or participative political decision-making procedures. It is true that the merely deliberative participation of the citizens and of their societal organisations in the political rule - their direct involvement in the discussions of the institutions competent for the binding political decisions - cannot replace the legitimising connection which goes back to elections and other votes. Such elements of participative democracy can, however, complement the legitimisation of European public authority. This encompasses in particular forms of legitimisation to which civic commitment can contribute in a more direct, more specialised and more profoundly issue-related manner, by, for instance, providing, in a suitable manner, the citizens of the Union and the societally relevant associations (Article 11.2 TEU Lisbon: "representative associations") with the possibility of expressing their views. Such forms of decentralised participation that is based on the division of labour and has a potential of increasing legitimacy, for their part contribute to making the primary representative and democratic connection of legitimisation more effective.

II.

273

The Treaty of Lisbon and the Act Approving the Treaty of Lisbon comply - taking into account the provisos that are specified in the grounds - with the constitutional requirements that have been explained (1.). The Act Amending the Basic Law (Articles 23, 45 and 93) is also constitutionally unobjectionable (2.). The Act Extending and Strengthening the Rights of the Bundestag and the Bundesrat in European Union Matters does not comply with the requirements under Article 38.1 in conjunction with Article 23.1 of the Basic Law and must be reformulated in a constitutional manner before the ratification of the Treaty (3.).

274

1. The Act Approving the Treaty of Lisbon is compatible with the requirements of the Basic Law, in particular with the principle of democracy. The right to vote under Article 38.1 of the Basic Law is not violated. In the free and equal election of the Members of the German *Bundestag* and in corresponding acts of voting in the *Länder*, the German people still decides on essential political issues in the Federation and in the *Länder*. The election of the German contingent of Members of the European Parliament opens up to the right to vote of the citizens of the Federal Republic of Germany a complementary possibility of participation in the system of European institutions, a possibility that provides a sufficient level of legitimisation in the system of conferred powers.

275

With a view to the extent of competences that have been transferred and the degree of independence of the decision-making procedures, the level of legitimisation of the European Union still complies with constitutional requirements to the extent that the principle of conferral is safeguarded to an extent which goes beyond the measure provided for in the Treaties (a). The Treaty of Lisbon neither transfers constituent power, which is not amenable to disposition by the constitutional bodies, nor abandons state sovereignty of the Federal Republic of

Germany (b). The German *Bundestag* still retains sufficiently weighty responsibilities and competences of its own (c).

276

a) With the present status of integration, the European Union does, even upon the entry into force of the Treaty of Lisbon, not yet attain a shape that corresponds to the level of legitimisation of a democracy constituted as a state.

277

Not only from the perspective of the Basic Law, the participation of Germany, however, is not the transfer of a model of a federal state to the European level but the extension of the federal model under constitutional law by a dimension of supranational cooperation. The Treaty of Lisbon has also decided against the concept of a European federal Constitution in which a European Parliament as the body of representation of a new federal people that would be constituted by this Constitution would be the focus. A will that aims at founding a state cannot be ascertained. Also measured against the standards of free and equal elections and the requirement of a viable majority rule, the European Union does not correspond to the federal level in a federal state. Consequently, the Treaty of Lisbon does not alter the fact that the *Bundestag* as the body of representation of the German people is the focal point of an interweaved democratic system.

278

The European Union complies with democratic principles because a qualitative look at the structure of its responsibility and of its rule reveals that it is exactly not laid out in analogy to a state. The allegation made in the pleadings of the applications and the constitutional complaint which is the focal point of the challenges, namely that the Treaty of Lisbon exchanges the subject of democratic legitimisation, is incorrect. Even as an association with its own legal personality, the European Union remains the creation of sovereign democratic states. With the present status of its integration, it is therefore not required to democratically develop the system of the European institutions in analogy to that of a state. With a view to the continued validity of the principle of conferral, and interpreting the competences newly accorded by the Treaty of Lisbon according to their letter and their spirit, the composition of the European Parliament need not do justice to equality in such a way that differences in the weight of the votes of the citizens of the Union depending on the Member States' numbers of inhabitants are forgone.

279

aa) The democratic fundamental rule of the equality of opportunities of success ("one man, one vote") only applies within a people, not in a supranational body of representation, which remains a representation of the peoples linked to each other by the Treaties, even if the citizenship of the Union is particularly emphasised now.

280

Measured against requirements in a constitutional state, the European Union lacks, even after the entry into force of the Treaty of Lisbon, a political decision-making body which has come into being by equal election of all citizens of the Union and which is able to uniformly represent the will of the people, What is also lacking in this connection is a system of organisation of political rule in which a will of the European majority carries the formation of the government in such a way that the will goes back to free and equal electoral decisions and a genuine competition between government and opposition which is transparent for the citizens, can come about. Even after the new formulation Article 14.2 TEU Lisbon, and contrary to the claim that Article 10.1 TEU Lisbon seems to make according to its wording, the European Parliament is not a body of representation of a sovereign European people. This is reflected in the fact that it, as the representation of the peoples in their respectively assigned national contingents of Members, is not laid out as a body of representation of the citizens of the Union as an undistinguished unity according to the principle of electoral equality.

281

Also in their elaboration by the Treaty of Lisbon, no independent people's sovereignty of the citizens of the Union in their entirety results from the competences of the European Union. If a decision between political lines

in the European Parliament receives a narrow majority, there is no guarantee of the majority of votes cast representing a majority of the citizens of the Union. Therefore the formation, from within Parliament, of an independent government vested with the competences that are usual in states would meet with fundamental objections. Possibly, a numerical minority of citizens existing according to the ratio of representation could govern, through a majority of Members of Parliament, against the political will of an opposition majority of citizens of the Union, which does not find itself represented as a majority. It is true that the principle of electoral equality only ensures a maximum degree of exactness as regards the will of the people under the conditions of a system of strict proportional representation. But also in majority voting systems, there is a sufficient guarantee of electoral equality for the votes at any rate as regards the value counted and the chance of success, whereas it is missed if any contingent that is not merely insignificant is established.

282

bb) For a free democratic fundamental order of a state such as it has been created by the Basic Law, the equality of all citizens when making use of their right to vote is one of the essential foundations of state order (see BVerfGE 6, 84 <91>; 41, 399 <413>; 51, 222 <234>; 85, 148 <157-158>; 99, 1 <13>; 121, 266 <295-296>).

283

Electoral equality is not a special characteristic of the German legal order. It belongs to the legal principles which are binding on all European states. Article 3 of the First Protocol to the ECHR guarantees the right to participate in the elections of the legislative bodies of a Contracting State, i.e. to the right to oneself vote and to stand for election. It is true that the Contracting States have a wide margin of appreciation when it comes to shaping the details of their electoral law, also with a view to national particularities and the historical development. From the fact that elections are to guarantee the “free expression of the opinion of the people”, however, the European Court of Human Rights draws the conclusion that this essentially includes the principle of equality of treatment of all citizens in the exercise of their right to vote. The European Court of Human Rights explicitly includes the counted value of votes into this equal treatment, whereas it admits exceptions for equal contribution towards success and for equal chances of victory for the candidates (European Court of Human Rights, judgment of 2 March 1987, Application no. 9267/81, Case of Mathieu-Mohin and Clerfayt v. Belgium, marginal no. 54; judgment of 7 February 2008, Application no. 39424/02, Case of Kovach v. Ukraine, marginal no. 49; on the application of Article 3 of the First Protocol to the European Parliament as a “legislature”: European Court of Human Rights, judgment of 18 February 1999, Application no. 24833/94, Case of Matthews v. United Kingdom, marginal no. 40 = NJW 1999, p. 3107 <3109>).

284

cc) Against this backdrop, the European Parliaments factually remains, due to the Member State’s contingents of seats, a representation of the peoples of the Member States. The degressively proportional composition that Article 14.2(1) sentence 3 TEU Lisbon prescribes for the European Parliament stands between the principle under international law of the equality of states and the state principle of electoral equality. Pursuant to the provisions in primary law, which show the beginnings of a concretisation of the principle of degressive proportionality, the maximum number of Members of the European Parliament shall be 750 (plus the President); no Member State shall be allocated more than 96 seats and none shall be allocated less than six seats (Article 14.2(1) sentences 2 to 4 TEU Lisbon). The result of this is that the weight of the vote of a citizen from a Member State with a low number of inhabitants may be about twelve times the weight of the vote of a citizen from a Member State with a high number of inhabitants.

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On 11 October 2007, the European Parliament submitted a draft decision that already anticipates the validity of Article 14.2(2) TEU Lisbon (European Parliament Resolution of 11 October 2007 on the Composition of the European Parliament, OJ 2008 no. C 227 E/132, Annex 1). It was approved by the Intergovernmental Conference (see Declaration no. 5 on the Political Agreement by the European Council Concerning the Draft Decision on the Composition of the European Parliament). The draft can only be adopted by the European Council after the entry into force of the Treaty of Lisbon. Pursuant to the draft Decision, the principle of degressive proportionality is to be applied in such a way that the minimum and maximum numbers of contingents of mandates must be fully utilised, that the number of seats allotted to a Member State is roughly proportionate to the size of its population and that the number of inhabitants represented by a mandate is higher in more populous Member States (Article 1 of the draft Decision). The Federal Republic of Germany is allotted

96 seats (Article 2 of the draft Decision). According to the Draft decision, a Member of the European Parliament elected in France would represent approximately 857,000 citizens of the Union and thus as many as a Member elected in Germany, who represents approximately 857,000 as well. In contrast, a Member of the European Parliament elected in Luxembourg would, however, only represent approximately 83,000 Luxembourg citizens of the Union, i.e. a tenth of them, in the case of Malta, it would be approximately 67,000, or only roughly a twelfth of them; as regards a medium-sized Member State such as Sweden, every elected Member of the European Parliament would represent approximately 455,000 citizens of the Union from his or her country in the European Parliament (as regards the population figures on which these calculations are based see Eurostat, Europe in figures, Eurostat yearbook 2008, 2008, p. 25).

286

In federal states, such marked imbalances are, as a general rule, only tolerated for the second chamber existing beside Parliament; in Germany and Austria, the second chamber is the *Bundesrat*, in Australia, Belgium and the United States of America, it is the Senate. They are, however, not accepted in the representative body of the people because this body would otherwise not represent the people in a manner that stems from the principle of personal freedom and does justice to equality. The elaboration of the right to vote in the European Union need, however, not be a contradiction to Article 10.1 TEU Lisbon, pursuant to which the functioning of the Union shall be founded on representative democracy; for the democracies of the Member States with their majorities and decisions on political direction are represented on the level of the European institutions in the Council and indeed in the Parliament. Consequently, this representation of the Member States only indirectly represents the distribution of power in the Member States. This is a decisive reason for the fact that it would be perceived as insufficient if a small Member State were represented in the European Parliament for instance by only one Member of Parliament if the principle of electoral equality were taken more strongly into account. The states affected argue that otherwise it would no longer possible to reflect national majority situations in a representative manner on the European level. Already due to this consideration, it is not the European people that is represented within the meaning of Article 10.1 TEU Lisbon but the peoples of Europe organised in their states, with their respective distribution of power that has been brought about by democratic elections taking account of the principle of equality and which are shaped in advance by party politics.

287

This consideration at the same time clarifies why representation in the European Parliament does not take as its nexus the equality of the citizens of the Union (Article 9 TEU Lisbon) but nationality, a criterion that is actually an absolutely prohibited distinction for the European Union. For political projects such as the economic union being able to succeed, it has been a central idea of the European union of integration since its foundation to prohibit or restrict discrimination on grounds of nationality (Article 12, Article 18 ECT; Article 18, Article 21 TFEU). The concept of the internal market is based on the conviction that the Member State from which goods or services come, the origin of workers or entrepreneurs and the origin of investment do not make any difference But it is exactly the criterion of nationality which is intended to be decisive pursuant to Article 14.2(1) sentence 3 TEU Lisbon when it comes to assigning the citizens' possibility of exerting influence in the European Union. The European Union thus shows an assessment of values that is in contradiction to the basis of the concept of a citizens' Union that it has of itself; this contradiction can only be explained by the character of the European Union as an association of sovereign states.

288

It is true that the democracy of the European Union is approximated to federalised state concepts; measured against the principle of representative democracy, however, it would to a considerable degree show excessive federalisation. With the personal composition of the European Council, of the Council, the Commission and the Court of Justice of the European Union, the principle of the equality of states remains linked to national rights of determination, rights which are, in principle, equal. Even for a European Parliament elected with due account to equality, this structure would be a considerable obstacle for asserting a representative will of the parliamentary majority with regard to persons or subject-matters. Also after the entry into force of the Treaty of Lisbon, the Court of Justice, for instance, must always be staffed according to the principle "one state, one judge" and under the determining influence of the Member States regardless of their number of inhabitants. The functioning of the European Union continues to be characterised by the influence of the negotiating governments and the subject-related administrative and formative competence of the Commission even though the rights of participation of the European Parliament have been strengthened on the whole. Within this system, the parliamentary influence has been consistently further developed with Parliament's being accorded the right to veto in central areas of

legislation. With the ordinary legislative procedure, the Treaty of Lisbon makes a norm what is already factually decisive under the currently applicable law in many areas: in the codecision procedure, a directive or a regulation cannot be adopted against the will of the European Parliament.

289

dd) The deficit of European public authority that exists when measured against requirements on democracy in states cannot be compensated by other provisions of the Treaty of Lisbon and to that extent, it cannot be justified.

290

(1) The European Union tries to compensate the existing considerable degree of excessive federalisation in particular by strengthening the citizens' and associations' rights aimed at participation and transparency, as well as by enhancing the role of the national parliaments and of the regions. The Treaty of Lisbon strengthens these elements of participative democracy aimed at procedural participation. Apart from the elements of complementary participative democracy, such as the precept of providing, in a suitable manner, the citizens of the Union and the "representative" associations with the possibility of communicating their views, the Treaty of Lisbon also provides for elements of associative and direct democracy (Article 11 TEU Lisbon). They include the dialogue of the institutions of the Union with "representative" associations and the civil society as well as the European citizens' initiative. The European citizens' initiative makes it possible to invite the Commission to submit any appropriate proposal on the regulation of political matters. Such an invitation is subject to a quorum of not less than one million citizens of the Union who have to be nationals of a "significant number of Member States" (Article 11.4 TEU Lisbon). The citizens' initiative is restricted to issues within the framework of the powers of the Commission and it requires concretisation of its procedures and conditions under secondary law by a regulation (Article 24.1 TFEU). At the same time, the European citizens' initiative is considered a measure aimed at promoting the development of a European public area, which was called for in the Laeken Declaration.

291

(2) As a justification for the inequality of the election to the European Parliament, reference is made, *inter alia* by the Federal Government (see *Bundestag* document 16/8300, p. 133 <135-136>), to the other track of legitimisation of the European public authority: The participation of the Council in the lawmaking procedure, which acts with weighted votes in majority decisions. What is known as the double qualified majority is intended to avoid the majority of inhabitants constituting the majority in the Council. Accordingly, to reach a majority of votes in the Council, not only a majority of 55 per cent of the Member States would have to be achieved but apart from this a majority of 65 per cent of the "population of the Union" (Article 16.4 TEU Lisbon). The present system of weighting of votes, which assigns to the Member States a number of votes according to their size, is intended to be cancelled after a transitional period.

292

Admittedly, the European Union takes up again the classical principle under international law of the equality of states - one state, one vote - by this approach of the Treaty of Lisbon. The new corrective element of the majority of the population, however, adds another subject of assignment, which consists of the peoples of the Member States of the Union, while making reference not to the citizens of the Union as the subjects of political rule but to the inhabitants of the Member States as the expression of the strength of representation of the representative of the respective Member State in the Council. In the future, a numerical majority of the people living in the European Union is intended to be behind a decision of the Council. Admittedly, this weighting, which depends on the number of inhabitants, counteracts excessive federalisation, without, however, complying with the democratic precept of electoral equality. As regards electoral equality and the mechanism of direct parliamentary representation, the democratic legitimisation of political rule is also in party democracies based on the category of the individual's act of voting and not assessed according to the quantity of those affected.

293

(3) Also the institutional recognition of the Member States' Parliaments by the Treaty of Lisbon cannot compensate for the deficit in the direct track of legitimisation of the European public authority that is based on the election of the Members of the European Parliament. The status of national parliaments is considerably

curtailed by the reduction of decisions requiring unanimity and the supranationalisation of police and judicial cooperation in criminal matters. Compensation, provided for by the Treaty, by the procedural strengthening of subsidiarity shifts existing political rights of self-determination to procedural possibilities of intervention and judicially assertable claims of participation; this was concurringly emphasised in the oral hearing.

294

(4) Neither the additional rights of participation, which are strongly interlocked as regards the effects of their many levels of action and in view of the large number of national parliaments, nor rights of petition which are associative and have a direct effect vis-à-vis the Commission are suited to replace the majority rule which is established by an election. They are intended to, and indeed can, ultimately increase the level of legitimisation all the same under the conditions of a *Staatenverbund* with restricted tasks.

295

Mere participation of the citizens in political rule which would take the place of the representative self-government of the people cannot be a substitute for the legitimising connection of elections and other votes and of a government that relies on it: The Treaty of Lisbon does not lead to a new level of development of democracy. The elements of participative democracy, such as the precept of providing, in a suitable manner, the citizens of the Union and "representative" associations with the possibility of making their views heard, as well a the elements of associative and direct democracy, can only have a complementary and not a central function when it comes to legitimising European public authority. Descriptions of, and calls for, a "Citizens' Europe" or the "strengthening of the European Parliament" can politically convey the European level and contribute to increasing acceptance of "Europe" and to explaining its institutions and procedures. If such descriptions and calls are, however, converted into normative statements, which is partly done by the Treaty of Lisbon, without this being connected with an elaboration of the institutions that takes due account of equality, they are not suited to introduce a fundamentally new model on the level of the law.

296

ee) The development of the institutional architecture by the Treaty of Lisbon not only contains rights of participation and improves the transparency of decision-making for instance as regards the legislative activity of the Council. It also contains contradictions because with the Treaty, the Member States follow the construction pattern of a federal state without being able to create the democratic basis for this under the Treaties in the form of the equal election of a representative body of representation of the people and of a parliamentary European government that is based on the legitimising power of a people of the Union alone.

297

The European Commission has grown into the function of a European government, shared with the Council and the European Council, already under applicable law. It is not apparent how this process of political independence could be promoted even further without directly originating from an election by the demos in which due account is taken of equality, an election which includes the possibility of being voted out of office and thereby becomes politically effective. If the shift of the focus of political action towards the Commission were to continue as it is intended in conceptual proposals for the future of the European Union, and if the President of the Commission were elected legally and factually by the European Parliament alone (see Article 17.7 TEU Lisbon), the election of the Members of Parliament would at the same time decide on a European government beyond the degree regulated today. As regards the legal situation according to the Treaty of Lisbon, this consideration confirms that without democratically originating in the Member States, the action of the European Union lacks a sufficient basis of legitimisation.

298

b) As regards its competences and its exercising these competences, the European Union, as a supranational organisation, must comply as before with the principle of conferral that is exercised in a restricted and controlled manner. Especially after the failure of the project of a Constitution for Europe, the Treaty of Lisbon has shown sufficiently clearly that this principle remains valid. The Member States remain the masters of the Treaties. In spite of a further expansion of competences, the principle of conferral is retained. The provisions of the Treaty can be interpreted in such a way that the constitutional and political identity of the fully democratically organised

Member States is safeguarded, as well as their responsibility for the fundamental direction and elaboration of Union policy. Even after the entry into force of the Treaty of Lisbon, the Federal Republic of Germany will remain a sovereign state and thus a subject of international law. The substance of German state authority, including the constituent power, is protected (aa), the German state territory remains assigned only to the Federal Republic of Germany (bb), there are no doubts concerning the continued existence of the German state people (cc).

299

aa) The sovereign state authority is preserved according to the rules on the distribution and delimitation of competences (1). The new provisions on Treaty amendments under primary law are not contrary to this (2). The continued existence of sovereign state authority also becomes apparent from the right to withdraw from the European Union (3) and is protected by the Federal Constitutional Court's right to pass a final decision (4).

300

(1) The distribution of the European Union's competences, and their delimitation from those of the Member States, takes place according to the principle of conferral (a) and according to other mechanisms of protection that relate to specific competences (b).

301

(a) The principle of conferral is a mechanism of protection to preserve the Member States' responsibility. The European Union is competent for an issue only to the extent that the Member States have conferred such competence on it. Accordingly, the Member States are the constituted primary political area of their respective polities, the European Union has secondary, i.e. delegated, responsibility for the tasks conferred on it. The Treaty of Lisbon explicitly confirms the current principle of conferral. "The Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein" (Article 5.1 sentence 1 and 5.2 TEU Lisbon; see also Article 1.1, Article 3.6, Article 4.1, Article 48.6(3) TEU Lisbon; Article 2.1 and 2.2, Article 4.1, Article 7, Article 19, Article 32, Article 130, Article 132.1, Article 207.6, Article 337 TFEU; Declaration no. 18 in Relation to the Delimitation of Competences; Declaration no. 24 Concerning the Legal Personality of the European Union).

302

A mechanism of protection with a formal approach is the categorisation and classification of the European Union's competences according to exclusive competences, competences shared with the Member States, and competences to carry out actions to support, coordinate or supplement the actions of the Member States, which is performed for the first time (see Rossi, Die Kompetenzverteilung zwischen der Europäischen Gemeinschaft und ihren Mitgliedstaaten, in: Scholz, Europa als Union des Rechts - Eine notwendige Zwischenbilanz im Prozeß der Vertiefung und Erweiterung, 1999, p. 196 <201>).

303

Admittedly, the transparency provided by this categorisation of competences is restricted in that the "parallel" competences, which are claimed by the Member States and the European Union alike, are not clearly assigned to a category in the Treaty of Lisbon (see Article 2.5(1) and Article 4.3 and 4.4 TFEU), the common foreign and security policy and the coordination of economic and employment policies are outside the three competence categories and what is known as the open method of coordination is not mentioned. However, these derogations from the systematising fundamental approach do not affect the principle of conferral, and their nature and extent also does not call the objective of clear delimitation of competences into question.

304

(b) Additionally, mechanisms of protection under substantive law, in particular provisions concerning the exercise of competences, are intended to ensure that the powers conferred to the European level are exercised in such a way that the competences of the Member States are not affected. The provisions concerning the exercise of competences include the precept of respecting the Member States' national identities (Article 4.2 TEU Lisbon), the principle of loyal cooperation (Article 4.3 TEU Lisbon), the principle of subsidiarity (Article 5.1

sentence 2 and 5.3 TEU Lisbon) and the principle of proportionality (Article 5.1 sentence 2 and 5.4 TEU Lisbon). These principles are confirmed, and partly rendered more precise as regards their content, by the Treaty of Lisbon.

305

Additionally, the principle of subsidiarity is procedurally strengthened by Protocol no. 2 on the Application of the Principles of Subsidiarity and Proportionality (Subsidiarity Protocol). This is done by involving the national Parliaments through what is known as an early warning system (Article 12 lit b TEU Lisbon, Articles 4 et seq. of the Subsidiarity Protocol) in the monitoring of adherence to the principle of subsidiarity, and by extending the group of those entitled to bring an action to have declared an act void before the Court of Justice of the European Union to include the national parliaments and the Committee of the Regions. The effectiveness of this mechanism depends on the extent to which the national parliaments will be able to make organisational arrangements that place them in a position to make appropriate use of the mechanism within the short period of eight weeks (see Mellein, Subsidiaritätskontrolle durch nationale Parlamente, 2007, pp. 269 et seq.). It will also be decisive whether the right of the national parliaments and of the Committee of the Regions to bring action will be extended to the question, which precedes the monitoring of the principle of subsidiarity, of whether the European Union has competence for the specific lawmaking project (see Wuermeling, Kalamität Kompetenz: Zur Abgrenzung der Zuständigkeiten in dem Verfassungsentwurf des EU-Konvents, EuR 2004, p. 216 <225>; von Danwitz, Der Mehrwert gemeinsamen Handelns, Frankfurter Allgemeine Zeitung of 23 October 2008, p. 8).

306

(2) The controlled and responsible transfer of sovereign powers to the European Union, which is the only way in which such transfer is possible under constitutional law, is also not called into question by individual provisions of the Treaty of Lisbon. The institutions of the European Union may neither in the ordinary (a) and simplified revision procedures (b) nor via what is known as the bridging clauses (c) or the flexibility clause (d) independently amend the foundations of the European Union under the Treaties and the order of competences vis-à-vis the Member States.

307

(a) The ordinary revision procedure for the foundations of the European Union under the Treaties (Article 48.2 to 48.5 TEU Lisbon) corresponds to the classical amendment procedures of comparable multilateral treaties. A Conference composed of representatives of the Member States which is convened by the President of the European Council is competent to adopt Treaty amendments. These amendments, however, shall only enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements (Article 48.4(2) TEU Lisbon). The Treaty of Lisbon makes it clear that these amendments may serve either to increase or to reduce the competences conferred on the Union in the Treaties (Article 48.2 sentence 2 TEU Lisbon).

308

This legal situation is not altered by the fact that this classical treaty amendment procedure is preceded by a procedure that has come into being by the process of European integration, according to which normally a Convention composed of representatives of the national Parliaments, of the Heads of State or Government of the Member States, of the European Parliament and of the Commission, which for its part decisively responds to the principle of the equality of states, shall participate (Article 48.3(1) TEU Lisbon). The Convention procedure is added to the amendment procedures under international law, which focus on the Member States, and thus takes due account of the institutional particularities of the European Union. The Convention shall examine the proposals for amendments and shall adopt by consensus a recommendation to a conference of representatives of the governments of the Member States (Article 48.3(1) sentence 3 TEU Lisbon). This is constitutionally unobjectionable as long as the Member States are not legally bound by the results achieved by the Convention and as long as they can freely decide which Treaty amendments they ultimately wish to agree under international law (see Article 48.4 TEU Lisbon).

309

(b) (aa) Additionally, the Treaty of Lisbon introduces a simplified revision procedure (Article 48.6 TEU Lisbon). While Treaty amendments in the ordinary procedure must be agreed by an Intergovernmental Conference, if necessary after convening the Convention, and require ratification by all Member States, the simplified revision procedure merely requires a decision adopted by the European Council, which shall enter into force after approval by the Member States "in accordance with their respective constitutional requirements" (Article 48.6(2) TEU Lisbon). It is explicitly made clear that the decision adopted by the European Council shall not increase the competences conferred on the Union in the Treaties (Article 48.6(3) TEU Lisbon). The differentiation according to ordinary and simplified Treaty revision procedures shows that fundamental amendments are reserved to the ordinary procedure because a higher degree of legitimisation is intended to be achieved by means of the Convention method, which is provided for as the norm. The European Council can nevertheless decide also in the ordinary revision procedure by a simple majority, after obtaining the consent of the European Parliament, not to convene a Convention should this not be justified by the extent of the proposed amendments (Article 48.3(2) TEU Lisbon).

310

The simplified Treaty revision procedure, which is made possible by the current Treaties only in individual provisions (see Article 17.1 TEU - introduction of a common defence; Article 42 TEU - applicability of Title IV of the Treaty establishing the European Community on police and judicial cooperation in criminal matters; Article 22.2 ECT - extension of the rights of the citizens of the Union; Article 190.4 ECT - introduction of a uniform procedure for the election of the European Parliament; Article 269.2 ECT - determination of the European Community's own resources), is, pursuant to the Treaty of Lisbon, applicable to amendments of provisions relating to the internal policies set out in Part Three of the Treaty on the Functioning of the European Union (Article 48.6(2) sentence 1 TEU Lisbon).

311

The implications of the authorisation to amend provisions of Part Three of the Treaty on the Functioning of the European Union can only be determined to a limited extent; as regards substance, they are hardly predictable for the German legislature. Article 48.6 TEU Lisbon opens up to the European Council a broad scope of action for amendments of primary law. The possible content of future amendments in the field of internal policies, which comprises a total of 172 Articles, policies which include the Single Market and the Economic and Monetary Union, is solely restricted by the prohibition of extending competences already conferred on the European Union (Article 48.6(3) TEU Lisbon).

312

The Federal Constitutional Court already ruled in its judgment on the Treaty of Maastricht that amendments of primary law can also be performed in an abbreviated procedure if the Member States assent pursuant to their constitutional requirements (*gemäß ihren verfassungsrechtlichen Vorschriften*) (see BVerfGE 89, 155 <199>). The different wording as compared to Article 48.4(2) TEU Lisbon, which says that approval of the Member States is necessary in accordance with their respective constitutional requirements (*im Einklang mit ihren jeweiligen verfassungsrechtlichen Vorschriften*) does not mean, however, that the national requirements placed on the ratification of "simplified" Treaty amendments are reduces in contrast to those placed on "ordinary" ones. The "approval" of the Federal Republic of Germany in simplified revision procedures pursuant to Article 48.6 TEU Lisbon always requires a law within the meaning of Article 23.1 sentence 2 of the Basic Law as a *lex specialis* with regard to Article 59.2 of the Basic Law (see BVerfGE 89, 155 <199>; as regards the reference to the national ratification requirements see also Decision no. 2007-560 DC of the Conseil constitutionnel of 20 December 2007, nos. 26 et seq.). The reference of a decision pursuant to Article 48.6 TEU Lisbon to the European Union's order of competences establishes an obligation to generally treat the simplified revision procedure like a transfer of sovereign powers within the meaning of Article 23.1 sentence 2 of the Basic Law (see also Pernice, in: Dreier, GG, vol. II, 2nd ed. 2006, Art. 23, marginal no. 86), without a further determination of the possible amendments being required. Amendments of the Treaties by which the content of the Basic Law is amended or supplemented or which make such amendments or supplements possible require the approval of two thirds of the members of the German *Bundestag* and two thirds of the votes of the *Bundesrat* (Article 23.1 sentence 3 in conjunction with Article 79.2 of the Basic Law; see BVerfGE 89, 155 <199>).

313

(bb) The Treaty of Lisbon incorporates other provisions into the Treaties which are worded in analogy to Article 48.6 TEU Lisbon but which are restricted to a specific area and are extended by Treaty of Lisbon (see Article 42.2(1) TEU Lisbon - introduction of a common defence; Article 25.2 TFEU - extension of the rights of the citizens of the Union; Article 218.8(2) sentence 2 TFEU - accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms; Article 223.1(2) TFEU - introduction of a uniform procedure for the elections of the European Parliament; Article 262 TFEU - competence of the European Union for the creation of European intellectual property rights; Article 311.3 TFEU - determination of the European Union's own resources).

314

The constitutional considerations as regards the simplified revision procedure also apply to these Treaty amendment procedures contained in individual Treaty provisions to the extent that Article 23.1 sentence 2 of the Basic Law is not applicable anyhow because the provisions on amendment do not contain a prohibition, corresponding to Article 48.6(3) TEU Lisbon, to extend the competences conferred on the European Union under the Treaties.

315

(c) Apart from the ordinary and the simplified revision procedures, the Treaty of Lisbon provides for what is known as the general bridging procedure as another Treaty amendment procedure (Article 48.7 TEU Lisbon). Moreover, the Treaty of Lisbon contains special bridging clauses in individual provisions (see Article 31.3 TEU Lisbon - decisions on the common foreign and security policy in cases other than those mentioned in Article 31.2 TEU Lisbon; Article 81.3(2)(3) TFEU - measures concerning family law with cross-border implications; Article 153.2(4) TFEU - measures in the areas concerning the protection of workers where their employment contract is terminated, representation and collective defence of the interests of workers and employers and conditions of employment for third-country nationals; Article 192.2(2) TFEU - measures in the area of environmental policy; Article 312.2(2) TFEU - determination of the multiannual financial framework; Article 333.1 and 333.2 TFEU - voting procedures in the context of enhanced cooperation in accordance with Articles 326 et seq. TFEU). The bridging procedures can change the voting modalities in the Council and the legislative procedure that is applied.

316

Pursuant to the general and the special bridging clauses, the European Council or the Council may adopt a decision authorising the Council to act by a qualified majority and not by unanimity in a certain area or in a specific case (Article 48.7(1) sentence 1 TEU Lisbon; Article 31.3 TEU Lisbon; Article 312.2(2), Article 333.1 TFEU) or allowing for the adoption of acts within the area of application of the Treaty on the Functioning of the European Union in accordance with the ordinary legislative procedure, not in accordance with the special legislative procedure (Article 48.7(2) TEU Lisbon; Article 81.3(2), Article 153.2(4), Article 192.2(2), Article 333.2 TFEU). In the majority of cases, the result of the transition from the special to the ordinary legislative procedure is that the Council decision is no longer adopted by unanimity but by a qualified majority (see Article 289.1 in conjunction with Article 294.8 and 294.13 TFEU). Decisions with military or defence implications are explicitly excluded from the possibility of passing over to qualified majority voting in the Council (Article 31.4, Article 48.7(1) sentence 2 TEU Lisbon). The European Council or the Council shall adopt a decision on the Treaty amendment by unanimity and - in the area of application of the general bridging clause - after obtaining the consent of the European Parliament (Article 48.7(4) TEU Lisbon). Additionally, the general bridging clause as well as the special bridging clause provide for the participation of the national parliaments in the area of family law with cross-border implications. Every national parliament can make known its opposition to a decision proposed by the European Council or the Council within six months after its being notified of it, with the consequence that the decision may not be adopted on the European level (Article 48.7(3) TEU Lisbon; Article 81.3(3) TFEU).

317

Unlike the simplified revision procedure pursuant to Article 48.6 TEU Lisbon, the general and the special bridging clauses make Treaty amendments possible only with a view to the two above-mentioned procedural provisions in the Treaty on the Functioning of the European Union and in Title V of the Treaty on European Union. Beyond this, the European Council or the Council do not have any scope of action. As according to the Treaty of Lisbon, qualified majority voting in the Council and the ordinary legislative procedure are the normal procedures for lawmaking (Article 16.1 and 16.3; Article 14.1 TEU Lisbon, Article 289.1 in conjunction with

Article 294 TFEU), the total extent to which the influence of the German representative in the Council will be reduced by the introduction of qualified majority voting can at least be ascertained in a general manner. What is not possible, however, is a complete exercise of the responsibility for integration with a view to the question of whether the level of democratic legitimisation of Union power is still commensurate with the extent of the competences that have been conferred and above all with the degree of independence of European decision-making procedures to the extent that it has been increased in the bridging procedure.

318

The loss of German influence in the Council which goes along with the exercise of the general and special bridging clauses must be predictable at the point in time of the ratification of the Treaty of Lisbon by the German legislature also as regards individual cases. Only if this is the case, the approval given in advance by a Member State to a later Treaty amendment is sufficiently democratically legitimised. The unanimity in the European Council or in the Council that is required by the bridging clauses for the amendment of the procedural provisions is not a sufficient guarantee for this because it may not always be sufficiently ascertainable for the representatives of the Member States in the European Council or in the Council to what extent the Member States' possibility of veto in the Council is thereby waived for future cases. Apart from the requirement of unanimity in the European Council or in the Council, the bridging clauses make different procedural requirements. Contrary to the general bridging clause in Article 48.7(3) TEU Lisbon, the special bridging clauses, with the exception of Article 81.3(3) TFEU, do not provide for a right of the Member States' parliaments to make known their opposition.

319

To the extent that the general bridging clause under Article 48.7 TEU Lisbon makes possible the transition from the principle of unanimity to the principle of qualified majority in the decision-making of the Council, or the transition from the special to the ordinary legislative procedure, this is a Treaty amendment under primary law, which is to be assessed pursuant to Article 23.1 sentence 2 of the Basic Law. In its judgment on the Treaty of Maastricht, the Federal Constitutional Court pointed out as regards the challenge made there concerning the loss of statehood in the area of Justice and Home Affairs, an area central to the subject of fundamental rights, that in the "Third Pillar", decisions were only adopted unanimously and that by these decisions no law was passed that would be directly applicable in the Member States and would claim precedence there (see BVerfGE 89, 155 <176>). The Treaty of Lisbon now transfers exactly this area to the supranational power of the Union by providing that by decisions adopted in the European Council in the general bridging procedure, areas can be transferred, with a right of opposition of the national parliaments but without a requirement of ratification in the Member States, from unanimity to qualified majority voting or from the special to the ordinary legislative procedure. This affects the core of the justifying line of argument of the judgment on the Treaty of Maastricht that has been cited. The national parliaments' right to make known their opposition (Article 48.7(3) TEU Lisbon) is not a sufficient equivalent to the requirement of ratification; therefore the approval by the representative of the German government always requires a law within the meaning of Article 23.1 sentence 2, and if necessary sentence 3, of the Basic Law. It is only in this way that the German legislative bodies exercise their responsibility for integration in a given case and also decide on the question of whether the level of democratic legitimisation is still high enough in the given case to accept the majority decision. The representative of the German government in the European Council may only approve a Treaty amendment brought about by the application of the general bridging clause if the German *Bundestag* and the *Bundesrat* have adopted within a period yet to be determined a law pursuant to Article 23.1 of the Basic Law which takes the purpose of Article 48.7(3) TEU Lisbon as an orientation. This also applies in case of the special bridging clause pursuant to Article 81.3(2) being used.

320

A law within the meaning of Article 23.1 sentence 2 of the Basic Law is not required to the extent that special bridging clauses are restricted to areas which are already sufficiently determined by the Treaty of Lisbon. Also in these cases, however, it is incumbent on the *Bundestag* and, to the extent that the legislative competences of the *Länder* are affected, on the *Bundesrat*, to comply with the responsibility for integration in another suitable manner. The veto right in the Council may not be waived without the participation of the competent legislative bodies even as regards subject-matters which have already been factually determined in the Treaties. The representative of the German government in the European Council or in the Council may therefore only approve an amendment of primary law through the application of one of the special bridging clauses on behalf of the Federal Republic of Germany if the German *Bundestag* and, to the extent that this is required by the provisions

on legislation, the *Bundesrat*, have approved this decision within a period yet to be determined, which takes the purpose of Article 48.7(3) TEU Lisbon as an orientation (see on this also the mandatory requirement of parliamentary approval pursuant to Section 6 of the British European Union <Amendment> Act 2008 <c. 7>, which, however, is not subject to a time-limit). It would be incompatible with the constitutional requirement of a parliamentary decision if the concrete elaboration of the requirement of a time-limit would construe the possible silence on the part of the legislative bodies as their approval. If this requirement is complied with, the corresponding provisions of the Treaty of Lisbon may be applied in Germany.

321

This constitutional requirement applies to the application of Article 31.3 TEU Lisbon, Article 312.2(2) and Article 333.1 TFEU, which permit passing over form unanimity to qualified majority voting. It must, however, also be extended to those Treaty provisions that, like, Article 153.2(4), Article 192.2(2) and Article 333.2 TFEU, have as their subject-matter the transition from the special to the ordinary legislative procedure because also in these cases, the Council can decide no longer unanimously but with a qualified majority (see Article 289.1 in conjunction with Article 294.8 and 294.13 TFEU).

322

(d) Finally, the Treaty of Lisbon does not vest the European Union with provisions that provide the European union of integration (*Integrationsverband*) with the competence to decide on its own competence (*Kompetenz-Kompetenz*). Article 311.1 TFEU (aa) as well as Article 352 TFEU (bb) can be construed in such a way that the integration programme envisaged in the provisions can still be predicted and determined by the German legislative bodies.

323

(aa) Pursuant to Article 311.1 TFEU, the European Union shall provide itself with the means necessary to attain its objectives and carry through its policies. The provision is identical with Article 6.4 TEU, which had been incorporated into primary law by the Treaty of Maastricht under the name “Article F.3”. In its decision on the Treaty of Maastricht, the Federal Constitutional Court, after comprehensively interpreting the legislative history of the provision, reached the conclusion that Article F.3 TEU did not empower the European Union to provide itself by its own authority with the financial means and other resources it considered necessary for the fulfilment of its objectives (BVerfGE 89, 155 <194 et seq.>; see also Puttler, in: Calliess/Ruffert, EUV/EGV, 3rd ed. 2007, Art. 6 EUV, marginal nos. 59-60; Hilf/Schorkopf, in: Grabitz/Hilf/Nettesheim, Das Recht der Europäischen Union, vol. I (EUV/EGV), 37th supplement, November 2008, Art. 6 EUV, marginal no. 113).

324

Article 311.1 TFEU will still have to be understood as a statement of intent regarding policies and programmes which does not establish a competence, and certainly not a *Kompetenz-Kompetenz*, for the European Union (see BVerfGE 89, 155 <194>). The European Union’s providing itself with the means necessary to attain its objectives and carry through its policies must take place within the existing competences. The new location of the provision in the Treaty of Lisbon confirms the interpretation that the provision only refers to financial means and not to the means of action as well.

325

(bb) In contrast, Article 352 TFEU, which is intended to fill lacunas concerning the existing competences of the European Union in an objective-related manner, does have the effect of a legal provision (see on the former Article 235 EECT BVerfGE 89, 155 <210>). The Treaty of Lisbon takes this provision - with amendments as regards its scope of application and the procedural requirements - from the existing primary law (now Article 308 ECT).

326

Article 352 TFEU not only establishes a competence of action for the European Union but at the same time relaxes the principle of conferral. Because action by the European Union in fields set out in the Treaties is

intended to be possible if the Treaties have not provided the specific competence necessary but action by the European Union should prove necessary to attain the objectives set out in the Treaties (Article 352.1 TFEU).

327

According to the current legal situation, Article 308 ECT appeared as a “lacuna-filling competence” (see BVerfGE 89, 155 <210>), which made a “further development, inherent in the Treaties” of European Union law “below the formal amendment of the Treaties” possible (see Oppermann, Europarecht, 3rd ed. 2005, § 6, marginal no. 68). The amendments brought about by the Treaty of Lisbon must lead to a new assessment of the provision. Article 352 TFEU is no longer restricted to the attainment of objectives in the context of the Common Market but makes reference to “the policies defined in the Treaties” (Article 352.1 TFEU) with the exception of the common foreign and security policy (Article 352.4 TFEU). The provision can thus serve to create a competence which makes action on the European level possible in almost the entire area of application of the primary law. This extension of the area of application is partly compensated by procedural safeguards. The use of the flexibility clause continues to require a unanimous decision by the Council on a proposal from the Commission which now requires the consent of the European Parliament (Article 352.1 sentence 1 TFEU). Apart from this, the Commission is obliged to inform national Parliaments about corresponding lawmaking proposals in the context of the procedure for monitoring adherence to the subsidiarity principle (Article 352.2 TFEU). Moreover, such a lawmaking proposal shall not entail harmonisation of Member States’ laws or regulations in cases where the Treaties otherwise exclude such harmonisation (Article 352.3 TFEU). The approval by the Member States in accordance with their respective constitutional requirements is not a requirement for the decision entering into force.

328

As regards the ban on transferring blanket empowerments or on transferring *Kompetenz-Kompetenz*, the provision meets with constitutional objections because the newly worded provision makes it possible to substantially amend Treaty foundations of the European Union without the mandatory participation of legislative bodies beyond the Member States’ executive powers (see on the delimitation of competences: Laeken Declaration on the Future of the European Union of 15 December 2001, Bulletin EU 12-2001, I.27 <Annex>). The duty to inform the national parliaments set out in Article 352.2 TFEU does not alter this; for the Commission need only draw the national Parliaments’ attention to a corresponding lawmaking proposal. With a view to the undetermined nature of future cases of application of the flexibility clause, its use constitutionally requires ratification by the German *Bundestag* and the *Bundesrat* on the basis of Article 23.1 sentences 2 and 3 of the Basic Law. The German representative in the Council may not declare the formal approval of a corresponding lawmaking proposal of the Commission on behalf of the Federal Republic of Germany as long as these constitutionally required preconditions are not fulfilled.

329

(3) The instruments covered by the Act Approving the Treaty of Lisbon clearly shows the existing principle of association (*Verbundprinzip*) in the system of the responsible transfer of sovereign powers and thus satisfies constitutional requirements. The Treaty makes the existing right of each Member State to withdraw from the European Union visible in primary law for the first time (Article 50 TEU Lisbon). The right to withdraw underlines the Member States’ sovereignty and shows apart from this that the current state of development of the European Union does not transgress the boundary towards a state within the meaning of international law (see Jouanjan, Monodisziplinäre Stellungnahmen, in: Kreis, Der Beitrag der Wissenschaften zur künftigen Verfassung der EU, 2003, p. 12 <16>). If a Member State can withdraw on account of decision made on its own responsibility, the process of European integration is not irreversible. The membership of the Federal Republic of Germany depends instead from its lasting and continuing will to be a member of the European Union. The legal boundaries of this will depend on the Basic Law.

330

Every Member State may withdraw from the European Union also against the will of the other Member States (see Article 54 lit a of the Vienna Convention on the Law of Treaties <VCLT> of 23 May 1969, Federal Law Gazette 1985 II pp. 926 et seq.). The decision to withdraw need not mandatorily be implemented by a withdrawal agreement between the European Union and the Member State in question. In the case of an agreement failing to be concluded, the withdrawal takes effect two years after the notification of the decision to withdraw (Article 50.3 TEU Lisbon). The right to withdraw can be exercised without further obligations because

the Member State that wishes to withdraw need not state reasons for its decision. Article 50.1 TEU Lisbon merely sets out that the withdrawal of the Member State must take place "in accordance with its own constitutional requirements". Whether these requirements have been adhered to in the individual case can, however, only be verified by the Member State itself, not, however, by the European Union or the other Member States.

331

(4) With Declaration no. 17 Concerning Primacy annexed to the Treaty of Lisbon, the Federal Republic of Germany does not recognise an absolute primacy of application of Union law, which would be constitutionally objectionable, but merely confirms the legal situation as it has been interpreted by the Federal Constitutional Court. The allegation of the complainant re III. that the approval of the Treaty of Lisbon would factually make the "unrestricted primacy" of the law made by the institutions of the Union over the law of the Member States, which had been planned in the failed Constitutional Treaty, a subject-matter of the Treaty, which would ultimately establish an inadmissible federal-state primacy of validity that would even make the derogation of contrary constitutional law of the Member States possible, is incorrect. The assumption that due to comprehensive gains in competence, it would be virtually impossible for the Federal Constitutional Court to examine adherence to the principle of conferral by the European Union and the ensuing legal effects in Germany and that it would no longer be possible to safeguard the substance of constitutional identity and of the German protection of fundamental rights is incorrect as well (this opinion is advanced, however, by Murswiek, Die heimliche Entwicklung des Unionsvertrages zur europäischen Oberverfassung, NVwZ 2009, pp. 481 et seq.).

332

As primacy by virtue of constitutional empowerment is retained, the values codified in Article 2 TEU Lisbon, whose legal character does not require clarification here, may in the case of a conflict of laws not claim primacy over the constitutional identity of the Member States, which is protected by Article 4.2 sentence 1 TEU Lisbon and is constitutionally safeguarded by the identity review pursuant to Article 23.1 sentence 3 in conjunction with Article 79.3 of the Basic Law. The values of Article 2 TEU Lisbon, which are contained in part as principles in the current Article 6.1 TEU, do not provide the European union of integration *Kompetenz-Kompetenz*, so that the principle of conferral also applies in this respect.

333

(a) The European instruments have assigned the interpretation of primary and of secondary law to their own European jurisdiction. The Court of Justice and the Court of First Instance ensure, each within its jurisdiction, on the basis of the current Treaty establishing the European Community and - to a lesser extent - of the Treaty on European Union that in the interpretation of the Treaties the law is observed (Article 220 ECT; Article 35 TEU). By means of preliminary rulings, the Court of Justice shall have jurisdiction to bindingly render judgment concerning the interpretation of the Treaty and the validity and interpretation of acts of the institutions of the Community and of the European Central Bank (Article 234 ECT). Consequently, the law under the Treaties makes the case-law of the European Courts, especially that of the Court of Justice, binding on the courts of the Member States via the orders to apply the law given through the national Acts approving the respective Treaty.

334

From the continuing sovereignty of the people which is anchored in the Member States and from the circumstance that the states remain the masters of the Treaties, it follows - at any rate until the formal foundation of a European federal state and the change of the subject of democratic legitimisation which must be explicitly performed with it - that the member states may not be deprived of the right to review adherence to the integration programme.

335

Due to the order issued in the Basic Law to this effect, federal law shall take precedence over conflicting *Land* law (see Article 31 of the Basic Law). The law which is established supranationally does not have such a derogating effect that annuls law. The primacy of application of European law does not affect the claim to validity of conflicting law in the Member States; it only forces it back as regards its application to the extent required by the Treaties and permitted by them pursuant to the order to apply the law given nationally by the Act

approving the Treaty (see BVerfGE 73, 339 <375>). Community law and law of a Member State that is contrary to the European Union is rendered inapplicable merely to the extent required by the content of regulation under Community and European Union law that is contrary to it.

336

This construction, which is rather theoretical in everyday application of the law because it often does not result in practical differences as regards its legal effects, has, however, consequences for the relation of the Member States' jurisdiction to the European one. Bodies of jurisdiction with a constitutional function may not, within the limits of the competences conferred on them - this is at any rate the position of the Basic Law - be deprived of the responsibility for the boundaries of their constitutional empowerment for integration and for the safeguarding of the inalienable constitutional identity.

337

The Basic Law's mandate of integration and current European law laid down in the treaties demand, with the idea of a Union-wide legal community, the restriction of the exercise of the Member States' judicial power. No effects that endanger integration are intended to occur by the uniformity of the Community's legal order being called into question by different applicability decisions of courts in Member States. The Federal Constitutional Court has put aside its general competence, which it had originally assumed, to review the execution of European Community law in Germany against the standard of the fundamental rights of the German constitution (see BVerfGE 37, 271 <283>), and it did so trusting in the Court of Justice of the European Communities performing this function accordingly (see BVerfGE 73, 339 <38>); confirmed in BVerfGE 102, 147 <162 et seq.>). Out of consideration for the position of the Community institutions, which is derived from international agreements, the Federal Constitutional Court could, however, recognise the final character of the decisions of the Court of Justice only "in principle" (see BVerfGE 73, 339 <367>).

338

To the extent that complainants in the proceedings on the constitutionality of the German Act Approving the Treaty of Maastricht inferred from the final character of the rulings of the Court of Justice a complete power of disposition on the part of Community institutions over the law laid down in the Treaties, and thus a constitutionally inadmissible transfer not of individual sovereign powers but of sovereignty as a whole, the Federal Constitutional Court has refuted this argument already in its decision on the Treaty of Maastricht. The Federal Constitutional Court found that it reviews whether legal instruments of the European institutions and bodies remain within the limits of the sovereign powers conferred on them or if the Community jurisdiction interprets the Treaties in an extensive manner that is tantamount to an inadmissible autonomous Treaty amendment (BVerfGE 89, 155 <188, 210>; in similar fashion recently Czech Constitutional Court, judgment of 26 November 2008, file reference Pl. ÚS 19/08, Treaty amending the Treaty on European Union and the Treaty establishing the European Community, marginal no. 139).

339

The primacy of application of European law remains, even with the entry into force of the Treaty of Lisbon, an institution conferred under an international agreement, i.e. a derived institution which will have legal effect in Germany only with the order to apply the law given by the Act Approving the Treaty of Lisbon. This connection of derivation is not altered by the fact that the institution of the primacy of application is not explicitly provided for in the Treaties but has been obtained in the early phase of European integration in the case-law of the Court of Justice by means of interpretation. It is a consequence of the continuing sovereignty of the Member States that at any rate if the mandatory order to apply the law is evidently lacking, the inapplicability of such a legal instrument to Germany is established by the Federal Constitutional Court. This establishment must also be made if within or outside the sovereign powers conferred, these powers are exercised with effect on Germany in such a way that a violation of the constitutional identity, which is inalienable pursuant to Article 79.3 of the Basic Law and which is also respected by European law under the Treaties, namely Article 4.2 sentence 1 TEU Lisbon, is the consequence.

340

The Basic Law aims to integrate Germany into the legal community of peaceful and free states, but does not waive the sovereignty contained in the last instance in the German constitution. There is therefore no contradiction to the aim of openness to international law if the legislature, exceptionally, does not comply with the law of international agreements - accepting, however, corresponding consequences in international relations - provided this is the only way in which a violation of fundamental principles of the constitution can be averted (see BVerfGE 111, 307 <317-318>). The Court of Justice of the European Communities based its decision of 3 September 2008 in the Case of Kadi on a similar view according to which an objection to the claim of validity of a United Nations Security Council Resolution may be expressed citing fundamental legal principles of the Community (ECJ, Joined Cases C-402/05 P and C-415/05 P, EuR 2009, p. 80 <100 et seq.>). The Court of Justice has thus, in a borderline case, placed the assertion of its own identity as a legal community above the commitment that it otherwise respects. Such a legal figure is not only familiar in international legal relations as reference to the ordre public as the boundary of commitment under a treaty; it also corresponds, at any rate if it is used in a constructive manner, to the idea of contexts of political order which are not structured according to a strict hierarchy. Factually at any rate, it is no contradiction to the objective of openness towards European law, i.e. to the participation of the Federal Republic of Germany in the realisation of a united Europe (Preamble, Article 23.1 sentence 1 of the Basic Law), if exceptionally, and under special and narrow conditions, the Federal Constitutional Court declares European Union law inapplicable in Germany (see BVerfGE 31, 145 <174>; 37, 271 <280 et seq.>; 73, 339 <374 et seq.>; 75, 223 <235, 242>; 89, 155 <174-175>; 102, 147 <162 et seq.>).

341

(b) Contrary to the submissions made by the complainant re III., the Federal Constitutional Court's reserve competence is not affected by Declaration no. 17 on Primacy annexed to the Final Act of the Treaty of Lisbon. The Declaration points out that in accordance with well settled case law of the Court of Justice of the European Union, and under the conditions laid down in this case law, the Treaties and the secondary law adopted by the Union on the basis of the Treaties have primacy over the law of Member States.

342

The primacy of application first of all requires the direct applicability of European law in the Member States (see Oppermann, Europarecht, 3rd ed. 2005, § 7, marginal nos. 8 et seq. with further references). In the area of the common foreign and security policy, no instruments are provided to which Declaration no. 17 on Primacy would be applicable. The Treaty does not provide any sovereign powers to the Union that would permit supranational "access" to the Member States' legal orders (see Article 24.1, Article 40 TEU Lisbon and Declaration no. 14 annexed to the Final Act of the Treaty of Lisbon).

343

The foundation and the limit of the applicability of European Union law in the Federal Republic of Germany is the order to apply the law which is contained in the Act Approving the Treaty of Lisbon, which can only be given within the limits of the current constitutional order (see BVerfGE 73, 339 <374 et seq.>). In this respect, it is insignificant whether the primacy of application, which the Federal Constitutional Court has already essentially recognised for Community law (see BVerfGE 31, 145 <174>), is provided for in the Treaties themselves or in Declaration no. 17 annexed to the Final Act of the Treaty of Lisbon. For in Germany, the primacy of Union law only applies by virtue of the order to apply the law issued by the Act approving the Treaties. As regards public authority exercised in Germany, the primacy of application only reaches as far as the Federal Republic of Germany approved this conflict of law rule and was permitted to do so (see Nettesheim, Die Kompetenzordnung im Vertrag über eine Verfassung für Europa, EuR 2004, p. 511 <545-546>; Sauer, Jurisdiktionskonflikte in Mehrebenensystemen, 2008, pp. 162 et seq.; Streinz, Europarecht, 8th ed. 2008, marginal nos. 224 et seq.). This at the same time establishes that the aspect of the primacy of application of Community law, and in the future of Union law, cannot serve to obtain a compelling argument in favour of a waiver of sovereign statehood or to constitutional identity upon the entry into force of the Treaty of Lisbon.

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bb) The Act Approving the Treaty of Lisbon does not abandon the state territory of the Federal Republic of Germany. It is true that the limiting element of the state territory, which becomes particularly clear by the territorial borders, which are, in principle, intended to prevent the exercise of alien autonomy to rule on the state territory, has become less important. International treaties amending and supplementing existing primary law have, in particular, created the internal market (Article 14.2 ECT) and have abolished border controls in what is

known as the Schengen area. The Treaty of Lisbon further decreases the importance of the limiting element by introducing an integrated management system for “external borders” (Article 77.1 lit c and 77.2 lit d TFEU). The European Union, however, exercises public authority in Germany on the basis of the competences transferred to it in the Act Approving the Treaty of Lisbon, and thus not without express permission of the Federal Republic of Germany. A territory-related state authority (see Jellinek, Allgemeine Staatslehre, 3rd ed. 1921, p. 394) continues to exist unchanged under the changed conditions of cross-border mobility.

345

This is not countered by the fact that the “area without internal frontiers” (Article 14.2 ECT, Article 154.1 ECT) and the “area of freedom, security and justice”, which has been supranationalised by the Treaty of Lisbon (Articles 67 et seq. TFEU), also reduces territorial sovereignty as an element of the state territory. Pursuant to the Treaty of Lisbon, the European Union does not have comprehensive territorial authority which replaces that of the Federal Republic of Germany. That it does not claim such authority even after the entry into force of the Treaty of Lisbon is shown by the fact that the Treaty only makes reference to a “territorial scope” of the Treaties (Article 52 TEU Lisbon; Article 355 TFEU). The territorial scope is accessory to the state territory of the Member States, which in its sum determines the area of application of Union law (Article 52 TEU Lisbon; Article 355 TFEU). There is no territory belonging directly to the Union which would be free from this accessory nature (on the extension of the area of applicability by the enlargement of a Member State’s territory see Oppermann, Europarecht, 3rd ed. 2005, § 4, marginal no. 36).

346

cc) After the ratification of the Treaty of Lisbon, the Federal Republic of Germany will continue to have a state people. The concept of the “citizen of the Union”, which has been more strongly elaborated in Union law, is exclusively founded on Treaty law. The citizenship of the Union is solely derived from the will of the Member States and does not constitute a people of the Union, which would be competent to exercise self-determination as a legal entity giving itself a constitution.

347

In particular, the introduction of the citizenship of the Union does not permit the conclusion that a federal system has been founded. Historical comparisons, for instance with the German foundation of a federal state via the North German Confederation of 1867 (see for instance Schönberger, Unionsbürger, 2005, pp. 100 et seq.), do not help very much in this context. After the realisation of the principle of the sovereignty of the people in Europe, only the peoples of the Member States can dispose of their respective constituent powers and of the sovereignty of the state. Without the expressly declared will of the peoples, the elected bodies are not competent to create a new subject of legitimisation, or to delegitimise the existing ones, in the constitutional areas of their states.

348

In this sense, the citizenship of the Union is nothing which culturally or normatively precedes the current treaty law and from which legal effects that shape the constitution could emerge. The citizenship of the Union, which has been incorporated into primary law by past treaty amendments, is a derived status which shall be additional to national citizenship (Article 17.1 sentences 2 and 3 ECT; Article 9 sentence 3 TEU Lisbon). This status is also not altered by the rights connected with the citizenship of the Union even though the Treaty of Lisbon extends these rights. The citizens of the Union are granted a right to participate in the democratic life of the Union (Article 10.3, Article 11.1 TEU Lisbon), which emphasises a necessary structural connection between the civic polity and public authority. Additionally, the exercise of existing rights of the citizens of the Union in the area of protection by the diplomatic or consular authorities and of the documents of legitimisation is facilitated (see Article 23.2, Article 77.3 TFEU).

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Other amendments of primary law also do not result in the primary citizenship status being superimposed by the citizenship of the Union. From the overall context of the Treaty of Lisbon, it becomes apparent that the terminological change of Article 9 sentence 3 TEU Lisbon as compared to Article 17.1 sentence 2 ECT (see Schrauwen, European Citizenship in the Treaty of Lisbon: Any Change at all?, MJECL 2008, p. 55 <59>), the

use of the term “citizens of the Union” in connection with the European Parliament (Article 14.2(1) sentence 1 TEU Lisbon) and the decisive role of the citizens of the Union in the European citizens’ initiative (Article 11.4 TEU Lisbon) do not intend to create an independent personal subject of legitimisation on the European level.

350

Also in view of the elaboration of the rights of the citizens of the Union, the German state people retains its existence as long as the citizenship of the Union does not replace the citizenships of the Member States or is superimposed on it. The derived status of the citizenship of the Union and the safeguarding of the national citizenship are the boundary of the development of the civic rights of the Union which is set out in Article 25.2 TFEU and the boundary of the Court of Justice of the European Union’s case-law (see on the significance of the citizenship of the Union ECJ, judgment of 12 May 1998, Case C-85/96, Martínez Sala, ECR 1998, p. I-2691 marginal nos. 62-63; ECJ, judgment of 20 September 2001, Case C-184/99, Grzelczyk, ECR 2001, p. I-6193 marginal nos. 31-32; ECJ, judgment of 17 September 2002, Case C-413/99, Baumbast, ECR 2002, p. I-7091 marginal no. 82; ECJ, judgment of 7 September 2004, Case C-456/02, Trojani, ECR 2004, p. I-7573 marginal no. 31; ECJ, judgment of 19 October 2004, Case C-200/02, Zhu, ECR 2004, p. I-9925 marginal no. 25). Possibilities to differentiate on account of nationality continue to exist in the Member States. In the Member States, the right to vote and stand for election for the respective bodies of representation above the local level remains to be reserved to the Member State’s own citizens, just as the duty to show financial solidarity between Member States in the form of social benefits paid to citizens of the Union remains restricted (see ECJ, judgment of 18 November 2008, Case C-158/07, Förster, EuZW 2009, p. 44 <45>).

351

c) With the Treaty of Lisbon the Member States extend the scope of competences and the political possibilities of action of the European association of integration. After the entry into force of the Treaty of Lisbon, the existing and newly conferred competences will be exercised by the European Union, which will replace the European Community. Particularly the newly conferred competences in the areas of judicial cooperation in criminal (aa) and civil matters (bb), external trade relations (cc), common defence (dd) and with regard to social concerns can, and must, be exercised by the institutions of the European Union in such a way that on the level of the Member States, tasks of sufficient weight as to their extent as well as their substance remain which legally and practically are the precondition of a living democracy. The newly established competences are - at any rate with the required interpretation - no “elements that establish a state”, which also in an overall perspective do not infringe the sovereign statehood of the Federal Republic of Germany in a constitutionally relevant manner. For the assessment of the challenge of an unconstitutional depletion of the competences of the German *Bundestag*, it can remain undecided how many legislative acts in the Member States are already influenced, pre-formed or determined by the European Union (see most recently Hoppe, Die Europäisierung der Gesetzgebung: Der 80-Prozent-Mythos lebt, EuZW 2009, p. 168-169). What is decisive for the constitutional assessment of the challenge is not the quantitative relations but whether the Federal Republic of Germany retains substantial national scope of action for central areas of statutory regulation and areas of life.

352

aa) (1) The Treaty of Lisbon considerably extends the European Union’s competences in the area of the administration of criminal law. The European Union is granted powers to establish “minimum rules” concerning the definition of criminal offences and sanctions in the areas of “particularly serious” crime which have a cross-border dimension “resulting from the nature or impact of such offences” or from “a special need to combat them on a common basis” (Article 83.1(1) TFEU). The areas of crime which can be considered for such cooperation are enumerated as examples but can be extended by the Council by adopting a unanimous decision after obtaining the consent of the European Parliament (Article 83.1(3) TFEU). Beyond this competence for the approximation of laws in criminal law concerning particularly serious crime with a cross-border dimension, the Union is granted an annex competence in criminal law, which has already been assumed in the case-law of the Court of Justice of the European Communities (see ECJ, judgment of 13 September 2005, Case C-176/03, Commission/Council, ECR 2005, p. I-7879, marginal nos. 47-48) in all policy areas which have been, or will be, subject to harmonisation measures (Article 83.2 sentence 1 TFEU).

353

As regards the law of criminal procedure, the European Union can establish minimum rules concerning “mutual” admissibility of evidence, the rights of the accused, the rights of witnesses and of victims of crime, and any other

specific aspects which the Council has identified in advance by a decision adopted unanimously after obtaining the consent of the European Parliament (Article 82.2(1)(2) TFEU). Furthermore, measures to promote and support the action of Member States in the field of crime may be established (Article 84 TFEU).

354

Finally, the competences of Eurojust can be extended on the basis of the Treaty of Lisbon. Eurojust can, in an ordinary legislative procedure, in particular be entrusted with initiating and coordinating criminal investigations and prosecutions (Article 85.1 TFEU), with formal acts of judicial procedure being reserved to the national prosecution authorities (Article 85.2 TFEU). Apart from this, a European Public Prosecutor's Office may be established from Eurojust by a unanimous decision of the Council adopted after obtaining the consent of the European Parliament, which would be responsible for investigation, prosecution and the bringing of charges before the national courts, this responsibility being limited at first to combating offences against the European Union's financial interests (Article 86.1 TFEU).

355

(2) Securing legal peace by the administration of criminal law has always been a central duty of state authority. As regards the task of creating, securing and enforcing a well-ordered social existence by protecting the elementary values of community life on the basis of a legal order, criminal law is an indispensable element to secure the unsvervingness of this legal order (see Sellert/Rüping, Studien- und Quellenbuch zur Geschichte der deutschen Strafrechtspflege, volume 1, 1989, p. 49). Every provision in criminal law contains a social and ethical verdict of unworthiness on the action which it penalises. The specific content of this verdict of unworthiness results from the constituent elements of the criminal offence and the sanction (see BVerfGE 25, 269 <286>; 27, 18 <30>). To what extent and in what areas a polity uses exactly the means of criminal law as an instrument of social control is a fundamental decision. By criminal law, a legal community gives itself a code of conduct that is anchored in its values, whose violation is, according to the shared convictions on law, regarded as so grievous and unacceptable for social existence in the community that it requires punishment (see Weigend, Strafrecht durch internationale Vereinbarungen - Verlust an nationaler Strafrechtskultur?, ZSW 1993, p. 774 <789>).

356

With the decision on punishable conduct, the legislature takes the democratically legitimised responsibility for a form of sovereign action that counts among the most intensive encroachments on individual freedom in a modern constitutional state. The legislature is in principle free concerning the decision of whether it wants to defend a specific legal interest whose protection it regards as essential exactly with the means of criminal law how it wants to do this (see BVerfGE 50, 142 <162>; 120, 224 <240>; on the delimitation between criminal wrongdoing and wrongdoing breaching administrative rules see BVerfGE 27, 18 <30>; 96, 10 <26>). Within the boundaries of the commitment to the constitution, it can, additionally decide which sanction it will impose on culpable conduct. The investigation of crimes, the detection of the perpetrator, the establishment of his guilt and his punishment are incumbent on the bodies of administration of criminal law, which for this purpose and under the conditions determined by the law, have to institute and to conduct criminal proceedings and have to execute imposed sanctions (see BVerfGE 51, 324 <343>).

357

Due to the integration of the German constitutional state into the order of international law of the community of states, the legislature's freedom of action may be constitutionally restricted by the obligation to enforce supranational law in its own area of responsibility. It can for instance be required to impose sanctions on certain action with the purpose of enforcing essential provisions of the general international law vis-à-vis the individual (see BVerfGE 112, 1 <26>). This applies above all to the process of the formation of an international criminal justice for genocide, crimes against humanity and war crimes (see BVerfGE 113, 273 <296-297>; Federal Constitutional Court - BVerfG, order of the 4th Chamber of the Second Senate of 12 December 2000 - 2 BvR 1290/99 -, NJW 2001, pp. 1848 et seq.). As a Member State of the European Union, Germany has made other commitments. With the construction and further development of the area of freedom, security and justice, which has taken place essentially according to the provisions relating to the intergovernmental "Third Pillar" of the law of the European Union, the European Union follows the objective combining the process of growing together and the opening of the borders for persons, goods, services and capital with an improved cooperation of the prosecution authorities. The Member States have agreed on creating provisions of criminal law and law of

criminal procedure in specific areas which do justice to the conditions of European circumstances with a cross-border dimension.

358

Due to the fact that democratic self-determination is affected in an especially sensitive manner by provisions of criminal law and law of criminal procedure, the corresponding foundations of competence in the Treaties must be interpreted strictly - on no account extensively -, and their use requires particular justification. The core content of criminal law does not serve as a technical instrument for effectuating international cooperation but stands for the particularly sensitive democratic decision on the minimum standard according to legal ethics. This is explicitly recognised by the Treaty of Lisbon where it equips the newly established competences in the administration of criminal law with a so-called emergency brake which permits a member of the Council, which is ultimately responsible to its parliament, to prevent directives with relevance to criminal law at least for its own country, invoking “fundamental aspects of its criminal justice system” (Article 83.3 TFEU).

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(3) The fight against particularly serious crime, which takes advantage of the territorial limitation of criminal prosecution by a state, or which, as in the case of corruption, threatens the viability of the rule of law and democracy in the European Union, can be a special justification for the transfer of sovereign powers also in this context. In this connection, the Treaty of Lisbon says that such offences must have a cross-border dimension (Article 83.1(1) TFEU) resulting from the nature or impact of such offences or from a special need to combat them on a common basis (Article 83.1(1) TFEU). Such a special need does not exist where the institutions have formed a corresponding political will. It cannot be detached from the nature or impact of such offences because it is unfathomable from what the need to combat these offences on a common basis should result if not from the nature and the impact of the offences in question.

360

The narrow interpretation which is thus required to protect the democratic primary area in the understanding of the Basic Law must also be the basis of the decision of the German representative in the Council if a decision is intended to be adopted in the area of mutual recognition of judgments and judicial decisions and in the general area of the law of criminal procedure (Article 82.1 and 82.2 TFEU).

361

With regard to the area of the annex competence which makes the approximation of criminal law possible in policy areas which have been subject to harmonisation measures (Article 83.2 TFEU), the Act Approving the Treaty of Lisbon can be assessed as being in conformity with the constitution for the sole reason that pursuant to the Treaty, this competence is to be interpreted narrowly. The annex competence hides a serious extension of the competence for the administration of criminal law as compared to the current legal situation. Everywhere where the Union has competences for a harmonisation of the law, it can, accordingly, establish minimum rules with regard to the definition of criminal offences and sanctions by means of directives to ensure the “effective implementation of a Union policy”. Because of the threatening boundlessness of this title of competence that concerns lawmaking in criminal law, such a competence provision is, by itself, just as incompatible with the principle of a transfer of sovereign powers having to be factually determined and only of a limited nature as with the required protection of the national legislature, which is democratically committed in a particular manner to the majority decision of the people.

362

The Treaty of Lisbon, however, provides sufficient indications for an interpretation in conformity with the constitution. On the one hand, the constituent element that grants lawmaking powers in criminal law is narrowly worded. Accordingly, the harmonisation of corresponding legal provisions of the Member States must prove “essential to ensure the effective implementation of a Union policy” in the harmonised area of the law (Article 83.2 sentence 1 TFEU). Only if it is demonstrably established that a serious deficit as regards enforcement actually exists and that it can only be remedied by the threat of a sanction, this exceptional constituent element exists and the annex competence for legislation in criminal law may be deemed conferred. These conditions also

apply to the existence of an annex competence for criminal law that has already been assumed by the European jurisdiction.

363

The general empowerment concerning the definition of criminal offences and sanctions pursuant to Article 83.1 TFEU must be interpreted in a correspondingly limiting fashion. Indications of this are the list of particularly serious criminal offences under Article 83.1(2) TFEU and the precondition that it must be particularly serious crime which has a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis. The list clarifies that the areas for which minimum rules, which leave the Member States substantial scope of discretion, may be established are typically areas of serious cross-border crime. Democratic self-determination is, however, affected in a particularly sensitive manner where a legal community is prevented from deciding on the punishability of conduct, or even the imposition of prison sentences, according to their own values. This applies all the more the closer these values are connected with historical experience, traditions of faith and other factors which are essential to the self-perception of the people and their society. In these areas, it is therefore only permitted to a limited extent to transfer the competence for criminal legislation, and it is at any rate necessary to comply with the requirements placed on a single act of transfer of a sovereign power (Article 23.1 sentence 2 of the Basic Law) if the list of areas of crime which fall under the competence of Union legislation is extended. The use of the dynamic blanket empowerment pursuant to Article 83.1(3) TFEU, to extend, “on the basis of developments in crime”, the list of particularly serious criminal offences with a cross-border dimension is factually tantamount to an extension of the codified competences of the Union, and it is therefore subject to the requirement of the enactment of a statute under Article 23.1 sentence 2 of the Basic Law. When implementing the minimum rules, it must also be kept in mind that the European framework provisions only make reference to the cross-border dimension of a specific criminal offence. The Member States’ competence for punishing, which is, in principle, not amenable to integration, could be preserved by the minimum rules not covering the complete area of a criminal offence (see Article 2.2 of the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States, OJ no. L 190/1), but merely part of the constituent elements of the offence.

364

Moreover, the competences of the European Union in the area of the administration of criminal law must be interpreted in a way that complies with the requirements of the principle of guilt. Criminal law is based on the principle of guilt. This principle presupposes a human being’s own responsibility, it presupposes human beings who themselves determine their actions and can decide in favour of right or wrong by virtue of their freedom of will. The protection of human dignity is based on the idea of Man as a spiritual and moral being which has the capabilities of determining himself, and of developing, in freedom (see BVerfGE 45, 187 <227>). In the area of the administration of criminal law, Article 1.1 of the Basic Law determines the idea of the nature of punishment and the relation between guilt and atonement (BVerfGE 95, 96 <140>). The principle that any sanction presupposes guilt thus has its foundation in the guarantee of human dignity under Article 1.1 of the Basic Law (see BVerfGE 57, 250 <275>; 80, 367 <378>; 90, 145 <173>). The principle of guilt forms part of the constitutional identity which is inalienable due to Article 79.3 of the Basic Law and which is also protected against encroachment by supranational public authority.

365

Against the backdrop of the importance of criminal law to individual freedom, additional particular requirements must be placed on the provision which accords a Member State special rights in the legislative procedure (Article 82.3, Article 83.3 TFEU). From the perspective of German constitutional law, the necessary degree of democratic legitimisation via the national parliaments can only be guaranteed by the German representative in the Council exercising the Member States’ rights set out in Article 82.3 and Article 83.3 TFEU only on the instruction of the German *Bundestag* and, to the extent that this is required by the provisions on legislation, the *Bundesrat* (see also the resolution of the German *Bundestag* of 24 April 2008 accompanying the Treaty of Lisbon <*Bundestag* document 16/8917, p. 6, Minutes of *Bundestag* plenary proceedings - BTPlenarprot 16/157, p. 16482 B>). All in all, the manner in which the empowerments are lent concrete shape in their implementation according to Article 82.2 and Article 83.1 and 83.2 TFEU is, as regards its significance, close to a Treaty amendment and requires the corresponding exercise of the responsibility for integration of the legislative bodies in the context of the emergency brake procedure.

366

To the extent that the European Union wishes to apply the general bridging procedure pursuant to Article 48.7 TEU Lisbon in the area of the administration of criminal law to the empowerment, provided for by Article 82.2(2) lit d TFEU, to establish minimum rules for any other specific aspects of criminal procedure in order to pass over from unanimity required in the Council to qualified majority voting, the requirements set out for the general bridging procedure must apply. The representative of the German government in the European Council may only approve a Treaty amendment of primary law if the German *Bundestag* and, to the extent that this is required by the provisions on legislation, the *Bundesrat*, have adopted a law within the meaning of Article 23.1 sentence 2 of the Basic Law within a period yet to be determined, which takes the purpose of Article 48.7(3) TEU Lisbon as an orientation This equally apples to the case that the area of the identification of other areas of crime pursuant to 83.1(3) TFEU is intended to be shifted, via the general bridging procedure, from unanimity to decision-making by a qualified majority.

367

bb) (1) The Treaty of Lisbon also extends the European Union's existing possibilities of action in the area of judicial cooperation in civil matters. The focus of the provision in Article 81 TFEU is the principle of mutual recognition of decisions. The principle has already played an important role in practice and will now be codified in the Treaty as the basis of judicial cooperation. The competence to approximate laws, which has been based on Article 65 ECT, is complemented in the Treaty of Lisbon by the competence for measures intended to ensure effective access to justice, the development of alternative methods of dispute settlement and support for the training of the judiciary and judicial staff (Article 81.2 lit e, g and h TFEU). The case groups for a harmonisation which requires the existence of cross-border aspects are exhaustively enumerated in the provision. Whether the criterion of the necessity of harmonisation is to be interpreted in such a way that it only relates to the smooth functioning of the internal market (see *Bundestag* document <BTDrucks> 16/8300, p. 175), may remain open. For the fact that the Treaty on the Functioning of the European Union admits of harmonisation only under the precondition of its necessity already results from the principle of subsidiarity (Article 5.1 sentence 2 and 5.3 TEU Lisbon). To the extent that the harmonisation measures concern family law, decision-making takes place by the Council acting unanimously after consulting the European Parliament (Article 81.3(1) TFEU). In this area, the Council may unanimously decide to pass over to the ordinary legislative procedure as regards certain aspects of family law (Article 81.3(2) TFEU). The national parliaments may make known their opposition to such transfer (Article 81.3(3) TFEU).

368

(2) The Member States' competence for the administration of justice is one of the areas which are, in principle, assigned to the Member States in the federal association of the European Union. It is true that the Member States are obliged by Community law to grant effective legal protection by the courts which may not be impaired by national legal provisions (see ECJ, judgment of 15. May 1986, Case 222/84, Johnston, ECR 1986, p. 1651 marginal nos. 17 et seq.; ECJ, judgment of 11 September 2003, Case C-13/01, Safalero, ECR 2003, p. I-8679 marginal no. 50). However, this legal situation leaves the Member States' competence for the organisation of the court system and its personal and financial resources unaffected. The overall context of Chapter 3 in Title V of the Treaty on the Functioning of the European Union shows that Article 81.2 TFEU did not confer a corresponding competence on the European Union which would restrict this responsibility of the Member States. The guarantee of effective legal protection under Article 19.4 of the Basic Law and the right of recourse to a court, rooted in the principle of the rule of law, which are also recognised by Union law (see Nowak, in: Heselhaus/Nowak, Handbuch der Europäischen Grundrechte, 2006, § 51), are not restricted for instance by the obligation to develop alternative methods of dispute settlement (Article 81.2 lit g TFEU). The access of a citizen to a court may not, in principle, be restricted by primary and secondary law or be made more difficult by the introduction of non-judicial preliminary proceedings.

369

To the extent that according to Article 81.3(1) TFEU, in derogation of Article 81.2 TFEU, measures concerning family law with cross-border implications shall be established by the Council, acting in accordance with a special legislative procedure, this is merely a procedural derogation from the rules for general civil law which strengthens the Member States' competences, but not the possibility of an extension of the content of the Council's competences for family-law measures which do not have a correspondence in the list according to Article 81.2 TFEU. Should this, however, be seen differently, it would have to be ensured - notwithstanding the

identity-protecting core of the constitution - that the competence pursuant to Article 81.3(1) TFEU is not used without the mandatory participation of the German legislative bodies.

370

cc) (1) Furthermore, the Treaty of Lisbon amends the provisions on the common commercial policy. This especially concerns foreign direct investment as well as the trade in services and the commercial aspects of intellectual property (Article 207.1 TFEU).

371

The common commercial policy, i.e. the external trade-policy representation of the internal market worldwide, has already been an exclusive area of activity of the European Community according to current Community law (ECJ, opinion 1/94 of 15 November 1994, ECR 1994, I-5267 marginal nos. 22 et seq.). This has, however, not included foreign direct investment, the trade in services and the commercial aspects of intellectual property. The European Community currently does not have competence for direct investment; it only has concurrent competence for the trade in services and the commercial aspects of intellectual property (Article 133.5 ECT). This is intended to change with the Treaty of Lisbon. Pursuant to Article 3.1 lit e) TFEU in conjunction with Article 207.1 TFEU, the European Union shall have exclusive competence for the common commercial policy including the above-mentioned areas.

372

(1) Accordingly, treaties *inter alia* in the framework of the World Trade Organization (WTO) such as the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) fall under the exclusive competence of the Union. This abolishes the basis of the current case-law of the Court of Justice of the European Communities, according to which, due to the mixed competence in this area, the Agreement Establishing the World Trade Organization (WTO Agreement) of 15 April 1994 (OJ 1994 no. L 336/3), as a so-called mixed agreement, had to be concluded and ratified by the European Community and by the Member States (ECJ, opinion 1/94 of 15 November 1994, ECR 1994, p. I-5267, marginal nos. 98 and 105; on the mixed-agreement status of an international agreement see also ECJ, opinion 1/78 of 4 October 1978, ECR 1979, p. 2871 marginal no. 2; ECJ, opinion 2/91 of19 March 1993, ECR 1993, p. I-1061, marginal nos. 13 and 39).

373

Accordingly, the Union shall have exclusive competence for the conclusion and the ratification of international agreements in the context of the common commercial policy, including those newly incorporated into Article 207.1 TFEU; the necessity and the possibility an agreement being concluded (also) by the Member States and the participation of the national parliaments in accordance with their respective constitutional requirements (Article 59.2 of the Basic Law) cease to exist. In contrast, the role of the European Parliament, which, according to the current provisions, not even has to be heard on the conclusion of agreements in the context of the common commercial policy is strengthened. Pursuant to Article 207.2 TFEU, a framework for implementing the common commercial policy is established by means of regulations in accordance with the ordinary legislative procedure. The European Parliament must give its consent to the conclusion of agreements under Article 218.6(2) lit a no. v TFEU (see on the extent of the requirement of consent, which has not yet been clarified, Krajewski, Das institutionelle Gleichgewicht in den auswärtigen Beziehungen, in: Herrmann/Krenzler/Streinz, Die Außenwirtschaftspolitik der Europäischen Union nach dem Verfassungsvertrag, 2006, p. 63 <69 et seq.>).

374

With the exclusive competence presented, the Union attains the sole power of disposition of international trade agreements which may result in essential reorganisations of the internal order of the Member States. The shift of competences by the Treaty of Lisbon that has been presented concerns the Member States beyond the loss of their competence for concluding international trade agreements - and the elimination of the legislative participation of the *Bundestag* and the *Bundesrat* pursuant to Article 59.2 of the Basic Law that goes with it - also to the extent that it might reduce the status of the Member States' membership in the World Trade Organization to a merely formal one. The right to vote in the bodies of the World Trade Organization could solely be exercised by the European Union. Furthermore, the Member States would lose their formal entitlement

to be a party in the dispute settlement procedures of the World Trade Organization. Additionally, the Member States would be excluded from the global negotiations on new or amended agreements in the context of the extended common commercial policy, the so-called rounds of world trade talks (see on the details Tietje, Das Ende der parallelen Mitgliedschaft von EU und Mitgliedstaaten in der WTO? in: Herrmann/Krenzler/Streinz, Die Außenwirtschaftspolitik der Europäischen Union nach dem Verfassungsvertrag, 2006, p. 161 <171 et seq.>).

375

It may remain open whether and to what extent the membership of the Member States of the European Union in the World Trade Organization would no longer exist on the substantive level but only on the institutional and formal level. The Treaty of Lisbon may at any rate not force the Member States to waive their member status. This especially applies to the negotiations on multilateral trade relations within the meaning of Article III.2 of the WTO Agreement whose possible future content is not determined by the law of the European Union, and for which therefore a competence of the Member States may therefore emerge in the future, depending on the course of future trade rounds. Therefore an inadmissible curtailment of the statehood presupposed and protected by the Basic Law and of the principle of the sovereignty of the people due to a loss of viability in not insignificant areas of international relations cannot occur. The World Trade Organization remains the central forum for the world-wide dialogue on trade issues and the negotiation of corresponding trade agreements. Even if the Member States will, in practice, normally be represented by the Commission, their legal and diplomatic presence is also the precondition for participating in the discourse on fundamental sociopolitical and economic policy issues and to then explain and discuss the arguments and the results on the national level. When the Federal Government informs the German *Bundestag* and the *Bundesrat* of the topics of the rounds of world trade talks and the negotiation directives adopted by the Council (Article 218.2 TFEU), thereby permitting them to review adherence to the integration programme and the monitoring of the Federal Government's activities, this is not only the normal exercise of its general task of information (see BVerfGE 57, 1 <5>; 70, 324 <355>; 105, 279 <301 et seq.>; 110, 199 <215>); it is constitutionally obliged to do so with a view to the joint responsibility for integration and the differentiation of tasks among the constitutional bodies under the separation of powers.

376

The idea that the Member States' own legal personality status in external relations gradually takes second place to a European Union which acts more and more clearly in analogy to a state does not is not at all reflected in a predictable tendency, made irreversible by the Treaty of Lisbon, in the sense of a formation of a federal state that would factually be necessary at any rate. The development to date of a membership that is cooperatively mixed and is exercised in parallel might, on the contrary, be a model for other international organisations and other associations of states. To the extent that the development of the European Union in analogy to a state would be continued on the basis of the Treaty of Lisbon, which is open to development in this context, this would be in contradiction to constitutional foundations. Such a step, however, has not been made by the Treaty of Lisbon.

377

(2) The framework for foreign direct investment must be assessed on another legal basis. The protection of investment under public international law is an independent category of international law for which the context of world trade is only of marginal importance (see the Agreement on Trade Related Investment Measures, OJ 1994 no. L 336/100). The institutional independence reflects the differences of opinion on the protection of property on the international level (see Dolzer/Schreuer, Principles of International Investment Law, 2008, pp. 11 et seq.). For decades, far-reaching ideologically motivated differences have existed concerning the sociopolitical importance of the fundamental liberty right to property (see BVerfGE 84, 90 et seq.; 94, 12 et seq.; 112, 1 et seq.).

378

Many states have concluded bilateral international agreements whose subject-matter is the protection of property as regards foreign assets. The vast majority of foreign assets, which for the Federal Republic of Germany amounted to 5,004 billion euros in 2007 (Bundesbank, Das deutsche Auslandsvermögen seit Beginn der Währungsunion: Entwicklung und Struktur, Monatsbericht 10.2008, p. 19 <table>), falls under the scope of application of 126 investment protection agreements currently in force (Federal Ministry of Economics and Technology, Übersicht über die bilateralen Investitionsförderungs- und -schutzverträge <IFV> der Bundesrepublik Deutschland <as per 27 May 2008>). At the end of 2007, a total of 2,608 bilateral investment

protection agreements existed worldwide (see UNCTAD, World Investment Report 2008, Transnational Corporations, and the Infrastructure Challenge, p. 15).

379

The extension of the common commercial policy to “foreign direct investment” (Article 207.1 TFEU) confers the European Union exclusive competence also in this area. Much, however, argues in favour of assuming that the term “foreign direct investment” only encompasses investment which serves to obtain a controlling interest in an enterprise (see Tietje, Die Außenwirtschaftsverfassung der EU nach dem Vertrag von Lissabon, 2009, p. 15-16). The consequence of this would be that exclusive competence only exists for investment of this type whereas investment protection agreements that go beyond this would have to be concluded as mixed agreements.

380

The continued legal existence of the agreements already concluded is not endangered. International agreements of the Member States that were concluded before 1 January shall in principle not be affected by the Treaty establishing the European Community (Article 307.1 ECT; Article 351.1 TFEU). In many cases, this provision is not directly applicable because bilateral investment protection agreements have, as a general rule, been concluded more recently, but the legal concept that a situation in the Member States which qualifies as a legal fact will in principle not be impaired by a later step of integration (see Bernhardt, Die Europäische Gemeinschaft als neuer Rechtsträger im Geflecht der traditionellen zwischenstaatlichen Beziehungen, EuR 1983, p. 199 (205); Schmalenbach, in: Calliess/Ruffert, EUV/EGV, 3rd ed. 2007, Art. 307 EGV, marginal no. 5). With a view to the mixed competence in investment issues, the existing investment protection agreements must be authorised by the European Union (see Council Decision of 15 November 2001 Authorising the Automatic Renewal or Continuation in Force of Provisions Governing Matters Covered by the Common Commercial Policy Contained in the Friendship, Trade and Navigation Treaties and Trade Agreements Concluded between Member States and Third Countries OJ no. L 320/13). This corresponds to the current practice, expressly declared or tacitly practiced, concerning the continued validity of international agreements concluded by the Member States.

381

dd) The mandatory requirement of parliamentary approval for the deployment of the armed forces abroad will continue to exist even after the entry into force of the Treaty of Lisbon. The Treaty of Lisbon does not confer on the European Union the competence to use the Member States’ armed forces without the approval of the Member State affected or its parliament.

382

(1) There is a requirement of parliamentary approval under the provisions of the Basic Law which concern defence if the context of a specific deployment and the individual legal and factual circumstances indicate that there is a concrete expectation that German soldiers will be involved in armed conflicts. The provisions of the Basic Law that relate to the forces are designed not to leave the *Bundeswehr* as a potential source of power to the executive alone, but to integrate it as a “parliamentary army” into the constitutional system of a democratic state under the rule of law (see BVerfGE 90, 286 <381-382>; 121, 135 <153 et seq.>).

383

The requirement of parliamentary approval under the provisions of the Basic Law which concern defence creates an effective right of participation for the German *Bundestag* in matters of sovereign decisions relating to foreign affairs. Without parliamentary approval, a deployment of armed forces is as a general rule not permissible under the Basic Law; only in exceptional cases is the Federal Government entitled – in the case of imminent danger – to provisionally resolve the deployment of armed forces in order that the defence and alliance capacities of the Federal Republic of Germany are not called into question by the requirement of parliamentary approval (see BVerfGE 90, 286 <388-389>).

384

(2) The wording of the Treaty of Lisbon does not oblige the Member States to provide national armed forces for military deployments of the European Union. The wording and the legislative history of Articles 42 et seq. TEU

Lisbon clearly show the Member States' intention to retain the sovereign decision on the deployment of their armed forces which is rooted in the last instance in their constitutions. This interpretation of the Treaty of Lisbon is not countered by Article 42.7(1) sentence 1 TEU Lisbon, which for the first time introduces an obligation of mutual assistance of the Member States. In the case of armed aggression on the territory of a Member State, "the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter".

385

It can remain open whether legal literature rightly calls into question the legally binding effect of this obligation of mutual assistance (see Dietrich, Die rechtlichen Grundlagen der Verteidigungspolitik der Europäischen Union, ZaöRV 2006, p. 663 <694>; Regelsberger, Von Nizza nach Lissabon - das neue konstitutionelle Angebot für die Gemeinsame Außen- und Sicherheitspolitik der EU, integration 2008, p. 266 <271>; Missiroli, The Impact of the Lisbon Treaty on ESDP, European Parliament, January 2008, p. 15; Schmidt-Radefeldt, Parlamentarische Kontrolle der internationalen Streitkräfteintegration, 2005, p. 186; Thym, Außenverfassungsrecht nach dem Lissaboner Vertrag, in: Pernice, Der Vertrag von Lissabon: Reform der EU ohne Verfassung?, 2008, p. 173 <184-185>).

386

From the wording and the location of Article 42 TEU Lisbon it becomes clear at any rate that the Member States' obligation of assistance does not go beyond the obligation of assistance pursuant to Article 5 of the North Atlantic Treaty of 4 April 1949 (Federal Law Gazette 1955 II p. 289). This obligation does not forcibly encompass the use of military means but grants the States Party to this Treaty a scope of assessment as regards the content of the assistance to be rendered (see BVerfGE 68, 1 <93>). In addition, the obligation of mutual assistance explicitly shall not prejudice "the specific character of the security and defence policy of certain Member States", (Article 42.7(1) sentence 2 TEU Lisbon), a statement which is contained in the Treaty also in other places (see Article 42.2(1) sentence 1 TEU Lisbon and Declarations no. 13 and 14 Concerning the Common Foreign and Security Policy annexed to the Final Act of the Treaty of Lisbon). This provides the Member States with the possibility, which is secured by primary law, of invoking fundamental content-related reservations as regards the obligation of assistance (see Graf von Kielmansegg, Die Verteidigungspolitik der Europäischen Union, 2005, pp. 396 et seq.). The requirement of parliamentary approval under the provisions of the Basic Law which concern defence can unfold its effectiveness in the area of application of this reservation.

387

(3) The requirement of parliamentary approval under the provisions of the Basic Law which concern defence cannot be bypassed on account of obligations to act on the part of the Member States which are based on secondary law. It is true that the Treaty of Lisbon grants the Council powers to adopt decisions on missions "in the course of which the Union may use civilian and military means" (Article 43.1 and 43.2 TEU Lisbon). The term "civilian and military means" could also include specific armed forces contingents of the Member States. However, the Member States' current understanding in the context of the common foreign and security policy, however, argues against this view. Accordingly, military contributions have never been a legal but at most a political "obligation".

388

Even if, however, Article 43.2 TEU Lisbon were interpreted broadly, the Council would have to adopt a corresponding decision unanimously (see Article 31.1 and 31.4, Article 42.4 TEU Lisbon). In this case, the German representative in the Council would be constitutionally obliged to deny approval to any draft Decision which would violate or bypass the requirement of parliamentary approval under the provisions of the Basic Law which concern defence. In this case, the requirement of unanimity in the Council cannot be changed into a requirement of a qualified majority by a decision of the Council (see Article 31.2 and 31.3 TEU Lisbon). Decisions with "military implications or those in the area of defence" are excluded from the scope of application of the general bridging clause pursuant to Article 48.7(1) sentence 2 TEU Lisbon and of the special bridging clause pursuant to Article 31.4 TEU Lisbon. A possible political agreement by the Member States to deploy armed forces in the European alliance would not be capable of generating on the legal level an obligation to act which could overrule the mandatory requirement of parliamentary approval pursuant to Article 24.2 of the Basic Law which would be more specific in this respect as compared to Article 23 of the Basic Law.

389

(4) The Treaty of Lisbon empowers the Member States to the progressive framing of a common Union defence policy. Such a common defence policy, which is also possible according to the current version of Article 17.1 TEU, will lead to a common defence, “when the European Council, acting unanimously, so decides” and the Member States have adopted such a decision “in accordance with their respective constitutional requirements” (Article 42.2(1) TEU Lisbon).

390

The requirement of ratification clarifies that the European Union does not yet take the step towards a system of mutual collective security by the current version of primary law and by the legal situation after an entry into force of the Treaty of Lisbon. Should the Member States decide to adopt a decision to this effect, an obligation of military cooperation of the Member States would only exist in the context of international law. Also after the entry into force of the Treaty of Lisbon, the common foreign and security policy, including the common security and defence policy, will not fall under supranational law (see Article 24.1, Article 40 TEU Lisbon; Article 2.4 TFEU and Declaration no. 14 Concerning the Common Foreign and Security Policy annexed to the Final Act of the Treaty of Lisbon.

391

Should the European Council unanimously adopt a common defence, the principle of unanimity which applies to the area of the common foreign and security policy (see Article 31.1 and.4; Article 42.4 TEU Lisbon) would guarantee that no Member State could be obliged against its will to take part in a military operation of the European Union. In this case, the requirement of parliamentary approval under the provisions of the Basic Law which concern could not be bypassed by an ordinary Treaty amendment (Article 48.2 to 48.5 TEU Lisbon) which would abolish the principle of unanimity in favour of qualified majority voting. The Federal Republic of Germany would be constitutionally prohibited to take part in such a Treaty amendment.

392

ee) The Treaty of Lisbon does not restrict the democratic possibilities of the German *Bundestag* of shaping social policy in such a way that the principle of the social state (Article 23.1 sentence 3 in conjunction with Article 79.3 of the Basic Law) would be impaired in a constitutionally objectionable manner and that the democratic scope for action which is necessary in this context would be inadmissibly curtailed.

393

The allegation made by the complainants re V. that European economic policy is a purely market-oriented policy without a social-policy orientation and that its functional approach restricts the possibilities of the legislature in the Member States to engage in a self-determined social policy is incorrect. Neither is the European Union without any social-policy competences, nor is it inactive in this area. At the same time, the Member States have a sufficient space of competences to take essential social-policy decisions on their own responsibility.

394

Since the beginning of the integration process, the European Union must deal with the reproach of neglecting the social dimension of society and of inadmissibly restricting the Member States’ democratic viability in the area of social policy. The thesis of an exclusion of the social dimension from the objectives of the integration process was based on an unspoken comparison with a state order, even though functional integration, the objective of which is the establishment of an internal market, did not forcibly have to fulfil the society’s expectations with regard to unity (see, however, Scharpf, The European Social Model: Coping with the Challenges of Diversity, JCMS 2002, pp. 645 et seq.). In the negotiations on the Treaty establishing the European Economic Community, social issues were discussed and found their way into the text of the Treaty, for instance in the area of the agricultural market organisation and of equal pay for men and women (Article 141 ECT; Article 157 TFEU), Since that time, the subject of social issues has increased in importance with every reform of the legal basis of European integration, and has seen a commensurate strengthening in primary law (see on European social law/Huster, Europäisches Sozialrecht: eine Einführung, 1999; Hanau/Steinmeyer/Wank, Handbuch des europäischen Arbeits- und Sozialrechts, 2002; Fuchs, Europäisches Sozialrecht, 4th ed. 2005; Marhold, Das neue

Sozialrecht der EU, 2005; de Búrca, EU Law and the Welfare State, 2005; Eichenhofer, Sozialrecht der Europäischen Union, 3rd ed. 2006).

395

In 1997, the Social Agreement, which, due to a lack of political consensus, had come into being first of all as an independent instrument under international law beside the Treaty of Maastricht, was incorporated into Community law. Article 136 to Article 150 ECT contain competences inter alia in the areas of social security, basic and advanced vocational training, codecision, dialogue with the social partners and working conditions (see on the details for instance Kingreen, Das Sozialstaatsprinzip im europäischen Verfassungsverbund, 2003, pp. 295 et seq.). These provisions are complemented by Article 13 ECT, which is the legal basis of the Anti-Discrimination Directives, Article 39 ECT, which provides for the freedom of movement for workers, and by the social fundamental rights laid down in the Charter of Fundamental Rights, to which, under the heading "Solidarity", the entire Title IV of the Charter of Fundamental Rights is dedicated (Article 27 to Article 38 of the Charter). The Court of Justice of the European Communities, in particular, has for some years now understood the citizenship of the Union as the nucleus of a European solidarity and has further developed it in its case-law on the basis of Article 18 in conjunction with Article 12 ECT. This line of case-law stands for the attempt of founding a European social identity by promoting the participation of the citizens of the Union in the respective social systems of the Member States (see the contributions in Hatje/Huber, Unionsbürgerschaft und soziale Rechte, 2007, and Kadelbach, Unionsbürgerrechte, in: Ehlers, Europäische Grundrechte und Grundfreiheiten, 2nd ed. 2005, pp. 553 et seq.; Hailbronner, Unionsbürgerschaft und Zugang zu den Sozialsystemen, JZ 2005, pp. 1138 et seq.).

396

The Treaty of Lisbon is situated in this line of development. In its second recital, the Preamble of the Treaty on the Functioning of the European Union states its being resolved "to ensure the economic and social progress" of the Member States "by common action". The aims of the Treaty on European Union are adapted in such a way that the Union works for a "highly competitive social market economy, aiming at full employment and social progress" (Article 3.3(1) TEU Lisbon). At the same time, the aim of "free and undistorted competition" is deleted from the operative part of the Treaty on European Union and is shifted to Protocol no. 27 on the Internal Market and on Competition. A new cross-sectional clause (Article 9 TFEU) is intended to ensure that requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion is taken into account in all policies and activities of the Union (other new elements in the social area are introduced by the Treaty of Lisbon through Article 5.3 (coordination of the Member States' social policies), Article 21.3 (citizenship of the Union and social security), Article 152 (role of the social partners) and Article 165.2 TFEU (social function of sport); Protocol no. 29 mentions the connection of the existence of a system of public broadcasting with the social needs of each society).

397

Political initiatives and programmes which fill the law and lend it concrete shape correspond to the legal framework of action. In its Presidency conclusions, the Brussels European Council of 11 and 12 December 2007 explicitly recognised that the subjects social progress and the protection of workers' rights, public services as an indispensable instrument of social and regional cohesion, the responsibility of Member States for the delivery of education and health services, the essential role and wide discretion of national, regional and local Governments in providing, commissioning and organising non-economic services of general interest Union are of high importance (Bulletin EU 12-2008, I-17 (Annex 1)).

398

Finally, the case-law of the Court of Justice has to be taken into account, which, admittedly, has until most recently given rise to criticism of a "one-sided market orientation" of the European Union but has at the same time shown a series of elements for a "social Europe". In its case-law, the Court of Justice has developed principles which strengthen the social dimension of the European Union. The Court of Justice has for instance recognised numerous important social concerns as mandatory requirements of the common good which can justify the restriction of the market freedoms of Community law. They include for instance, the protection of workers (ECJ, judgment of 15 March 2001, Case C-165/98, Mazzoleni, ECR 2001, p. I-2189, marginal no. 27), the financial equilibrium of the system of social security (ECJ, judgment of 13 May 2003, Case C-385/99, Müller-Fauré, ECR 2003, p. I-4509, marginal no. 73), the requirements of the system of social assistance (ECJ,

judgment of 17 June 1997, Case C-70/95, Sodemare, ECR 1997, p. I-3395, marginal no. 32) and of the social order (ECJ, judgment of 21 October 1999, Case C-67/98, Zenatti, ECR 1999, p. I-7289, marginal no. 31) and the protection against social dumping (ECJ, judgment of 18 December 2007, Case C-341/05, Laval, ECR 2007, p. I-11767, marginal no. 103). In its decision of 11 December 2007, the Court of Justice even established the existence of a European fundamental right to strike (ECJ, Case C-438/05, Viking, ECR 2007, p. I-10779, marginal no. 44; on criticism see Rebhahn, Grundfreiheit vor Arbeitskampf - der Fall Viking, ZESAR 2008, pp. 109 et seq.; Joerges/Rödl, Informal Politics, Formalised Law and the "Social Deficit" of European Integration: Reflections after the Judgments of the ECJ in Viking and Laval,, ELJ 2009, pp. 1 et seq., as well as the contributions on the symposium "Die Auswirkung der Rechtsprechung des Europäischen Gerichtshofes auf das Arbeitsrecht der Mitgliedstaaten" of the Federal Ministry of Labour and Social Affairs on 26 June 2008, http://www.bmas.de/).

399

Considering the legal situation presented, the development and the fundamental political direction in the European Union, the broad scope of discretion which exists also on the European level as regards social issues, has at any rate not been transgressed. Contrary to what the complainants re V. fear, there are also no indications justifying the assumption that the Member States are deprived of the right, and the practical possibilities of action, to take conceptual decisions regarding systems of social security and other social policy and labour market policy decisions in their democratic primary areas.

400

To the extent that Article 48.1 TFEU empowers the European Union to adopt such measures in the field of social security as are necessary to provide freedom of movement for workers, there is the possibility for a member of the Council to request, via the emergency-brake procedure, that the matter be referred to the European Council to thus achieve the suspension of the ordinary legislative procedure (Article 48.2 TFEU). Just like in the emergency-brake proceedings in the area of the administration of criminal law (Article 82.3 and Article 83.3 TFEU), the German representative in the Council may only exercise this right of the Member States on the instruction of the German *Bundestag* and, to the extent that this is required by the provisions on legislation, the *Bundesrat*.

401

2. The Act Amending the Basic Law (Articles 23, 45 and 93) (Amending Act), which is a constitution-amending Act, meets neither with formal nor with substantive objections and is hence constitutional.

402

In the case of a constitution-amending Act, the Federal Constitutional Court review whether the requirements placed by Article 79.3 of the Basic Law on amendments of the Constitution are satisfied (see BVerfGE 30, 1 <24>; 94, 12 <33-34>); 109, 279 <310>). According to the regulatory content of the Amending Act, it is not apparent by what the principles laid down Article 1 and Article 20 of the Basic Law could be affected.

403

a) This especially applies to Article 1 no. 1 of the Amending Act, which introduces the right to bring a subsidiarity action into the constitution as a minority right (Article 23.1a sentence 2 of the Basic Law, new version). The meaning and purpose of the obligation of the German *Bundestag* to bring action that is provided for is to preserve to the parliamentary minority the competence to assert the rights of the German *Bundestag* also where the latter does not wish to exercise its rights, in particular in relation to the Federal Government carried by it. The opposition parliamentary group, and thus the organised parliamentary minority, as the antagonist of the government majority, is intended to be opened up the possibility of recourse before the Court of Justice of the European Union to make possible the actual assertion of the rights reserved to Parliament in the system of European integration (see on *Organstreit* proceedings: BVerfGE 90, 286 <344>; 117, 359 <367-368>), on the elaboration of the subsidiarity action as a parliamentary minority right see also Article 88-6 § 3 of the French Constitution of 4 October 1958 in its version of 26 January 2009).

404

The insertion of a subsection 1a into Article 23 of the Basic Law does not meet with constitutional objections also as regards the quorum of one fourth of the Members of the German *Bundestag*. It is true that the obligation of the *Bundestag* to bring a subsidiarity action if one fourth of its Members demand this step (Article 23.1a sentence 2 of the Basic Law, new version) derogates from the majority principle set out in Article 42.2 of the Basic Law. This is, however, unobjectionable for the sole reason that these are not decisions with a regulatory effect but the power to take recourse to a court (see Article 93.1 no. 2 of the Basic Law).

405

b) The power of delegation provided for in Article 1 no. 2 of the Amending Act pursuant to Article 45 sentence 3 of the Basic Law, new version, does not infringe democratic principles within the meaning of Article 79.3 of the Basic Law. The *Bundestag* appoints a Committee on European Union Affairs. It can empower the Committee to exercise the rights of the *Bundestag* under 23 of the Basic Law. It can also empower the Committee to exercise the rights which are accorded to the *Bundestag* in the Treaties which are the basis of the European Union. Not the granting of the rights, but solely their exercise may, in individual cases, meet with constitutional objections.

406

3. The Act Extending and Strengthening the Rights of the Bundestag and the Bundesrat in European Union Matters (Extending Act) infringes Article 38.1 in conjunction with Article 23.1 of the Basic Law insofar as rights of participation of the German *Bundestag* and the *Bundesrat* have not been elaborated to the extent required.

407

a) The Extending Act, which has not yet been signed by the Federal President, is intended to create the national preconditions for the exercise of the rights of participation that are granted to the *Bundestag* and to the *Bundesrat*, which is to be deemed a chamber of a National Parliament in this context, by the Treaty of Lisbon (*Bundestag* document 16/8489, p. 7). The Act regulates the exercise of the rights granted in the context of the procedure for monitoring adherence to the subsidiarity principle (Article 1 § 2 and § 3 of the Extending Act) and the right, explicitly provided for in the Treaty of Lisbon, to reject treaty-amending instruments of the European Union (Article 1 § 4 of the Extending Act) via the bridging procedure pursuant to Article 48.7(3) TEU Lisbon and Article 81.3(3) TFEU.

408

Furthermore, the Article 1 § 5 of the Extending Act makes it possible for the plenary sitting of the *Bundestag* to grant the Committee on European Union Affairs, appointed by it pursuant to Article 45 of the Basic Law, powers to exercise the rights of the *Bundestag* - with the restrictions concerning the subsidiarity action which result from the requirements placed on decision-making by the Extending Act, and with the rights to make known one’s opposition in the context of the bridging procedures (see on this *Bundestag* document 16/8489, p. 8) - vis-à-vis the institutions of the European Union (Article 1 § 5 of the Extending Act).

409

b) To the extent that the Member States elaborate the law laid down in the Treaties in such a way that an amendment of the law laid down in the Treaties can be brought about without a ratification procedure solely or to a decisive extent by the institutions of the Union, albeit under the requirement of unanimity, a special responsibility is incumbent on the legislative bodies, apart from the Federal Government, as regards participation; in Germany, participation must, on the national level, comply with the requirements under Article 23.1 of the Basic Law. The Extending Act does not comply with these requirements insofar as the *Bundestag* and the *Bundesrat* have not been accorded sufficient rights of participation in European lawmaking procedures and treaty amendment procedures.

410

aa) The Extending Act has the function of reflecting the constitutionally required rights of participation of the legislative bodies in the process of European integration on the level of ordinary law and to lend them concrete shape. The Agreement between the Federal Government and the Länder Pursuant to § 9 of the Act on the Cooperation of the Federation and the Länder in European Union Matters (*Vereinbarung zwischen*

Bundesregierung und den Ländern nach § 9 des Gesetzes über die Zusammenarbeit von Bund und Ländern in Angelegenheiten der Europäischen Union) of 28 September 2006 (Federal Law Gazette I p. 2177) is not sufficient for this due to its ambiguous legal nature (see Hoppe, Drum prüfe, wer sich niemals bindet - Die Vereinbarung zwischen Bundesregierung und Bundestag in Angelegenheiten der Europäischen Union, DVBl 2007, p. 1540 <1540-1541>)) and due to its content (see *inter alia* the resolution of the German *Bundestag* of 24 April 2008 accompanying the Treaty of Lisbon <*Bundestag* document 16/8917, p. 6, Minutes of *Bundestag* plenary proceedings - BTPlenarprot 16/157, p. 16482 B>). The *Bundestag* and the *Bundesrat* must therefore have the opportunity of newly deciding on procedures and forms of their participation taking into account the provisos that are specified in this decision.

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bb) In this new legislative decision, *Bundestag* and *Bundesrat* must take into account that they must exercise their responsibility for integration in numerous cases of dynamic development of the Treaties:

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(1) While the ordinary treaty amendment procedure (Article 48.2 to 48.5 TEU Lisbon) is subject to the classical requirement of ratification for international agreements, also amendments of primary law in the simplified procedure (Article 48.6 TEU Lisbon) constitutionally requires an Approving Act pursuant to Article 23.1 sentence 2 and if necessary pursuant to sentence 3 of the Basic Law. The same requirement applies to the amendment provisions which correspond to Article 48.6 TEU Lisbon (Article 42.2(1) TEU Lisbon; Article 25.2, Article 218.8(2) sentence 2, Article 223.1(2), Article 262 and Article 311.3 TFEU).

413

(2) In the area of application of the general bridging procedure pursuant to Article 48.7 TEU Lisbon and the special bridging clauses, the legislature may not by the Extending Act waive its necessary and mandatory approval of an initiative of the European Council or of the Council for passing over from unanimity to qualified majority voting as regards the adoption of decisions in the Council and for passing over from a special legislative procedure to the ordinary legislative procedure; it may also not give its approval “in reserve”, i.e. in abstract anticipation. With the approval of a primary-law amendment of the Treaties in the area of application of the general bridging clause and the special bridging clauses, *Bundestag* and *Bundesrat* determine the extent of the commitments which are based on an international agreement and bear political responsibility for this vis-à-vis the citizen (see BVerfGE 104, 151 <209>; 118, 244 <260>; 121, 135 <157>). In this context, legal and political responsibility of Parliament is, even in the case of European integration, not restricted to a single act of approval but extends to its further execution. Silence on the part of the *Bundestag* and the *Bundesrat* is therefore not sufficient for exercising this responsibility.

414

(a) To the extent that the general bridging procedure pursuant to Article 48.7(3) TEU Lisbon and the special bridging clause pursuant to Article 81.3(3) TFEU grant the national parliaments a right to make known their opposition, this is not a sufficient equivalent to the requirement of ratification. It is therefore necessary that the representative of the German government in the European Council or in the Council may only approve the draft Resolution if empowered to do so by the German *Bundestag* and the *Bundesrat* within a period yet to be determined, which takes the purpose of Article 48.7(3) TEU Lisbon as an orientation, by a law within the meaning of Article 23.1 sentence 2 of the Basic Law.

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Article 1 § 4.3 no. 3 of the Extending Act contradicts the function of the right to make known one’s opposition to effectively protect the Member States against further, unpredictable treaty amendments to the extent that it provides for these clauses that the decision-making competence on the exercise of the right to make known one’s opposition in cases of concurrent legislation shall only be incumbent on the *Bundestag* where the *Bundesrat* does not object. A differentiated elaboration of the exercise of the right to make known one’s opposition as can be found in Article 1 § 4.3 no. 3 of the Extending Act, does not do justice to the general responsibility of integration of the German *Bundestag*. It is therefore constitutionally required that the *Bundestag* be accorded the decision-

making competence on the exercise of the right to make known one's opposition in these cases independently of a decision of the *Bundesrat*.

416

(b) On the basis of the other special bridging clauses in Article 31.3 TEU Lisbon, Article 153.2(4), Article 192.2(2), Article 312.2(2) and Article 333.1 and 333.2 TFEU, which do not provide for a right of making known their opposition for the national parliaments, lawmaking in the European Union can only be in a manner that is binding on the Federal Republic of Germany if the German *Bundestag* and, to the extent that this is required by the provisions on legislation, the *Bundesrat*, have approved the respective draft Decision within a period yet to be determined, which takes the purpose of Article 48.7(3) TEU Lisbon as an orientation; here, the silence of the *Bundestag* or the *Bundesrat* may not be construed as approval.

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(3) To the extent that the flexibility clause under Article 352 TFEU is intended to be used, this requires a respective law within the meaning of Article 23.1 sentence 2 of the Basic Law.

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(4) In the context of the emergency brake procedures according to Article 48.2, Article 82.3 and Article 83.3 TFEU, the Federal Government may act in the Council only on the corresponding instruction of the German *Bundestag* and, to the extent that this is required by the provisions on legislation, the *Bundesrat.*

419

(5) In the area of judicial cooperation in criminal matters, the exercise of Article 83.1(3) TFEU requires a law within the meaning of Article 23.1 sentence 2 GG. To the extent that in the context of Article 82.2(2) lit d and Article 83.1(3) TFEU, the general bridging clause is intended to be applied, this requires, as in the other cases of application of the general bridging clause, the previous approval by the *Bundestag* and the *Bundesrat* in the shape of a law pursuant to Article 23.1 sentence 2 of the Basic Law. If necessary, this applies *mutatis mutandis* n the cases of Article 86.4 TFEU (powers of the European Public Prosecutor's Office) and of Article 308 sentence 3 TFEU (statute of the European Investment Bank).

D.

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Considering that the Act Approving the Treaty of Lisbon is compatible with the Basic Law only taking into account the provisos that are specified in this decision and that the accompanying laws are unconstitutional in part, the complainants and applicants are to be reimbursed their necessary expenses in proportion to their success pursuant to § 34a.2 and 34a.3 of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz*). Accordingly, the complainant re III. is to be reimbursed one half, the complainants re IV. and VI., respectively, one fourth, and the complainants re V. and the applicant re II., respectively, one third of their necessary expenses of these proceedings.

E.

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The decision was reached unanimously as regards the result, by seven votes to one as regards the reasoning.

Voßkuhle	Broß	Osterloh
Di Fabio	Mellinghoff	Lübbe-Wolff
Gerhardt	Landau	