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Motor or Brake for European Policies? Germany's new role in the EU after the Lisbon-Judgment of its Federal Constitutional Court

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1. Introduction

More than ten years after the Treaty of Amsterdam the Treaty of Lisbon has brought a solution to the 'left-overs' of Amsterdam on the institutional reform the European Union needed after its enlargement. Lisbon provides the Union with the instruments for functioning appropriately. A simplified structure of the Treaties, clear legal capacity of the Union, new institutional arrangements, new powers and procedural provisions for more effective and democratic decision-making etc. not only provide it with more personality and visibility but also better instruments to meet the challenges of crisis in a changing world. This includes mechanisms for flexibility and the dynamic development of primary law by *passerelle* and other clauses for simplified treaty amendments. Much has already been said on these improvements at this most stimulating gathering, and we have discussed the positions taken by several national Constitutional Courts on the Treaty of Lisbon regarding the implementation of democratic principles, on the protection of fundamental rights and on the implementation of the new structures.

Let me not repeat what has already been discussed by others: Instead I will look to the future in assessing to what degree Germany can continue acting as one of the motors of European integration following the judgment of the German Federal Constitutional Court of June 30, 2009 in Karlsruhe[1]. I shall examine, whether, and if so, to what extent its government and parliamentary bodies are hampered in continuing to play its positive role because of clear restrictions laid upon them by certain statements we can find in this judgement. If Germany would turn out to be a brake for European policies and integration, this would not be a German problem only. As questions from several ambassadors of other EU Member States in Berlin confirmed, it is a concern of the EU as a whole and the dynamics of integration.

I had the honour of representing the German *Bundestag* in this case in Karlsruhe; therefore it is not primarily my role to comment on and criticise this judgment. Others have done so sufficiently[2]. My arguments for why

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1 German Federal Constitutional Court (FCC), Second Senate, - 2 BvE 2/08 – Judgment of 30 Juni 2009, 123 BVerfGE 267, online available at www.bverfg.de/entscheidungen/es20090630_2bve000208en.html. For a short summary in English see: Editorial Comments, 'Karlsruhe has spoken: „Yes" to the Lisbon Treaty, but …' (2009) 46 CMLRev 1023.

2 See eg R Bieber, 'An Association of Sovereign States' (2009) 5 European Constitutional Law Review 391, 396 et seq; T Giegerich, 'The Federal Constitutional Court's Judgment on the Treaty of Lisbon' (2009) 52 German Yearbook of International Law 9 et seq; D Thym, 'In the Name of Sovereign Statehood: A Critical Introduction to the Lisbon Judgment of the German Constitutional Court' (2009) 46 CMLRev 1795; C Tomuschat, 'Lisbon – Terminal of the European Integration Process? The Judgment of the German Constitutional Court of 30 June 2009' (2010) 70 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV) 251, 263 et seq (with references on positive reactions ibid note 37, critical comments note 38); F Schorkopf, 'Case Note Lisbon Judgment', (2010) 104 AJIL 259. In French with extracts of the judgment: A von Ungern-Sternberg, 'L'arrêt Lisbonne de la Cour constitutionnelle fédérale allemande, la fin de l'intégration européenne?' (2010) RDP 317; for a French view: J Ziller, 'Zur Europarechtsfreundlichkeit des deutschen Bundesverfassungsgerichtes. Eine ausländische Bewertung des Urteils des Bundesverfassungsgerichtes zur Ratifikation des Vertrages von Lissabon' (2010) 65 Zeitschrift für öffentliches Recht 157, 160; in Spanish: F Castillo de la Torre, 'La sentencia del Tribunal Constitucional Federal Alemán de 30.06.2009, Relativa a la aprobación del Tratado de Lisboa – Análisis y comentarios' (2009) 34 Revista de Derecho Comunitario Europeo 969. With an oversight on the first reactions to the judgment: P Häberle, 'Das retrospektive Lissabon-Urteil als versteinernde Maastricht II-Entscheidung' in id, (2010) 58 Jahrbuch des Öffentlichen Rechts der Gegenwart 317 et seq, with critical remarks: 'some light and lots of shadow' (ibid, p. 321 et seq). With a comparative analysis of the jurisprudence of constitutional courts of other Member States: A Weber, 'Die Europäische Union unter Richtervorbehalt? – Rechtsvergleichende Anmerkungen zum Urteil des BVerfG v. 30.6.2009 ("Vertrag von Lissabon")' (2010) 65 Juristenzeitung (JZ) 157, 161. From the immense German literature see only: C Calliess, 'Das Ringen des Zweiten Senats mit der Europäischen Union: Über das Ziel hinausgeschossen…' (2009) Zeitschrift für europarechtliche Studien (ZEuS) 559; C Ohler, 'Herrschaft, Legitimation und Recht in der Europäischen Union – Anmerkungen zum Lissabon-Urteil des BVerfG' (2010) 135 Archiv des öffentlichen Rechts (AöR) 153

the Treaty of Lisbon is in line with the spirit and the provisions of the German *Grundgesetz* are explained in my briefs in defence of the Treaty of Lisbon against all kinds of arguments trying to establish that ratifying this Treaty would put an end to the existence of Germany as a sovereign democratic state[3]. I explained that the Preamble of our *Grundgesetz* even requires steps like the Treaty of Lisbon to be taken for developing the European Union. It states that the German people in giving itself this *Grundgesetz*, was 'inspired by the determination to promote world peace as an equal partner in a united Europe[4]'. Nothing is said in the *Grundgesetz* about national sovereignty[5]. Indeed, the conditions of Germany in 1949 were not such as to allow the use of this questionable concept, and the drafters in the Parliamentary Council, conscious about the lack of sovereignty decided to draft a *Grundgesetz*, a provisional statute, instead of a Constitution[6]. A new approach of 'integrated statehood[7]' was chosen after the experiences of the Nazi-regime, the Holocaust and World War II, based upon European integration. And this approach allowed the unification of Germany under the European roof – just twenty years ago[8]. Yet, the FCC uses national sovereignty as the key element in the Lisbon-judgment for defining the national identity of Germany and seems to apply it among other devices with the possible effect of limiting, if not blocking, the development of the Union as the Treaty of Lisbon was intended to make it fit for[9].

What is it in the judgment to cause such serious concerns? Let me first mention and later explain in detail three important points:

- The Court defines a number of specifically sensitive taboo-areas where new policies shall not be developed except under very restrictive conditions, and sets 'red lights' even for future steps of European integration. This is a warning to German (and other) policy-makers not to touch key aspects of national sovereignty.

- For the same purpose, but also in order to preserve democracy and statehood against a competence-competence of the Union the application of both, the flexibility-clause of Article 352 TFEU and the passarelle-clauses of the Treaty would need prior authorization by a formal ratification law under Article 23 (1) of the German *Grundgesetz* (GG) or, at least, an enabling decision of the *Bundestag*.

- The FCC assumes itself the power to scrutinize, on the basis of individual constitutional complaints, whether or not any European measure or national act authorizing such measure, remains within the competences of the Union and respects the limits set by the principle of national identity.

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et seq Most recently: A Hatje and JP Terhechte (eds), *Europarecht Beiheft 1: Grundgesetz und europäische Integration. Die Europäische Union nach dem Lissabon-Urteil des Bundesverfassungsgerichts* (Baden-Baden, Nomos, 2010), with an extensive bibliography, ibid, 325-333.

3 For the documentation of the proceedings see: 'Der Vertrag von Lissabon vor dem Bundesverfassungsgericht – Verfahrensdokumentation', www.whi-berlin.de/documents/whi-paper0509.pdf (access: 29 November 2010).

4 cf in this sense the useful statements of the judgment FCC, above n 1, para 222: 'After the experience of devastating wars, in particular between the European peoples, the Preamble of the Basic Law emphasises 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 calls for the participation of Germany in international organisations, an order of mutual peaceful balancing of interests established between the states and organised co-existence in Europe.'

5 For an attempt to give the term a modern meaning see FCC, above n 1, para 223 et seq; for supporting this line of thought see also D Grimm, *Souveränität. Herkunft und Zukunft eines Schlüsselbegriffs* (Berlin, Berlin University Press, 2009), 9 et seq for the change of the concept with the change of the idea of the state, and ibid, 108 et seq, 123: sovereignty as protection of democracy (self-determination) – still related to the state, while ways for organising political self-determination in a democratic way in multilevel polity are not explored.

6 See G Leibholz and H von Mangoldt (eds), *Entstehungsgeschichte der Artikel des Grundgesetzes, Neuausgabe des Jahrbuchs des öffentlichen Rechts der Gegenwart Vol. 1*, (Tübingen, Mohr Siebeck, 2010) 15 et seq, 22-30, 34; see also P Häberle, 'Einleitung', ibid, V (XVIII).

7 See M Kaufmann, 'Integrierte Staatlichkeit als Staatsstrukturprinzip' (1999) Juristenzeitung (JZ) 814.

8 See also T Giegerich, 'The European Dimension of German Reunification' (1991) 51 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV) 384, 393 et seq, 404 et seq; see also I Pernice, 'Deutschland in der Europäischen Union' in J Isensee and P Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland Vol. VIII* (Heidelberg, Müller, 1995), § 191 note 3, 4, 6 et seq.

9 PC Müller-Graff, 'Das Karlsruher Lissabon-Urteil: Bedingungen, Grenzen, Orakel und integrative Optionen' (2009) 32 integration 331, 357 et seq, on the other hand, believes that the judgment remains so vague that it will have no (negative) effect on the European policies of Germany.

There is no specific concern, actually, about the protection of fundamental rights. The FCC has confirmed in its recent decision on the Data Retention Directive that it has no reason to change its *Solange*-jurisprudence. Thus, it will not review European measures with regard to German fundamental rights as long as the required level of protection of fundamental rights at the European level is not generally and evidently disregarded[10]. What it indicates, however, is how it understands the term 'constitutional identity':

> It is part of the constitutional identity of the Federal Republic of Germany that the citizens' enjoyment of freedom may not be totally recorded and registered, and the Federal Republic must endeavour to preserve this in European and international connections[11].

This is an important statement, given the clear announcement in the Lisbon-judgment that the FCC will exercise constitutional control not only on acts taken by the EU *ultra vires*, but also –and this is new– on measures allegedly intruding the constitutional identity of Germany as it sees it determined by Article 79 (3) *Grundgesetz* – that could re-open access to the FCC also in matters of fundamental rights[12].

2. 'Taboo-areas' of European legislation

The European Union is obliged, under Article 4 (2) TEU to respect the national identity of the Member States. Hand in hand with this provision, the FCC says, goes the guarantee in Article 79 (3) GG for the constitutional identity and the preservation of national sovereignty understood as an expression of democratic self-determination[13]. The FCC understands these boundaries to be applicable in what it qualifies 'a union of sovereign states' as opposed to a federal state for the foundation of which the *Grundgesetz* is not open, and for the establishment of which the German people would have to adopt a new constitution[14]. The summary of the judgment states in headnote 4 as follows:

> European unification on the basis of a treaty union of sovereign states may not be achieved in such a way that not sufficient space is left to the Member States for the political formation of economic, cultural and social living conditions. This applies in particular to areas which shape the citizens' living conditions, in particular the private sphere of their own responsibility and of political and social security, protected by fundamental rights, as well as to political decisions that rely especially on cultural, historical and linguistic perceptions and which develop within public discourse in the party political and parliamentary sphere of public politics[15].

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10 FCC Judgment of 2 March 2010, case 1 BvR 256/08, 1 BvR 263/08, 1 BvR 586/08 – Data Retention, para 182, English press release www.bundesverfassungsgericht.de/en/press/bvg10-011en.html (access: 30 November 2010).

11 ibid, judgment para 218.

12 For this see F Mayer, 'Rashomon in Karlsruhe' (2010) 63 Neue Juristische Wochenschrift (NJW) 714 et seq; id, 'Rashomon à Karlsruhe' (2010) 46 Revue trimestrielle de droit européen 77,79, concluding that in some way any problem of protection of fundamental rights could thus be treated as a problem of constitutional identity, too.

13 FCC, above n 1, headnote 5 and grounds para 240.

14 FCC, above n 1, para 228: 'Integration requires the willingness to joint action and the acceptance of autonomous common opinion-forming. However, integration into a free community neither requires submission removed from constitutional limitation and control nor the forgoing one's own identity. 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.' And para 232: 'In accordance with the powers granted with a view to European integration under Article 23.1 in conjunction with the Preamble, Article 20, Article 79.3 and Article 146 of the Basic Law, there can be no independent subject of legitimation for the authority of the European Union which would constitute itself, so to speak, on a higher level, without being derived from an external will, and thus of its own right.' For the distinction see also ibid, para 334: 'It follows 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, that - in any case until the formal foundation of a European federal state and the change of the subject of democratic legitimation which must be explicitly effected with it - that the member states may not be deprived of the right to review compliance with the integration programme.' This is not the only possible understanding of the relevant provisions of the German Basic Law as it is shown by U Fastenrath, 'Verfassungsrechtliche Perspektiven und Grundgesetz: Offenheit, Bedingungen und Grenzen der Beteiligung Deutschlands an Neuerungen der Europäischen Union' in PC Müller-Graff (ed), *Deutschlands Rolle in der Europäischen Union* (Baden-Baden, Nomos, 2008) 207, 212 et seq.

15 FCC, above n 1, headnote 4; see also grounds paras 249 et seq.

And these principles are even materialised by a concrete list of areas of high sensitivity, where the European legislator is required to use its competences with greatest care, a list with absolute boundaries, which is unique in the jurisprudence of European constitutional courts[16]:

> Particularly 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 monopoly on the use of force by the police within the state and by the military towards the exterior (2), fundamental fiscal decisions on public revenue and public expenditure, the latter being particularly motivated, inter alia, by social policy considerations (3), decisions on the shaping of living conditions in a social state (4) and decisions of particular cultural importance, for example on family law, the school and education system and on dealing with religious communities (5)[17].

In assessing the question of the democratic deficit of the European Union, Andrew Moravcsik repeatedly argued that the EU does not deal with all kinds of political subjects considered the most salient ones for the individual. If, as he says, 'the most salient task of the modern state is to equalize life chances and socialize the risk faced by individual citizens' the analysis of the EU leads to the conclusion that the EU is 'indifferent or even hostile' to this goal. He argues:

> Of the five most salient issues in most west European democracies – health care provision, education, law and order, pension and social security policy, and taxation – none is primarily an EU competence. Among the next ten, only a few (managing the economy, the environment, alongside the anomalous issue of Europe itself) could be considered manor EU concerns, non exclusively so[18].

We have used this argument for showing that, though the EU has important competences, it is far from reality to find, as the applicants in the Lisbon-case argued, that national parliaments had lost the substantial powers needed for exercising their basic democratic functions[19]. It is interesting to see that exactly these issues listed by Moravcsik are also mentioned in the judgment as the most sensitive policy-areas of Germany and the self-determination of the German people.

The Treaty of Lisbon does not exceedingly confer powers in these areas upon the EU, and the FCC therefore did not hold it unconstitutional. However, some explanations on each of the policy fields listed may help to interpret these EU competences in a harmonious way and to determine the limits in order to respect the powers of the Member States in these most salient issues, even if this understanding is not binding for other member states[20].

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16 See C Möllers, 'Was ein Parlament ist, entscheiden die Richter' (2009) No. 162 of 16 July 2009 Frankfurter Allgemeine Zeitung (F.A.Z.) 27. See also D Halberstam and C Möllers, 'The German Constitutional Court says „Ja zu Deutschland!"' (2010) 10 German Law Journal (GLJ) 1241, 1249, who consider this theory of necessary state functions as strange and unnecessary.

17 FCC, above n 1, para 252.

18 A Moravcsik, 'In Defence of the "Democratic Deficit". Reassessing Legitimacy in the European Union' (2002) 40 JCMS 603, 605, 615. See also id, 'The European Constitutional Settlement' (2008) The World Economy 178.

19 Documentation, above n 3, Duplik Deutscher Bundestag www.whi-berlin.de/documents/whi-paper0509_02.pdf) 26 et seq.

20 CD Classen, 'Legitime Stärkung des Bundestages oder verfassungsrechtliches Prokrustesbett? Zum Urteil des BVerfG zum Vertrag von Lissabon' (2009) 64 Juristenzeitung (JZ) 881, 888; C Calliess, 'Das Ringen des Zweiten Senats mit der Europäischen Union: Über das Ziel hinausgeschossen…' (2009) Zeitschrift für europarechtliche Studien (ZEuS 559, 580; PC Müller-Graff, 'Das Karlsruher Lissabon-Urteil: Bedingungen, Grenzen, Orakel und integrative Optionen' (2009) 32 integration 331, 352, 355, who is worried about the risk of more restrictions from other Constitutional Courts in particular for the effectiveness and uniform application of EU law. Of a different opinion concerning the possibility of a reservation under public international law: KF Gärditz and C Hillgruber, 'Volkssouveränität und Demokratie ernst genommen – Zum Lissabon-Urteil des BVerfG' (2010) 64 Juristenzeitung (JZ) 872, 877-878.

2.1. Criminal and Civil Law

The FCC sees criminal law as a central task of the state being particularly sensitive because it is an expression of culture and traditions of a country with its ethical and social implications as well as those on personal freedoms and fundamental rights[21]. A very restrictive use of the competences under Articles 82 and 83 TFEU is therefore required:

> In this important area for fundamental rights any transfer of sovereign rights beyond intergovernmental cooperation may only lead to harmonisation for specific cross-border situations on restrictive conditions; in principle, substantial freedom of action must remain reserved to the Member States here[22].

Although, compared to the wide definitions under pillar three of the former EU-Treaty, the 'new' powers of the EU in criminal law should rather be seen as more limited and more democratically controlled, the FCC considers this not enough. It requires that Article 83 (1) TFEU must be extremely limited to situations where action is specifically justified by their cross-border character and a special need to fight this criminal act on a common European basis, in particular when the list of crimes shall be extended according to subparagraph 3[23]. That means a common European regulation is only the last resort, *ultima ratio*[24]. A particular example for the restrictive approach chosen is Article 83 (2) TFEU which allows related criminal legislation in areas subject to harmonisation, where so required in order to make the substantive law effective. The ECJ had already recognised that this competence is part of the harmonisation powers conferred upon the EU, eg in the field of environmental law[25]. The FCC explicitely refers to this jurisprudence[26]. Nevertheless, it understands the new provisions of Article 83 (2) TFEU as a real change: 'the related competence conceals a serious extension of the competence for the administration of criminal law as compared to the current legal situation' and because of its vagueness the Court sees a need for a very narrow application in order to be acceptable under constitutional law:

> Because this competence in criminal lawmaking carries the threat that it could be without limits, a provision granting such competence is, as such, just as incompatible with the factually determined and only limited transfer of sovereign powers as with the required protection of the national legislature which is democratically especially bound by the majority decision of the people[27].

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21 FCC, above n 1, paras 253, 355.

22 FCC, above n1, para 253.

23 FCC, above n 1 paras 358 et seq, 363.

24 FCC, n 1, paras 358 et seq. For comments: S Braum, 'Europäisches Strafrecht im Fokus konfligierender Verfassungsmodelle. Stoppt das Bundesverfassungsgericht die europäische Strafrechtsentwicklung?' (2009) Zeitschrift für Internationale Strafrechtsdogmatik, 418, 422; available online at http://www.zis-online.com/dat/artikel/2009_8_348.pdf (access: 30 November 2010). Some authors suggest that there is room for development, nevertheless: CD Classen, above n 20, 881, 887: 'At least the law of criminal procedure is by now co-determined by the ECHR not without any substantial effects, and in a community of values agreeing on ethical minimums cannot be considered as a problem in principle.' [own translation]; M Ruffert, 'An den Grenzen des Integrationsverfassungsrechts: Das Urteil des Bundesverfassungsgerichts zum Vertrag von Lissabon', 124 Deutsches Verwaltungsblatt (2009), 1197, 1203: 'In the end, the restrictive use of supranational criminal law making does not primarily refer to understandings of values but to particularly strict requirements of the protection of fundamental rights. To preserve these can be temporarily the duty of the Member States' responsibility for integration with the consequence that the legislature could definitively be activated within the German participation in the meaning of art. 82-III and art. 83-III TFEU ('emergency brake procedure'). This, however, is not without an alternative: Alongside the EU criminal law the fundamental rights protection of the affected ones must develop. The Charter of Fundamental Rights does include fundamental guarantees of criminal procedure (cf art. 48 et seqq.) which can further be shaped by the ECJ and can integrate the principle of *nulla poena sine culpa* as well.' [own translation].

25 ECJ, case C-176/03 *Commission v Council* [2005] ECR I-7879, para 48: 'However, the last-mentioned finding does not prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective.'. See the seminal study on this subject M Heger, *Die Europäisierung des deutschen Umweltstrafrechts* (Tübingen, Mohr Siebeck, 2009).

26 FCC, above n 1, para 352.

27 FCC, above n 1, para 361.

This could mean that Article 83 (2) TFEU would not be allowed to be applied in practice. However, the FCC finds that a narrow interpretation of this term is possible and under this condition the provision can be accepted. The specific requirement for the application set in the provision, that criminal law included in the harmonisation is 'essential to ensure the effective implementation of a Union policy' implies that it must be 'demonstrably established that a serious deficit as regards enforcement actually exists and that it can only be remedied by a threat of sanction[28]'.

This interpretation does not seem to be an unreasonable restriction of the new powers given to the Union. On the other hand, instead of trying to force the German understanding of the principle of conferral on the ECJ, some authors propose rather to seek an opt-out under the emergency brake or to use the identity clause since the subjective relativity inherent in the identity review allows for pragmatic and country-specific solutions and is, therefore, less restrictive than conditions for the interpretation of the Treaties[29]. What is more important, however, is that we can find an example here for the way the FCC argues in each of the 'taboo-areas': First, it makes clear why the area is particularly sensitive regarding the preservation of democratic self-determination and sovereign statehood in Germany. Second, it refers to the provisions in the Treaties susceptible to be a real threat in this regard. Third, it suggests an understanding of these provisions on which basis it is possible not only to find them in compliance with the limits on the transfer of powers set – in its view – by the *Grundgesetz* but also to guide the institutions when they act under these provisions. And the FCC expressly calls the representatives of the German government acting in the Council to base their position on a restrictive interpretation as required by the Constitution[30].

2.2. Internal and external security of the state and the use of force

This applies particularly to questions of internal and external security of Germany, so the deployment of armed forces. More generally the FCC refers to the monopoly on the use of force – this is what characterises the state according to Max Weber – and considers the disposition of it by the police within the state and by the military towards the exterior as one of the areas specifically sensitive for the 'ability of a constitutional state to democratically shape itself[31]'. With a view to 'the precept of peace and democracy, which precedes the integration authorisation of Article 23.1 of the Basic Law in this respect' the FCC excludes the supranationalisation of decision-making regarding the use of armed forces and makes clear that the 'constitutive requirement of parliamentary approval for the deployment of the *Bundeswehr* abroad' may not be put into question by European integration[32]. But the Court finds that the Treaty of Lisbon respects the ultimate responsibility of the Member States for the deployment of their armed forces which it considers to be 'rooted in the last instance in their constitutions' and its provisions do not give the Council the power to order the deployment of their armed forces[33]. And should Article 43 (2) TEU be interpreted in such a way, the Court refers to the requirement of unanimity in the Council in the area of defence where, because of Articles 31 (4) and 48 (7) TEU, decisions by qualified majority can even not be introduced under the *passarelle*-clauses of the Treaty: In a given case,

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28 FCC, above n 1, para 362.

29 D Thym, above n 2, 1809.

30 FCC, above n 1, paras 360, 366.

31 FCC, above n 1, para 252.

32 FCC, above n 1, para 255.

33 FCC, above n 1, para 384-387. For a thorough analysis see D Thym, 'Integrationsziel europäische Armee? Verfassungsrechtiche Grundlagen der deutschen Beteiligung an der Gemeinsamen Sicherheits- und Verteidigungspolitik (GSVP)' in A Hatje and JP Terchechte (eds), Europarecht Beiheft 1: Grundgesetz und europäische Integration. Die Europäische Union nach dem Lissabon-Urteil des Bundesverfassungsgerichts (Baden-Baden, Nomos, 2010) 171. For a different opinion: D Halberstam and C Möllers, 'The German Constitutional Court says „Ja zu Deutschland!"' (2010) 10 German Law Journal (GLJ) 1241, 1246, who understand the judgment as prohibiting efforts as the current German naval deployment under a joint EU command on the coast of Africa as unconstitutional.

> the German representative in the Council would be constitutionally obliged to refuse 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.

The Court continues to make clear that such a 'bypass' would neither be allowed by a decision taken to implement a common defence policy of the Union under Article 42 (2) TEU nor even by an ordinary treaty amendment: 'The Federal Republic of Germany would be constitutionally prohibited to take part in such a treaty amendment[35].' However, it has to be considered that the *Bundestag* in finding its decision has to respect European law[36] and, hence, also the objectives of the common defence policy. Where an objective of the EU requires a task to be fulfilled the *Bundestag* cannot reject an approval simply for political reasons.

2.3. Budgetary Autonomy and Taxation

More fundamental and more related to the constitutional foundations of the state seem to be the budgetary powers of the national parliament with a view to its social implications and, in particular, the parliament's 'political discretion regarding revenue and expenditure' This area cannot be 'supranationalised to a considerable extent[37]'. The FCC takes much care to explain the importance of free political debate, the autonomy of the parliament and its discretion to adopt the appropriate policies particularly regarding the social conditions of life as a matter of democracy:

> The German *Bundestag* must decide, in an accountable manner vis-à-vis the people, on the total amount of the burdens placed on citizens. The same applies correspondingly to essential state expenditure. In this area, the responsibility concerning social policy in particular is subject to the democratic decision-making process, which citizens want to influence through free and equal elections. Budget sovereignty is where political decisions are planned to combine economic burdens with benefits granted by the state.

As realistic as it is, the Court accepts that not every European or international obligation having a budgetary effect would be a danger for these fundamental powers of the *Bundestag*. Some authors understand this only as prohibiting an exclusive European competence, not the introduction of singular European taxes[38]. What has to be preserved, however, is the 'overall responsibility, with sufficient political discretion regarding revenue and expenditure[39]'.

There is no mention of new powers of the EU to be considered as being too large or threatening in any other way the budgetary autonomy of the *Bundestag*. In particular, the FCC does not understand Article 311 (1) TFEU as giving the Union legislative or special budgetary powers[40]. Thus, the general statements do not lead to any concrete conclusion. They may, however, be taken into account when new mechanisms are discussed for a better surveillance of the budgetary discipline of the Member States as a consequence of the Greek debt crisis.

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34 FCC, above n 1, para 388.

35 FCC, above n 1, para 391.

36 J Isensee, 'Integrationswille und Integrationsresistenz des Grundgesetzes. Das Bundesverfassungsgericht zum Vertrag von Lissabon' (2010) 43 Zeitschrift für Rechtspolitik (ZRP) 33, 35.

37 FCC, above n 1, para 256.

38 Classen, above n 20, 881, 887.

39 FCC, above n 1, para 256.

40 FCC, above n 1, paras 323, 324: 'Article 311.1 TFEU must continue to be considered 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.'

2.4. Social Policies and Social Security

If already the budgetary autonomy is considered as a sensitive area, namely with a view to the inherent social policy considerations, this seems to be all the more true for 'decisions on the shaping of living conditions in a social state'. The FCC does not deny the social dimension of the European Union as required even by Article 23 (1) of the German *Grundgesetz*. Yet, it underlines that

> 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 to shape the structures of a social state.

It is difficult to assess the exact implications of this statement for future social policies of the European Union. The FCC does not question the achievements of European social policies up to now, nor ignore the new reference among the Union's aims in Article 3 (3) TEU to a 'highly competetive *social* market economy' and the new powers in the field such as for adopting, in accordance with the ordinary legislative procedure, measures under Article 48 (1) TFEU in the field of social security as necessary to provide freedom of movement for workers. The fact that measures concerning social security and protection may now be adopted under Article 21 (3) TFEU with regard to the right to move and reside freely given to the citizens of the Union does not raise concerns, nor does the new horizontal clause (Article 9 TFEU) which ensures that social concerns are regularly taken into account by the Union in defining and implementing its policies and activities. Indeed, even the new powers of the EU remain modest. Employment policies remain national, though coordinated policies (Articles 145 to 150 TFEU) and the chapter on Social Policy (Articles 151 to 161 TFEU) clearly show that the Union is limited to 'support and complement the activities of the Member States' only (Article 153 (1) TFEU), and the provisions adopted under Article 153 TFEU shall not – as is laid down in its paragraph 4 – 'affect the right of Member States to define the fundamental principles of their social security systems and must not significantly affect the financial equilibrum thereof', and issues like payment, the right of association, the right to strike or the right to impose lock-outs are excluded from the Union's legislative powers (paragraph 5). Article 156 TFEU gives the Commission the task to encourage cooperation of the Member States in some important fields of employment and social policy, but all the provisions implicitely recognise that social security and what the FCC calls 'shaping of living conditions in a social state'.

Criticism of the applicants against a too market-oriented concept of the Lisbon Treaty might have been the reason why, instead of establishing clear limits on EU action in this field, the FCC rather highlights the achievements of social policies and the recognition of social rights of the Union citizens by the ECJ[41], including a new concept of 'European social identity':

> The Court of Justice of the European Communities, in particular, has for some years now interpreted citizenship of the Union as the nucleus of European solidarity and has further developed it in its case law based on Article 18 in conjunction with Article 12 ECT. This line of case law represents the attempt to found a European social identity by promoting participation of the citizens of the Union in the respective social systems of the Member States[42].

41 FCC, above n 1, paras 395-398.

42 FCC, above n 1, paras 395 and 398.

The positive description of what aspects of a social dimension of the Union has already materialised concludes with the recognition that

> contrary to what the complainants 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 social security systems and other measures of social policy and labour market policy in their democratic primary areas[43].

Thus, contrary to the field of criminal law the judgment seems rather encouraging in the field of social policies.

2.5. Common Commercial Policy

With this regard only a long chapter on the new powers in the field of common commercial policies looks puzzeling: I was not aware that any complainant has raised issues regarding commercial policies[44], and the summary in the judgment of the facts and arguments of the parties does not even mention commercial policy. Nevertheless, the FCC devotes pages to deal with the new exclusive powers of the EU in this field[45]. But there is not much said about future policies. It recognises the importance of the WTO and describes the role of the Member States therein:

> The World Trade Organization remains the central forum for the worldwide 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 socio-political and economic policy issues and to then explain and discuss the arguments and the results at national level[46].

The conclusion is that the government bodies have a constitutional obligation to inform the Bundestag about the issues dealt with in the WTO with a view to its 'responsibility for integration and the differentiation of tasks among the constitutional bodies under the separation of powers[47]. What the Court holds contrary to the German statehood and Constitution is a pure hypothesis, which in the present case does not occur:

> The Treaty of Lisbon may at any rate not force the Member States to waive their member status. This particularly 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 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 the freedom to act in not insignificant areas of international relations cannot occur[48].

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43 FCC, above n 1, para 399.

44 For one remark of the complainant Peter Gauweiler related to the commercial policy, however, in relation to the incapacity of the Member States to lead an independend employment policy due to the exclusive competence of the EU in the field of commercial policy, see C Herrmann, 'Die Gemeinsame Handelspolitik der Europäischen Union im Lissabon-Urteil' in A Hatje and JP Terhechte (eds), *Europarecht Beiheft 1: Grundgesetz und europäische Integration. Die Europäische Union nach dem Lissabon-Urteil des Bundesverfassungsgerichts* (Baden-Baden, Nomos, 2010) 193, 197 et seq.

45 FCC, above n 1, paras 371-380. For some sharp criticism: M Nettesheim, 'Ein Individualrecht auf Staatlichkeit? Die Lissabon-Entscheidung des BVerfG' (2009) 62 Neue Juristischen Wochenschrift (NJW) 2867; Herrmann, above n 44, 193, 198-204 et seq.

46 FCC, above n 1, para 373.

47 FCC, above n 1, para 375.

48 FCC, above n 1, para 375.

Would this occur, however, the judgment makes clear that this would constitute a transgression of the constitutional boundaries and be inadmissable[49].

With regard to the new exclusive competence of the EU for foreign direct investment the judgment is even more cryptic. It notes that it is merely related to commercial policies but much more to property rights. It explains its independent treatment by different opinions on their protection at the international level. And it adds that 'far-reaching ideologically motivated differences have existed concerning the socio-political importance of the right to property as a fundamental freedom'. The FCC suggests that the term of foreign direct investment should only encompass 'investment which serves to obtain a controlling interest in an enterprise' and that treaties with third states on investment protection with a broader application should be perceived as mixed agreements[50]. Some further reflections on the future of existing bilateral investment treaties also suggest that they should legally persist but might need authorisation of the Commission. The FCC does not even try to relate these thoughts on what the European law could be to the German *Grundgesetz* and the allegations that it could be violated by the ratification of the Treaty of Lisbon.

2.6. Culture, School and Education Systems

The same is true for the last of the sensitive areas listed in the Lisbon-judgment: decisions of particular cultural importance, for example on family law, the school and education system and on dealing with religious communities[51]. The FCC points out the importance of these issues in terms of democratic self-determination:

> The manner in which curricula and the content of education and, for example, the structure of a multi-track school system are organised, are fundamental policy decisions closely connected 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 established rules and values rooted in specific historical traditions and experience.

However, in concluding that 'democratic self-determination requires that a political community bound by such traditions and convictions remains the subject of democratic legitimation[52]' no concrete restriction is imposed upon European policies implemented under the relevant provisions of the Treaties. It seems that the activities of the Union according to the Lisbon Treaty do not have impacts on these issues which are in the primary responsibility of the Member States, and that the FCC merely tried to create an instrument in order to restrict future developments, also on the basis of secondary law or the jurisprudence of the ECJ in these matters, eg in anti-discrimination law[53].

There is one exception, however. It regards family law harmonisation under Article 81 (3) TFEU. The Court understands this provision as merely a specific procedural safeguard for unanimous decision where measures listed in paragraph 2 of Article 81 TFEU are taken with regard to family law. It would not allow an extension to other measures in the field of family law. Insofar the Court establishes a clear limitation for future policies:

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49 Nettesheim, above n 45, 2867 et seq, qualifies this argument as 'breathtaking'.

50 FCC, above n 1, paras 377-380. The FCC overlooks here the competences of the Union in the field of free movement of capital and payments (in particular Articles 64 and 66 TFEU) which allow at least discussion on exclusivity also with regard to portfolio investments, see also Herrmann, above n 44, 193, 204.

51 For a more thourough analysis of this point G Britz, 'Vom kulturellen Vorbehalt zum Kulturvorbehalt in der bundesverfassungsgerichtlichen Demokratietheorie des Lissabon-Urteils' in A Hatje and JP Terchechte (eds), *Europarecht Beiheft 1: Grundgesetz und europäische Integration. Die Europäische Union nach dem Lissabon-Urteil des Bundesverfassungsgerichts* (Baden-Baden, Nomos, 2010) 151.

52 FCC, above n 1, para 260.

53 Classen, above n 20, 881, 888.

> Should this, however, be regarded 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 constitutive participation of the German legislative bodies[54].

3. Beyond sensitivity: red lights for further integration

The reference here to the 'identity-protecting core of the constitution' makes clear that FCC does not limit itself to imposing a restrictive interpretation and use of new powers of the EU after the reform regarding certain 'taboo-areas' but goes further to announce constitutional boundaries in terms of procedure and substance regarding any measure having the effect of widening the powers of the EU. The construction of the 'constitutional identity' as the Court finds it determined by the 'eternity-clause' of Article 79 (3) of the *Grundgesetz* and recognized in Article 4 (2) TEU is the key for understanding what these boundaries actually are. In some way the complete judgment reflects what the FCC's view is, but some selected statements may suffice for establishing in broad lines what the concerns are (below 3.1.), before some examples of what the Court would exclude for violating the national identity are discussed (below 3.2.) and practical conclusions are drawn for defining the 'red lights' for integration in the future (below 3.3.).

3.1. Constructing Constitutional Identity

Nothing in the German *Grundgesetz* tells us what the 'constitutional identity' of Germany really is, even the term is not used in the text. As the FCC locates it in Article 79 (3) GG it seems appropriate to quote this provision literally:

> 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[55]'.

The principles referred to are the protection of human dignity and other human rights as inviolable and inalienable rights which are directly applicable law (Article 1 GG)[56], and the principles of democracy, the rule of law and that Germany is a social federal state (Article 20 GG)[57]. In explaining the reasons for accepting the constitutional complaints based upon the citizen's right to vote (Article 38 GG) as admissable the FCC primarily relies upon the principle of democracy which in its view is an expression of human dignity and sovereign statehood. Three quotes taken from the judgment may demonstrate the argument[58]:

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54 FCC, above n 1, para 369.

55 Quote of translation from www.btg-bestellservice.de/pdf/80201000.pdf (access: 30 November 2010).

56 (1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority. (2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world. (3) The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law.

57 (1) The Federal Republic of Germany is a democratic and social federal state. (2) All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive and judicial bodies. (3) The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice. (4) All Germans shall have the right to resist any person seeking to abolish this constitutional order, if no other remedy is available.

58 FCC, above n 1, para 211, 216 and 218.

> (211) The citizens' right to determine in respect of persons and subjects, in freedom and equality by means of elections and other votes, public authority is the fundamental element of the principle of democracy. The right to free and equal participation in public authority is enshrined in human dignity (Article 1.1 of the Basic Law). It forms part of the principles of German constitutional law established as inviolable by Article 20.1 and 20.2 in conjunction with Article 79.3 of the Basic Law.
>
> (216) The principle of democracy may not be balanced against 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 to 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 even prevents a constitution-amending legislature from disposing of the identity of the free constitutional order. The Basic Law thus not only presumes sovereign statehood for Germany but guarantees it.
>
> (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 encroachment upon 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 granted the power to amend the constitutional principles which are essential pursuant to Article 79.3 of the Basic Law. The Federal Constitutional Court monitors this.

Democracy, the sovereign state and the constituent power of the people: This is what the Court finds to be the identity of the constitution. The notion is so vague that it opens the door for a merely unlimited constitutional control of European politics[59]. More importantly, it is biased by an outdated concept of statehood neglecting the innovative power the German people has demonstrated with the vision of its membership in an United Europe expressed in the Preamble. The Court does not ignore the Preamble, however. The openness to peaceful cooperation of the nations and towards European integration[60], even the constitutional duty of the German institutions under Article 23 (1) GG to promote the development of a United Europe, are expressly recognised[61]. Yet, the FCC constructs the identity of Germany as a sovereign state as an unsurmountable limit to European integration[62]:

> Integration into a free community neither requires submission removed from constitutional limitation and control nor the forgoing one's own identity. 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[63].

Had the Preamble been taken seriously, the result could have been quite different: If the German people sees itself to become part of a United Europe, should this not have any impact on the definition of the constitutional identity of Germany?

The definition chosen by the FCC instead is the key for understanding the thrust of the judgment: The German *Grundgesetz* does not allow the establishment of a European federal state. Such a step would require a new constitution to be adopted by referendum. And as long as this step has not been taken, European integration

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59 See also Ohler, above n 2, 176.

60 FCC, above n 1, paras 220 et seq.

61 FCC, above n 1, para 225.

62 For critical comments see M Nettesheim, 'Entmündigung der Politik' (2009) No 198 of 27 August 2009 Frankfurter Allgemeine Zeitung (F.A.Z.) 8, calling this an incapacitation of politics; cf. also Möllers, above n 16, 27.

63 FCC, above n 1, para 228.

is considered subject to an ultimate control of the national authorities. Their 'responsibility for integration' includes the constitutional duty not to give up or to admit giving up or even weakening this national control rooted in the principle of democracy[64].

3.2. Examples for Violation

These constitutional limits to European integration determine what the FCC explains to be inadmissable. Some examples taken from the judgment may give a picture of instances where the Court would set the red light:

- The European Union may not be given autonomy regarding the definition of its own powers: the 'competence to decide on its own competence (*Kompetenz-Kompetenz*)[65]'. This is why the Court puts so much emphasis to the principle of conferred competences, laid down in Article 5 TEU but also seen – like the protection of national identity in Article 6 (2) TEU – as an expression of national constitutional principles[66]. The Court concludes:

  > The obligation under European law to respect the constituent power of the Member States as the masters of the Treaties corresponds to the non-transferable identity of the constitution (Article 79.3 of the Basic Law), which is not open to integration in this respect. Within the boundaries of its competences, the Federal Constitutional Court must review, where necessary, whether these principles are adhered to[67].

- The powers conferred to the European Union shall not exceed a certain threshold so that national parliaments retain enough substantive powers to exercise its proper democratic functions. In particular the Court states that

  > 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 be shaped within the meaning of Article 20.2 of the Basic Law and citizens cannot rule according to the will of a majority. The principle of the representative rule of the people may be violated if in the structure of bodies established by the Basic Law, the rights of the Bundestag are considerably curtailed and thus a loss of substance occurs of the democratic freedom of action of the constitutional body which has directly come into being according to the principles of free and equal elections[68].

- On the other hand, an amount of competences of the European Union comparable to the federal level of a federal state would involve an inacceptable democratic deficit. The FCC goes so far as to impose the withdrawal from the EU as *ultima ratio*:

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64 See for a definition FCC, above n 1, para 245: 'A permanent responsibility for integration is incumbent upon the German constitutional bodies. In the transfer of sovereign powers and the elaboration of the European decision-making procedures, it is aimed at ensuring that, seen overall, 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.'

65 FCC, above n 1, para 233.

66 FCC, above n 1, para 234.

67 FCC, above n 1, para 235.

68 FCC, above n 1, para 210, see also ibid, para 351: '[t]he newly established competences in any case in their proper interpretation are not "state-founding elements", which also in an overall perspective do not infringe the sovereign statehood of the Federal Republic of Germany to a constitutionally significant extent. [...] What is decisive for the constitutional assessment of the challenge is not 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.'

> If an imbalance between type and extent of the sovereign powers exercised and the degree of democratic legitimation arises in the course of the development of the European integration, it is for the Federal Republic of Germany because of its responsibility for integration, to endeavour to effect a change, and in the worst case, even to refuse further participation in the European Union.

- Regarding external relations the FCC does not see the Treaty of Lisbon as triggering a gradual loss of the Member States' legal personality status for the benefit of the European Union. Nevertheless it issues a warning in case the cooperative path of mixed treaties and parallel action would be left:

> However, in so far as the development of the European Union in analogy to a state were to be continued on the basis of the Treaty of Lisbon, which is open to development in this context, this would come into conflict with constitutional foundations[69].

- As it was already mentioned, Germany would be constitutionally banned from participating in amendments of the Treaty allowing the Union to oblige Member States to take part against their will in a military action of the Union. As the Court affirms, the 'requirement of parliamentary approval under the provisions of the Basic Law could not be bypassed' even by an ordinary amendment under Article 48 (2-5) TEU.

3.3. Practical Consequences

All these limitations to further European integration established by the FCC in order to restrict politics are often criticised, mainly because the GG does not provide such constraints but is rather furthering European integration. Moreover, it is questionable whether a court should bind the democratically legitimised and responsible legislator in such a way, also concerning the future development of the constitution[70].

However, the new limits are still rather general and vague, except for the military issues mentioned. So the 'red lights' would not hinder amendments of the Treaties giving the Union more powers or control on matters which are not, or less effectively, managable by the individual Member States. As governments would never accept powers to be given to the European institutions without a real need – or, to say it in terms of subsidiarity: the conferral of responsibilities to the Union in matters they can cope with at the national level appropriately – would such increase of European competences correspond to a loss of real powers at the national level? All a Member State would lose is the illusion of being competent. Thus, there is no real risk for an amendment of the Treaties in practice to violate the boundaries set by the Lisbon-judgment.

4. Procedural boundaries on flexibility and dynamics

What is more important in practice are the procedural conditions the FCC sets for all measures of the Union explicitly or implicitly amending the Treaties and which, in particular, may result in widening its competences.

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69 FCC, above n 1, para 376.

70 See only Ch Calliess, above n 2, 559, 582; O Lenz, 'Ausbrechender Rechtsakt' (8 August 2009) Frankfurter Allgemeine Zeitung (F.A.Z.) 8; F Mayer, above n 12, 714-715; ibid, above n 12, 77, 83; C Möllers, above n 16, 27; P Müller-Graff, above n 9, 331, 342; M Nettesheim, above n 62, 8; J Schwarze, 'Die verordnete Demokratie – Zum Urteil des 2. Senats des BVerfG zum Lissabon-Vertrag' (2010) 45 EuR 108.

These new conditions follow from the principle of conferred competences and the exclusion of any autonomous development of the Union. The Court insists that the Member States are and remain the masters of the Treaties[71]. One of the consequences are the limits to the principle of primacy of European law:

> It follows 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, that –in any case until the formal foundation of a European federal state and the change of the subject of democratic legitimation which must be explicitly effected with it– that the member states may not be deprived of the right to review compliance with the integration programme[72].

The other consequence is that the FCC held that the accompanying laws are unconstitutional in part because they do not provide for sufficient control by the parliamentary bodies of the government participating in all kinds of action of the Union developing primary law outside the formal ordinary amendment procedure under Article 48 (1-5) TEU. Given the difficulties of achieving the ratification of such ordinary amendments by 27 Member States the reform completed by the Treaty of Lisbon expressly aimed at finding simplified methods, as far as possible, for dynamically developing the Treaties. Though the results of this effort were modest anyway, the Lisbon-judgment of the FCC clearly deprives them from their *effet utile* as far as Germany is concerned, and even goes further in imposing new procedural requirements where the Treaty of Lisbon does not change the formerly existing law. The requirement of a law or parliamentary consent might cause procedural delays, blockades and package deals[73]. The reference to the limitations determined by the constitution –or better by the FCC– might even become a useful mean in political discussions[74]. But –more importantly– it will enable the FCC to control the compliance with its standards established in the Lisbon-judgment. Some authors consider this –and not the strengthening of the parliament[75]– actually to be the main reason of the FCC for expanding the 'responsibility for integration' (*Integrationsverantwortung*) –of the *Bundestag* and, therewith, its own as well[76].

Let me distinguish three levels of intensity for the intervention of the German legislative bodies imposed by the FCC to be provided for in a new accompanying law as a condition for the Treaty of Lisbon to be ratified.

First, the formal ratification procedure under the integration clause of Article 23 (1) GG must be activated in each case where the dynamics of European integration materialise through the use of the flexibility –or *passarelle*– clauses of the Treaties. As already mentioned, even an extensive interpretation of a given competence may trigger this requirement (below 4.1.). For special *passarelle* clauses, as far as they do not provide for a national parliament to oppose the adoption of a legislative act, the Court orders to make sure that the German member of the Council would have to vote against the act in all cases where there is no express authorisation by a parliamentary decision (below 4.2.). Third, the *Bundestag* and, if applicable, the *Bundesrat* is given a special say where specific competence-clauses provide for an 'emergency brake', that is the right of each member of the Council to suspend or stop the ordinary legislative procedure (below 4.3.).

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71 In particular, FCC above n 1, para 231: '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 powers, however, comes 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 democratic constitutions in their states. The "Constitution of Europe", international treaty law or primary law, remains a derived fundamental order.'; ibid, para 298.

72 FCC, above n 1, para 334.

73 P Müller-Graff, above n 9, 331, 358; A von Ungern-Sternberg, above n 2, 171, 182.

74 F Mayer, above n 12, 714, 717; ibid, above n 12, 77, 88.

75 *Inter alia*: M Ruffert, 'Nach dem Lissabon-Urteil des Bundesverfassungsgerichts – zur Anatomie einer Debatte' (2010) 7 Zeitschrift für Staats- und Europawissenschaften 381, 388.

76 P Müller-Graff, above n 9, 331, 352. For the *passarelle* clauses: CD Classen, above n 20, 881, 886. See also: F Mayer, above n 12, 714, 715; ibid, above n 12, 77, 82; Ch Calliess, above n 2, 559, 570.

4.1. The Requirement of Prior Ratification

With a view to the principle of conferred competences including that all conferral of powers to the European Union and its institutions needs the consent of the parliamentary bodies as provided in Article 23 (1) GG, the 'special responsibility (for integration)' of the national institutions is to be exercised according to the conditions and procedures laid down in this provision even where the Treaties are open for flexibility or simplified amendment[77]. The Court holds this applicable for

- the simplified amendment procedure under Article 48 (6) TEU – although this provision expressly excludes any increase of competences conferred on the Union in the Treaties;

- the general *passarelle*-clause in Article 48 (7) TEU allowing to replace unanimity by qualified majority voting in the Council or to pass from the special to the ordinary legislative procedure in given cases, as well as the specific *passarelle*-clause in Article 81 (3) TFEU regarding family law – although for all decisions to this effect the national parliaments are given the right to veto;

- special powers of the European Council or the Council to adopt decisions of fundamental character and requiring consent of the Member States 'according to their respective constitutional requirements', such as the establishment of a common defence according to Article 42 (2) TEU, provisions strengthening or establishing new rights for the citizen of the Union (Article 25 (2) TFEU), the accession of the EU to the European Convention for the Protection of Human Rights (Article 118 (8) TFEU), provisions for a uniform system of European elections (Article 223 (1) TFEU), the extension of the ECJ jurisdiction to European intellectual property rights (Article 262 TFEU) and provisions relating to the system of own ressources of the Union according to Article 311 (2) TFEU[78];

- the application of the flexibility-clause of Article 352 TFEU – although this provision confers a legislative competence to the Union with broad and general boundaries but strict procedural requirements, but does not, as the FCC wrongly suggests, 'serve to create a new competence' of the Union[79].

In making prior authorisation by a law adopted under Article 23 (1) GG mandatory in all these cases, the FCC leaves open insofar whether this law would have to meet the normal procedural requirements or is subject to the special conditions applicable for amendments of the Constitution under Article 23 (1) third sentence, read together with Article 79 (2) and (3) GG, meaning that a two thirds majority of the two chambers is necessary[80]. This question would have to be decided case by case and generate lengthy political discussion as well as procedures at the FCC.

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77 FCC, above n 1, para 409.

78 FCC, above n 1, paras 412-414.

79 FCC, above n 1, para 327: 'The amendments made by the Treaty of Lisbon must lead to a new assessment of the provision. Article 352 TFEU is no longer confined 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.' Criticising the weakness of the arguments: Ch Ohler, above n 2, 162 et seq.

80 FCC, above n 1, para 412. This question is left open also by §§ 2-4 of the Integrationsverantwortungsgesetz (Bundesgesetzblatt 2009 Teil I Nr. 60, of 24 September 2009), which regulates the details of the procedures. For more details on this act: B Daiber, 'Die Umsetzung des Lissabon-Urteils des Bundesverfassungsgerichts durch Bundestag und Bundesrat' (2010) Die Öffentliche Verwaltung, 293 et seq; J Hahn, 'Die Mitwirkungsrechte von Bundestag und Bundesrat in EU-Angelegenheiten nach dem neuen Integrationsverantwortungsgesetz' (2009) Europäische Zeitschrift für Wirtschaftsrecht, 758 et seq Against this for Article 352 and 81 (3) TFEU because of the limited consequences: CD Classen, above n 20, 881, 884.

Concerning the flexibility-clause, at least, it is understood that the law must not entail all the details of the proposed EU act. The 'responsibility for integration' of the legislative bodies cannot require more concreteness for acts adopted under Article 352 TFEU than for a conferral of new competences by formal amendment of the European treaties[81].

Nevertheless, this requirement might be undermined by the European legislative bodies and the German government if any possible: So the Council based its Regulation 407/2010 authorising the Commission to take credits up to 80 billion Euros for the financial stabilisation mechanism on Article 122 (2) TFEU only, without a reference to the flexibility-clause. Given the principle that the EU budget is financed by 'own ressources', this looks quite audacious and, hence, as a procedure to avoid the need of a time-consuming prior authorisation by a German law.

4.2. Simplified Parliamentary Consent

Passarelle-clauses not providing for consent by the Member States according to their respective constitutional requirements are seen in a more benign light by the FCC. Are they less fundamental or politically sensitive, or are they narrower in their scope and therefore more predictable? Different reasons seem to explain why the simple consent is judged sufficient in the various areas concerned.

As family law is deeply rooted in the particular culture and traditions of each Member State, the Court has made clear that Article 81 (3) TFEU has to be interpreted as covering only acts as listed in paragraph 2 of that Article, with regard to family law; should it be given a broader application, this would not be possible without the 'constitutive participation of the German legislative bodies[82]'. The Court has not made clear what form of participation it has in mind.

Prior consent of the *Bundestag* and, if the *Länder* have competence in the matter, of the *Bundesrat* is required according to the Lisbon-judgment for decisions of the European Council under Article 31 (3) TEU pass from unanimity to qualified majority decision in foreign and security policies, except defence. This is a change with far-reaching implications, but as responsibilities primarily of the government are concerned and not of the national parliaments the Court might have seen this case as different from the cases of Article 48 (7) TEU.

This is not applicable to decisions of the Council under Article 153 (2) TFEU to pass from the special legislative procedure to the ordinary one for certain issues of social policy. Here the legislative powers of the parliaments are in question, but this specific *passarelle* is well defined regarding its scope in substance. The same reasoning should also apply to the parallel for matters of environmental policy under Article 192 (2) TFEU, to Article 312 (2) TFEU regarding regulations laying down the multiannual financial framework for the Union as well as to Article 333 TFEU regarding decisions taken in the framework of enhanced cooperation.

The prior parliamentary consent required in all these cases may be achieved more rapidly than where the formal legislative procedure has to be applied under Article 23 (1) GG. It is nevertheless regarded as 'constitutive' for the power of the German representative to allow the decision of the Council to be adopted. Many authors criticise that this requirement of parliamentary consent undermines the Treaty, which provides

81 CD Classen, above n 20, 881, 884.

82 FCC, above n 1, para 369.

a mere veto right of the national parliaments[83]. Yet, also other Member States provide for prior parliamentary authorisation of their respective member of the Council to give green light for decisions of this kind or even to legislative acts in general.

The problem here is not the active participation of the parliaments, but the specific implication such requirement for an express decision of the *Bundestag* or *Bundesrat* would have with a view to the control powers of the FCC. While the simple behaviour of a German minister in the Council is difficult to be subject to judicial review by the FCC, the 'constitutive' decision of the *Bundestag* as required now for authorising a specific act of the Council to be taken can be attacked before the FCC as it is the case for a law adopted under Article 23 (1) GG.

4.3. Parliament and Emergency Brake

Certain provisions of the Treaties allow European legislation pursuant to the ordinary legislative procedure. Yet, because of the implications for the existing national systems they provide for a special procedural safeguard: Each member of the Council may request that the legislative draft is brought to the attention of the European Council and so to suspend or stop the ordinary legislative procedure. Article 48 (2) TFEU opens this option in the field of social security for migrant workers if the act would affect important aspects of the social security system of the Member State in question, including its scope, cost or financial structure, or if it would affect the financial balance of that system. Articles 82 (3) and 83 (3) TFEU do accordingly in the field of criminal law 'where a member of the Council considers that a draft directive […] would affect fundamental aspects of its criminal justice system'.

While the German member of the Council is, in principle, free to use this procedure on the discretion of the government, the FCC finds that a special participation of the parliamentary bodies is required here as well. The specific powers given to the Council in Article 82 (1) and 83 (1) and (2) TFEU, however, are the reason for the Court to stipulate extra provision of democratic legitimacy:

> 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 exercise of the responsibility for integration of the legislative bodies in the context of the emergency brake procedure[84].

With a somewhat cryptical language the Court suggests that the government may exercise its rights under these provisions only if so instructed by the *Bundestag* or the *Bundesrat*[85]. The implication would be, however, that the emergency brake could not be used without positive instruction. Apparently this was not meant[86]. The new accompagnying law is limited therefore to oblige the German government to activate the emergency brake in each case the *Bundestag* or *Bundesrat* instructs it to do so[87].

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83 See only CD Classen, above n 20, 881, 886.

84 FCC, above n 1, para 365.

85 FCC, above n 1, para 400: '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, in so far as this is required by the provisions on legislation, the Bundesrat.' See also ibid, para 418.

86 Like this also CD Classen, above n 20, 881, 886. Following a strict interpretation: D Halberstam and C Möllers, above n 16, 1241, 1244.

87 See § 9 Integrationsverantwortungsgesetz (Bundesgesetzblatt 2009 Teil I Nr. 60, of 24 September 2009).

5. Constitutional review without limits?

Early press reactions to the Lisbon-judgment of the FCC were enthusiastic about the contribution this judgment was understood to make to enhance democracy in Germany. The entire case, indeed, was build upon an alleged violation of the electoral rights of the citizen, Article 38 (1) GG, construed as a citizen's fundamental right to democracy. And the Court found it important to instruct the Parliament how to draft the laws on its own participation and control of the government's position-taking in the decision-making of the Union. It even made the prior adoption of new provisions to be taken in conformity with the very explicit requirements developed in the judgment a condition for the ratification of the Treaty of Lisbon by the German President.

As a result, the new provisions of the accompagnying laws (*Begleitgesetze*), are almost completely judge-made law in a very specific meaning. What a referendum is in France, the former President of the FCC, Jutta Limbach, said ironically in a public speech 1996 in Aachen, is the judgment of the FCC for the Germans. Apparently, we like authority more than our own opinion, we trust our judges more than our elected members of Parliament. Many authors criticise this 'gouvernement des juges[88]', and that the German democracy is determined by the FCC rather than by the democratically legitimated parliament[89]. However, this attitude is now even sustained by the FCC, which encourages the citizens to take action against its own and directly elected parliament[90]. The FCC, however, risks to be used politically[91]. It seems, Germany has yet to learn what democracy can be.

The FCC developed an amazing creativity in extending its own powers of control not only on acts of the German authorities – the acts approving the Treaties in particular – but also of the European Union based on the simple right to vote in Article 38 (1) GG, which actually reads very simply:

> (1) Members of the German Bundestag shall be elected in general, direct, free, equal and secret elections. They shall be representatives of the whole people, not bound by orders or instructions, and responsible only to their conscience.
>
> (2) Any person who has attained the age of eighteen shall be entitled to vote; any person who has attained the age of majority may be elected.
>
> (3) Details shall be regulated by a federal law.

Let us see more in detail what kind of powers the Court has assumed on that basis with a view to protect the peoples democratic self-determination against decisions taken by their own elected representatives[92] regarding European policies and the development of the European Union (below 5.1.) as well as of the acts of the Union itself (below 5.2.), in both cases with a view of determining to what extend this may modify the role of Germany from a motor of integration to become a brake.

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88 F Mayer, above n 12, 714, 715; ibid, above n 12,77, 83.

89 O Lenz, above n 70: 'justizgeprägte Demokratie'.

90 KF Gärditz and Ch Hillgruber, above n 20, 872, 874.

91 P Müller-Graff, above n 9, 331, 356.

92 F Schorkopf, above n 2, 6, talks about the FCC mobilising the citizen against its directly elected national and European representation.

5.1. Constitutional Review of National Acts on Integration

Perhaps the most illuminating example for how far the FCC is going in the exercise of constitutional review on national acts on European integration is the Lisbon-judgment itself. It was already a remarkable step that under the 1949 *Grundgesetz* the law of 1951 on the Constitutional Court made it possible for individuals to bring constitutional complaints to the FCC claiming that a legislative acts affect them directly and individually in one of the fundamental rights; this special remedy was taken up in Article 93 (1) No. 4a GG by the 19th constitutional amendment in 1969[93]. Yet, to construct the right to vote as an individual right to democracy so that it can be invoked against the conclusion of treaties under Article 23 (1) GG giving the Court access to a complete constitutional review of such a treaty, is a courageous further step. The complaint against the Treaty of Maastricht was the first opportunity for the Court to open up this path in allowing Article 38 GG to be invoked when the Bundestag was arguably deprived of its substantial powers making the election of its members politically meaningful[94] – and it was strongly criticised[95]. The FCC is going further now when saying that this democratic right extends to the constitution-making power of the people and its fundamental decisions protected by the 'eternity-clause' of Article 79 (3) GG. Or, using the terms of Tom Eijsbouts: It gives a standing to the individual (citizen) to protect the original peoples' prerogatives against the representatives of the electoral people acting as the preamble and Article 23 of the *Grundgesetz* requires them to act[96].

This new 'fundamental right to democracy' so opens the door for the Court to receive constitutional complaints not only against all acts of the public authorities of Germany based upon an alleged violation of specific fundamental rights like the freedom of speech or private property, but constitutional complaints will also be admissable, via the right to vote, arguing that the structural principles protected in Article 79 (3) GG such as the rule of law, democracy, federalism or –as the Court affirms– the sovereign statehood and identity of Germany are violated. This seems to be breaking new ground for a popular complaint beyond what was possible so far under the constitutional regime on the access to justice at the FCC[97].

The object of such constitutional complaints can be, with regard to European matters, not only laws under Article 23 (1) GG on ratification of European treaties, but any law or decision taken by the parliamentary bodies of Germany with regard to the application of flexibility or *passarelle*-clauses or even of a given competence, as shown in chapter IV above.

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93 19th law amending the Grundgesetz of 29 January 1969 (BGBl. I, p 97). For the history see J Wieland 'Article 93 n 9' in Dreier (ed), Grundgesetz *Kommentar, Vol. III* (Tübingen, Mohr Siebeck, 2nd ed, 2008), 75-79.

94 FCC Judgment 2 BvR 2134, 2159/92 of 12 October 1993, BVerfGE 89, 155 (171 et seq) – Maastricht (online at www.servat.unibe.ch/dfr/bv089155.html [access: 30 November 2010]), paras 60-63. References in this essay refer to the English translation in (1994) 33 International Legal Materials 388.

95 See the references in: I Winkelmann, *Das Maastricht-Urteil des Bundesverfassungsgerichts vom 12. Oktober 1993. Dokumentation des Verfahrens mit Einführung* (Berlin, Duncker und Humblot, 1994), 36 et seq; in particular: K Meessen, 'Maastricht nach Karlsruhe' (1994) Neue Juristische Wochenschrift 549, 550 et seq, for him '*darf das Wahlrecht nicht zum Einstieg in eine kompetenzrechtliche Popularklage genutzt werden*' ('the right to vote shall not be used to introduce a popular complaint for violation of competences'). For S Magiera, 'Article 38', para 104 in Sachs (eds), *Grundgesetz Kommentar* (3rd ed, 2003), the principle of democracy does not contain a '*Maßstab für den Umfang übertragbarer Hoheitsrechte*' – ie it does not prescribe the extent of conferrable competences; similarly H P Ipsen, 'Zehn Glossen zum Maastricht-Urteil' (1994) 1 Europarecht 1 et seq; U M Gassner, 'Kreation und Repräsentation – zum demokratischen Gewährleistungsgehalt von Art. 38 Abs. 1 S. 1 GG' (1995) Der Staat, 429 et seq, argues that there is '*kein zwingender Rechtfertigungsgrund für die Umdeutung des Art. 38 I 1 GG in ein Grundrecht auf substantielle Demokratie*' – ie that there is no reason to interpret Article 38 GG as a human right to substantial democracy; E Klein, 'Grundrechtsdogmatische und verfassungsprozessuale Überlegungen zur Maastricht-Entscheidung des BVerfG' in A Randelzhofer, R Scholz and D Wilke (eds), *Gedenkschrift Grabitz* (München, Beck 1994), 271 et seq, is sceptical to see the citizen as '*Wächter des demokratischen Prinzips und [...] Verteidiger von Organkompetenzen*' – as a guard for the principle of democracy and defendant of institutional competences and doubts whether Art. 38 (1) sentence 1 GG is compatible with '*dem Repräsentationsprinzip*' – the principle of representation; very critical also Ch Tomuschat, 'Die Europäische Union unter der Aufsicht des Bundesverfassungsgerichts' (1993) Europäische Grundrechte Zeitschrift 1993, 1 et seq.

96 T. Eijsbouts, 'Courts, People, Citizens Understanding EU's Constitutional Democracy with the help of the Lisbon Treaty and the *Lissabon-Urteil*' in I. Pernice and JM Beneyto Pérez (eds.), *Europe's Constitutional Challenges in the Light of the Recent Case Law-Lisbon and Beyond* (Baden-Baden, Nomos, 2011).

97 Ch Schönberger, 'Die Europäische Union zwischen "Demokratiedefizit" und Bundesstaatsverbot, Anmerkungen zum Lissabon-Urteil des Bundesverfassungsgerichts' (2009) Der Staat 535, 540, who criticises this as change in the elaborated system of constitutional procedures and concerning the admissibility of individual constitiutional complaints; see also Ch Tomuschat, 'The Ruling of the German Constitutional Court on the Treaty of Lisbon' (2009) 10 German Law Journal 1259; D Thym, 'Europäische Integration im Schatten souveräner Staatlichkeit' (2009) Der Staat 559, 570.

5.2. Review of European Union Acts

The FCC is clear about the capacity and readiness of the ECJ to protect adequatly the fundamental rights, since the Treaty of Lisbon also on the basis of the European Charter of Fundamental Rights. Therefore, as long as a substantial, general and evident deviation from this path of virtue is not shown, it will not hold admissible constitutional complaints against acts of the Union which allegedly violate German fundamental rights[98]. Some authors see the risk that a violation of human rights might be held as affecting the constitutional identity and, thus, give ground for the FCC to find this admissible[99]. Yet, it is very unlikely that the FCC would declare an act of the European Union inapplicable in Germany for infringing human rights.

In the Maastricht-judgment, however, it has announced that in cases of EU acts *ultra vires* it might be held inapplicable in Germany for lack of legitimacy. Such acts exceeding the actual powers conferred to the Union by the Member States could not be binding for German authorities or citizens[100].

This jurisprudence was confirmed and extended by the Lisbon-judgment, and the FCC added a new criterion for its scrutiny, as already mentioned: the constitutional identity which it finds defined in Article 79 (3) GG. As long as the European Union is not a federal state and as long as, therefore, the Member States remain the masters of the Treaties, the Court argues that such control is consistent with the nature and structure of the Union:

> [I]t must be possible within the German jurisdiction to assert the responsibility for integration if obvious transgressions of the boundaries occur when the European Union claims competences –this has also been emphasised by the agents 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 examines whether legal instruments of the European institutions and bodies keep within the boundaries of the sovereign powers accorded to them by way of conferral (see BVerfGE 58, 1 <30-31>; 75, 223 <235, 242>; 89, 155 <188>: see the latter concerning legal instruments transgressing the limits) whilst adhering to the principle of subsidiarity under Community and Union law (Article 5.2 ECT; Article 5.1 second sentence and 5.3 Lisbon TEU). Furthermore, the Federal Constitutional Court reviews whether the inviolable core content of the constitutional identity of the Basic Law pursuant to Article 23.1 third sentence in conjunction with Article 79.3 of the Basic Law is respected (see BVerfGE 113, 273 <296>). The exercise of this review power, 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 sincere cooperation (Article 4.3 Lisbon TEU); otherwise, with progressing integration, the fundamental political and constitutional structures of sovereign Member States, which are recognised by Article 4.2 first sentence Lisbon TEU, cannot be safeguarded in any other way. In this respect, the guarantee of national constitutional identity under constitutional and under Union law go hand in hand in the European legal area. The identity review makes

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98 Confirming its established jurisprudence FCC, above n 1, para 337, most recently: FCC, Judgment of 2 March 2010, 1 BvR 256/08 www.bverfg.de/entscheidungen/rs20100302_1bvr025608.html (access: 30 November 2010), paras 181, 182.

99 F Mayer, above n 12, 714 et seq; ibid, above n 12, 77, 79.

100 FCC, above n 94, headnote 5 (p. 395-395) and p. 422-423: 'If, for example, European institutions or governmental entities were to implement or to develop the Maastricht Treaty in a manner no longer covered by the Treaty in the form of it upon which the German Act of Accession is based, any legal instrument arising from such activity would not be binding within German territory. German State institutions would be prevented by reasons of constitutional law from applying such legal instruments in Germany. Accordingly, the German Federal Constitutional Court must examine the question of whether or not legal instruments of European institutions and governmental entities may be considered to remain within the bounds of the sovereign rights accorded to them, or whether they may be considered to exceed those bounds […].'

> it possible to examine whether due to the action of European institutions, the principles under Article 1 and Article 20 of the Basic Law, declared inviolable in Article 79.3 of the Basic Law, have been violated. This ensures that the primacy of application of Union law only applies by virtue and in the context of the constitutional empowerment that continues in effect[101].

Talking about 'openness towards European Law' and cooperation in this context sounds somewhat hypocritical in particular when the Court expressly considers the possibility of a denial of application of European law[102]. This looks rather like a clear affront to the established jurisprudence of the ECJ since Costa/ENEL and to Declaration No. 17 attached to the Treaty of Lisbon on the primacy of EU law, where this jurisprudence is referred to. It is, however, possible to understand the FCC's statement as a move towards a non-hierarchical or pluralistic conceptualisation of the constitutional building composed by the national constitutions of the Member States and the EU primary law. Here the responsibility for safeguarding the law including the common values as listed in Article 2 TEU lies in the hands of both, the ECJ and the national (constitutional) courts[103]. This co-responsibility is reflected not only in the well known dialogue of judges instituted by Article 267 TFEU, but also in the new drafting of the former Article 220 TEC as we find it in Article 19 (1) TEU, where not only the tasks of the ECJ are defined, but also the duty of the Member States to organise remedies sufficient to ensure effective legal protection in the fields covered by Union law. As the FCC clearly recognises, the concept of primacy is quite different from the hierarchical approach of Article 31 GG for the relationship between federal law and state law in Germany: Under this provision 'federal law shall take precedence over conflicting *Land* law'. In the EU, however, 'the supranationally based law does not have such a derogating effect to the extent that it annuls law[104]'. Interestingly, the FCC in discussing primacy and its own powers to exceptionally declare European law inapplicable in Germany refers to the Kadi-jurisprudence of the ECJ[105]. Although the situations are quite different regarding the binding effect of international law for states only and the direct effect of European law upon individuals, the conclusions of the FCC are remarkable:

> 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 construct is not only familiar in international legal relations as a reference to the ordre public as the boundary of a treaty commitment; it also corresponds, if used constructively, to the idea of contexts of political order which are not structured according to a strict hierarchy. It does not in any case factually contradict the objective of openness towards European law, i.e. to the participation of the Federal Republic of Germany in the building of a united Europe (Preamble, Article 23.1 first sentence of the Basic Law), if exceptionally, and under special and narrow conditions, the Federal Constitutional Court declares European Union law inapplicable in Germany[106].

The most important insight here is the reference to 'contexts of political order which are not structured according to a strict hierarchy'.

If taken seriously, the principles of mutual respect and cooperation constitute the key for the resolution of normative conflicts between European and national law in the European system, which is constructed and

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101 FCC, above n 1, para 240.

102 FCC, above n 1, para 241.

103 See for more detail: I Pernice, 'Costa v ENEL and Simmenthal: Primacy of European Law' in M Poires Maduro and L Azoulai (eds), *The Past and the Future of EU Law* (Oxford, Hart Publishing, 2010), 47, 58 et seq.

104 FCC, above n 1, para 335.

105 Reference to ECJ, Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* Europarecht 2009, 80, 100 et seq (available online at www.eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005J0402:EN:HTML [access: 30 November 2010]).

106 FCC, above n 1, para 340.

must be understood in terms of multilevel constitutionalism[107] –or if you associate hierarchy with this term[108] we could also say 'network constitutionalism'– as a pluralist compound of constitutions.

Respect and cooperation in a composed constitutional system like the European Union exclude that courts compete for primacy and power[109]. It requires instead that they cooperate and acknowledge the necessity to consider the legal systems of all 27 Member States as well as the need for uniform and effective application of the common law. Such consideration and cooperation serve best the interest of the citizens who are the source of legitimacy for any public authority exercised in the Union. Primacy of European law is rooted in the principle of equality of Union citizens before all Union law (Article 9 TEU read together with Article 20 (2) TFEU). Its equal or unitary application is the condition for the recognition of the norm as valid and binding. A norm is either equally applicable to all, or it is not law. Thus, it is in the interest of both, national and European courts to ensure that no exception is accepted to the application of European law for otherwise European law would suffer a loss of recognition as law. This is the very reason for the existence of the dialogue of judges under Article 267 TFEU. It is the expression of their common and joint responsibility – their 'composite responsiveness[110]'.

The FCC seems to understand this and is determined to cooperate, in spite of its claims for an ultimate control. This claim is inherent for a national constitutional court and merely reflects the function of a court established by a national constitution which is –together with the constitutions of the other Member States– the basis of the European constitution and its proper functioning. Also the European institutions, including the ECJ, are aware of the 'reserve'-competence of the national constitutional courts exercising some ultimate control over the respect of the limits of their powers, on the basis of the common values and principles laid down in the Treaties. This reserve competence for exceptional cases does not exclude cooperation in general.

More explicitly than in the Lisbon-judgment the FCC does recognise the duty to submit preliminary questions to the ECJ under Article 267 TFEU in case of doubt about the validity and applicability of EU law. This was expressed in the judgment on the data retention case[111]. Much more explicitely, however, the FCC makes clear in its Decision of July 6, 2010 in the case Honeywell that the question of *ultra vires* must be submitted to the ECJ before it is possible for it to consider its applicability[112]. In addition, the Court limits its control now very clearly to cases of evidence and hence to exceptional cases. This is the case only where a qualified violation of the principle of conferred competences can be determined and if the act in question has a substantial impact on the architecture of powers divided between the Union and the Member States[113]. In particular, it recognises the task of the ECJ to develop the law by its judgments according to European standards of interpretation, the achievements of its jurisprudence eg in developing general principles of law including fundamental rights and the discretion it enjoys in developing its case law – though the limits of the principle of conferral have to be respected[114].

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107 See recently: I Pernice, 'The Treaty of Lisbon. Multilevel Constitutionalism in Action' (2009) 15 Columbia Journal of European Law, 349, 372-385, also available as WHI Paper 02/09, online at http://www.whi-berlin.de/documents/whi-paper0209.pdf (access: 30 November 2010).

108 Questions coming from G della Cananea, 'Is European Constitutionalism Really "Multilevel"?' (2010) 70 ZaöRV 283 et seq, in particular p. 307: 'the term is very questionable', quoting D J Elazar 'who argued, the word "level" has a clear hierarchical connotation'. See also L F M Besselink, 'A Composite European Constitution' (Groningen: Europa Law Publishing, 2007 2007), 5 et seq, with strong arguments also against the hierarchical approach.

109 In this vein I understand the conclusion of D Thym, above n 2, 1809: 'As constructive player, that presents itself as an altruistic actor which engages into meaningful dialogue, the BVerfG may have influence on the ECJ, but not as troublemaker: then its warnings will fall on deaf ears and may result in protracted disputes.'

110 D Thym, above n 2, 1795, 1809.

111 FCC, above n 10, para 185.

112 FCC, Decision of 6 July 2010, 2 BvR 2661/06 – Honeywell, para 53 et seq, 60, online available at www.bundesverfassungsgericht.de/en/decisions/rs20100706_2bvr266106.html (access: 30 November 2010).

113 ibid, para 61.

114 ibid, paras 62-66.

In the light of these recent decisions it is possible to assume that also the 'identity-control' may effectively be restricted to cases of evidence and substantial violations of values and principles which are not only laid down in Article 79 (3) GG but– perhaps even because of their fundamental character shown in this provision –also in the basis of the Union according to Article 2 TEU and, as far as the specific constitutional structures of the Member States are concerned, the subject of Article 4 (2) TEU. Issues of national identity are special also insofar, as they have a 'subjective' character: Not the validity of the disputed act is questioned, but its applicability within one Member State only, due to a particular conflict with its fundamental constitutional provisions[115].

With the specific discursive nature of the procedure under Article 267 TFEU allowing, besides the European institutions involved, the participation of all the national governments, the ECJ indeed is the appropriate forum for finding solutions for the fundamental questions at stake. And after the Court, consisting itself of judges representing the diverse legal cultures of the Union, having heard all the arguments as well as the opinion of the Advocate General has finally given its judgment, it should be very unlikely that the solution found gives rise to further dispute.

6. Conclusions

As a result, the Lisbon-judgment of the FCC develops a specific view on the constitutional structure of the European Union, its relationship to the Member States and their constitutions, in particular to the German *Grundgesetz*. The new dynamism of the Treaty of Lisbon might be notably slowed down because of new procedural requirements aimed at giving the parliamentary bodies a more decisive role in the definition of the government's position in the Council, particularly where the flexibility-clause or *passarelles* of the treaties are used[116].

It also sets a number of warning lights marking particular limits for the implementation of certain powers like in criminal law but also for further integration. The transition of the European Union to a federal state shall not be possible under the *Grundgesetz* and require new action of the constitution-making power under Article 146 of the Constitution[117]. The withdrawal or expulsion of the Member States from the WTO would exceed the limits of what is in accordance with the principle of sovereign statehood as protected by the eternity-clause of Article 79 (3) GG[118]. However, these are theoretical issues which were not decided by the Lisbon Treaty and which will not be on the agenda in the next years. Therefore, they do not justify the assumption that Germany might change its overall attitude towards European integration and policies. The Treaty of Lisbon was approved by the FCC and could come into force. And indeed, the daily application of European law in Germany will be dominated by the principle of the openness towards European law which was so much stressed by the FCC.

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115 D Thym, above n 2, 1809, rightly emphasises the 'subjective relativity inherent in the identity review', allowing 'for pragmatic and country-specific solutions'.

116 For the potentials of new European policies after Lisbon see: I Pernice and S Hindelang, 'Potenziale europäischer Politik nach Lissabon – Europapolitische Perspektiven für Deutschland, seine Institutionen, seine Wirtschaft und seine Bürger' (2010) 11 EuZW, 407.

117 FCC, above n 1, para 228: '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.' See also ibid, paras 263, 334.

118 FCC, above n 1, para 375: 'The Treaty of Lisbon may at any rate not force the Member States to waive their member status. This particularly 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 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 the freedom to act in not insignificant areas of international relations cannot occur.' For a critical analysis see Ch Herrmann, above n 44, 193, 198 et seq.

If the FCC continues to follow the path of peace which may be observed in its more recent decisions on data retention and Honeywell, not too many worries are necessary regarding an active role of Germany in promoting effective European policies where required.

The next test cases will be the German laws regarding the Greek rescue package and the European financial stabilization mechanism. Jean-Victor Louis has written an excellent analysis of these measures from a European law point of view in a recent guest editorial of the Common Market Law Review[119]. After reading this I surely believe that neither the *ultra vires* claim nor arguments of the applicants related to the violation of fundamental rights or the constitutional identity of Germany have any chance to succeed.

[119] J Louis, Guest Editorial: 'The no-bailout clause and rescue packages' (2010) 47 CMLRev 971 et seq. See also Ch Herrmann, 'Griechische Tragödie – der währungsverfassungsrechtliche Rahmen für die Rettung, den Austritt oder den Ausschluss von überschuldeten Staaten aus der Eurozone' (2010) 11 EuZW 413.

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Resumen: Este documento de trabajo, siguiendo la sentencia del Tribunal Constitucional Federal Alemán de 30 de junio de 2009 en *Karlsruhe*, tiene como propósito echar una mirada al futuro y determinar en qué medida Alemania puede continuar siendo uno de los motores de la integración europea. Se examina aquí si Gobierno y Parlamento alemanes están siendo impedidos de actuar de manera favorable a la integración, debido a las claras restricciones a las que son sometidos y que podemos encontrar en la sentencia antes mencionada. Si Alemania actuara como freno de las políticas y de la integración europea, esto no sería únicamente un problema alemán, sino que afectaría a toda la UE y a su dinámica de integración.

Palabras clave: Tratado de Lisboa, Tribunal Constitucional Federal Alemán, competencias de la UE, identidad nacional, constitución nacional, constitucionalismo multinivel, áreas tabú, freno de emergencia, parlamentos nacionales.

Abstract: Following the judgment of the German Federal Constitutional Court of June 30, 2009 in *Karlsruhe*, this paper is an attempt to look to the future in assessing to what degree Germany can continue to be one of the motors of European integration. This paper examines whether, and if so, to what extent German government and parliamentary bodies are prevented from continuing to play a positive role because of clear restrictions laid upon them by certain statements we can find in the above-mentioned judgment. If Germany becomes a brake on European policies and integration, this would not only be a German problem; it would be a concern for the EU as a whole, and would affect the dynamics of integration.

Keywords: Treaty of Lisbon, German Federal Constitutional Court, EU-competencies, national identity, national constitution, multilevel constitutionalism, taboo-areas, emergency brake, national parliaments.

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