

# A INTEGRAÇÃO EUROPEIA E O PAPEL DO TRIBUNAL CONSTITUCIONAL FEDERAL ALEMÃO

EUROPEAN INTEGRATION AND THE ROLE OF THE GERMAN FEDERAL CONSTITUTIONAL COURT

LA INTEGRACIÓN EUROPEA Y EL ROL DEL TRIBUNAL CONSTITUCIONAL FEDERAL ALEMÁN

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## RESUMO

O objetivo deste artigo é apresentar a influência da jurisdição do Tribunal Constitucional Federal Alemão, chamado *Bundesverfassungsgericht*, na Integração Europeia. Com base na análise de três decisões marco, ficará evidente que a partir do ponto de vista da lei constitucional nenhuma integração supranacional posterior pode levar à criação de um Estado Federal Europeu que deixe a Alemanha sem “substância de estado”. Além disso, o princípio da democracia, com garantia permanente na constituição alemã, seria violado pela criação de um mecanismo permanente de responsabilidade solidária por tempo indeterminado na Europa. Esta “linha vermelha” estabelecida pelo Tribunal precisa ser a diretriz da política alemã em suas futuras negociações sobre maior Integração Europeia.

**PALAVRAS-CHAVE:** Integração Europeia. Constituição Alemã. Princípio de democracia.

## ABSTRACT

The objective of this article is to describe the impact of the jurisdiction of the German Federal Constitutional Court, the *Bundesverfassungsgericht*, on European Integration. Based on three landmark decisions, it is clear that from a perspective of constitutional law, no further supranational integration can lead to the creation of a European Federal State, leaving Germany without “state substance”. Furthermore, the principle of democracy, eternally guaranteed by the German constitution, would be violated by the creation of a permanent mechanism of indefinite joint liability in Europe. This “red line” stipulated by the Court has to be the guideline for German politics in its future negotiations on further European Integration.

**KEYWORDS:** European Integration. German Constitution. Principle of Democracy.

## RESUMEN

El objetivo de este artículo es plantear la influencia de la jurisdicción del Tribunal Constitucional Federal Alemán, denominado *Bundesverfassungsgericht*, en la Integración Europea. En base al análisis de tres decisiones marco resultará evidente que, desde el punto de vista de la ley constitucional, ninguna integración supranacional posterior puede llevar a la creación de un Estado Federal Europeo que deje a Alemania sin “sustancia de estado”. Además de ello, el principio de la democracia, con garantía permanente en la constitución alemana, sería violado por la creación de un mecanismo permanente de responsabilidad solidaria por tiempo indeterminado en Europa. Esta “línea roja” establecida por el Tribunal necesita ser la directriz de la política alemana en sus futuras negociaciones sobre una mayor Integración Europea.

**PALABRAS CLAVE:** Integración Europea. Constitución Alemana. Principio de Democracia.

## 1 RELEVANCE OF THE QUESTION

Speaking of European Integration, one might come to the conclusion that it is merely a question of “politics”. Political summits dominate the picture and the newspapers report on political compromises that have been achieved – if indeed there are any such achievements. Consequently, the final outcome of integration, the extent of supranational power, even the creation of the “United States of Europe” seem to be dependent on the respective “political will” to act. However, this does not properly reflect the legal situation:

Firstly, the European Union is a supranational entity created by law and ruled by law, meaning the European Treaties, particularly the Treaty on European Union (“TEU”)<sup>2</sup> and the Treaty on the Functioning of the European Union (“TFEU”).<sup>3</sup> However, the Union is not a “state” as such. A state is defined by an original competence, the so-called power-of-power, which enables it to take care of any issue which might arise in its territory with respect to its citizens. The European Union, by contrast, is only entitled to act on powers which have been conferred upon Union level in the Treaties. This tremendously important “principle of conferral” is explicitly provided in Article 5 (1) and (2) TEU<sup>1</sup>.

Consequently, any further European integration not contained in or intended by the Treaties in their present form must be provided for by a unanimous amendment of the Treaties, Article 48 TEU.<sup>4</sup> Thus, the political agreement between the governments of the 27 Member States is in fact necessary, but not sufficient as such.

Secondly, the transfer of sovereign rights to the Union level has an impact on the constitution of any Member State. As far as Germany is concerned, such transfer must be legally admissible in terms of the German *Grundgesetz* (“Basic Law”), as the German Constitution is called.

Compliance with the boundaries of the Basic Law is monitored by the German Federal Constitutional Court (“the Court”), in German the *Bundesverfassungsgericht*, with headquarters in the city of Karlsruhe and established sixty years ago in 1951, i.e. only six years after the end of World War II and two years, after the *Grundgesetz* entered into effect. It is the “Guard of Constitution”. In this article, I will explain the impact of this “guard-watch” on the question of further integration.

## 2 THE ROLE OF THE BUNDESVERFASSUNGSGERICHT

As “Guard of Constitution”, the *Bundesverfassungsgericht* consisting of sixteen judges in two “senates” is entitled to control – under certain formal conditions – all state measures by the standards of the *Grundgesetz*. This has been particularly important with respect to the basic rights and the principle of democracy, as well as the rule of law, pursuant to Articles 1 through 20 of the Basic Law. The Court can even declare Acts of Parliament in breach of the *Grundgesetz* null and void. This particularly strong position – even vis-à-vis the legislative power – is to be seen in light of the negative experiences during the Nazi era. Never again should it be possible, either for the Parliament itself or for any other authorities, to undermine basic laws and violate human dignity. In other words: There should be no power without limits.<sup>5</sup> In fact, it would not be an exaggeration to say that in Germany, any “big” legal or social issue whatsoever is likely to “reach Karlsruhe” in the end. The consciousness of the German public in regard to the rule of law has been deeply shaped by the rulings of this Court. “Famous” decisions concern everybody’s life and are vividly and often controversially discussed.<sup>6</sup> Its mission and its decisions – even if they were contrary to the “public

1 Article 5 TEU (ex Article 5 TEC).

The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.

2. Under the 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. Competences not conferred upon the Union in the Treaties remain with the Member States.

opinion” – have made the *Bundesverfassungsgericht* a well-established authority in Germany, still holding the trust of the vast majority of the population.

For a rather long time, the Court even claimed the right to monitor legal measures adopted at a European level, and to decide on the validity of the respective national transformation acts as the “last instance” for the German public. Clearly, this was in contrast to the opinion of the European Court of Justice (“ECJ”). The struggle for power between the ECJ and the *Bundesverfassungsgericht* lessened, however, from the year 1986 on, when the Court finally accepted the European law as superior – superior even to the German Constitution – ‘as long as the basic rights were generally guarded by the European Communities, in particular by the ECJ, in a comparable manner as the *Bundesverfassungsgericht* used to do’.<sup>7</sup>

Today, the *Bundesverfassungsgericht* is widely deemed to be the second most influential Court in the European Union apart from the ECJ, and calls its relationship to the ECJ “cooperative”<sup>8</sup> However, this view is neither defined in detail by the Court itself nor particularly welcomed by the ECJ. In the text that follows, we will look briefly at the background to this ‘relationship of cooperation’.

### 3 EUROPEAN INTEGRATION AND GERMAN BASIC LAW

#### 3.1 The Basic Law is “Integration-Friendly”

As stated above, the transfer of sovereign rights to the Union level has always had an impact on the constitution of a Member State. In Germany, this transfer of powers was explicitly made admissible in 1992 – in the context of the Treaty of Maastricht – by amending the constitution through a newly-shaped Art. 23.<sup>9</sup> The current version reads:

Article 23 (1) Basic Law<sup>10</sup>

*With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law. To this end the federation may transfer sovereign powers by a law with the consent of the Bundesrat.<sup>11</sup> The establishment of the European Union, as well as changes in its treaty foundations and comparable regulations that amend or supplement this Basic Law, or make such amendments or supplements possible, shall be subject to paragraphs (2) and (3) of Article 79.*

However, although generally admissible, the limits of this transfer of powers are already indicated in this very Article, when it refers to Article 79 of the Basic Law. Below, I will deal with three “landmark decisions” of the Court that have shaped this “red line” for further integration.

#### 3.2 The Limits of Integration – Landmark Decisions

##### 3.2.1 “Maastricht” and “Lisbon” Proceedings: An Overview

The so-called “Maastricht – Decision”<sup>12</sup> of 12<sup>th</sup> October 1993 concerns the Act of Parliament that approved the **Treaty of Maastricht**,<sup>13</sup> which established the European Union, the “three pillar concept” and – most importantly – introduced the **Economic and Monetary Union**. Signed by the Member States’ representatives on 7<sup>th</sup> of February 1992, it still had to be ratified. Unlike Denmark, Ireland and France, no referendum was required in Germany. Instead, the afore-mentioned Article 23 *Grundgesetz* was made use of, i.e. (only) the Parliament had to approve the Treaty. It is no secret that politics in Germany was not ‘unhappy’ about the fact that it did not require a positive referendum, since the population was not particularly favorable to the idea of monetary union and the abolition of the *Deutsche Mark*, despite the continual promises of the ruling politicians that the Euro would be as stable as the *Deutsche Mark*.<sup>14</sup>

Following the Parliamentary approval in December 1992, the only recourse left to the opponents of monetary union was to file a complaint to the *Bundesverfassungsgericht*, claiming that the transfer of powers in the Treaty was not compatible with the Basic Law, since it violated the sovereignty of the German State in an impermissible manner.

The Court finally confirmed the compatibility of the Maastricht Treaty with the Basic Law, emphasizing, in particular, the principle of conferral in Article 5 (2) TEU.<sup>15</sup> However, one cannot assume that the Court did not identify any legal problems. On the contrary, it outlined boundaries of the Basic Law regarding future integration, which it confirmed, further developed, and explained in detail in its “Lisbon – Decision” in 2009. Therefore, I shall first briefly address the background and circumstances of this second important decision, before going on to discuss those boundaries.

In the “Lisbon-Decision”<sup>16</sup> of 30<sup>th</sup> June 2009, the *Bundesverfassungsgericht* found the **Treaty of Lisbon**<sup>17</sup> to be in conformity with the Basic Law. Similar to the Maastricht proceedings, the applicants claimed the transfer of powers in the Treaty of Lisbon would grant the European Union a state-like legal status, and abolish the Federal Republic of Germany as a sovereign state, thereby violating the principle of democracy. And in fact the Treaty of Lisbon again reformed the EU to a great extent, even if the Treaty – after negative referendums in France and the Netherlands – was no longer named the “European Constitution”: It dissolved the European Union’s “three pillar concept” and the European Union – now gaining legal personality – succeeded the European Community (Article 1.3 and 47 TEU). Moreover, the Treaty of Lisbon made majority voting in the Council the norm, introduced a High Representative of the Union for Foreign Affairs and Security Policy, strengthened the role of the European Parliament (Article 14 (1) TEU<sup>2</sup>; Article 289 (1) TFEU<sup>3</sup>), transferred further competences to the Union, and transferred matters that were formerly only the jurisdiction of intergovernmental co-operation, such as justice and home affairs, to the supranational level. A further step in supranational integration, and a huge one at that.

However, the Court nonetheless allowed the Treaty to be passed. In its 147-page ruling, it stressed the principle of conferral as it had already done in its Maastricht decision. Despite all the powers transferred to the Union level, the Union did not grant a power-of-power. The German state was therefore not about to be abolished. In describing why the Treaty of Lisbon was *not* in breach of the Basic Law, the Court did, however, at the same time, set out limits, *when* such incompatibility of integration with the Basic Law would in fact occur. Below, I summarize the most important aspects thus far, in my opinion.

### 3.2.2 Limits of Integration as set out in the Maastricht and Lisbon Rulings

Further Integration leaving no “substance” to Germany, and in particular to the German Parliament, violates the principle of democracy

The core issue of both the Maastricht and the Lisbon ruling is the principle of democracy, embedded in Article 20 Basic Law and absolutely inadmissible according to Art. 79 (3) Basic Law (the so-called “eternity guarantee”).<sup>18</sup>

In accordance with this principle the German people are – still – the sole holder of constituent power. However, constituent power, executed by the right to vote, would in the end become meaningless if no place were given for the national political formation of the economic, cultural and social circumstances in life.<sup>19</sup> The Court stated (I have added the English translation below the original German text):<sup>20</sup>

Die Wahl der deutschen Abgeordneten durch das Volk erfüllt nur dann ihre tragende Rolle im System föderaler und supranationaler Herrschaftsverflechtung, wenn der das Volk repräsentierende

2 Article 14 (TEU).

The European Parliament shall, jointly with the Council, exercise legislative and budgetary functions. It shall exercise functions of political control and consultation as laid down in the Treaties. It shall elect the President of the Commission.

3 Article 289 (TFEU).

The ordinary legislative procedure shall consist in the joint adoption by the European Parliament and the Council of a regulation, directive or decision on a proposal from the Commission. This procedure is defined in Article 294.

Deutsche Bundestag und die von ihr getragene Bundesregierung einen gestaltenden Einfluss auf die politische Entwicklung in Deutschland behalten. Das ist dann der Fall, wenn der Deutsche Bundestag eigene Aufgaben und Befugnisse von substanziellem politischen Gewicht behält oder die ihm politisch verantwortliche Bundesregierung maßgeblichen Einfluss auf europäische Entscheidungsverfahren auszuüben vermag [...].<sup>21</sup>

The election of the Members of the German *Bundestag*<sup>22</sup> by the people fulfils its central role in the system of the federal and supranational intertwining of power only if the German *Bundestag*, which represents the people, and the Federal Government sustained by it, retain a formative influence on the political development in Germany. This is the case if the German *Bundestag* retains own responsibilities and competences 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 [...].

The "state quality" of the European Union is not compatible with the Basic Law

Based on the concept of the German people as a constituent power, it is a matter of mere consequence that the Court continues its rulings, pointing out that the transfer of a power-of-power to the Union level would be in breach of the Basic Law:

Das Grundgesetz ermächtigt die für Deutschland handelnden Organe nicht, durch einen Eintritt in einen Bundesstaat das Selbstbestimmungsrecht des Deutschen Volkes in Gestalt der völkerrechtlichen Souveränität Deutschlands aufzugeben. Dieser Schritt ist wegen der mit ihm verbundenen unwiderruflichen Souveränitätsübertragung auf ein neues Legitimitätssubjekt allein dem unmittelbar erklärten Willen des Deutschen Volkes vorbehalten.<sup>23</sup>

The Basic Law does not grant powers to bodies acting on behalf of Germany to abandon the right to self-determination of the German people in the form of Germany's sovereignty under international law by joining a federal state. Due to the irrevocable transfer of sovereignty to a new subject of legitimation that goes with it, this step is reserved to the directly declared will of the German people alone.

With this, the Court clearly states that a creation of the "Federal States of Europe" is not an admissible objective in terms of the Basic Law, but requires the "directly declared will of the German people", i.e. a referendum, pursuant to Article 146 of the Basic Law.

Article 146 of the Basic Law

*This Basic Law, which is valid for the entire German people following the achievement of the unity and freedom in Germany, shall cease to be in force on the day on which a constitution adopted by the free decision of the German people comes into force.*

In other words: There are no boundaries for transferring sovereign rights to the Union level; even the power-of-power may be transferred, provided this abolition of the German State identity is approved by the German people in a referendum, replacing the existing Basic Law and its limits. However, a referendum in Germany is not likely to happen in the near future, for reasons that are not addressed in this article.

**Ultra-vires control by the German Court, should EU measures exceed the competences granted by the Treaties**

Apart from the afore-said, the Court stresses the meaning of the principle of conferral for the validity of European legal measures. Provided the European authorities act within the powers validly transferred to them in the European Treaties, the superiority of European law vis-à-vis national law is legally justified by this very transfer.

That means, however, that any European legal measure that exceeds the transferred powers – i.e. is "ultra vires" - cannot be considered applicable in Germany. For this reason, the *Bundesverfassungsgericht* reserves the right to assess such inapplicability, i.e. the right to control whether the European authorities are acting "off-limits".<sup>24</sup>

It comes as no surprise then, that this opinion might lead to conflicts, in view of Article 263 of the TFEU, which states that it is the task of the ECJ, and not of the national courts, to decide on these matters. Meanwhile however, perhaps as a reaction of this criticism, the *Bundesverfassungsgericht*

“downsized” its approach to a kind of “evidence control”, leaving a wide scope of interpretation to the ECJ<sup>25</sup> and thereby shaping the relationship of cooperation it had already mentioned in the Maastricht judgment.<sup>26</sup> And in the “Euro-Decision” explained below, the Court, interestingly enough, did not take the opportunity to examine whether the “Euro rescue” actions at Union and Member State levels had in fact violated Article 123 and the “no bail-out” of Article 125 of the TFEU.<sup>27</sup>

### 3.2.3 Constitutional Boundaries affecting financial assistance in the Euro-Crisis, the Court’s “Euro- Decision” of 7 September 2011<sup>28</sup>

The third “landmark decision” discussed in this Article concerns German Acts of Parliament granting authority to the German government to provide financial aid to Greece, and to give guarantees to the European Financial Stability Facility (“EFSF”) amounting, in total, to approximately € 170 billion. The *Bundesverfassungsgericht* had to decide whether these Acts had been adopted in accordance with the Basic Law.

Core issue: Budgetary right of Parliament

The Court, in principle, agreed with the applicants that under certain circumstances, the principle of democracy could be violated by the assumption of guarantees:

The budgetary right is a core competence of any parliament in a democracy. Thus, if the budgetary right of Parliament is virtually rendered completely ineffective by the amount of guarantees involved, it is impaired in a constitutionally impermissible manner.<sup>29</sup> In other words: If the Parliament elected by the constituent power – i.e. the German people – has or will have nothing to decide upon, since there is actually no “free” budget to distribute, the principle of democracy and the democratic right to vote, becomes a mere formality and is therefore violated.

However, in the case in question, the Court did not yet recognize – accepting a relatively wide prerogative of the legislative power – such a strangling effect of the assumed risk of € 170 billion to future German Parliaments.<sup>30</sup>

No “general power” by the German Parliament

The Court particularly strengthened and stressed the role of Parliament: Any authorization granted by the *Bundestag* to give guarantees to third parties must be largely defined, such as the definite amount of possible guarantees and the fundamental modalities. Sufficient parliamentary influence must also be guaranteed, with regard to the way the funds that are made available are dealt with.<sup>31</sup> Any kind of “general power” to the government is in breach of the Basic Law. Thus, the Court not only strengthened but also appealed to the Parliament: It must take its responsibility seriously and is not allowed to simply leave “difficult economic topics” to the government or even the financial markets.

No permanent European mechanism automatically resulting in a liability of Germany

As a consequence of the afore-said, any establishment of a permanent mechanism that results in an assumption of liability for the voluntary decisions of another State, especially if they have consequences whose impact is difficult to calculate, is prohibited.<sup>32</sup> Thus, the Parliament is prevented from shifting its responsibility not only to the national government, but to any third party whatsoever. This explicitly means a disapproval of any automatic indefinite “liability union” of the Member States within the European framework.

## 4 CONSEQUENCES FOR FURTHER INTEGRATION

The consequences of the jurisdiction of the German Federal Constitutional Court for further supranational integration in Europe are tremendous, as far as the German membership is concerned. The Court’s President *Andreas Voßkuhle* made this startlingly clear when he said in an interview, subsequent to the Euro-Decision, that the admissible scope of integration based on the *Grundgesetz* had already widely been used.<sup>33</sup>



A European Union as a federal state leaving no powers of substance to the Member States, affecting the identity of the German State as shaped by its present Constitution, cannot be based on Article 23 of the Basic Law. However, should politics decide to take this further step, and agree to shift core competences and the substance of the German national State's identity, such as dues and taxes, criminal justice, police and military issues or the structure of the welfare system to the Union level, this would only be permissible through a positive vote by the German people, in a referendum.

## 5 JURISDICTION OF THE BUNDESVERFASSUNGSGERICHT AND EURO-CRISIS

### 5.1 Strangling Effect of Increasingly Higher Guarantees?

The Euro Decision referred to above will, most likely, not be the last one in this respect. On September 29, 2011 the German Parliament gave its consent to even higher German guarantees to the EFSF, this time amounting to € 211 billion. (plus a 20% "reserve") instead of € 123 billion.<sup>34</sup> The question is, when will the guarantees, and therefore the risk, be "high enough" to strangle the budgetary right of future German Parliaments and therefore violate the principle of democracy in the sense of the "Euro-Decision"?

### 5.2 Economic and Financial Union Violating the Basic Law?

Another, perhaps even more important issue concerns the European Member States' or at least the "Euro" States' cooperation in the field of economic and financial policy. It is common knowledge that the introduction of a monetary union without a real economic and financial union was – from an economic point of view – a very dangerous decision from the start. Actually, all the fears of the applicants in the Maastricht Decision – very interesting to read these days – proved to be well-founded. However, the introduction of the monetary union was a political decision in the first place, with politics hoping that the "stability arrangements" agreed upon and based on (now) Article 126 of the TFEU would make it work in the long run. It is clear that it did not work, for reasons outside the scope of this article.

What is the impact of the jurisdiction of the *Bundesverfassungsgericht* mentioned above in the present situation?

Looking at the different propositions to solve the Euro crisis, more economic and financial cooperation between at least the "Euro"-States within the European Union is the most likely scenario. Whereas a pure intergovernmental cooperation bears relatively low risks to exceed the limits of the German Basic Law, the picture changes dramatically with a supranational perspective, as stipulated, for example, by *José Manuel Barroso*, President of the European Commission, considering the Commission as the only – true – "economic government of the Union" and thereby encroaching a core competence of any sovereign state. Promoting the model of an extensive supranational integration, the issue of joint debt (so-called "Euro-bonds") appears, from this perspective, to be a "natural and advantageous step for all concerned".<sup>35</sup> Considering the jurisdiction of the *Bundesverfassungsgericht*, however, such joint liability is likely – depending on its details – to cross the "red line" in terms of German Basic Law, as it would represent the forbidden permanent mechanism of indefinite joint liability.<sup>36</sup>

## SUMMARY

In summary, the judgments of the *Bundesverfassungsgericht* have had, and will continue to have, an impact on European Integration, even with respect to the present and future handling of the Euro crisis. Given the likelihood of further amendments to the European Treaties, in order to foster a closer economic and financial cooperation between the Member States, the Court will keep an eye on German politics when negotiating a transfer of budgetary rights to Union level, and the future of the Euro.

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\_\_\_\_\_. **Amendments to this Basic Law affecting the division of the federation into *Länder*, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.**

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## BILLS

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- 2 Consolidated version: Official Journal of the European Union (OJ) C 83/13 of 30 March 2010.
- 3 Consolidated version: Official Journal of the European Union (OJ) C 83/47 of 30 March 2010.
- 4 Article 352 TFEU – the so-called flexibility clause – might at first sight be considered a “hidden” power-of-power. However, not only the prerequisites of this article itself – in particular subpara. (3) and (4) – are impediments to this effect, but also, as far as Germany is concerned, any provision based on Art. 352 TFEU requires the consent of the German Parliament pursuant to Article 23 subpara. (1) of the German Constitution in connection with § 8 of the German *Integrationsverantwortungsgesetz*.
- 5 This function of the Court explicitly confirmed on the day of the 60<sup>th</sup> anniversary of the Court, Chancellor *Angela Merkel*, in her speech held in Karlsruhe on September 28, 2011, which can be found at <http://www.bundeskanzlerin.de>: “Absage an den politischen Allmachtsanspruch”.
- 6 Examples are the strengthening of the principle of equality of men and women, e.g. by abolishing the “dominant vote” of the father in childcare issues (1959), the creation of the “basic law of personal data protection” against spying by any spying (1983), which is an impediment even today for extensive “anti-terrorist” measures, the strengthening of “freedom of opinion” even between private parties (1958) and the decision of the Court that any ‘out of area mission’ of the German army requires the prior consent of the German Parliament (1994).
- 7 Decision 2 BvR 197/83 of Oct. 22, 1986 (“Solange II”), *Neue Juristische Wochenschrift* (“NJW”) 1987, 577.
- 8 Decision 2 BvR 2134/92, 2 BvR 2159/92 of Oct. 12, 1993 (“Maastricht”), NJW 1993, 3047.
- 9 Art. 23 had formerly been the “German re-unification” article and had thus become inapplicable after the re-unification in fact occurred 1990. It was seen as a matter of symbolism to replace just this very article by a provision of European unity.
- 10 Translation of the Basic Law used in this article edited by Deutscher Bundestag, “Basic Law of the Federal Republic of Germany”, version October 2010.
- 11 The *Bundesrat* represents the *Bundesländer*/federal states in Germany.
- 12 Decision 2 BvR 2134/92 and 2 BvR 2159/92 of Oct. 12, 1993 (“Maastricht”), NJW 1993, 3047.
- 13 Treaty on European Union, Official Journal of the European Union (OJ) C 191 of 29 July 1992.

- 14 Debate in Parliament on April 23, 1998, Parliamentary Protocol, BT-Ds. 13/230: Chancellor *Helmut Kohl*: "Meine Damen und Herren, nach der vertraglichen Regelung gibt es keine Haftung der Gemeinschaft für Verbindlichkeiten der Mitgliedstaaten und keine zusätzlichen Finanztransfers"; Minister of Finance *Theo Waigel*: "Jedes Land haftet alleine für seine Schulden. Es wird in der Währungsunion keine zusätzlichen Finanztransfers geben. Haftungsübernahmen seitens der Gemeinschaft oder anderer Teilnehmerstaaten sind ausgeschlossen. [...] Die Währungsunion ist als Stabilitätsgemeinschaft konzipiert, die vorrangig die Preisstabilität zu gewährleisten hat".
- 15 Decision 2 BvR 2134/92 and 2 BvR 2159/92 of Oct. 12, 1993 ("Maastricht"), NJW 1993, 3047.
- 16 Decision 2 BvE 2/08 a.o. of June 30, 2009 ("Lisbon"), NJW 2009, 2267.
- 17 Treaty of Lisbon, Official Journal of the European Union (OJ) C 306/01 of 17 Dec. 2007.
- 18 Article 79 (3) of the Basic Law reads: "Amendments to this Basic Law affecting the division of the federation into *Länder*, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible."
- 19 Decision 2 BvE 2/08 a.o. of June 30, 2009 ("Lisbon"), NJW 2009, 2267, 2273/4, section 249. As examples the Court named the fields of citizenship, civil and military forces, budget topics, education system and the like.
- 20 The English language version of the decision is published on <http://www.bverfg.de>.
- 21 Decision 2 BvE 2/08 a.o. of June 30, 2009 ("Lisbon"), NJW 2009, 2267, 2273, section 246; Decision 2 BvR 2134/92 and 2 BvR 2159/92 of Oct. 12, 1993 ("Maastricht"), NJW 1993, 3047.
- 22 Name of the German Parliament.
- 23 Decision 2 BvE 2/08 a.o. of June 30, 2009 ("Lisbon"), NJW 2009, 2267, 2271, section 228.
- 24 Decision 2 BvE 2/08 a.o. of June 30, 2009 ("Lisbon"), NJW 2009, 2267, 2285, sections 338, 339, 341.
- 25 As *Herdegen*, *Europarecht*, 13th ed., § 10, 28 puts it: ECJ had been granted an "Anspruch auf Fehler-toleranz" by the German Court.
- 26 Decision 2 BvR 2661/06 of July 6, 2010 ("Honeywell"), NJW 2010, 3422; more information e.g. by *Proelß*, *Zur verfassungsgerichtlichen Kontrolle der Kompetenzmäßigkeit von Maßnahmen der Europäischen Union: Der "ausbrechende Rechtsakt" in der Praxis des BVerfG*, *EuR (Europarecht)*, 2011, 241, 246.
- 27 This very question had been discussed in the (legal) literature for months, and it was widely expected that the Court would confirm a breach of the TFEU. However, the Court chose not to do so.
- 28 Decision 2 BvR 987/10, 2 BvR 1485/10, 2 BvR 1099/10 of Sept. 7, 2011 ("Euro"), see [http://www.bverfg.de/entscheidungen/rs20110907\\_2bvr0987.10.html](http://www.bverfg.de/entscheidungen/rs20110907_2bvr0987.10.html). An English language version of the Court's press release can be found at [www.bverfg.de](http://www.bverfg.de) as well.
- 29 "Euro" - Decision of the Court, see note 28, sections 121 pp.
- 30 "Euro" - Decision of the Court, see note 28, sections 132 through 135.
- 31 "Euro" - Decision of the Court, see note 28, sections 125 pp, 128.
- 32 "Euro" - Decision of the Court, see note 28, sections 125 pp, 128.
- 33 Interview in *Frankfurter Allgemeine Zeitung (FAZ)* of Sept. 25, 2011, <http://www.faz.net/artikel/C30638/im-gespraech-andreas-vosskuhle-mehr-europa-laesst-das-grundgesetz-kaum-zu-30723509.html>.
- 34 According to calculations of the Deutsche Bank, the liability including interests even exceeds this amount, i.e. appr. € 400 billion., as cited by *Schäfers/Mussler*, in: *Frankfurter Allgemeine Zeitung (FAZ)* / [www.faz.net](http://www.faz.net) of 29.9.2011.
- 35 *Barroso*, *European Renewal – State of the Union Address 2011* / European Parliament Strasbourg, 28 Sept. 2011, [www.europa.eu](http://www.europa.eu), speech/11/607.
- 36 Interview with *Andreas Voßkuhle*, President of the *Bundesverfassungsgericht*, in *Frankfurter Allgemeine Zeitung (FAZ)* of Sept. 25, 2011, <http://www.faz.net/artikel/C30638/im-gespraech-andreas-vosskuhle-mehr-europa-laesst-das-grundgesetz-kaum-zu-30723509.html>.