Headnotes

to the judgment of the Second Senate of 30 June 2009

- 2 BvE 2/08 -

- 2 BvE 5/08 -

- 2 BvR 1010/08 -

- 2 BvR 1022/08 -

- 2 BvR 1259/08 -

- 2 BvR 182/09 -

1. **Article 23 of the Basic Law grants powers to take part in and develop a European Union designed as an association of sovereign states (*Staatenverbund*). The concept of *Verbund* covers a close long-term association of states which remain sovereign, a treaty-based association which exercises public authority, but whose fundamental order is subject to the decision-making power of the Member States and in which the peoples, i.e. the citizens, of the Member States remain the subjects of democratic legitimation.**

2. **a) In so far as the Member States elaborate treaty law in such a way as to allow treaty amendment without a ratification procedure, whilst preserving the application of the principle of conferral, a special responsibility is incumbent on the legislative bodies, in addition to the Federal Government, within the context of participation which in Germany has to comply internally with the requirements under Article 23.1 of the Basic Law (responsibility for integration) and which may be invoked in any proceedings before the Federal Constitutional Court.**

3. **b) A law within the meaning of Article 23.1 second sentence of the Basic Law is not required, in so far as special bridging clauses are limited to subject areas which are already sufficiently defined by the Treaty of Lisbon. However, in such cases it is incumbent on the *Bundestag* and, in so far as legislative competences of the *Länder* are affected, the *Bundesrat*, to assert its responsibility for integration in another appropriate manner.**

4. **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.**

5. **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 two 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 of the Treaty on European Union in the version of the Treaty of Lisbon < 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.**

FEDERAL CONSTITUTIONAL COURT

- 2 BVE 2/08 -
- 2 BVE 5/08 -
- 2 BVR 1010/08 -
- 2 BVR 1022/08 -
- 2 BVR 1259/08 -
- 2 BVR 182/09 -

Pronounced
30 June 2009
Herr
Registrar
of the Court Registry

IN THE NAME OF THE PEOPLE

In the proceedings

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

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

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

applicant: Dr. G...,

- agents: 1. Prof. Dr. Dietrich Murswiek,
2. Prof. Dr. Wolf-Rüdiger Bub,
Promenadeplatz 9, 80333 Munich -

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

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

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

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

and an application for an interlocutory injunction

and an application for any other remedy

- 2 BVE 2/08 -,

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

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

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

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

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

and an application for an interlocutory injunction

- 2 BVE 5/08 -,

III. on the constitutional complaint

brought by Dr. G...,

- agents: 1. Prof. Dr. Dietrich Murswiek,

2. Prof. Dr. Wolf-Rüdiger Bub,
Promenadeplatz 9, 80333 Munich -

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

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

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

and an application for an interlocutory injunction

and an application for any other remedy

- 2 BVR 1010/08 -,

IV. on the constitutional complaint

brought by Prof. Dr. Dr. B...,

- agents: Lawyers Tempel & Kollegen,
Sternstraße 21, 80538 Munich -

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

and an application for an interlocutory injunction

- 2 BVR 1022/08 -,

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

1. Mr. A...,
2. Dr. B...,
3. Ms B...,
4. Prof. Dr. B...,
5. Ms B...,
6. Ms B...,
7. Dr. B...,
8. Mr. C...,
9. Ms D...,

10. Dr. D…,
11. Mr. D...,
12. Dr. E...,
13. Mr. E...,
14. Mr. G...,
15. Ms G...,
16. Dr. G...,
17. Ms H...,
18. Mr. H...,
19. Mr. H...,
20. Ms H...,
21. Ms H...,
22. Dr. H...,
23. Ms J...,
24. Dr. J...,
25. Prof. Dr. K...,
26. Ms K...,
27. Ms K...,
28. Mr. K...,
29. Ms K...,
30. Mr. L...,
31. Mr. L...,
32. Ms L...,
33. Dr. >L...,
34. Mr. M...,
35. Ms M...,
36. Ms M...,
37. Ms N...,
38. Mr. N...,
39. Prof. Dr. P...,
40. Ms P...,
41. Mr. R...,
42. Ms R...,
43. Mr. S...,
44. Mr. S...,

45. Prof. Dr. S...,
46. Dr. S...,
47. Dr. S...,
48. Mr. S...,
49. Dr. T...,
50. Dr. T...,
51. Mr. U...,
52. Mr. W...,
53. Ms Z...,

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

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

and an application for an interlocutory injunction

- 2 BVR 1259/08 -,

VI. on the constitutional complaint brought by

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

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

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

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

- 2 BVR 182/09 -

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

Voßkuhle (Vice-President),
Broß,
Osterloh,

Di Fabio,
Mellinghoff,
Lübbe-Wolff,
Gerhardt, and
Landau

delivered the following

JUDGMENT

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

1. The proceedings are consolidated for joint adjudication.
2. The application made by the applicant re I. in the Organstreit proceedings is dismissed as inadmissible.
3. The application made by the applicant re II. in the Organstreit proceedings is rejected as unfounded.
4. a) The Act Extending and Strengthening the Rights of the Bundestag and the Bundesrat in European Union Matters (Bundestag printed paper 16/8489) infringes Article 38.1 in conjunction with Article 23.1 of the Basic Law in so far as rights of participation of the German Bundestag and the Bundesrat have not been elaborated to the extent required taking into account the provisos that are specified under C. II. 3.
   b) Before rights of participation set out in law as constitutionally required have entered into force, the Federal Republic of Germany's instrument of ratification of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 (Federal Law Gazette 2008 II page 1039) may not be deposited.
5. For the remainder, the constitutional complaints are rejected as unfounded.
6. The Federal Republic of Germany is ordered to reimburse the complainant re III. one half, the complainants re IV. and VI., respectively, one fourth, and the complainants re V. and the applicant re II., respectively, one third of their necessary expenses of these proceedings.

Gründe:

A.

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

tered into force, and the Act Extending and Strengthening the Rights of the Bundestag and the Bundesrat in European Union Matters, which has been adopted, but not yet signed and promulgated.

I.

1. Like the Single European Act and the Treaties of Maastricht, Amsterdam and Nice, the Treaty of Lisbon is an international amending treaty. Like the Treaties of Amsterdam and Nice, it is based on Article 48 of the Treaty on European Union (TEU) of 7 February 1992 (OJ no. C 191/1; see for the latest, consolidated version OJ 2002 no. C 325/5); this means that it has come into being according to the amendment procedure provided for since the entry into force of the Treaty of Maastricht. Unlike the Single European Act and the Treaties of Amsterdam and Nice, the Treaty of Lisbon provides for a fundamental change of the existing treaty system. It dissolves the pillar structure of the European Union and formally confers legal personality on the Union. It therefore resembles the Treaty of Maastricht in terms of its significance for the development of the European Union. 2

2. The Treaty of Lisbon replaces the Treaty establishing a Constitution for Europe (Constitutional Treaty) of 29 October 2004 (OJ no. C 310/1) which was not ratified by all Member States. While the Treaty of Lisbon adopts its contents for the most part, there are differences. 3

a) aa) The entry into force of the Treaty establishing the European Coal and Steel Community from the year 1951 (Federal Law Gazette 1952 II p. 445), which had been signed in Paris, initiated the process of European integration. 4

After 1945, the European idea of a political unification of Europe had grown considerably stronger (see Loth, *Der Weg nach Europa. Geschichte der europäischen Integration 1939-1957*, 1990; Niess, *Die europäische Idee - aus dem Geist des Widerstands, 2001; Wirsching, Europa als Wille und Vorstellung, Die Geschichte der europäischen Integration zwischen nationalem Interesse und großer Erzählung*, ZSE 2006, pp. 488 et seq.; Haltern, *Europarecht*, 2nd ed. 2007, paras 48 et seq.). Efforts were directed towards the foundation of United States of Europe and towards the creation of a European nation. A European federal state was to be established through a Constitution. This was made clear as early as 1948 by the Congress of Europe in The Hague which called for a federated Europe, the European Movement that sprang from it, and finally the “Action Committee for the United States of Europe”, founded by Jean Monnet and with influential politicians such as Fanfani, Mollet, Wehner, Kiesinger and later on Heath, Brandt, and Tindemans (see Oppermann, Europarecht, 3rd ed. 2005, § 1, para. 14). The Council of Europe, chaired by Count Coudenhove-Kalergi, the leader of the Pan-European Movement which had already been active in the 1920s, presented a “Draft for a European Federal Constitution” consisting of 18 articles, on 6 May 1951. This text was drawn up by 70 members of the Consultative Assembly of the Council of Europe as the basis for the “Constitutional Committee for the United States of Europe”. This Committee took its lead from the structure of the 5

Swiss constitutional bodies, with a bi-cameral Parliament and a governing federal council. The peoples of the Federation were intended to be represented in the Chamber of Deputies, in proportion to their numbers, with one deputy per million, or fraction of a million, of inhabitants (Article 9.3 of the Draft for a European Federal Constitution, reproduced in: Mayer-Tasch/Contiades, *Die Verfassungen Europas: mit einem Essay, verfassungsrechtlichen Abrissen und einem vergleichenden Sachregister*, 1966, pp. 631 et seq.).

bb) From the beginning, the idea of a Constitution for the United States of Europe was confronted by the strong views of national states, which were mainly focused on necessary reconstruction and thus inward-looking. Strong counter-forces consisted of the political constraints of a common foreign and defence policy faced with the threat in the Cold War. The United States of America in particular, as the protecting power of Western Europe, were pressing for a substantial European contribution to defence, which made it seem advisable to look also for ways of achieving an integrated and controlled German rearmament. First priorities were therefore the Europeanisation of the coal and steel industry, which was important for the economy and armament at that time, by means of the European Coal and Steel Community, and the foundation of a European Defence Community, i.e. the creation of European armed forces with major French and German participation. The Treaty establishing the European Defence Community, negotiated at the same time as the Treaty establishing the European Coal and Steel Community, which provided for an integration at security-policy level, failed, however, because of the rejection by the French National Assembly (see von Puttkamer, *Vorgeschichte und Zustandekommen der Pariser Verträge vom 23. Oktober 1954*, ZaöRV 1956/1957, pp. 448 et seq.). Political union, which originally had already been a subject of negotiation as well, had already failed during the negotiations and had been postponed indefinitely. The refusal of the European Defence Community and the failure of the European Political Community made it clear that a European federal state could not be achieved immediately. 6

cc) Therefore, economic integration by the European Coal and Steel Community which was nevertheless initiated, was the only concrete step taken for the time being to turn the European vision into practical reality. In subsequent decades, the detour towards political integration, necessary because of the forces of obstinacy of national states, and interlinking and communitarisation of economic elements, determined the character of European development. Economic intertwining, as far-reaching as possible, and a Common Market, were intended to result in the practical need for political communitarisation. Commercial and economic conditions were to be created which would lead towards political unity, including foreign and security policy, to be viewed as the only logical conclusion (see Stikker, The Functional Approach to European Integration, Foreign Affairs 1951, pp. 436 et seq.; Küsters, *Die Gründung der Europäischen Wirtschaftsgemeinschaft*, 1982, pp. 55 et seq. and 79 et seq.). This functional approach was the basis of the “Treaties of Rome”, which were signed in 1957 - the Treaty establishing the European Atomic Energy Community (Federal Law Gazette 7

1957 II p. 753) and the Treaty establishing the European Economic Community (EECT); (Federal Law Gazette 1957 II p. 766; see for the latest, consolidated version of the Treaty establishing the European Community <ECT> OJ 2002 no. C 325/1). In the following decades, these treaties were further developed step by step, and the institutional structure was partly adapted to structures existing in states. In 1979, the so-called “Direct Elections Act” enabled first direct elections of the European Parliament to take place (Act Concerning the Election of the Members of the European Parliament by Direct Universal Suffrage, Council Decision of 20 September 1976 <Federal Law Gazette 1977 II p. 733>; last amended by the Council Decision of 22 June 2002 and 23 September 2002 <Federal Law Gazette 2003 II p. 810>).

dd) After the Merger Treaty of 1965 (OJ 1967 no. L 152/1), which dealt with organisational and technical issues, and the amendment in the 1970s of the financial provisions contained in the Treaties (OJ 1971 no. L 2/1 and OJ 1977 no. L 359/1), the Single European Act of 28 February 1986 (OJ 1987 no. L 169/1) was the first major amendment of the Treaties. This treaty clearly showed the return to the original objective of a political union of Europe. It brought about an extension of qualified majority voting in the Council, an increase of the European Parliament’s competences by the introduction of the cooperation procedure, the introduction of European Political Cooperation, on an intergovernmental procedure, and the formal institutionalisation of the European Council as a guiding body for the broad outline of policy (“impetus” within the meaning of Article 4 TEU; see Bulmer/Wessels, The European Council: Decision-making in European Politics, 1987). 8

The Community treaties were further developed fundamentally by the Treaty on European Union (Treaty of Maastricht) of 7 February 1992 (OJ no. C 191/1). This intended to achieve a “new stage in the process of creating an ever closer union among the peoples of Europe” (Article 1.2 TEU; see also Decisions of the Federal Constitutional Court <*Entscheidungen des Bundesverfassungsgerichts* - BVerfGE> 89, 155 <158 et seq.>). The European Union (EU) was founded. Its basis was constituted by the Communities - formerly three, now two since the expiry of the Treaty establishing the European Coal and Steel Community. They are complemented by two forms of intergovernmental cooperation: the Common Foreign and Security Policy (CFSP) and cooperation in the fields of justice and home affairs (the so-called “three-pillar concept”). The European Economic Community was renamed European Community (EC). In addition, the Treaty of Maastricht introduced the principle of subsidiarity, citizenship of the Union and economic and monetary union; it created new competences for the European Community (education, culture, health, consumer protection, trans-European networks), and extended the European Parliament’s competences by introducing the codecision procedure for lawmaking in some areas. In this procedure, acts of secondary legislation can no longer be adopted without the consent of the European Parliament. The Treaty of Maastricht also provided for a revision of the Treaties in respect of the architecture of the European institutions (Article N.2 of the Treaty of Maastricht), which appeared to be of increasing urgency due to an enlargement of the 9

European Union that could be seen to emerge on the political level. The composition and functioning of the European institutions had hardly been changed since the 1950s although the number of Member States had increased from originally six to twelve at that time and the European Union performed considerably more duties than the European Communities at the beginning of European integration.

The Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts (Treaty of Amsterdam) of 2 October 1997 (OJ no. C 340/1) again extended the competences of the European Union and of the European Community, such as for example for Community employment policy. It incorporated areas which had until then been subjects of intergovernmental cooperation, such as asylum, immigration and visa issues, as well as judicial cooperation in civil matters, into the area of application of the supranational Treaty establishing the European Community and created the possibility of an increased cooperation between certain Member States. Apart from this, the Treaty of Amsterdam introduced a High Representative for the Common Foreign and Security Policy, streamlined the codecision procedure and strengthened the European Parliament's rights of supervision of the Commission. The treaty left open, however, the institutional issues connected with the enlargement of the European Union, in particular the size of the institutions, the allotment of seats and the extent of majority decision-making. 10

Once the Treaty of Amsterdam had been signed and had come into force, another amending treaty was therefore deemed necessary. It came into being as the Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts (Treaty of Nice) of 26 February 2001 (OJ no. C 80/1). It further extended the number of subject-areas which are subject to qualified majority voting in the Council and adapted the composition of the Commission, the number of Members of the European Parliament and the weighting of votes in the Council to the enlargement of the European Union by up to ten states from East and South East Europe, which had now been decided at political level. In addition, the government representatives agreed that the Member States which adopt a decision in the Council have to represent at least 62 per cent of the entire population of the European Union. Furthermore, the Nice Intergovernmental Conference solemnly proclaimed the Charter of Fundamental Rights of the European Union (EU Charter of Fundamental Rights - Charter, OJ 2000 no. C 364/1), which had been drafted by a Convention, as a political declaration by the European Parliament, the Council and the Commission, without incorporating it into the Treaty of Nice. 11

b) aa) When it emerged that the Treaty of Nice would only make such adaptations to the institutional structure of the European Union as had been deemed necessary, a linking up with the constitutional project which had failed in the 1950s came again to be considered. The German Foreign Minister Fischer, for example, proposed a European Constitution (see Fischer, *Vom Staatenverbund zur Föderation - Gedanken über die Finalität der europäischen Integration*, integration 2000, pp. 149 et seq.), 12

thus initiating a far-reaching constitutional debate (see on this Laffan, *Der schwierige Weg zur Europäischen Verfassung: Von der Humboldt-Rede Außenministers Fischer bis zum Abschluss der Regierungskonferenz*, in: Jopp/Matl, *Der Vertrag über eine Verfassung für Europa, Analysen zur Konstitutionalisierung der EU*, 2005, pp. 473 et seq.). Although the Nice Intergovernmental Conference included the project of a European Constitution in its Declaration no. 23 on the Future of the Union (OJ 2001 no. C 80/85) it expressly wanted to continue only the institutional reform of the Union. The Laeken Declaration on the Future of the European Union of 15 December 2001 (Bulletin EU 12-2001, I.27 <Annex I>) laid down four objectives of the reform:

- Firstly: “A better division and definition of competence in the European Union” - here the focus was intended to be above all on greater transparency in the delimitation of the division of competence between the Union and the Member States and on a possible enhancement of the principle of subsidiarity, and it was above all to examine on the one hand which competences were to be newly assigned to the Union but on the other hand also which powers that had been exercised by the Community until then could be restored to the Member States. 13

- Secondly: “Simplification of the Union’s instruments” - to achieve this, a distinction between legislative and executive measures and a reduction of the number of legislative instruments was intended to be considered. 14

- Thirdly: “More democracy, transparency and efficiency in the European Union” - with this objective, organisational and procedural questions of the structure of the Union’s institutions and the role of the national Parliaments were to be comprehensively considered. 15

- Fourthly: “Towards a Constitution for European citizens” - with this perspective, the Treaties were to be reorganised, the inclusion of the Charter of Fundamental Rights in the basic treaty and the adoption of a constitutional text in the Union were to be considered. 16

The third objective dealt above all with the question of how the democratic legitimacy and transparency of the existing institutions could be increased and how the President of the Commission should be appointed: by the European Council, by the European Parliament or - by means of direct elections - by the citizens. The Laeken Declaration asked whether and how the membership and functioning of the European Parliament as well as the activities of the Council should be reviewed. 17

bb) Following the Laeken Declaration, the European Council convened a Convention for drafting the text of a Constitution (on the Convention, see in general terms Wessels, *Der Konvent: Modelle für eine innovative Integrationsmethode*, integration 2002, pp. 83 et seq.). The Convention was to examine the four above-mentioned objectives of reform, with full involvement of the then accession candidate countries. The Constitutional Treaty, which was drafted by the Convention and revised by the Intergovernmental Conference, contained far-reaching amendments, but did not 18

amount to a complete revision of the Treaties. The Constitutional Treaty provided for the integration of the Treaty on European Union and the Treaty establishing the European Community into a single treaty, dissolving the pillar structure and vesting the European Union with its own legal personality. The primacy of Community law over national law, which so far had been based on the case law of the Court of Justice of the European Communities, was to be explicitly established in the Constitution, and the symbols of the European Union - flag, anthem, motto, currency and Europe day - were to be codified for the first time. The following other major amendments were provided for:

- the incorporation of the Charter of Fundamental Rights into the Constitutional Treaty, 19

- the categorisation and classification of the Union's competences, 20

- the further development of the institutions of the Union, in particular by creating the offices of a President of the Council and of a Union Minister for Foreign Affairs, 21

- the introduction of the double majority principle for Council voting, 22

- a new typology of the Union's legal instruments, with terms such as "law" and "framework law", 23

- the introduction of a European citizens' initiative, 24

- the establishment of a neighbourhood policy, 25

- the establishment of a right for the Member States to withdraw from the Union, 26

- different and less onerous amendment procedures for individual parts and aspects of the Constitutional Treaty as well as 27

- the involvement of the national Parliaments in the legislative process to monitor subsidiarity in the form of an early warning system and a subsidiarity action. 28

After the negative outcome of the referenda held in France and the Netherlands on the Constitutional Treaty on 29 May and on 1 June 2005, the European Council agreed to embark on a "period of reflection". The Member States that had not yet ratified the Constitutional Treaty were to be given the opportunity, after a comprehensive public discourse, to ratify the Constitutional Treaty without any time pressure or to postpone its ratification (Declaration by the Heads of State or Government of the Member States of the European Union on the Ratification of the Treaty establishing a Constitution for Europe <European Council, 16 and 17 June 2005>, Bulletin EU 6-2005, I.30). It turned out not to be possible, however, to re-start the ratification process. 29

c) In the Berlin Declaration of 25 March 2007 on the Occasion of the 50th Anniversary of the Signature of the Treaties of Rome (Bulletin EU 3-2007, II.1) the Member States agreed on making another attempt at a reform treaty (see Maurer, *Nach der Referendenzäsur: Deutsche Europapolitik in und nach der Denkpause über den Ver-* 30

fassungsvertrag, in: Müller-Graff, *Deutschlands Rolle in der Europäischen Union*, 2008, pp. 11 et seq.). On 22 June 2007, the Brussels European Council gave an Intergovernmental Conference the mandate to draw up a so-called Reform Treaty amending the existing Treaties (Presidency Conclusions of the Brussels European Council <21/22 June 2007>, Bulletin EU 6-2007, I.37 <Annex I>).

The mandate for the Intergovernmental Conference was different from earlier mandates in that the European Council laid down the form and the content of the text of the new treaty almost completely and in some parts even its actual text (see the linguistically revised version of the mandate in Council Document 11218/07, Annex). In doing so, it based its proposal on the Constitutional Treaty, of which the actual content was to be included as much as possible in the new Reform Treaty. On 13 December 2007, the Reform Treaty was signed as the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (Treaty of Lisbon). 31

3. a) The Preamble of the Treaty of Lisbon does not make reference to the failed Constitutional Treaty but establishes a direct line between the Treaty of Lisbon and the Treaties of Amsterdam and Nice. It repeats the objective of the Intergovernmental Conference's mandate - enhancing the efficiency and democratic legitimacy of the Union, as well as the improvement of the coherence of its action - but it not longer specifically emphasises coherence of the Union's external action. While all former amending treaties served to enhance the efficiency and the coherence of the European Communities or of the European Union, the Treaty of Lisbon for the first time explicitly pursues the objective of enhancing the Union's democratic legitimacy (see also Fischer, *Der Vertrag von Lissabon*, 2008, pp. 91-92). 32

Unlike the Constitutional Treaty, according to the mandate for the Intergovernmental Conference, the Treaty of Lisbon expressly renounces the constitutional concept "which consisted in repealing all existing treaties and replacing them by a single text called 'Constitution'" (Council Document 11218/07, Annex, para. 1). The Treaties are merely amended, and the concepts on which the amended Treaties are based reflect the renouncing of the constitutional concept. Terminology commonly used in respect of states is abandoned. The term "Constitution" is not used (a different opinion is advanced, however, by Pernice, *Der Vertrag von Lissabon - Das Ende des Verfassungsprozesses der EU?*, EuZW 2008, p. 65; Schiffauer, *Zum Verfassungszustand der Europäischen Union nach Unterzeichnung des Vertrags von Lissabon*, EuGRZ 2008, pp. 1 et seq.), the "Union Minister for Foreign Affairs" is called "High Representative of the Union for Foreign Affairs and Security Policy", and the terms "law" and "framework law" are not maintained, unlike the less symbolically charged term "decision". The codecision procedure, however, is renamed "ordinary legislative procedure" and is distinguished from a "special legislative procedure". The acts adopted in a legislative procedure are referred to as "legislative acts". The symbols of the European Union - flag, anthem, motto, currency and Europe day - are not mentioned. However, 16 of the 27 Member States, among them the Federal Republic of Germany, empha- 33

sise in Declaration no. 52 on the symbols of the European Union, annexed to the Final Act of the Treaty of Lisbon, that these symbols “will for them continue as symbols to express the sense of community of the people in the European Union and their allegiance to it”. The primacy of Union and Community law over national law is still not explicitly regulated (as regards the Declaration on the matter, see A. I. 3. i below). Apart from this, however, the Treaty of Lisbon incorporates essential elements of the content of the Constitutional Treaty into the existing treaty system and contains additional provisions that are specifically tailored to individual Member States (see Mayer, *Die Rückkehr der Europäischen Verfassung? Ein Leitfaden zum Vertrag von Lissabon*, ZaöRV 2007, pp. 1141 et seq.; as regards the provisions concerning the national Parliaments, see specifically Barrett, “The king is dead, long live the king”. The Recasting by the Treaty of Lisbon of the Provisions of the Constitutional Treaty Concerning National Parliaments, E.L.Rev. 2008, pp. 66 et seq.).

b) The Treaty of Lisbon dissolves the European Union’s “three-pillar concept” (Article 1.3 first sentence TEU). The Treaty on European Union retains its name (see for a consolidated version <Lisbon TEU > OJ 2008 no. C 115/13); the Treaty establishing the European Community is renamed Treaty on the Functioning of the European Union (TFEU) (see for a consolidated version OJ 2008 no. C 115/47). The European Union replaces and succeeds the European Community (Article 1.3 third sentence Lisbon TEU), and it attains legal personality (Article 47 Lisbon TEU). The European Atomic Energy Community is removed from the former umbrella organisation of the European Union, and it continues to exist - apart from an institutional linkage to the European Union - as an independent international organisation. 34

c) According to the Treaty of Lisbon, the fundamental rights’ protection in the European Union is based on two foundations: the Charter of Fundamental Rights of the European Union in its revised version of 12 December 2007 (OJ no. C 303/1; Federal Law Gazette 2008 II pp. 1165 et seq.), which is given the same legal value as the treaties (Article 6.1 first sentence Lisbon TEU) and thus becomes legally binding, and the Union’s unwritten fundamental rights, which continue to apply as general principles of Union law (Article 6.3 Lisbon TEU). These two foundations of European fundamental rights protection are complemented by Article 6.2 Lisbon TEU, which authorises and commits the European Union to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (Federal Law Gazette 2002 II p. 1054). 35

d) Title II of the new version of the Treaty on European Union contains “provisions on democratic principles”. Accordingly, the functioning of the European Union shall be founded on representative democracy (Article 10.1 Lisbon TEU), complemented by elements of participative, associative and direct democracy, in particular by a citizens’ initiative (Article 11 Lisbon TEU). The principle of representative democracy makes reference to two tracks of legitimation: the European Parliament, which “directly” represents the citizens of the Union, and the Heads of State or Government, represented in the European Council, and the Member States’ members of govern- 36

ment represented in the Council, “themselves democratically accountable either to their national Parliaments, or to their citizens” (Article 10.2 Lisbon TEU).

The national Parliaments “contribute actively to the good functioning of the Union” (Article 12 Lisbon TEU). Draft legislative acts of the European Union must be made available to the national Parliaments eight weeks before they are placed on the Council’s agenda (Article 4 of Protocol no. 1 on the Role of National Parliaments in the European Union). In the context of the so-called early warning system provided for by Protocol no. 2 on the Application of the Principles of Subsidiarity and Proportionality (Subsidiarity Protocol), any national Parliament or any chamber of a national Parliament may, within this eight-week period, state in a reasoned opinion why it considers that the drafts in question do not comply with the principle of subsidiarity (Article 6 of the Subsidiarity Protocol). Reasoned opinions, however, only establish an obligation to review the drafts where they represent a certain proportion of all the votes allocated to the national Parliaments (Article 7.2 and 7.3 of the Subsidiarity Protocol). Furthermore, any national Parliament or a chamber thereof may bring an action to have declared an act void according to Article 263 TFEU via their Member States if they deem a legislative act incompatible with the principle of subsidiarity (Article 8 of the Subsidiarity Protocol). 37

Moreover, the national Parliaments are involved in the political monitoring of Europol and Eurojust (Article 12 lit c Lisbon TEU; Article 88.2(2), Article 85.1(3) TFEU), and in the so-called bridging procedure, a treaty amendment procedure generally introduced by the Treaty of Lisbon, they are entitled to make known their opposition to the treaty amendment proposed by the Commission within six months after their being notified (Article 48.7(3) Lisbon TEU; Article 81.3(3) TFEU). Opposition by a single national Parliament is sufficient for making the proposed treaty amendment fail. 38

e) The Treaty of Lisbon also reforms the institutions and proceedings. 39

aa) The European Parliament’s competences in the area of lawmaking are further developed. The codecision procedure, in which the European Parliament acts in tandem with the Council, is streamlined, renamed “ordinary legislative procedure” and declared the norm (Article 14.1 first sentence Lisbon TEU; Article 289.1 TFEU). The cooperation procedure is abolished. The consultation procedure and the assent procedure are united under the term “special legislative procedure” and are henceforth only applied in specific cases provided for by the treaties (Article 289.2 TFEU). The stronger role of the European Parliament in lawmaking also affects the conclusion of agreements under international law by the European Union. In areas governed by the ordinary legislation procedure, or, if the approval of the European Parliament is required by the special legislation procedure, the Council may only adopt a decision to conclude an international treaty after the European Parliament’s consent has been obtained (Article 218.6(2) lit a no. v TFEU). 40

In addition, the European Parliament decides on the draft budget in tandem with the Council (Article 14.1 first sentence Lisbon TEU; Article 314 TFEU) and exercises 41

functions of political control. It elects the President of the Commission upon a proposal by the European Council by a majority of its component members (Article 14.1 third sentence, Article 17.7 Lisbon TEU). The proposal must take into account the result of the elections to the European Parliament (Article 17.7(1) first sentence Lisbon TEU). If the proposed candidate does not obtain the required majority, the European Council must within one month propose a new candidate to the European Parliament (Article 17.7(1) third sentence Lisbon TEU). Furthermore, the European Parliament, just like the national Parliaments, scrutinises Europol's activities and takes part in the evaluation of Eurojust's activities (Article 88.2(2), Article 85.1(2) TFEU).

The Treaty of Lisbon changes the composition of the European Parliament, which shall be elected "by direct universal suffrage in a free and secret ballot" (Article 14.3 Lisbon TEU). It shall no longer be composed of representatives "of the peoples of the States brought together in the Community" (Article 189.1 ECT), but of representatives of "the Union's citizens" (Article 14.2(1) first sentence Lisbon TEU). The allocation of seats in the European Parliament is to be determined by secondary law for the first time (Article 14.2(2) Lisbon TEU). According to the procedure provided for, the European Council shall adopt by unanimity, on the initiative of the European Parliament and with its consent, a decision establishing the composition of the European Parliament. The decision must respect the content-related principles laid down in Article 14.2(1) second to fourth sentence Lisbon TEU, i.e. a total number of members that shall not exceed 750, "plus the President", with representation of the citizens of the Union being degressively proportional, with a minimum threshold of six members per Member State, and no Member State being allocated more than 96 seats. 42

bb) The Treaty of Lisbon upgrades the European Council to an institution of the European Union (Article 13.1(2) Lisbon TEU), as a single entity vested with legal personality. Accordingly, the European Council's acts are placed under the jurisdiction of the Court of Justice of the European Union, but only to the extent that they are intended to produce legal effects *vis-à-vis* third parties (Article 263.1, Article 265.1 TFEU), and with regard to the Common Foreign and Security Policy, in so far as the Court of Justice is exceptionally competent (Article 275.2 TFEU). 43

Furthermore, the Treaty of Lisbon introduces the office of the (permanent) President of the European Council. The President of the European Council shall be elected by the European Council, by a qualified majority, for a term of two and a half years (Article 15.5 Lisbon TEU). The President of the European Council shall perform the tasks connected with the preparation and the chairing of the European Council, which include driving forward its work, and the external representation of the Union on issues concerning its Common Foreign and Security Policy "at his level" and "without prejudice to" the powers of the High Representative of the Union for Foreign Affairs and Security Policy (Article 15.6(1)(2) Lisbon TEU). The office of the President of the European Council is compatible with other European offices, but not with national offices (Article 15.6(3) Lisbon TEU). 44

cc) The Treaty of Lisbon declares qualified majority voting in the Council the norm (Article 16.3 Lisbon TEU), like the ordinary legislative procedure (Article 16.1 Lisbon TEU; Article 289.1 TFEU), in which the Council in principle also decides by a qualified majority (Article 294.8 and 294.13 TFEU). The current system of weighted votes is to be replaced in the long run by the "double majority" system, according to which a qualified majority requires in principle a "double majority" of 55 per cent of the Member States and 65 per cent of the population of the Union (Article 16.4 Lisbon TEU; Article 3 of Protocol no. 36 on Transitional Provisions). Where the Council does not act on a proposal from the Commission or from the High Representative of the Union for Foreign Affairs and Security Policy, the qualified majority shall require in the long run a "double majority" of 72 per cent of the Member States and 65 per cent of the population of the European Union (Article 238.2 TFEU; Article 3 of Protocol no. 36 on Transitional Provisions). Restrictions are imposed as a result of what is known as the "Ioannina compromise" (Declaration on Article 16(4) of the Treaty on European Union and Article 238(2) of the Treaty on the Functioning of the European Union). For the first time, deliberations and voting on draft legislative acts in the Council take place in public (Article 16.8 Lisbon TEU). 45

dd) As from 1 November 2014, the Commission shall consist of a number of members corresponding to two thirds of the number of Member States, unless the European Council, acting unanimously, decides to alter this number (Article 17.5 Lisbon TEU; see also Article 244 TFEU). After the entry into force of the Treaty of Lisbon, however, a decision could be taken, "in accordance with the necessary legal procedures", to the effect that the Commission shall continue to include one national of each Member State (see Presidency Conclusions of the Brussels European Council of 11 and 12 December 2008 in Brussels, Bulletin EU 12-2008, I.4, para. 2). 46

Moreover, the Treaty of Lisbon reorganises the Commission's autonomous, executive lawmaking and identifies it by giving it its own legal form, that of "non-legislative acts" (see currently Article 202 third indent first sentence, Article 211 fourth indent ECT). A legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act (Article 290.1(1) TFEU). Legislative acts shall explicitly lay down the objectives, content, scope and duration of the delegation of power (Article 290.1(2) TFEU) and the conditions to which the delegation is subject (Article 290.2(1) TFEU). These so-called delegated acts (Article 290.3 TFEU) must be distinguished from implementing acts. Where uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission or, exceptionally, on the Council (Article 291.2 TFEU). The measures enacted on the basis of the implementing powers conferred are called implementing acts (Article 291.4 TFEU). 47

ee) The position of the "High Representative of the Union for Foreign Affairs and Security Policy", newly introduced by the Treaty of Lisbon, unites various functions that are at present exercised in respect of the external relations of the European Union 48

and the European Community (Article 18.2 to 18.4 Lisbon TEU). The High Representative "shall conduct" the Union's Common Foreign and Security Policy, including the common security and defence policy (Article 18.2 first and third sentence Lisbon TEU). This means that he has the right to make proposals to the Council and that he carries out the Union's Common Foreign and Security Policy "as mandated by the Council" (Article 18.2 second sentence, Article 27.1 Lisbon TEU). The High Representative of the Union for Foreign Affairs and Security is "appoint[ed]" by the European Council, acting by a qualified majority, with the agreement of the President of the Commission (Article 18.1 first sentence Lisbon TEU). In addition, he is subject to a vote of consent by the European Parliament as one of the Commission's Vice-Presidents (Article 17.4 first sentence 1 and 17.7(3) Lisbon TEU). The duration of his term of office is not regulated (see, however, Article 18.1 second sentence, Article 17.8 third sentence Lisbon TEU).

"In fulfilling his mandate", the High Representative shall be assisted by a European External Action Service, working in cooperation with the diplomatic services of the Member States and comprising officials from relevant departments of the General Secretariat of the Council and of the Commission as well as staff seconded from national diplomatic services of the Member States (Article 27.3 first and second sentences Lisbon TEU). Further details, in particular the organisation and functioning of the European External Action Service, are to be established by decision of the Council (Article 27.3 third sentence Lisbon TEU; see also *Bundestag* printed paper 16/9316). 49

ff) The provisions concerning the Court of Justice of the European Communities, which is renamed Court of Justice of the European Union, are also further developed by the Treaty of Lisbon. In principle, the Court of Justice does not have jurisdiction in the area of the Common Foreign and Security Policy. Exceptions apply to the monitoring of compliance with Article 40 Lisbon TEU and to actions to have declared an act void brought in connection with the review of the legality of decisions providing for restrictive measures against natural or legal persons (Article 24.1(2) fifth sentence Lisbon TEU; Article 275 TFEU). In respect of the area of freedom, security and justice, however, the Court of Justice of the European Union does have, in principle, jurisdiction. Exceptions apply to the review of the validity or proportionality of operations carried out by the police or other law enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security (Article 276 TFEU). Furthermore, the Treaty of Lisbon modifies the types of action that may be brought, in particular the action for annulment. 50

f) In principle, the Treaty of Lisbon provides for three types of procedure according to which the treaties may be amended: the ordinary revision procedure (Article 48.2 to 48.5 Lisbon TEU), the simplified revision procedure (Article 48.6 Lisbon TEU) and the so-called bridging procedure (Article 48.7 Lisbon TEU). Amendments in the ordinary revision procedure, which may aim either to increase or to reduce the European 51

Union's competences (Article 48.2 second sentence Lisbon TEU), shall as before be agreed by a conference of representatives of the governments of the Member States, possibly after having called a Convention composed of representatives of the national Parliaments, of the Heads of State or Government of the Member States, of the European Parliament and of the Commission (Article 48.3 Lisbon TEU). The amendments shall enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements (Article 48.4(2) Lisbon TEU).

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

53 Amendments in the general bridging procedure are also based on a unanimous decision of the European Council, which, however, may only be adopted after obtaining the consent of the European Parliament (Article 48.7(4) Lisbon TEU). Such adoption requires that no national Parliament makes known its opposition to the proposal within six months (Article 48.7(3) Lisbon TEU). Unlike the ordinary and the simplified revision procedures, the general bridging procedure concerns selective amendments which refer to voting in the Council or to the legislative procedure. Where the Treaty on the Functioning of the European Union or Title V of the Treaty on European Union provides for the Council to act by unanimity in a given area or case, the European Council may adopt a decision authorising the Council to act by a qualified majority in that area or in that case (Article 48.7(1) first sentence Lisbon TEU). Decisions with military implications or those in the area of defence are excluded (Article 48.7(1) second sentence Lisbon TEU). Furthermore, the European Council may adopt a decision allowing for the adoption of legislative acts within the scope of application of the Treaty on the Functioning of the European Union in accordance with the ordinary leg-

islative procedure instead of the special legislative procedure (Article 48.7(2) Lisbon TEU; see already Article 67.2, Article 137.2(2) second sentence, Article 175.2(1) ECT). Both alternatives to the general bridging procedure do not apply to Article 311.3 and 311.4, Article 312.2(1), Article 352 and Article 354 TFEU (see Article 353 TFEU). The general bridging procedure is complemented by special bridging clauses (see Article 31.3 Lisbon TEU - decisions on the Common Foreign and Security Policy in cases other than those mentioned in Article 31.2 Lisbon TEU; Article 81.3(2)(3) TFEU - measures concerning family law with cross-border implications; Article 153.2(4) TFEU - measures in certain areas of labour law; Article 192.2(2) TFEU - measures in the area of environmental policy; Article 312.2(2) TFEU - determination of the multiannual financial framework; Article 333.1 and 333.2 TFEU - voting procedures in the context of enhanced cooperation in accordance with Articles 326 et seq. TFEU). A right for national Parliaments to make known their opposition that corresponds to Article 48.7(3) Lisbon TEU is provided only for measures concerning family law with cross-border implications (Article 81.3(3) TFEU).

g) Article 50 Lisbon TEU introduces the right for each Member State to withdraw from the European Union. 54

h) The Treaty of Lisbon pursues the objective of achieving more transparency concerning the division of competence between the Union and the Member States (see Laeken Declaration on the Future of the European Union of 15 December 2001, Bulletin EU 12-2001, I.27 <Annex I>), and it extends the European Union's competences. 55

aa) It confirms the principles of the distribution and exercise of the European Union's competences, in particular the principle of conferral (Article 5.1 first sentence and 5.2 first sentence Lisbon TEU; see also Article 1.1, Article 3.6, Article 4.1, Article 48.6(3) Lisbon TEU; Article 2.1 and 2.2, Article 4.1, Article 7, Article 19, Article 32, Article 130, Article 132.1, Article 207.6, Article 337 TFEU; Declaration no. 18 in Relation to the Delimitation of Competences; Declaration no. 24 Concerning the Legal Personality of the European Union) and the principles of subsidiarity (Article 5.1 second sentence and 5.3 Lisbon TEU) and of proportionality (Article 5.1 second sentence and 5.4 Lisbon TEU). The latter are complemented on the procedural level by the Subsidiarity Protocol. 56

Furthermore the European Union is bound to respect, in addition to the Member States' national identities, "inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government", the "equality of Member States before the Treaties" and their "essential State functions" (Article 4.2 first and second sentences Lisbon TEU). By way of example, "ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security" are mentioned. 57

bb) The Treaty of Lisbon categorises and classifies the European Union's competences for the first time. Article 2 TFEU starts by specifying different categories of 58

competence. Depending on the intensity of European action, and its effects at Member State level, a fundamental distinction is made between exclusive competence (first paragraph), competence shared with the Member States, which corresponds with the present category of concurrent competence (second paragraph), and competence to carry out actions to support, coordinate or supplement [the actions of the Member States] (fifth paragraph). Beyond this competence triad, Article 2 TFEU indicates two areas which are not categories of competence. The coordination of economic and employment policies (third paragraph) and the Common Foreign and Security Policy (fourth paragraph) are regulated independently. Articles 3 et seq. TFEU then assign individual areas to the categories of competence, although this does not amount to a complete catalogue of competences.

cc) The Treaty of Lisbon establishes additional competences of the European Union, extends the content of existing competences and supranationalises areas which so far have been subject to intergovernmental cooperation. 59

(1) In the former “First Pillar”, the Treaty of Lisbon establishes new competences of the European Union for neighbourhood policy (Article 8 Lisbon TEU), services of general economic interest (Article 14 TFEU), energy (Article 194 TFEU), tourism (Article 195 TFEU), civil protection (Article 196 TFEU) and administrative cooperation (Article 197 TFEU). Furthermore, it extends the content of existing competences of the European Union, which are incorporated from the Treaty establishing the European Community into the Treaty on the Functioning of the European Union. This particularly concerns the provisions of the common commercial policy that extend the content of competence to foreign direct investment and the nature of competence to trade in services and the commercial aspects of intellectual property (Article 207.1 first sentence in conjunction with Article 3.1 lit e TFEU). The flexibility clause (Article 352 TFEU) loses its restriction to the Common Market (see however Article 352.3 and 352.4 TFEU); its exercise is subject for the first time to the consent of the European Parliament (Article 352.1 TFEU). 60

(2) The Common Foreign and Security Policy of the former “Second Pillar” is regulated in Title V of the Treaty on European Union (see also Article 40 Lisbon TEU; Article 2.4 TFEU). Accordingly, specific rules and procedures (Article 24.1(2) Lisbon TEU) apply that “will not affect the existing legal basis, responsibilities, and powers of each Member State in relation to the formulation and conduct of its foreign policy” (Declaration no. 14 Concerning the Common Foreign and Security Policy). Decisions shall be taken in principle by the European Council and the Council acting unanimously (Article 31.1 Lisbon TEU). Via the special bridging clause in Article 31.3 Lisbon TEU, however, the European Council may unanimously adopt a decision stipulating that the Council may act by a qualified majority in cases other than those referred to in Article 31.2 Lisbon TEU. Decisions having military or defence implications are excluded (Article 31.4 Lisbon TEU). The adoption of legislative acts shall be excluded (Article 24.1(2) second sentence, Article 31.1(1) second sentence Lisbon TEU). The European Parliament is consulted and informed concerning essential is- 61

sues and developments; it is to be ensured that its views are duly taken into consideration (Article 36 Lisbon TEU).

The common security and defence policy, which is mentioned in Article 17 TEU, is further elaborated by the Treaty of Lisbon as an integral part of the Common Foreign and Security Policy (Articles 42 to 46 Lisbon TEU). The Council is granted powers to adopt decisions relating to missions “in the course of which the Union may use civilian and military means” (Article 43.1 and 43.2 Lisbon TEU). Moreover, an obligation of mutual assistance is introduced for the Member States. In the case of armed aggression on the territory of a Member State, “the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter” (Article 42.7(1) first sentence Lisbon TEU). This shall not prejudice the specific character of the security and defence policy of certain Member States (Article 42.7(1) second sentence Lisbon TEU). The permanent structured cooperation of Member States, codified for the first time by the Treaty of Lisbon, aims to contribute to making the common security and defence policy more flexible (Article 42.6, Article 46 Lisbon TEU; Protocol no. 10 on Permanent Structured Cooperation). 62

(3) The field of police and judicial cooperation in criminal matters, which was the only one remaining in the former “Third Pillar” after the Treaties of Amsterdam and Nice, is incorporated into the area of application of the Treaty on the Functioning of the European Union by the Treaty of Lisbon. Under the heading “Area of Freedom, Security and Justice”, Title V of the Treaty on the Functioning of the European Union now comprises the entire field of justice and home affairs, which in the Treaty of Maastricht was still entirely subject to intergovernmental cooperation. 63

(a) The Treaty of Lisbon extends the competences in individual fields of policy specified in Title V of the Treaty on the Functioning of the European Union. 64

(aa) In the context of judicial cooperation in criminal matters, the Treaty of Lisbon grants powers to the European Union to adopt “minimum rules” in the area of the law of criminal procedure “to the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension” (Article 82.2(1) TFEU). These rules shall concern “mutual” admissibility of evidence between Member States, the rights “of individuals” in criminal procedure, the rights of victims of crime and any other specific aspects of criminal procedure which the Council has identified in advance by a unanimous decision after obtaining the consent of the European Parliament (Article 82.2(2) TFEU). 65

Moreover, the Treaty of Lisbon extends the content of the European Union’s competence for the approximation of laws in the field of criminal law (see Article 31.1 lit e TEU). The European Union is granted powers to establish by means of directives “minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common 66

basis" (Article 83.1(1) TFEU). The enumeration of these areas of crime, which ranges from terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment and computer crime to organised crime is not exhaustive. "On the basis of developments in crime", it may be extended by a decision of the Council acting unanimously after obtaining the consent of the European Parliament (Article 83.1(3) TFEU). In addition to this competence for the approximation of laws in the field of criminal law, the Treaty of Lisbon introduces a related competence of the European Union in criminal law for all areas which have "been subject to harmonisation measures" to the extent that "the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy" in these areas (Article 83.2 first sentence TFEU).

Finally, the Treaty of Lisbon makes it possible to extend the competences of Eurojust, an agency of the European Union with legal personality, with a view to coordinating national investigating and prosecuting authorities in cases of serious cross-border crime (see Council Decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime, OJ no. L 63/1). In accordance with the ordinary legislative procedure, Eurojust may be entrusted in particular with the task of initiating and coordinating criminal investigations (Article 85.1(2) lit a TFEU), while formal procedural action remains reserved to the national prosecuting authorities (Article 85.2 TFEU). Moreover, the Council may, acting unanimously after obtaining the consent of the European Parliament, establish a European Public Prosecutor's Office emanating from Eurojust in order to combat crimes affecting the financial interests of the Union (Article 86.1(1) TFEU). This office would be responsible for investigating and prosecuting such crimes and bringing them to judgment before the national courts (Article 86.2 TFEU). 67

(bb) In the context of police cooperation, the European police office Europol, with its cross-border activity, can be entrusted, in an ordinary legislative procedure, with not only the collection, storage, processing, analysis and exchange of information (see already Article 3.1 of the Convention of 26 July 1995 on the establishment of a European Police Office, OJ no. C 316/2), but also the powers to coordinate, organise and implement investigative and operational action jointly with the Member States' competent authorities or in the context of joint investigative teams (Article 88.2 TFEU). Any such operational action by Europol must, however, be carried out in liaison and in agreement with the authorities of the Member States whose territory is concerned (Article 88.3 first sentence TFEU). The application of coercive measures shall remain the exclusive responsibility of the competent national authorities (Article 88.3 second sentence TFEU). 68

(b) Special procedural provisions apply to the exercise of the competences. In different fields of policy, decisions in the Council must be adopted unanimously (see Article 77.3, Article 81.3(1), Article 86.1(1), Article 87.3(1), Article 89 TFEU). 69

(aa) In the field of judicial cooperation in civil matters, the Council, on a proposal from the Commission and after consulting the European Parliament, may adopt a decision determining those aspects of family law with cross-border implications which may be the subject of acts adopted by the ordinary legislative procedure (Article 81.3(2) TFEU). The proposal shall be notified to the national Parliaments, which can make known their opposition to the proposal within six months (Article 81.3(3) TFEU). 70

(bb) In the fields of judicial cooperation in criminal matters and police cooperation, apart from the Commission, a quarter of the Member States is entitled to initiate the adoption of an act (Article 76 lit b TFEU). Moreover, the exercise of specific competences of the European Union is linked with a so-called emergency brake mechanism (Article 82.3, Article 83.3, Article 86.1(2)(3), Article 87.3(2)(3) TFEU; see already Article 23.2(2) TEU). This provides that a member of the Council that considers that a draft directive to approximate laws in the areas of criminal law or law of criminal procedure affects “fundamental aspects of its criminal justice system” may request that the draft directive be referred to the European Council (Article 82.3(1), Article 83.3(1) TFEU). In case of a consensus within this institution, the European Council shall, within four months of the suspension of the legislative procedure, refer the draft back to the Council. In case of disagreement, less stringent conditions concerning enhanced cooperation apply. If at least nine Member States wish to establish enhanced cooperation on the basis of the draft, authorisation for this is deemed to have been granted (Article 82.3(2), Article 83.3(2) TFEU), after notification of the European Parliament, the Council and the Commission (Article 20.2 Lisbon TEU; Article 329 TFEU) . A slightly modified emergency brake mechanism applies to the establishment of the European Public Prosecutor’s Office and the adoption of measures that concern police cooperation involving national police, customs and other specialised law enforcement services. This provides that a group of at least nine Member States may request that the draft of the legislative act be referred to the European Council in case of absence of unanimity in the Council (Article 86.1(2) second sentence, Article 87.3(2) first sentence TFEU). 71

i) Declaration no. 17 on Primacy annexed to the Final Act of the Treaty of Lisbon reads as follows: 72

The Conference recalls that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law. 73

The Conference has also decided to attach as an Annex to this Final Act the Opinion of the Council Legal Service on the primacy of EC law as set out in 11197/07 (JUR 260): 74

“Opinion of the Council Legal Service of 22 June 2007 75

It results from the case-law of the Court of Justice that primacy of EC law is a cor- 76

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

([1]) It follows (…) that the law stemming from the treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question." 77

4. On 24 April 2008, the German *Bundestag* adopted the Act Approving the Treaty of Lisbon by 515 of 574 votes cast (Minutes of *Bundestag* plenary proceedings - BT-Plenarprot 16/157, p. 16483 A). On 23 May 2008, the *Bundesrat* approved the Act Approving the Treaty of Lisbon by a two-thirds majority (Minutes of *Bundesrat* plenary proceedings - BRPlenarprot 844, p. 136 B). On 8 October 2008, the Federal President signed the Act Approving the Treaty of Lisbon. It was promulgated in the Federal Law Gazette Part II of 14 October 2008 (pp. 1038 et seq.) and entered into force on the following day (Article 2.1 of the Act Approving the Treaty of Lisbon). 78

5. Furthermore, the German *Bundestag*, on 24 April 2008, adopted the accompanying laws, the Act Amending the Basic Law (Articles 23, 45 and 93) (Amending Act - Minutes of *Bundestag* plenary proceedings 16/157, p. 16477 A) and the Act Extending and Strengthening the Rights of the Bundestag and the Bundesrat in European Union Matters (Extending Act - Minutes of *Bundestag* plenary proceedings 16/157, p. 16482 D). On 23 May 2008, the *Bundesrat* adopted both Acts (BRPlenarprot 844, p. 136 D). 79

a) The Act Amending the Basic Law (Articles 23, 45 and 93) of 8 October 2008 was promulgated in the Federal Law Gazette I of 16 October 2008 (p. 1926) and will enter into force on the day on which the Treaty of Lisbon will enter into force for the Federal Republic of Germany pursuant to its Article 6.2 (Article 2 of the Amending Act). 80

Pursuant to Article 1 no. 1 of the Amending Act, Article 23.1a of the Basic Law, new version, has the following wording: 81

The *Bundestag* and the *Bundesrat* shall have the right to bring action before the Court of Justice of the European Union on account of a legislative act of the European Union infringing the principle of subsidiarity. The *Bundestag* shall be obliged to do so on the application of one fourth of its Members. An Act requiring the approval of the *Bundesrat* may admit of exceptions to Article 42.2 first sentence and Article 52.3 first sentence for the exercise of the rights granted to the *Bundestag* and the *Bundesrat* in the Treaties constituting the basis of the European Union. 82

Article 45 of the Basic Law is complemented by the following sentence (Article 1 no. 2 of the Amending Act): 83

It may also empower it to exercise the rights granted to the *Bundestag* in the Treaties constituting the basis of the European Union. 84

In Article 93.1 no. 2 of the Basic Law the words “one third” are replaced by the words „one fourth” (Article 1 no. 3 of the Amending Act). 85

b) The Act Extending and Strengthening the Rights of the Bundestag and the Bundesrat in European Union Matters (*Bundestag* printed paper 16/8489) has not yet been signed and promulgated because its content requires the amendment of Article 23 and Article 45 of the Basic Law and the entry into force of the constitution-amending Act must be waited for (see BVerfGE 34, 9 <22 et seq.>; 42, 263 <283 et seq.>). It will enter into force on the day following promulgation, at the earliest, however, on the day following the day on which the Amending Act will have entered into force (Article 3 of the Extending Act). 86

Article 1 of the Extending Act contains the Act on the Exercise of the Rights of the Bundestag and the Bundesrat under the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 (*Gesetz über die Ausübung der Rechte des Bundestages und des Bundesrates aus dem Vertrag von Lissabon vom 13. Dezember 2007 zur Änderung des Vertrags über die Europäische Union und des Vertrags zur Gründung der Europäischen Gemeinschaft*). The Act is intended to create the national preconditions for the exercise of the rights of participation that are granted by the Treaty of Lisbon to the *Bundestag* and to the *Bundesrat*, which is to be deemed a chamber of a national parliament in this context (*Bundestag* printed paper 16/8489, p. 7). These are the right to give a reasoned opinion (“subsidiarity objection”) pursuant to Article 6.1 of the Subsidiarity Protocol (Article 1 § 2 of the Extending Act), the right to bring an action pursuant to Article 8 of the Subsidiarity Protocol (“subsidiarity action”), via the Federal Government, on account of a legislative act of the European Union infringing the principle of subsidiarity (Article 1 § 3 of the Extending Act), and the right to make known its opposition to a draft legislative act of the European Union pursuant to Article 48.7(3) Lisbon TEU and Article 81.3(3) TFEU (Article 1 § 4 of the Extending Act). 87

Paragraph 1 of Article 1 § 2 of the Extending Act essentially provides that as regards draft legislative acts of the European Union, the Federal Government shall submit to the *Bundestag* and the *Bundesrat* detailed information “at the earliest possible date”, at the latest, however, two weeks after the beginning of the eight-week period. Paragraph 2 grants the *Bundestag* and the *Bundesrat* powers to regulate the adoption of decisions concerning subsidiarity objections in their rules of procedure. Paragraph 3 sets out that the President of the *Bundestag* or the President of the *Bundesrat* transmits such a decision to the Presidents of the European Parliament, the Council and the Commission and informs the Federal Government. 88

Article 1 § 3 of the Extending Act regulates the procedure of the subsidiarity action. The *Bundestag* is obliged, in particular pursuant to its paragraph 2 in analogy to Article 44.1 first sentence and Article 93.1 no. 2 of the Basic Law, new version, to bring an action upon the application of one fourth of its Members; pursuant to paragraph 3, the *Bundesrat* can regulate in its Rules of Procedure how to bring about the adoption of a decision on a subsidiarity action. Pursuant to paragraph 4, the Federal Government sends the action on behalf of the body that has decided to bring such action "without delay" to Court of Justice of the European Union. 89

Paragraph 3 of Article 1 § 4 of the Extending Act regulates the interaction of *Bundestag* and *Bundesrat* when exercising the right to make known their opposition pursuant to Article 48.7(3) Lisbon TEU taking into account the national allocation of responsibilities: 90

1. If an initiative essentially affects exclusive legislative competences of the Federation, opposition to the initiative shall be made known if the *Bundestag* so decides by a majority of votes cast. 91

2. If an initiative essentially affects exclusive legislative competences of the *Länder*, opposition to the initiative shall be made known if the *Bundesrat* so decides by a majority of its votes. 92

3. In all other cases, the *Bundestag* or the *Bundesrat* may, within four months after notification of the initiative of the European Council, decide to make known their opposition against this initiative. In these cases, opposition to the initiative shall only be made known if such a decision has not been rejected two weeks before the expiry of the time-limit of six months pursuant to Article 48.7(3 sentence 2 of the Treaty on European Union by the other body. Opposition to an initiative shall also not be made known if one body rejects the other body's decision in so far as it holds the view that there is not a case under number 1 or number 2. If the *Bundestag* adopted its decision on making known its opposition to the initiative by a majority of two thirds, rejection by the *Bundesrat* requires a majority of at least two thirds of its votes. If the *Bundesrat* adopted its decision on making known its opposition to the initiative by a majority of at least two thirds of its votes, rejection by the *Bundestag* shall require a majority of two thirds, at least the majority of the Members of the *Bundestag*. 93

According to paragraph 6, paragraph 3 sentence 1 no. 3 shall apply *mutatis mutandis* to the right of opposition pursuant to Article 81 paragraph 3(3) TFEU. Paragraph 4 provides that the Presidents of the *Bundestag* and the *Bundesrat* shall jointly send a decision reached pursuant to paragraph 3 to the Presidents of the European Parliament, of the Council and the Commission, and that they shall inform the Federal Government thereof. 94

Article 1 § 5 of the Extending Act makes it possible for the plenary session of the *Bundestag* to grant the Committee on European Union Affairs, appointed by it pursuant to Article 45 of the Basic Law, powers to exercise the rights of the *Bundestag* 95

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

Article 2 of the Extending Act contains amendments of other Acts, in particular of the two last-mentioned Acts. 96

6. The Treaty of Lisbon requires ratification under international law by the Member States of the European Union in accordance with their respective constitutional requirements (Article 6.1 first sentence of the Treaty of Lisbon). The instruments of ratification are to be deposited with the Government of the Italian Republic (Article 6.1 second sentence of the Treaty of Lisbon). 97

After the complainants re III., IV. and V. and the applicants had applied for a interlocutory injunction to prevent a commitment under international law to the Treaty of Lisbon by the Federal Republic of Germany by depositing the instrument of ratification, the Federal President declared via the Head of the Office of the Federal President that he would not sign the instrument of ratification until the Federal Constitutional Court had given a final ruling in the main proceedings. 98

II.

1. The complainants in the constitutional complaint proceedings challenge the Act Approving the Treaty of Lisbon. In addition, the constitutional complaints of the complainants re III. and VI. concern the Act Amending the Basic Law (Articles 23, 45 and 93) as well as the Act Extending and Strengthening the Rights of the Bundestag and the Bundesrat in European Union Matters. 99

a) The complainants concur in submitting that their right under Article 38 of the Basic Law is violated. They argue as follows: Article 38 of the Basic Law grants them, as Germans entitled to vote, the individual right to participate in the election to the German *Bundestag*, and thereby to take part in the legitimation of state authority on the federal level and to influence its exercise. The transfer of sovereign powers to the Eu- 100

ropean Union that is effected in the Act Approving the Treaty of Lisbon encroaches upon this right because the legitimation and the exercise of state authority is withdrawn from their influence. The encroachment transgresses the boundaries of the powers granted with a view to European integration pursuant to Article 23.1 third sentence in conjunction with Article 79.3 of the Basic Law and is therefore not justified. To the extent that it is inviolable pursuant to Article 79.3 of the Basic Law in conjunction with Article 20.1 and 20.2 of the Basic Law, the principle of democracy is infringed in two different respects: by the competences of the German *Bundestag* being undermined on the one hand and by a lack of democratic legitimation of the European Union on the other hand.

aa) The complainant re III. challenges the violation of the principle of democracy under both aspects. To the extent that he claims the competences of the German *Bundestag* being undermined, he submits that the European Union is no longer a sectoral economic community. Instead, it has taken on tasks in all politically relevant areas of life and can itself fill remaining gaps in competence. With a view to the democratic legitimation of the European Union, he argues that Europe's democratic deficit is not reduced but aggravated by the Treaty of Lisbon. The Council can no longer provide sufficient legitimacy that is derived from the peoples of the Member States. The chain of legitimacy to the national parliaments is broken in particular by the majority principle, which is applied as a norm. The application of the principle of unanimity can also no longer be justified. Once adopted, legislative acts cannot be repealed as long as only a single state intends to maintain the legislative act. Regardless of its being strengthened, the European Parliament is not democratically legitimised as long as it is not elected on the basis of democratic equality. 101

Apart from this, according to the complainant re III., numerous individual provisions of the Treaty of Lisbon infringe the principle of democracy. First, he cites Article 14.2 Lisbon TEU, which allegedly places the people of the Union (*Unionsvolk*), comprising all the Union's citizens, on an equal footing with the peoples of the Member States of the European Union, as a new subject of democratic legitimation; second, provisions such as Article 48.6 Lisbon TEU and Article 311 TFEU, which would make amendments of the treaties possible without the approval of the German *Bundestag*, third, provisions such as Article 48.7 Lisbon TEU, which would permit changing from unanimous decisions provided for in the treaties to majority decisions in the Council, without the German *Bundestag* sufficiently participating in such transition, and, fourth, the flexibility clause of Article 352 TFEU, almost universally applicable now. 102

bb) The complainant re IV. submits that the "threshold to the insignificance of the original German legislative competences" has been crossed by the transfer of sovereign powers to the European Union by the Treaty of Lisbon. A "sellout of the state's very own competences" is alleged to have taken place. The Common Foreign and Security Policy is alleged to be supranationalised because measures in this area are assigned to the European Union, which is vested with its own legal personality and is no longer represented on the international level by the foreign ministers of the Mem- 103

ber States but by the High Representative of the Union for Foreign Affairs and Security Policy. The common security and defence policy is alleged deliberately to adopt the course of a “European defence under the European flag”. The Member States are alleged to be forced to engage in a military build-up. Police and judicial cooperation in criminal matters is also alleged to be supranationalised. Finally, the flexibility clause is alleged to make an amendment of the treaties possible without a formal amendment procedure.

104 At the same time the complainant re IV. raises the European Union’s lack of democratic legitimation. He argues as follows: Admittedly, the Treaty of Lisbon strongly upgrades the European Parliament’s competences. This, however, can only legitimise the exercise of public authority by the European Union if electoral equality would be respected. Member States with a low number of inhabitants, however, are still granted a disproportionally large number of votes in comparison to Member States with a big population.

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

106 The complainants further argue as follows: The exercise of the European Union’s sovereign powers is not sufficiently legitimised by the European institutions. The Council can from the outset only confer a restricted legitimation. The principle of democracy requires essential decisions to be adopted by the Parliament. The feedback between the state bodies and the people, which is decisive in a democratic state, is not exhaustively established by the act of the election of the Parliament, which only recurs at certain intervals. The state’s opinion-forming process can instead be described as a process to which the different views, ideologies and interests of the people contribute. The Council as the representative of national interests can fulfil this function only to a limited extent. First, it is not a representative body, which means that the formation of the people’s opinion is so strongly filtered and reduced as regards the persons involved that the consultative function incumbent on the Parliament can only be exercised to a restricted extent. Second, the national opposition is not represented in the Council. The European Parliament also does not sufficiently legitimise the European Union’s exercise of its sovereign powers because the principle

of electoral equality does not apply to the election of the European Parliament, the European Parliament does not sufficiently legitimise the Commission and the level of the legitimation of European decisions does not correspond to the level of democratic legislation required by the principle of democracy and accepted by the developed democratic states. The codecision procedure, which has been renamed “ordinary legislative procedure”, only becomes the apparent norm because many special provisions establishing derogations can be found in the individual fields of policy. Essential decisions which encroach on fundamental rights - for example in the areas of application of Article 87.3, Article 89, Article 113 TFEU - can be adopted without the consent of the European Parliament.

Finally, the Treaty of Lisbon violates the democratic principle of changing majorities. The democratic process includes competition for political power, i.e. the interplay of minority and majority. Such competition, however, does not occur at European level. The European institutions are not arranged around the central issue of political conflict. The fact that political conflict lines of cannot be identified leads to political apathy in the form of abstentions in the elections to the European Parliament. 107

dd) The complainants re VI. also allege that the democratic foundations of the European Union have not kept pace with the process of integration. They call upon the Federal Constitutional Court to examine, in light of sovereign powers that have already been transferred and those that still are to be transferred, whether the expectations in the European Union’s democratic development under the rule of law, laid down in its judgment on the Treaty of Maastricht (see BVerfGE 89, 155 et seq.), have been fulfilled. The complainants re VI. maintain that this is not the case. The Commission’s practice of lawmaking and decision-making is said to have developed into a “regime of self-authorisation”. The Stability Pact is alleged to be deprived of its substance due to the exemptions granted in the past. It would, therefore, no longer be possible to say that Germany consented to membership of the European Monetary Union. 108

Furthermore, the Treaty of Lisbon allegedly makes qualified-majority voting in the Council the norm, thereby depleting the competences of the German *Bundestag*. Due to the excessive structural demands placed on the national parliaments, the procedures for enforcing the principle of subsidarity provided for in the Subsidiarity Protocol would be unsuited to assert effectively the principles of conferral, subsidiarity and proportionality. Moreover, the procedures would result in smaller Member States being taken into account to the same extent as Germany as regards the number of reasoned opinions of national parliaments that establish an obligation to review a draft legislative act (Article 7 of the Subsidiarity Protocol). The national parliaments’ right to make known their opposition in the context of the bridging procedure would also not ensure democratic consent, and the extension of the material area of application of the flexibility clause would result in an “unrestricted competence to extend competences”. 109

In the opinion of the complainants re VI., the question whether the allocation of seats in the European Parliament is compatible with the principle of democratic representativeness does not need to be addressed. They argue that what is decisive instead is that the European Parliament does not have the possibility of countering the Commission's monopoly on the right of initiative by the power to make the Commission refrain from legislative initiatives. Moreover, the Commission's competence in tertiary lawmaking would curtail the European Parliament's right of codecision in the lawmaking process (see Articles 290 and 291 TFEU). 110

b) In addition, the complainants re III. and IV. take the view that the Act Approving the Lisbon Treaty results in the Federal Republic of Germany losing its statehood. They also base this challenge on Article 38 of the Basic Law. 111

aa) In the view of the complainant re III., the Treaty of Lisbon transgresses the boundary of what the principle of sovereign statehood permits as regards the transfer of sovereign powers. The complainant argues that the European Union would become a subject of international law and could act like a state at the level of international law. It would be provided with a foreign-policy machinery of an outwardly quasi-state nature and with far reaching foreign policy competences. European Union law would have unrestricted primacy over the law of the Member States, and also over the Basic Law, with the consequence that review by the Federal Constitutional Court is excluded. The European Union would have the competence to decide on its own competence (*Kompetenz-Kompetenz*) (Article 48.6 and 48.7 Lisbon TEU; Article 311, Article 352 TFEU) and has entered core areas of statehood with competences in internal security and prosecution. This loss of sovereignty on the part of the Member States would be countered neither by the principle of conferral, which would no longer have an effectively restricting function, nor by the principle of subsidiarity. This situation could be remedied only by concrete elaboration in the form of final, limited competences or negative competence lists and the establishment of an independent monitoring body, for instance of a court of justice that rules on conflicts of competence. 112

Apart from state power, the European Union is said to also have a state territory, namely the area of freedom, security and justice, and a state people. The European Parliament would no longer be composed of representatives of its Member States, but of representatives of the Union's citizens. The evolution of the European Union into a federal state would transgress the responsibilities and competences of the Federal Republic of Germany. Only a Constitutional Act that the German people must give itself pursuant to Article 146 of the Basic Law can be the foundation that is required for such an integration. 113

bb) In the opinion of the complainant re IV., the polity that has been created by the Treaty of Lisbon is factually not an association of sovereign states (*Staatenverbund*) based on an international treaty. Instead it is said to be a "large federation with its own legal personality", which acts like a state of its own, with its own legislative bodies, its 114

own authorities and its own citizenship of the Union. The competence for the approximation of laws in the fields of criminal law and law of criminal procedure is alleged to concern a core area of state authority because nothing embodies the exercise of sovereign powers more strongly than the right to shape substantive criminal law and to enforce it procedurally. The question of whether and how a state defends itself is also said to be a decisive aspect of a state's statehood.

c) The complainants re IV., V. and VI. moreover challenge the violation of other structural principles of the state by the Act Approving the Treaty of Lisbon on the basis of Article 38 of the Basic Law. 115

aa) The complainant re IV. alleges a violation of the principle of the rule of law to the extent that it has been declared inviolable by Article 79.3 in conjunction with Article 20.3 of the Basic Law. In view of the extensive competences of the European Union, fundamental rights control would be insufficient. In particular, the Treaty of Lisbon has not introduced a fundamental rights action before the Court of Justice of the European Union. 116

bb) In the view of the complainants re V., the democratic possibilities of the German *Bundestag* to shape social policy are restricted by the Treaty of Lisbon in so far as the European Union is committed to engage in a competition oriented "open market economy". It is true that the Basic Law does not contain a commitment to a specific economic system. The principle of the social state, however, would oblige the legislature to ensure the balancing of social differences, although it leaves the legislature broad latitude for doing so. According to the complainants, allegedly competition promoting European lawmaking and case law may oust the principle of the social state contrary to Article 23.1 sentence 3 in conjunction with Article 79.3 of the Basic Law. Pursuant to the Treaty of Lisbon, the European Union has extensive competences, for example in all issues of economic policy, but not in the area of tax law and social security. According to recent judgments of the Court of Justice, the right to strike only applies if its exercise does not disproportionately restrict the fundamental freedoms (see ECJ, judgment of 11 December 2007, Case C-438/05, Viking, ECR 2007, p. I-10779 para. 90; ECJ, judgment of 18 December 2007, Case C-341/05, Laval, ECR 2007, p. I-11767 para. 111). 117

cc) The complainants re VI. allege a violation of the principle of the separation of powers. They argue as follows: to the extent that the sovereign powers transferred to the European Union increase in quantity, the requirements as to quality placed on the internal legal organisation of the European Union under the aspect of the separation of powers have to increase accordingly. With the exception of the Court of Justice of the European Union, which is clearly assigned a judicial function, the other institutions of the Union combine executive and legislative functions. Contrary to the Commission, the European Parliament does not have a right of initiative, but only codecision rights in the area of lawmaking. 118

d) The complainants re III. and V. raise further allegations that concern the Act Ap- 119

proving the Treaty of Lisbon, which are not based on Article 38 of the Basic Law but on other provisions of the Basic Law.

aa) In the pleading of his constitutional complaint of 23 May 2008, the complainant re III. challenges a violation of Article 20.4 and Article 2.1 of the Basic Law. In a pleading of 21 October 2008, he partly withdraws this complaint - in so far as Article 2.1 of the Basic Law had been invoked for the violation of objective constitutional principles - and additionally alleges a violation of Article 1.1, Article 2.1 and 2.2, Article 3, Article 4.1 and 4.2, Article 5.1 and 5.3, Articles 8 to 14, Article 16, Article 19.4, Article 101, Article 103 and Article 104 of the Basic Law. 120

(1) He puts forward the following: A right preceding the right of resistance results from Article 20.4 of the Basic Law which is directed against all actions that wholly or partly eliminate the constitutional foundations which are unchangeable pursuant to Article 79.3 of the Basic Law. A constitutional complaint which is based on this right is not subsidiary to constitutional complaints which are based on other fundamental rights. Admittedly, Article 38 and Article 20.4 of the Basic Law are violated if the boundaries of the transfer of sovereign powers to the European Union resulting from the principle of democracy and the principle of sovereign statehood are transgressed. However, the violation of the other constitutional principles protected by Article 79.3 of the Basic Law, in particular of the principle of the separation of power, only results in the violation of Article 20.4 of the Basic Law. As regards the separation of powers, the Act Amending the Treaty of Lisbon falls short of the required minimum that must be respected in the area of application of Article 23 of the Basic Law pursuant to Article 79.3 in conjunction with Article 20.2 of the Basic Law. In its lawmaking function, the Federal Government outranks the German *Bundestag* at European level. As part of the Council, it can make higher-ranking law, which supersedes the law adopted by the German *Bundestag*. Via this “circumventing route”, the Federal Government can bypass Parliament and can get provisions accepted at European level for which it would not obtain a majority in the *Bundestag*. 121

The complainant re III. takes the view that “other remedies” within the meaning of Article 20.4 of the Basic Law are to be granted in constitutional complaint proceedings. He argues that Article 20.4 of the Basic Law also can be construed to mean that the provision guarantees an extraordinary legal remedy in terms of a “right to any other remedy” to be granted in analogy to the constitutional complaint proceedings. 122

(2) The complainant re III. substantiates the allegation of a violation of Article 1.1, Article 2.1 and 2.2, Article 3, Article 4.1 and 4.2, Article 5.1 and 5.3, Articles 8 to 14, Article 16, Article 19.4, Article 101, Article 103 and Article 104 of the Basic by making reference to the binding effect of the Charter of Fundamental Rights under the Treaty of Lisbon. The complainant argues that the binding effect not only leads to human dignity being subject to weighing against other legal interests, in particular against the economic fundamental freedoms, in the framework of the European Union. The Charter of Fundamental Rights is alleged to moreover largely exempt the German state 123

bodies from their obligation to respect the fundamental rights of the Basic Law, not only in those areas in which they implement mandatory provisions of Union law but also in areas in which they are not bound by Union law. Finally, the Charter of Fundamental Rights would abolish the position of guarantor which the Federal Constitutional Court has for the protection of fundamental rights pursuant to the so-called “Solange II” case law (see BVerfGE 73, 339 et seq.).

bb) The complainants re V. also allege a violation of Article 1.1 of the Basic Law. In their opinion, in view of the general requirement of the enactment of a statute pursuant to Article 52.1 of the Charter, the Treaty of Lisbon lacks a contractual clarification according to which human dignity may not be weighed against other legal interests, in particular against the economic fundamental freedoms. 124

e) The complainants re III. and VI. further argue that the accompanying laws, the Amending Act and the Extending Act, violate their rights under Article 38 of the Basic Law. In addition, the complainant re III. alleges a violation of Article 2.1 and Article 20.4 of the Basic Law. 125

aa) In the pleading of his constitutional complaint of 23 May 2008, the complainant re III. initially makes an application for a finding that the accompanying laws as such violate his right under Article 38 of the Basic Law. In his pleading of 21 October 2008, he restricts his application to individual provisions of the accompanying laws, namely Article 1 nos. 1 and 2 of the Amending Act and Article 1 § 3.2, § 4.3 no. 3 and 4.6 as well as § 5 of the Extending Act. The complainants re VI. also restrict their application to the above-mentioned provisions. 126

bb) The complainants re III. and VI. concur in stating that Article 1 no. 1 of the Amending Act and Article 1 § 3.2 of the Extending Act violate the democratic majority principle because the German *Bundestag* is forced to bring a subsidiarity action against the will of its majority. Article 1 § 4.3 no. 3 and 4.6 of the Extending Act would also be incompatible with the principle of democracy in so far as Article 79.3 in conjunction with Article 20.1 and 20.2 of the Basic Law declares it inviolable. The German *Bundestag* would be deprived of its right of opposition pursuant to Article 48. 7(3) Lisbon TEU in those cases in which the focus of the European Council’s initiative refers to concurrent legislation or in which no clear priority can be ascertained. Finally, Article 1 no. 2 of the Amending Act and Article 1 § 5 of the Extending Act would violate the principle of democratic representation by establishing the possibility that the rights of participation of the German *Bundestag* introduced by the Treaty of Lisbon might be transferred to the Committee on European Union Affairs. 127

The complainant re III. states that the Federal Constitutional Court’s judgment on the Treaty of Maastricht at least does not rule out that an individual right to respect the principle of democracy within the Federal Republic of Germany results from Article 38 of the Basic Law. The right is said to exist at any rate in so far as the right to take part in the democratic legitimation of state authority, which is guaranteed by Article 38 of the Basic Law, is indirectly affected. The complainants re VI. argue that the right to 128

lodge a constitutional complaint against the accompanying laws results from the factual context. Without the Act Approving the Treaty of Lisbon, the separate laws would lose their meaning. The Act Approving the Treaty of Lisbon and the accompanying laws must therefore be viewed together in terms of constitutional procedure. It would follow from this *inter alia* that the accompanying laws, as well as the Act Approving the Treaty of Lisbon, may by way of exception already be challenged before signing and promulgation.

cc) Finally, in the pleading of his constitutional complaint of 23 May 2008, the complainant alleges a violation of Article 20.4 and Article 2.1 of the Basic Law by the accompanying laws. In his pleading of 21 October 2008, he restricts his application to individual provisions of the accompanying laws, namely Article 1 nos. 1 and 2 of the Amending Act and Article 1 § 3.2, § 4.3 no. 3 and 4.6 as well as § 5 of the Extending Act and no longer alleges a violation of Article 2.1 of the Basic Law. He substantiates this by stating that the incompatibility of the above-mentioned provisions of the accompanying laws with the principle of democracy can also be demonstrated via Article 20.4 of the Basic Law. 129

2. The applicants in the *Organstreit* proceedings challenge the Act Approving the Treaty of Lisbon, the applicant re I. additionally challenges the accompanying laws. 130

a) The applicant re I. is a Member of the German *Bundestag* and at the same time the complainant re III. In his application of 23 May 2008, he asks first to find that the Act Approving the Treaty of Lisbon and the accompanying laws infringe the Basic Law, in particular its Article 20.1 and 20.2, Article 2.1, Article 38.1 second sentence in conjunction with Article 79.3 as well as Article 23.1 thereof and are, therefore, void. He names as respondents the Federal President, the German *Bundestag* and the Federal Republic of Germany. In his pleading of 21 October 2008, he reformulates his application. He now makes an application to find that the Act Approving the Treaty of Lisbon, Article 1 nos. 1 and 2 of the Amending Act and Article 1 § 3.2, § 4.3 no. 3 and 4.6 as well as § 5 of the Extending Act infringe Article 20.1 and 20.2, Article 23.1 and Article 79.3 of the Basic Law and violate the applicant's rights under Article 38.1 of the Basic Law. He no longer also alleges an infringement of Article 2.1 of the Basic Law. The German *Bundestag* and the Federal Government are named as respondents. 131

The applicant re I. argues that the Act Approving the Treaty of Lisbon and the accompanying laws violate his status right as a Member of the German *Bundestag* under Article 38.1 of the Basic Law. Whereas Article 38.1 of the Basic Law grants the individual citizen the individual right to participate in the election to the German *Bundestag* and thereby to take part in the legitimation of state authority by the people at federal level and to influence its exercise, this must apply all the more to the Members of the German *Bundestag*. Their status is also alleged to be regulated by Article 38.1 of the Basic Law. If the responsibilities and competences of the German *Bundestag* are undermined by the transfer of sovereign powers to the European Union, 132

this would not only affect the individual voter's possibility to take part in the democratic legitimation of state authority. It would affect to a much greater extent the possibility of a Member of Parliament to represent the people in the exercise of state authority and achieve democratic legitimation in legislation and in monitoring the government. In the alternative, the applicant re I. substantiates the violation of his status right under Article 38.1 of the Basic Law in that, "performing the functions of a constitutional body", he is responsible for the German *Bundestag* not acting *ultra vires*. The *Bundestag* may not enact laws that transgress its competences. At any rate, it may not adopt such decisions if these laws were to contribute to abandoning the state founded on the Basic Law or to significantly restricting its statehood.

In addition, the applicant re I. asserts, in a general sense, that his rights of participation as a Member of the German *Bundestag* pursuant to Article 38.1 of the Basic Law have been curtailed in the legislative procedure. He argues that there was no sign of an opinion-forming based on the force of arguments, which would have enabled the Member of Parliament to assume responsibility for their decision. It did not do sufficient justice to the status of a member of Parliament to have had the opportunity to voice his constitutional reservations during a debate in the German *Bundestag* in an interposed question according to § 27.2 of the Rules of Procedure of the German *Bundestag* (*Geschäftsordnung des Deutschen Bundestags - GOBT*). It was just as insufficient to be able to read a statement on the unconstitutionality of the Act Approving the Treaty of Lisbon. 133

b) The applicant re II., a parliamentary group of the German *Bundestag*, makes an application, acting on behalf of the German *Bundestag*, to find that the Act Approving the Treaty of Lisbon violates the German *Bundestag*'s rights as a legislative body and is therefore incompatible with the Basic Law. It does not name a respondent in its application. 134

The applicant re II. substantiates its application by stating that the Act Approving the Treaty of Lisbon transfers democratic decision-making competences beyond the extent permissible pursuant to Article 23.1 third sentence in conjunction with Article 79.3 of the Basic Law. The principle of democracy is alleged to be violated in several respects in so far as Article 79.3 of the Basic Law declares it to be inviolable. Reference is made to the identical line of argument of the complainants re V. (see above A. II. 1. c) bb). In addition, the applicant re II. asserts that the principle of the "parliamentary army" (*Parlamentsarmee*), which results from the principle of democracy, is undermined by the German *Bundestag*'s losing its competence to decide on the deployment of the German armed forces for the area of European crisis intervention. Pursuant to Article 42.4 Lisbon TEU, decisions initiating a mission, for which the Member states have to make available their own armed forces pursuant to Article 42.3 Lisbon TEU, shall be adopted by the Council acting unanimously. There is no mention, however, that the decision shall be adopted in accordance with the respective constitutional requirements of the Member States. It could, admittedly, be argued that the requirement of parliamentary approval under the provisions concerning defence of the 135

Basic Law is not voided by the Act Approving the Treaty of Lisbon and that the representatives of the German government in the Council must obtain the approval of the German *Bundestag* before committing themselves in the Council to a participation of German armed forces in a mission. This, however, would lead to a systemic rupture because as a general rule, the representation of the Federal Republic of Germany in the Council falls under the competence of the government.

III.

1. The German *Bundestag* (a), the Federal Government (b) and the *Bundesrat* (c) have given written opinions concerning the constitutional complaints re III. and V. In addition, the Federal Government and the *Bundesrat* have included the constitutional complaint re IV. in their opinion. The *Landtag* (state parliament) of Baden-Württemberg (d) restricts its opinion to the constitutional complaints re III. and IV. 136

a) The German *Bundestag* takes the view that the constitutional complaints re III. and V. are inadmissible (aa) and unfounded (bb). It maintains the following: 137

aa) The entitlement to lodge a constitutional complaint, which is based on Article 38 of the Basic Law, to oppose acts of integration pursuant to Article 23.1 of the Basic Law is restricted to cases in which the principle of democracy, to the extent protected by Article 79.3 of the Basic Law, has been manifestly and grievously violated. The complainants re III. and V. did not substantiate this. The constitutional complaint re III. can also not be founded on Article 20.4 of the Basic Law. As an obvious failure on the part of the competent bodies of the state to protect and defend the constitution cannot be established, a situation of resistance does not arise. An independent legal remedy existing in parallel to the constitutional complaint cannot be derived from Article 20.4 of the Basic Law. Furthermore, a violation of the complainants re III. and V. under Article 1.1 of the Basic Law is not apparent. Human dignity is also guaranteed as inviolable at the European level. Moreover, the Charter of Fundamental Rights does not invalidate the fundamental rights of the Basic Law. Finally, the complainant re III. did not sufficiently substantiate the possibility of a violation of rights by the accompanying laws. 138

bb) The German *Bundestag* maintains that the constitutional complaints re III. and V. are at any rate unfounded because the Treaty of Lisbon is compatible with the Basic Law. Accordingly, the German *Bundestag* takes the view that the factual extent of review of the constitutional complaints is restricted to the new elements introduced by the Treaty of Lisbon. The integration process as such cannot be the subject of the proceedings. The Federal Constitutional Court's judgment on the Treaty of Maastricht is *res iudicata*, and any decision with a view to the evolution of the Treaties of Amsterdam and Nice would be ruled out due to § 93 of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz - BVerfGG*). 139

(1) Article 38 of the Basic Law is alleged not to be violated by the Act Approving the Treaty of Lisbon. In so far as the Treaty of Lisbon establishes new competences of 140

the European Union or transfers individual policy areas from intergovernmental cooperation to the Community method, the boundaries of the transferability of sovereign powers drawn by Article 79.3 of the Basic Law are alleged not to be transgressed. The Member States would suffer only a slight loss of competences and would be granted in return new freedoms to act and new ways of political development. According to the German *Bundestag*, the fact that qualified majority voting becomes the normal decision-making procedure in the Council cannot be criticised. Majority voting, and thus the possibility of being overruled in the Council, has been accepted by the Federal Constitutional Court in its judgment on the Treaty of Maastricht (see BVerfGE 89, 155 et seq.). The Member States would retain substantial competences. The fields of internal and external security, as well as defence policy, would entirely remain within the Member States' area of competence, just as would economic, financial and employment policy.

A possible claim under Article 38 of the Basic Law to the democratic legitimation of the European Union is also alleged not to be violated. The democratic legitimation of the Council is based on the one hand on the foundation in constitutional law that regulates the Council's decision-making procedures, on the other hand on the discourse taking place in the Council. The European Parliament would also provide democratic legitimation. This is not negated by the lack of equal contribution towards success in the election of the European Parliament; the lack of equal contribution towards success is said rather to be the consequence of the special structure of the European Union, which is built on the Member States, and which contains special forms of democratic representation. The Treaty of Lisbon is alleged to strengthen democratic legitimation not only by enhancing the role of the European Parliament but also by an increased public nature of the Council meetings and by the introduction of the early warning system to monitor compliance with the principle of subsidiarity. In addition, the Treaty of Lisbon is alleged to enhance the position of the German *Bundestag*. 141

The German *Bundestag* further maintains: The Treaty of Lisbon does not grant the European Union *Kompetenz-Kompetenz*. The flexibility clause under Article 352 TFEU cannot be interpreted as an unrestricted competence to extend competences; Article 311 TFEU does not go beyond the current provision on the procurement of own resources. Neither do the provisions on the simplified treaty revision procedure and the provisions concerning transition to majority decisions in the Council establish a *Kompetenz-Kompetenz* of the European Union. In fact, those provisions anticipate the respective treaty amendments. Content and modalities of the decision-making procedures are sufficiently determined. 142

(2) In the view of the German *Bundestag*, there is also no violation of the principle of sovereign statehood. The Basic Law is said to guarantee the statehood of the Federal Republic of Germany in the form of open statehood as laid down *inter alia* in the Preamble of the Basic Law and in Articles 23 to 25 of the Basic Law. Consequently, European integration is not only permitted by the Basic Law but desired by it. The Treaty of Lisbon is said not to establish a statehood of its own for the European Union. Such 143

statehood is alleged to be contained neither in the recognition of the European Union's legal personality nor in the linkage of Community law and Union law. Apart from this, the separation of supranational and intergovernmental fields of activity is alleged not to have been abandoned. The reference to the Union's citizens in Article 14.2 Lisbon TEU is alleged to emphasise their position as the subject of legitimation of the European Union without constituting a European people. The primacy of application of Union Law, which is the subject of Declaration no. 17, is alleged not to confer statehood on the Union but solely to emphasise the character of the European Union as a legal community. This declaration, which does not form part of the normative part of the treaty, is alleged not to change the existing legal situation and not to result in a fundamental priority of Union law over the national constitution. The right to withdraw from the European Union would be contrary to the assumption of the European Union's statehood; the European Union would have no competence to perform coercive or enforcement measures.

(3) According to the German *Bundestag*, there is also no violation of the principle of the separation of powers. The Treaty of Lisbon would neither establish an executive legislation on the part of the Federal Government nor open up new possibilities of what the complainant has called a "circumventing route". Such conduct can in fact be better prevented under the new provisions on the public nature of Council meetings and the increased monitoring rights of the national parliaments under the Subsidiarity Protocol. 144

(4) Finally, the constitutional complaint re III. is also unfounded as regards the challenged accompanying laws. The fact that pursuant to Article 1 no. 1 of the Amending Act and Article 1 § 3.2 of the Extending Act, the German *Bundestag* might be obliged, upon the application of one fourth of its Members, to bring a subsidiarity action, is said not to violate the principle of democracy. The provision is alleged to be an expression of the protection of minorities inherent in every functioning democracy. The provision set out in Article 1 no. 1 of the Amending Act as well as in Article 1 § 4.3 and 4.6 of the Extending Act concerning the exercise of the right to make known one's opposition pursuant to Article 48.7(3) Lisbon TEU would correspond to the national allocation of responsibilities between the *Bundestag* and the *Bundesrat* and to the principle of the federal state. The possibility provided for in Article 1 no. 2 of the Amending Act and Article 1 § 5 of the Extending Act to transfer decision-making competences to the Committee on European Union Affairs already would not establish a violation of a right because those provisions alone do not allow for a transfer of competences, rather they merely authorise the *Bundestag* to do so. 145

b) The Federal Government also takes the view that the constitutional complaints re III., IV. and V. are inadmissible (aa), or, in any case, unfounded (bb). 146

aa) According to the Federal Government, the constitutional complaints are already inadmissible because the Act Approving the Treaty of Lisbon and the accompanying laws do not personally, presently and directly affect the complainants re III., IV. and V. 147

under Article 38 of the Basic Law. Before their entry into force, the accompanying laws are alleged to be an inappropriate object of a challenge because they, unlike the Act Approving the Treaty of Lisbon, can only be the subject of a constitutional complaint after the completion of the parliamentary legislative procedure. The challenges made by the complainants re III. and V. under Article 1.1 of the Basic Law and by the complainant re III. under the other fundamental rights relating to freedom, equality and judicial proceedings are alleged to be without substance. Human dignity is said to be inviolable pursuant to the Charter of Fundamental Rights, and the fundamental rights of the Union in the field of application of the Charter of Fundamental Rights are said to be exercised in parallel to the fundamental rights of the Basic Law.

bb) (1) The Act Approving the Treaty of Lisbon is alleged to be compatible in particular with the principle of democracy. The position of the Council in the lawmaking procedure and the associated limited representation of the actual population figures cannot be objected to. They are said to be due to the special nature of the European Union as an association of sovereign states (*Staatenverbund*). The European Parliament is said to play an important role in the context of European legislation, which would be further strengthened by the extension of the area of application of the ordinary legislative procedure. The fact that the principle of the equality of all citizens is only insufficiently realised in the elections to the European Parliament is said to follow from the need to adapt this principle in the light of the equality of all states. 148

The Federal Government argues that the Treaty of Lisbon does not make a treaty amendment possible without the approval of the Federal Republic of Germany. A decision of the European Council pursuant to Article 48.6(2) Lisbon TEU would require, pursuant to Article 59.2 of the Basic Law, an Act approving it adopted by the *Bundestag*. The Federal Republic of Germany would also have a right of veto in the context of the transition from unanimity to the qualified majority procedure, as provided under Article 48.7 Lisbon TEU. 149

(2) The Treaty of Lisbon is said to neither result in the creation of a Union state nor to weaken the statehood of the Federal Republic of Germany. It is said to avoid any terminological allusion to statehood, nor would the recognition of the legal personality of the European Union provide any indication for this. The free right of withdrawal is alleged to confirm the continued existence of state sovereignty. The Member States would remain the “masters of the Treaties” and would not have granted the European Union *Kompetenz-Kompetenz*. The principle of conferral would continue to apply. The use of the flexibility clause would be subject to substantive requirements and procedural safeguarding mechanisms by the Treaty of Lisbon. 150

Hardly any substantial competences are said to be transferred to the European Union. Measures in the context of the Common Foreign and Security Policy would have no supranational quality even after the abolition of the division between European Union and European Community. The area of freedom, security and justice would not impair the territorial sovereignty of the Member States but would guarantee 151

cooperation between Member States, necessary in an area without internal borders. A “people of the Union” is also not established. Neither the Charter of Fundamental Rights nor the primacy of Community law are alleged to result in the establishment of a European state.

(3) Apart from this, the institutional structure created by the Treaty of Lisbon is said to be compatible with the principle of the separation of powers. A stronger decision-making power of the state executive would go along with the elaboration of the European Union as an association of sovereign states (*Staatenverbund*). Besides, the Federal Constitutional Court has deemed the current institutional system of the European Union compatible with the Basic Law, and the Treaty of Lisbon would result in a strengthening of the national parliaments. 152

c) The *Bundesrat* regards the challenged Acts as being in conformity with the constitution. The Treaty of Lisbon is said to strengthen the democratic legitimation of the European Union in particular by enhancing the position of the European Parliament and of the national parliaments. The treaty is said not to result in a loss of statehood of the Federal Republic of Germany. The delimitation of competences would be improved; additional competences are transferred only to a limited extent. The safeguarding of state sovereignty is said to be clearly expressed in the explicit recognition of the respect of national identity pursuant to Article 4.2 Lisbon TEU and in the right to withdraw from the Union pursuant to Article 50 Lisbon TEU. 153

d) The *Landtag* of Baden-Württemberg considers the constitutional complaints re III. and IV. to be unfounded. 154

2. In the *Organstreit* proceedings, the German *Bundestag* (a), the Federal Government (b), the *Bundesrat* and the *Landtag* of Baden-Württemberg (c) have submitted written observations. 155

a) The German *Bundestag* takes the view that the applications made in the *Organstreit* proceedings are inadmissible (aa), and, in any case, unfounded (bb). 156

aa) (1) In so far as the applicant in the *Organstreit* proceedings re I. makes an application to find that the Act Approving the Treaty of Lisbon and the accompanying laws are declared void, this is said to be the typical content of an application for the abstract review of a statute pursuant to Article 93.1 no. 2 of the Basic Law, which the applicant, as an individual Member of Parliament, is not entitled to make. The German *Bundestag* does not make a statement on the written application amended by the applicant re I. in his pleading of 21 October 2008. In so far as the applicant re I. attacks deficiencies in opinion-forming during the debate in the German *Bundestag*, his submissions are said to be unsubstantiated. Moreover, the applicant re I. is alleged not to be entitled to be a party to the proceedings to the extent that he, as part of the German *Bundestag* as a body, wishes to exercise its rights acting on its behalf in the proceedings. The Federal Constitutional Court has explicitly rejected the entitlement of an individual Member of the German *Bundestag* to act on behalf of the German *Bun-* 157

destag in proceedings. Finally, the applicant is said not to exercise the rights of the body of which he is a part but to challenge a decision of that very body. This would result in *inter se* proceedings, inadmissible in constitutional legal proceedings.

(2) The application made in the *Organstreit* proceedings re II. is also alleged to be inadmissible. The applicant is said not to be entitled to make such application because it did not plausibly substantiate that its rights as a parliamentary group had been violated. It is said not to have a right to require the *Bundestag* to respect the boundaries of integration nor would it have a general right to require the Basic Law to be respected. Nor may the parliamentary group, acting on behalf of the *Bundestag*, claim rights of the *Bundestag* against the *Bundestag*. In addition, it is said to lack a need for legal protection as its application amounts in fact to one applying for an abstract review of statutes; whereas it is said not to be entitled to be a party to such proceedings. 158

bb) The German *Bundestag* points out that the extent of review of the *Organstreit* proceedings re I. and II. is restricted to the specific situation under constitutional law. The objective constitutionality of the challenged Acts cannot be examined. As regards the unfoundedness of the *Organstreit* proceedings re I. and II., the German *Bundestag* makes reference to its statements made concerning the constitutional complaints re III. and V. (see A. III. 1. a) bb) above). 159

b) The Federal Government also takes the view that the applications in the *Organstreit* proceedings are inadmissible (aa), and, in any case, unfounded (bb). 160

aa) (1) It maintains that the applicant in the *Organstreit* proceedings re I. is not entitled to make an application. He is alleged not to be affected as regards his legal position, granted to him under Article 38.1 of the Basic Law as a member of a constitutional body, but he is said to be trying to obtain a general review of the constitutionality of the challenged Acts by the Federal Constitutional Court via the *Organstreit* proceedings. Therefore, at most, an abstract review of constitutionality would be permissible, which the applicant, however, is said not to be entitled to institute. The challenged accompanying laws are said merely to strengthen the rights of the German *Bundestag* so that a violation of the applicant's rights would be ruled out. 161

The Federal Government maintains that in so far as the applicant claims that he did not have sufficient opportunity in the *Bundestag* to state his dissenting opinion, it is not apparent in what respect a measure of the German *Bundestag* is challenged. Furthermore, the corresponding provisions of the Rules of Procedure of the German *Bundestag* are said to restrict the status right of the Member of Parliament in a constitutionally admissible manner. Moreover, the applicant has had the opportunity to submit a written statement or make a brief oral statement pursuant to § 31.1 of the Rules of Procedure of the German *Bundestag*. 162

(2) The application made in the *Organstreit* proceedings re II. is also said to be inadmissible. A suitable respondent is said not to exist. In the context of *Organstreit* pro- 163

ceedings, the mere challenge of an Act is said to be impermissible. Moreover, it is said not to be apparent how the status rights of the applicant parliamentary group were violated. Nor may the applicant, acting on behalf of the *Bundestag*, claim rights of the *Bundestag* against the *Bundestag*. As the applicant does not achieve the quorum required under Article 93.1 no. 2 of the Basic Law, interpreting the relief sought as an application for the abstract review of statutes is also said to be ruled out.

bb) As regards the unfoundedness of the applications in the *Organstreit* proceedings re I. and II., the Federal Government makes reference to its statements on the unfoundedness of the constitutional complaints re III. and V. (see A. III. 1. b) bb above). In addition, it states that in so far as the Act Approving the Treaty of Lisbon is challenged, the Treaty of Lisbon contains only a few new elements in the area of the common security and defence policy. The German *Bundestag*'s rights of participation would be safeguarded because no Member State can be obliged against its will to take part in military measures. 164

c) The *Bundesrat* and the *Landtag* of Baden-Württemberg regard the applications made in the *Organstreit* proceedings as unfounded for the same reasons that they put forward regarding the constitutional complaints (see A. III. 1. c) and d) above). 165

IV.

On 10 and 11 February 2009, an oral hearing was held in which the parties to the proceedings explained and elaborated their legal points of view. 166

B.

The constitutional complaints lodged against the Act Approving the Treaty of Lisbon are admissible to the extent that they challenge a violation of the principle of democracy, the loss of statehood of the Federal Republic of Germany and a violation of the principle of the social state on the basis of Article 38.1 first sentence of the Basic Law. The constitutional complaints re III. and VI. lodged against the accompanying laws are admissible to the extent that they are based on Article 38.1 first sentence of the Basic Law (I.). The application made in the *Organstreit* proceedings re II. is admissible to the extent that the applicant asserts a violation of the competences of the German *Bundestag* to decide on the deployment of the German armed forces (II.). In other respects, the constitutional complaints and the applications made in *Organstreit* proceedings are inadmissible. 167

I.

The constitutional complaints are admissible to the extent that the complainants claim a violation of the principle of democracy, the loss of statehood of the Federal Republic of Germany and a violation of the principle of the social state by the Act Approving the Treaty of Lisbon and the accompanying laws on the basis of Article 38.1 sentence 1 of the Basic Law. 168

1. The complainants are entitled to lodge a constitutional complaint. They belong to the group of persons who can lodge a constitutional complaint as “any person” within the meaning of § 90.1 of the Federal Constitutional Court Act. This also applies to the complainants re III. and V., who are Members of the German *Bundestag* but who lodge the constitutional complaint as citizens of the Federal Republic of Germany. They do not invoke their status under constitutional law *vis-à-vis* a body entitled to be a party in *Organstreit* proceedings but allege a violation of their fundamental rights by public authority (see BVerfGE 64, 301 <312>; 99, 19 <29>; 108, 251 <267>). 169

2. The Act Approving the Treaty of Lisbon and the accompanying laws thereto can, as measures of German public authority, be a suitable subject of a complaint in constitutional complaint proceedings. This applies regardless of the fact that these Acts have not yet entered into force. Because the binding character of the Treaty of Lisbon under international law at the present stage only depends on the Federal President signing the instrument of ratification and depositing it with the depositary, the Act Approving the Treaty of Lisbon can, exceptionally, be the subject of the constitutional complaints before its entry into force (see BVerfGE 108, 370 <385>). This applies *mutatis mutandis* to the accompanying laws, whose entry into force is linked to the entry into force of the Treaty of Lisbon. Article 2 of the Amending Act makes reference to the entry into force of the Treaty of Lisbon, Article 3 of the Extending Act makes reference to the entry into force of the Amending Act. 170

3. The entitlement to lodge a constitutional complaint requires the complainants’ allegation to be personally, presently and directly injured by the challenged measures of public authority as regards a fundamental right, or right equal to a fundamental right, which may be the subject of a constitutional complaint lodged pursuant to Article 93.1 no. 4a of the Basic Law and § 90.1 of the Federal Constitutional Court Act. The complainants must sufficiently substantiate that such violation appears possible (§ 23.1 second sentence, § 92 of the Federal Constitutional Court Act; see BVerfGE 99, 84 <87>; 112, 185 <204>). The complainants meet this requirement to varying degrees. 171

a) To the extent that the complainants assert the violation of their right under Article 38.1 first sentence of the Basic Law, which is equal to a fundamental right, by the Act Approving the Treaty of Lisbon, the entitlement to lodge a constitutional complaint depends on the content of the individual challenges. 172

aa) As regards their challenge that the principle of democracy has been violated in that the competences of the German *Bundestag* have been undermined, the complainants re III., IV. and VI. sufficiently substantiate a violation of their right under Article 38.1 first sentence of the Basic Law, which is equal to a fundamental right. 173

Article 38.1 and 38.2 of the Basic Law guarantees the individual right to take part in the election of the Members of the German *Bundestag* (see BVerfGE 47, 253 <269>; 89, 155 <171>). The individualised safeguard set out in the substance of this Article ensures that the citizen is entitled to the right to elect the German *Bundestag* and that 174

in the election, the constitutional principles of electoral law will be respected. The safeguard also extends to the fundamental democratic content of that right (see BVerfGE 89, 155 <171>). The election not only legitimises state authority at the federal level pursuant to Article 20.1 and 20.2 of the Basic Law but also exerts a directing influence on how it is exercised (see BVerfGE 89, 155 <172>). For those entitled to vote can choose between competing candidates and parties, which stand for election with different political proposals and projects.

The act of voting would lose its meaning if the elected state body did not have a sufficient degree of responsibilities and competences in which the legitimised power to act can be realised. In other words: Parliament has not only an abstract “safeguarding responsibility” for the official action of international or supranational associations but bears specific responsibility for the action of its state. The Basic Law has declared this legitimising connection between the person entitled to vote and state authority inviolable by Article 23.1 third sentence in conjunction with Article 79.3 and Article 20.1 and 20.2 of the Basic Law. Article 38.1 first sentence of the Basic Law excludes the possibility, in the area of application of Article 23 of the Basic Law, of depleting the content of the legitimation of state authority, and the influence on the exercise of that authority provided by the election, by transferring the responsibilities and competences of the *Bundestag* to the European level to such an extent that the principle of democracy is violated (see BVerfGE 89, 155 <172>). 175

bb) To the extent that the complainants re III., IV., V. and VI. allege that the European Union is not sufficiently democratically legitimised, they are entitled to lodge a constitutional complaint pursuant to Article 38.1 first sentence of the Basic Law. 176

Those entitled to vote can challenge constitutionally relevant deficits in the democratic legitimation of the European Union under the same right as deficits of democracy on the national level, which is affected by European integration as regards the extent of its competences. The interrelation between Article 38.1 first sentence and Article 20.1 and 20.2 of the Basic Law, which originally was only significant at national level, is gradually extended by the progressing European integration. As a consequence of the transfer of sovereign powers pursuant to Article 23.1 second sentence of the Basic Law, decisions which directly affect the citizen are moved to the European level. Against the background of the principle of democracy, which is made a possible subject of a challenge by Article 38.1 first sentence of the Basic Law as an individual right under public law, it can, however, not be insignificant, where sovereign powers are transferred to the European Union, whether the public authority exercised at European level is democratically legitimised. Because the Federal Republic of Germany may, pursuant to Article 23.1 first sentence of the Basic Law, only participate in a European Union which is committed to democratic principles, a legitimising connection must exist in particular between those entitled to vote and European public authority, a connection to which the citizen has a claim according to the original constitutional concept, which continues to apply, set out in Article 38.1 first sentence of the Basic Law in conjunction with Article 20.1 and 20.2 of the Basic Law. 177

cc) To the extent that the complainants re III. and IV. allege the loss of statehood of the Federal Republic of Germany by the Act Approving the Treaty of Lisbon, their entitlement to lodge a constitutional complaint also results from Article 38.1 first sentence of the Basic Law. 178

According to the Basic Law, those entitled to vote have the right by a decision “freely adopted” to decide on the change of identity of the Federal Republic of Germany that would be effected by its becoming a constituent state of a European federal state, and the concomitant replacement of the Basic Law. Like Article 38.1 first sentence of the Basic Law, Article 146 of the Basic Law creates a right of participation of the citizen entitled to vote. Article 146 of the Basic Law confirms the pre-constitutional right to give oneself a constitution from which constitutional authority emanates and by which it is bound. Article 38.1 first sentence of the Basic Law guarantees the right to take part in the legitimation of constitutional authority and to influence its exercise. Article 146 of the Basic Law sets out, in addition to the substantive requirements laid down in Article 23.1 first sentence of the Basic Law, the ultimate boundary of the participation of the Federal Republic of Germany in European integration. It is the constituent authority alone, and not the constitutional authority emanating from the constitution, which is entitled to release the state constituted by the Basic Law. 179

The fact that Article 146 of the Basic Law does not found an independent, individual right, which is claimable and therefore capable of founding a constitutional complaint within the meaning of Article 93.1 no. 4a of the Basic Law (see BVerfGE 89, 155 <180>), is not contrary to the possibility of lodging a constitutional complaint against the “loss of statehood”. For this does not rule out that a violation of Article 146 of the Basic Law in conjunction with the fundamental rights, and rights equivalent to fundamental rights, listed in Article 93.1 no. 4a of the Basic Law - here Article 38.1 first sentence of the Basic Law - may be alleged. The submissions of the complainants re III. and IV. are also not directly aimed at for example holding a referendum. The submissions of the complainants re III. and IV. are, in fact, directed against the alleged loss of statehood of the Federal Republic of Germany by the Act Approving the Treaty of Lisbon and thus also against the tacit replacement of the Basic Law. 180

dd) In so far as the complainants re IV., V. and VI., allege the violation of other structural principles of the state on the basis of Article 38.1 first sentence 1 of the Basic Law, the constitutional complaints are only admissible as regards the alleged violation of the principle of the social state. 181

The complainants re V. establish the necessary connection with the principle of democracy, which can directly be the subject of a constitutional complaint under Article 38.1 first sentence 1 of the Basic Law, having demonstrated sufficiently strongly that the democratic ability to shape social policy of the German *Bundestag* would be restricted to such an extent by the competences of the European Union pursuant to the Treaty of Lisbon that the German *Bundestag* would no longer be able to fulfil the minimum requirements of the principle of the social state resulting from Article 23.1 182

third sentence in conjunction with Article 79.3 of the Basic Law.

In so far as the complainants re IV. and VI. assert the violation of the principles of the rule of law and of the separation of powers, they do not show a comparable connection. In this respect, the constitutional complaints are inadmissible. 183

b) The constitutional complaints of the complainants re III. and V. against the Act Approving the Treaty of Lisbon are inadmissible in so far as they are not based on Article 38.1 first sentence of the Basic Law. 184

aa) In so far as the complainant re III. relies on the right under Article 20.4 of the Basic Law, which is equal to a fundamental right, he is not entitled to lodge a constitutional complaint. He does not demonstrate sufficiently strongly that the prior right postulated by him to refrain from any action that would bring about a resistance situation, which could be derived from Article 20.4 of the Basic Law and against which a constitutional complaint may be lodged, or that the extraordinary legal construct for obtaining “any other remedy”, granted in his opinion by Article 20.4 of the Basic Law, could become relevant here. 185

The right of resistance pursuant to Article 20.4 of the Basic Law is a subsidiary exceptional right, which from the outset may only be considered, as *ultima ratio*, if all legal remedies provided by the legal order provide so little prospect of an effective remedy that the exercise of resistance is the last resort for maintaining or reinstating the law (see on the right of resistance already BVerfGE 5, 85 <377>). Accordingly, a violation of Article 20.4 of the Basic Law cannot be challenged in proceedings in which precisely a judicial remedy is being sought against the alleged abolition of the constitutional order. The fact that Article 20.4 of the Basic Law is mentioned in Article 93.1 no. 4a of the Basic Law does not alter this. The subsidiary character of this right remains unaffected by its being designed as a right that is, also procedurally, equal to a fundamental right. 186

bb) Apart from this, the complainants re III. and V. are not entitled to lodge a constitutional complaint as regards other fundamental rights and rights equal to fundamental rights by the Act Approving the Treaty of Lisbon. 187

(1) The complainants re III. and V. do not sufficiently substantiate with their submission that human dignity is made into a right to be weighed against others by the Charter of Fundamental Rights, made legally binding under Article 6.1 first sentence Lisbon TEU, that a violation of their fundamental right under Article 1.1 of the Basic Law is possible. 188

The general provision concerning limitations under Article 52.1 of the Charter may at most restrict the human dignity guaranteed in Article 1 of the Charter, but not Article 1.1 of the Basic Law. A distinction must be made between European and national levels of fundamental rights. The complainants do not even make submissions that sufficiently differentiate between levels of fundamental rights. Moreover, Article 52.1 of the Charter can only be relevant at the national level of fundamental rights in so far as 189

it would no longer guarantee a level of protection of fundamental rights at European level that is essentially comparable to that afforded by the Basic Law within the meaning of Article 23.1 first sentence of the Basic Law. Such shortcomings cannot be inferred from the complainants' submissions. The general curtailment of human dignity alleged by them does not follow automatically from the Charter of Fundamental Rights or from the case law of the Court of Justice of the European Communities cited by them. It will be for future proceedings to clarify whether and to what extent a claim of a decline of the protection of fundamental rights by changes in primary law may be admissible at all on the basis of Article 1.1 of the Basic Law and what requirements as to substantiation may be placed on such a challenge (see on the violation of fundamental rights of the Basic Law by secondary Union law BVerfGE 102, 147 <164>).

(2) In so far as the complainant re III. moreover maintains that in the area of application of the Charter of Fundamental Rights, made legally binding under Article 6.1 first sentence Lisbon TEU, the German state bodies are largely exempted from their obligation to respect the fundamental rights of the Basic Law, he also does not sufficiently substantiate a possible violation of his fundamental rights and rights equal to fundamental rights. 190

Irrespective of the scope of application of the Charter of Fundamental Rights pursuant to Article 51 of the Charter, the fundamental rights of the Basic Law are part of constitutional contents that restrict the transfer of sovereign powers to the European Union pursuant to Article 23.1 second sentence of the Basic Law (see BVerfGE 37, 271 <279-280>; 73, 339 <376>). The Federal Constitutional Court no longer exercises its jurisdiction to decide on the applicability of secondary Union law and other acts of the European Union, which is the legal basis for any acts of German courts or authorities within the sovereign sphere of the Federal Republic of Germany, merely as long as the European Union guarantees an application of fundamental rights which in substance and effectiveness is essentially similar to the protection of fundamental rights required unconditionally by the Basic Law (see BVerfGE 73, 339 <376, 387>; 102, 147 <164>). 191

c) The challenges of the complainants re III. and VI. that the principle of democracy is also violated by the accompanying laws are admissible to the extent that they are based on Article 38.1 first sentence of the Basic Law. 192

The complainants re III. and VI. sufficiently substantiate a possible violation of Article 38.1 first sentence of the Basic Law by the accompanying laws. The entitlement to lodge a constitutional complaint under Article 38.1 first sentence of the Basic Law can also extend to Acts that are directly connected with a law approving an international agreement pursuant to Article 23.1 second sentence of the Basic Law. In this respect, the complainants explain sufficiently clearly that the Act Approving the Treaty of Lisbon and the accompanying laws form a unit for the purposes of constitutional law procedure. The challenge, which means in essence that the accompanying laws do not 193

create sufficient conditions for the exercise of the rights of participation at national level granted to the German *Bundestag* and the *Bundesrat* by the Treaty of Lisbon, concerns the democratic content of Article 38.1 of the Basic Law. As regards the Amending Act, the complainants re III. and VI. moreover make sufficient reference to the special standard of review for constitution-amending laws from Article 79.3 in conjunction with Article 20.1 and 20.2 of the Basic Law.

II.

The application made in the *Organstreit* proceedings re I. is inadmissible (1.). The application made in the *Organstreit* proceedings re II. is admissible to the extent that the applicant asserts a violation of the competences of the German *Bundestag* to decide on the deployment of the German armed forces (2.). 194

1. The application made in the *Organstreit* proceedings re I., which has to be assessed according to the version submitted the pleading of the applicant re I. of 21. October 2008, is inadmissible. 195

a) The application is inadmissible to the extent that it is directed towards the Federal Government. The measures criticised - the decisions of the German *Bundestag* on the adoption of the Act Approving the Treaty of Lisbon and of the accompanying laws - can only be attributed to the German *Bundestag*, and not to the Federal Government (see BVerfGE 84, 304 <320-321>; 86, 65 <70>; 99, 332 <336>). The Federal Government merely introduced the drafts of the Act Approving the Treaty of Lisbon and of the accompanying laws in the German *Bundestag* (Article 76.1 of the Basic Law). 196

b) For the remainder, the application is also inadmissible. 197

aa) In his allegation that his right to participate in the work of the *Bundestag* has been curtailed, the applicant re I. does not sufficiently state that this right (see BVerfGE 80, 188 <218>; 90, 286 <343>) might have been violated or endangered by the challenged legislation (§ 64.1, § 23.1 second sentence of the Federal Constitutional Court Act). The adoption of the Act Approving the Treaty of Lisbon and the decisions on the accompanying laws may, as the applicant re I. maintains, be based on an insufficient discussion in the *Bundestag*; the legislative acts themselves, however, do not violate rights of participation of the applicant re I. 198

bb) In so far as the applicant re I. maintains that his right as a Member of the German *Bundestag* to represent the people in the exercise of state authority and to bring about democratic legitimation has been violated, the existence of such a right, which is derived by the applicant from Article 38.1 of the Basic Law, as well as its possible violation by the challenged legislation, does not need be considered. As a citizen of the Federal Republic of Germany, the applicant re I. may lodge a constitutional complaint and has done so. The constitutional complaint permits the assertion of all rights that may be derived from Article 38.1 of the Basic Law on whose violation the application in the *Organstreit* proceedings is based. Besides that contained in the constitu- 199

tional complaint, no independent status-specific interest of legal protection exists for the application.

cc) The applicant re I. is also not entitled to assert rights of the German *Bundestag* in his own name, bringing an action on behalf of the German *Bundestag* or “performing [its] functions of a constitutional body”. The possibility of bringing an action in one’s own name but on another’s behalf is an exception from the general procedural principle that parties to an action may only assert their own rights. Someone who brings an action in his own name but on another’s behalf therefore requires explicit statutory permission (see BVerfGE 60, 319 <325>; 90, 286 <343>). Such permission does not exist because § 63 and § 64.1 of the Federal Constitutional Court Act only refer to parts of a body acting on behalf of the whole and a Member of the *Bundestag* is no such part of the *Bundestag* as a body (see BVerfGE 2, 143 <160>; 67, 100 <126>; 90, 286 <343-344>; 117, 359 <367-368>). As parts of the Bundestag as a body, only the permanent components of the German *Bundestag* are entitled to assert rights of the *Bundestag*. The individual Member is no such “component” of the *Bundestag*. 200

2. The application made in the *Organstreit* proceedings re II. is partly admissible. 201

a) As a parliamentary group of the German *Bundestag*, the complainant re II. is entitled to be a party to *Organstreit* proceedings (§ 13 no. 5, §§ 63 et seq. of the Federal Constitutional Court Act). As one of the permanent components pursuant to the Rules of Procedure of the German *Bundestag*, it can assert rights in its own name that are due to the *Bundestag* (see BVerfGE 1, 351 <359>; 2, 143 <165>; 104, 151 <193>; 118, 244 <255>). The German *Bundestag*, against which the application is directed according to the interpretation of the submissions made in the application, is a possible respondent (§ 63 of the Federal Constitutional Court Act). 202

b) The applicant re II. is partly entitled to make an application. 203

aa) In its challenge of the violation of the requirement of parliamentary approval under the provisions of the Basic Law concerning defence (see BVerfGE 90, 286 <383>) by the Act Approving the Treaty of Lisbon, the applicant re II. sufficiently substantiates a possible violation or direct threat to the rights of the German *Bundestag* by the Act Approving the Treaty of Lisbon (§ 23.1 second sentence, § 64.1 of the Federal Constitutional Court Act). The applicant re II. states that the *Bundestag* will lose its competence to decide on the deployment of the German armed forces for the area of European crisis intervention by the provisions of the Treaty of Lisbon because, pursuant to Article 42.4 Lisbon TEU, decisions “initiating a mission” shall be adopted by the Council. Because such a decision need not be adopted in accordance with the respective constitutional requirements of the Member States, the question arises whether the representative of the German government in the Council is obliged to obtain the approval of the German *Bundestag* before voting in the Council takes place. 204

The entitlement to make the application cannot be negated arguing that this would constitute prohibited *inter se* proceedings. The possibility of bringing an action in one's own name but on another's behalf provided for in § 64.1 of the Federal Constitutional Court Act places the *Organstreit* proceedings in the reality of the interplay of political forces, in which the separation of powers is not realised mainly in the classical confrontation between those who hold as monolithic bodies but first and foremost in the establishment of rights of the opposition and minority rights. The purpose of bringing an action in one's own name but on another's behalf is therefore to preserve to the parliamentary opposition and minority the competence to assert the rights of the *Bundestag* not only where the latter does not wish to exercise these rights, in particular in relation to the Federal Government which it sustains (see BVerfGE 1, 351 <359>; 45, 1 <29-30>; 121, 135 <151>), but also where the parliamentary minority wishes to assert rights of the *Bundestag* against the parliamentary majority that politically sustains the Federal Government (see Lorenz, in: Festgabe aus Anlass des 25jährigen Bestehens des Bundesverfassungsgerichts, vol. 1, 1976, p. 225 <253-254>). The granting of the power to act on behalf of the *Bundestag* is an expression of the control function of Parliament and as well an instrument of the protection of minorities (see BVerfGE 45, 1 <29-30>; 60, 319 <325-326>; 68, 1 <77-78>; 121, 135 <151>; Schlaich/Korioth, Das Bundesverfassungsgericht, 7th ed. 2007, para. 94). 205

bb) The applicant re II. is not entitled to make an application in so far as it asserts that the Act Approving the Treaty of Lisbon transfers democratic decision-making competences beyond the extent permissible pursuant to Article 23.1 third sentence in conjunction with Article 79.3 of the Basic Law. The applicant re II. does not sufficiently substantiate a violation or direct threat to the rights of the German *Bundestag* by the Act Approving the Treaty of Lisbon (§ 23.1 second sentence, § 64.1 of the Federal Constitutional Court Act). The principle of democracy guaranteed in Articles 20.1 and 20.2 of the Basic Law, also in so far as it is declared inviolable by Article 79.3 of the Basic Law, is not a right of the *Bundestag*. In *Organstreit* proceedings, there is no room for a general review, detached from the rights of the *Bundestag*, of the constitutionality of a challenged measure (see BVerfGE 68, 1 <73>; 73, 1 <30>; 80, 188 <212>; 104, 151 <193-194>). 206

C.

I.

In so far as they are admissible, the constitutional complaints re III. and VI. are well-founded in part. The Act Extending and Strengthening the Rights of the Bundestag and the Bundesrat in European Union Matters (*Gesetz über die Ausweitung und Stärkung der Rechte des Bundestages und des Bundesrates in Angelegenheiten der Europäischen Union*) does not contain the required provisions and is to that extent unconstitutional. In other respects, the constitutional complaints lodged and the application made in *Organstreit* proceedings by the applicant re II. are, to the extent that 207

they are admissible, unfounded. Taking into account the provisos specified in the grounds, there are no decisive constitutional objections to the Act Approving the Treaty of Lisbon (*Zustimmungsgesetz zum Vertrag von Lissabon*) and the Act Amending the Basic Law (Articles 23, 45 and 93) (*Gesetz zur Änderung des Grundgesetzes <Artikel 23, 45 und 93>*).

1. The standard of review of the Act Approving the Treaty of Lisbon is determined by the right to vote as a right that is equal to a fundamental right (Article 38.1 first sentence in conjunction with Article 93.1 no. 4a of the Basic Law). The right to vote establishes a right to democratic self-determination, to free and equal participation in the state authority exercised in Germany and to compliance with the principle of democracy including the respect of the constituent power of the people. In the present combination of procedural circumstances, the review of a violation of the right to vote also comprises encroachments on the principles which are codified in Article 79.3 of the Basic Law as the identity of the constitution (see BVerfGE 37, 271 <279>; 73, 339 <375>). 208

a) Article 38.1 of the Basic Law guarantees every citizen entitled to vote the right to elect the Members of the German *Bundestag*. In general, free and equal elections of the Members of the German *Bundestag* the people of the Federation directly exercises its political will. As a general rule, it governs itself via a majority (Article 42.2 of the Basic Law) in the representative assembly which has come into being in this manner. From within the assembly, the Chancellor - and thus the Federal Government - is appointed; this is where the Chancellor is accountable. At the federal level of the state founded on the Basic Law as its constitution, the election of the Members of the German *Bundestag* is the source of state authority - which time and again newly emanates from the people in periodically repeated elections (Article 20.2 of the Basic Law). 209

The right to vote is the citizens' most important individual right to democratic participation guaranteed by the Basic Law. In the state system that is shaped by the Basic Law, the election of the Members of the German *Bundestag* is of major importance. Without the free and equal election of the body that has a decisive influence on the government and the legislation of the Federation, the constitutive principle of personal freedom remains incomplete. Invoking the right to vote, the citizen can therefore claim the violation of democratic principles by means of a constitutional complaint (Article 38.1 first sentence, Article 20.1 and 20.2 of the Basic Law). The right to equal participation in democratic self-determination (democratic right of participation), to which every citizen is entitled, can also be violated by the organisation of state authority being changed in such a way that the will of the people can no longer effectively 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 210

come into being according to the principles of free and equal elections (see BVerfGE 89, 155 <171-172>).

b) 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. 211

aa) In so far as in the public sphere binding decisions, in particular as regards encroachments on fundamental rights, are taken for the citizen, these decisions must be founded on a freely formed majority will of the people. The order constituted by the Basic Law rests on the self-esteem and dignity of the individual in free determination. This order is power under the rule of law founded on the self-determination of the people in freedom and equality according to the will of the respective majority (see BVerfGE 2, 1 <12>). Consequently, citizens are not subject to an inescapable political power which they are fundamentally incapable of freely determining, with equal regard to persons and subject-matter. 212

bb) Self-determination of the people according to the majority principle, achieved through elections and other votes, is constitutive of the state order as constituted by the Basic Law. It acts in the sphere of public, free opinion-forming and in the organised competition between political forces of accountable government and parliamentary opposition. The exercise of public authority is subject to the majority principle of regularly forming accountable government and an unhindered opposition, which has an opportunity to come into power. In particular, in electing the representative assembly of the people, or in the election of highest-ranking offices at government level, a generalised will of the majority with regard to persons or subjects must have an opportunity to express itself and decisions on political direction resulting from the elections must be possible. 213

This central requirement of democracy may be achieved according to different models. According to German electoral law, constitutionally required representative parliamentary rule is achieved by reflecting the will of the electorate as proportionally as possible in the allocation of seats. A majority decision in Parliament represents at the same time the majority decision of the people. Every Member of Parliament is a representative of all the people and thus a member of an assembly of equals (Article 38.1 of the Basic Law) who have gained their mandate under conditions governed by equality. The Basic Law requires that every citizen be free and equal within the legal sense (i.e. equal before the law). For the requirement of democracy this means that every citizen with the right to vote based on age and who has not lost this active right is entitled to an equal part in the exercise of state authority (see BVerfGE 112, 118 <133-134>). The equality of the citizens entitled to vote must then continue to apply at further levels of the development of democratic opinion-forming, in particular as re- 214

gards the status of a Member of Parliament. The status of a Member of Parliament therefore includes the right to equal participation in the process of parliamentary opinion-forming as guaranteed in Article 38.1 second sentence of the Basic Law (see BVerfGE 43, 142 <149>; 70, 324 <354>; 80, 188 <218>; 96, 264 <278>; 112, 118 <133>).

In presidential systems or under a first-past-the-post electoral system, the concrete elaboration of the central requirement of democracy may well be different. However, all systems of representative democracy have this in common: a will of the majority that has come about freely and taking due account of equality is formed, either in the constituency or in the assembly which has come into being proportionally, by the act of voting. The decision on political direction which is taken by the majority of voters is to be reflected in Parliament and in the government; the losing part remains visible as a political alternative and active in the sphere of free opinion-forming as well as in formal decision-making procedures, as an opposition that will, in subsequent elections, have an opportunity to become the majority. 215

c) 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. 216

It may remain open whether, due to the universal nature of dignity, freedom and equality alone, this commitment even applies to the constituent power, i.e. to the case that the German people, in free self-determination, but in a continuity of legality to the rule of the Basic Law, gives itself a new constitution (see Isensee, in: Isensee/Kirchhof, HStR VII, 1992, § 166, paras 61 et seq.; Moelle, Der Verfassungsbeschluss nach Art. 146 GG, 1996, pp. 73 et seq.; Stückrath, Art. 146 GG: Verfassungsablösung zwischen Legalität und Legitimität, 1997, pp. 240 et seq.; see also BVerfGE 89, 155 <180>). Within the order of the Basic Law, the structural principles of the state laid down in Article 20 of the Basic Law, i.e. democracy, the rule of law, the principle of the social state, the republic, the federal state, as well as the substance of elementary fundamental rights indispensable for the respect of human dignity are, in any case, not amenable to any amendment because of their fundamental quality. 217

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 218

amend the constitutional principles which are essential pursuant to Article 79.3 of the Basic Law. The Federal Constitutional Court monitors this. Through what is known as the eternity guarantee, the Basic Law reacts on the one hand to the historical experience of a creeping or abrupt erosion of the free substance of a democratic fundamental order. However, it makes clear on the other hand that the Constitution of the Germans, in accordance with the international development which has taken place in particular since the existence of the United Nations, has a universal foundation which cannot be amended by positive law.

2. The elaboration of the principle of democracy by the Basic Law allows for the objective of integrating Germany into an international and European peace order. The new shape of political rule thereby made possible is not schematically subject to the requirements of a constitutional state applicable at national level and may therefore not be measured automatically against the concrete manifestations of the principle of democracy in a Contracting State or Member State. The empowerment to embark on European integration permits a different shaping of political opinion-forming than the one determined by the Basic Law for the German constitutional order. This applies as far as the limit of the inviolable constitutional identity (Article 79.3 of the Basic Law). The principle of democratic self-determination and of participation in public authority with due account being taken of equality remains unaffected also by the Basic Law's mandate of peace and integration and the constitutional principle of the openness towards international law (*Völkerrechtsfreundlichkeit*) (see BVerfGE 31, 58 <75-76>; 111, 307 <317>, 112, 1 <26>; Chamber Decisions of the Federal Constitutional Court (*Kammerentscheidungen des Bundesverfassungsgerichts* - BVerfGK 9, 174 <186>). 219

a) The German constitution is directed towards opening the sovereign state order to peaceful cooperation of the nations and towards European integration. Neither *pari passu* integration into the European Union nor integration into peacekeeping systems such as the United Nations is tantamount to submission to alien powers. Instead, it is a voluntary, mutual *pari passu* commitment which secures peace and strengthens the possibilities of shaping policy by joint coordinated action. The Basic Law does not protect individual freedom, as the self-determination of the individual, with the objective of promoting uncommitted high-handedness and the ruthless enforcement of interests. The same applies to the sovereign right of self-determination of the political community. 220

The constitutional state commits itself to other states with the same foundation of values of freedom and equal rights and which, like itself, make human dignity and the principles of equal entitlement to personal freedom the focal point of their legal order. Democratic constitutional states can only gain a formative influence on an increasingly mobile society, which is increasingly linked across borders, through sensible cooperation which takes account of their own interest as well as of their common interest. Only those who commit themselves because they realise the need for a peaceful balancing of interests and the possibilities provided by joint concepts gain the measure of possibilities of action required for any future ability to responsibly shape the condi- 221

tions for a free society. The Basic Law takes account of this with its openness to European integration and to commitments under international law.

b) 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. 222

This understanding of sovereignty becomes visible in the objectives laid down in the Preamble. The Basic Law abandons a self-serving and self-glorifying concept of sovereign statehood and returns to a view of the state authority of the individual state which regards sovereignty as “freedom that is organised by international law and committed to it” (von Martitz, Internationale Rechtshilfe in Strafsachen, vol. I, 1888, p. 416). It breaks with all forms of political Machiavellianism and with a rigid concept of sovereignty which until the beginning of the 20th century regarded the right to wage war - even a war of aggression - as a right due to a sovereign state as a matter of course (see Starck, Der demokratische Verfassungsstaat, 1995, pp. 356-357; Randelzhofer, Use of Force, in: Bernhardt, Encyclopedia of Public International Law, vol. IV, 2000, pp. 1246 et seq.), even though the Conventions signed at the Hague Peace Conference on 29 July 1899 initiated a gradual proscription of the use of force between states, whilst still preserving the *ius ad bellum*. 223

In contrast, the Basic Law codifies the maintenance of peace and the overcoming of destructive antagonism between European states as outstanding political objectives of the Federal Republic of Germany. This means that sovereign statehood stands for a pacified area and the order guaranteed therein on the basis of individual freedom and collective self-determination. The state is neither a myth nor an end in itself but the historically grown and globally recognised form of organisation of a viable political community. 224

The constitutional mandate to realise a united Europe, which follows from Article 23.1 of the Basic Law and its Preamble (see Schorkopf, Grundgesetz und Überstaatlichkeit, 2007, p. 247) means in particular for the German constitutional bodies that it is not left to their political discretion whether or not they participate in European integration. The Basic Law calls for European integration and an international peaceful order. Therefore, not only the principle of openness towards international law, but also the principle of openness towards European law (*Europarechtsfreundlichkeit*) applies. 225

c) It is true that the Basic Law grants the legislature powers to engage in a far-reaching transfer of sovereign powers to the European Union. However, the powers are granted under the condition that the sovereign statehood of a constitutional state is maintained on the basis of an integration programme according to the principle of conferral and respecting the Member States' constitutional identity, and that at the same time the Member States do not lose their ability to politically and socially shape living conditions on their own responsibility. 226

aa) The objective of integration laid down for the German people by the Preamble and by Article 23.1 of the Basic Law does not say anything about the final character of the political organisation of Europe. In its Article 23, the Basic Law grants powers to participate in a supranational system of cooperation that promotes peace. This does not include the obligation to realise democratic self-determination on the supranational level in the exact forms prescribed by the Basic Law for the Federation and, via Article 28.1 first sentence of the Basic Law, also for the *Länder* (states); instead, it permits derogations from the organisational principles of democracy applying at national level which arise from the requirements of a European Union based on the principle of the equality of states and negotiated under the law of international treaties. 227

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. 228

bb) The current constitution shows a different way: it aims for Germany's integration *pari passu* into state systems of mutual security such as that of the United Nations or that of the North Atlantic Treaty Organisation (NATO) and for Germany's participation in the European unification. Article 23.1 of the Basic Law like Article 24.1 of the Basic Law underlines that the Federal Republic of Germany takes part in the development of a European Union designed as an association of sovereign states (*Staatenverbund*) to which sovereign powers are transferred. The concept of *Verbund* covers a close long-term association of states which remain sovereign, a treaty-based association which exercises public authority, but whose fundamental order is subject to the decision-making power of the Member States and in which the peoples, i.e. the citizens, of the Member States, remain the subjects of democratic legitimation. 229

This connection is made clear by Article 23.1 first sentence of the Basic Law, which lays down a binding structure for Germany's participation in the development of the European Union. Pursuant to Article 23.1 third sentence of the Basic Law, the Basic Law can be adapted to the development of the European Union; at the same time, 230

this possibility is set an ultimate limit by Article 79.3 of the Basic Law, to which the provision makes reference. The minimum standard protected by Article 79.3 of the Basic Law must not fail to be achieved even by Germany's integration into supranational structures.

cc) The empowerment to transfer sovereign powers to the European Union or other intergovernmental institution permits a shift of political rule to international organisations. The empowerment to exercise supranational 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. It establishes a supranational autonomy which undoubtedly makes considerable inroads into everyday political life but is always limited factually. Here, autonomy can only be understood - as is usual regarding the law of self-government - as an autonomy to rule which is independent but derived, i.e. is granted by other legal entities. In contrast, sovereignty under international law and public law requires independence from an external will precisely for its constitutional foundations (see Carlo Schmid, *Generalbericht in der Zweiten Sitzung des Plenums des Parlamentarischen Rates am 8. September 1948*, in: *Deutscher Bundestag/ Bundesarchiv, Der Parlamentarische Rat 1948-1949, Akten und Protokolle*, vol. 9, 1996, p. 20-21). It is not decisive here whether an international organisation has legal personality, i.e. whether it for its part can enter into binding acts as a subject in international legal relations. What is decisive is how the fundamental legal relationship between the international organisation and the Member States and Contracting States which have created it and have vested it with legal personality is elaborated. 231

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. 232

d) The Basic Law does not authorise the German state bodies to transfer sovereign powers in such a way that their exercise can independently establish other competences for the European Union. It prohibits the transfer of competence to decide on its own competence (*Kompetenz-Kompetenz*) (see BVerfGE 89, 155 <187-188, 192, 199>; see also BVerfGE 58, 1 <37>; 104, 151 <210>). Even a far-reaching process of independence of political rule for the European Union brought about by granting it steadily increased competences and by gradually overcoming existing unanimity requirements or so far prevailing rules of state equality can, from the perspective of German constitutional law, only occur as a result of the freedom of action of the self-determined people. According to the constitution, such integrational steps must be factually limited by the act of transfer and must, in principle, be revocable. For this 233

reason, withdrawal from the European union of integration (*Integrationsverband*) may, regardless of a commitment for an unlimited period under an agreement, not be prevented by other Member States or by the autonomous authority of the Union. This is not a secession from a state union (*Staatsverband*), which is problematical under international law (Tomuschat, Secession and Self-Determination, in: Kohen, Secession - International Law Perspectives, 2006, pp. 23 et seq.), but merely the withdrawal from an association of sovereign states (*Staatenverbund*) which is founded on the principle of the reversible self-commitment.

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

235 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.

236 e) The integration programme of the European Union must be sufficiently precise. In so far as the people itself is not directly called upon to decide, democratic legitimation can only be achieved by means of parliamentary responsibility (see BVerfGE 89, 155 <212>). A blanket empowerment for the exercise of public authority, in particular one which has a direct binding effect on the national legal system, may not be granted by the German constitutional bodies (see BVerfGE 58, 1 <37>; 89, 155 <183-184, 187>). In so far as the Member States elaborate treaty law in such a way as to allow treaty amendment without a ratification procedure solely or mainly by the institutions of the Union, albeit under the requirement of unanimity, whilst preserving the principle of conferral, a special responsibility is incumbent on the legislative bodies, in addition to the Federal Government, within the context of participation which in Germany, has to comply internally with the requirements under Article 23.1 of the Basic Law (responsibility for integration) and which may be invoked in any proceedings before the Federal Constitutional Court.

237 aa) Any integration into peacekeeping systems, in international or supranational organisations opens up the possibility for the institutions thus created to develop independently, and in doing so, to show a tendency of political self-enhancement, even, and particularly if, their bodies act according to their mandate. An Act that grants powers of integration, like the Act Approving the Treaty of Lisbon, can therefore, despite

the principle of conferral, only outline a programme in whose boundaries a political development occurs which cannot be determined in advance in every respect. When striving for integration one must expect the institutions of the Union to form independent opinions. Therefore a tendency towards maintaining the *acquis communautaire* and to effectively interpreting powers along the lines of the US doctrine of implied powers (see also International Court of Justice, Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion of 11 April 1949, ICJ Reports 1949, p. 174 <182 et seq.>) or the principle of *effet utile* under the law of international treaties (see on the good sense of this principle Gill, The League of Nations from 1929 to 1946, 1996; Rouyer-Hameray, *Les compétences implicites des organisations internationales*, 1962, p. 90 et seq.; especially as regards European law Pescatore, *Monisme, dualisme et "effet utile" dans la jurisprudence de la Cour de justice de la Communauté européenne*, in: *Festschrift für Rodríguez Iglesias*, 2003, pp. 329 et seq.; see on the corresponding development of the case law of the Court of Justice of the European Communities Höreth, *Die Selbstautorisierung des Agenten, Der Europäische Gerichtshof im Vergleich zum US Supreme Court*, 2008, pp. 320 et seq.) must be tolerated. This is part of the mandate of integration called for by the Basic Law.

bb) Under the constitution, however, faith in the constructive force of the mechanism of integration cannot be unlimited. If in the process of European integration primary law is amended, or expansively interpreted by institutions, a constitutionally important tension will arise with the principle of conferral and with the individual Member State's constitutional responsibility for integration. If legislative or administrative competences are only transferred in an unspecified manner or with a view to further dynamic development, or if the institutions are permitted to re-define expansively, fill lacunae or factually extend competences, they risk transgressing the predetermined integration programme and acting beyond the powers granted to them. They are moving on a road at the end of which there is the power of disposition of their foundations laid down in the treaties, i.e. the competence of freely disposing of their competences. There is a risk of transgression of the constitutive principle of conferral and of the conceptual responsibility for integration incumbent upon Member States if institutions of the European Union can decide without restriction, without any outside control, however restrained and exceptional, how treaty law is to be interpreted. 238

It is therefore constitutionally required not to agree dynamic treaty provisions with a blanket character or if they can still be interpreted in a manner that respects the national responsibility for integration, to establish, at any rate, suitable national safeguards for the effective exercise of such responsibility. Accordingly, the Act approving an international agreement and the national accompanying laws must therefore be capable of permitting European integration continuing to take place according to the principle of conferral without the possibility for the European Union of taking possession of *Kompetenz-Kompetenz* or to violate the Member States' constitutional identity, which is not open to integration, in this case, that of the Basic Law. For borderline 239

cases of what is still constitutionally admissible, the German legislature must, where necessary, take precautions in its legislation accompanying approval to ensure that the responsibility for integration of the legislative bodies can sufficiently develop.

240 Apart from this, it 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 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.

241 The *ultra vires* review as well as the identity review may result in Community law or, in future, Union law being declared inapplicable in Germany. To preserve the viability of the legal order of the Community, taking into account the legal concept expressed in Article 100.1 of the Basic Law, an application of constitutional law that is open to European law requires that the *ultra vires* review as well as the finding of a violation of constitutional identity is incumbent on the Federal Constitutional Court alone. It need not be decided here in which specific types of proceedings the Federal Constitutional Court's jurisdiction may be invoked for such review. Availing oneself to types of pro-

ceedings that already exist, i.e. the abstract review of statutes (Article 93.1 no. 2 of the Basic Law) and the concrete review of statutes (Article 100.1 of the Basic Law), *Organstreit* proceedings (Article 93.1 no. 1 of the Basic Law), disputes between the Federation and the *Länder* (Article 93.1 no. 3 of the Basic Law) and the constitutional complaint (Article 93.1 no. 4a of the Basic Law) may be considered. Also conceivable, however, is the creation by the legislature of an additional type of proceedings before the Federal Constitutional Court that is especially tailored to *ultra vires* review and identity review to safeguard the obligation of German bodies not to apply in individual cases in Germany legal instruments of the European Union that transgress competences or that violate constitutional identity.

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

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

244 3. The shape of the European Union must comply with democratic principles as regards the nature and the extent of the transfer of sovereign powers as well as with regard to the organisational and procedural elaboration of the Union authority acting autonomously (Article 23.1, Article 20.1 and 20.2 in conjunction with Article 79.3 of the Basic Law). European integration may neither result in the system of democratic

rule in Germany being undermined (a) nor may the supranational public authority as such fail to comply with fundamental democratic requirements (b).

a) 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. 245

The election of the Members of the German *Bundestag* by the people fulfils its central role in the system of the federal and supranational intertwining of power only if the German *Bundestag*, which represents the people, and the Federal Government sustained by it, retain a formative influence on the political development in Germany. This is the case if the German *Bundestag* retains own responsibilities and competences of substantial political importance or if the Federal Government, which is answerable to it politically, is in a position to exert a decisive influence on European decision-making procedures (see BVerfGE 89, 155 <207>). 246

aa) Inward federalisation and outward supranationalisation can open up new possibilities of civic participation. An increased cohesion of smaller or larger units and better opportunities for a peaceful balancing of interests between regions and states grow from them. Federal or supranational intertwining creates possibilities of action which otherwise would encounter practical or territorial limits, and facilitates the peaceful balancing of interests. At the same time, it makes it more difficult to create a will of the majority that can be asserted and that directly derives from the people (Article 20.2 first sentence of the Basic Law). The assignment of decisions to specific responsible actors becomes less transparent, with the result that citizens have difficulty in having their vote guided by tangible contexts of responsibility. The principle of democracy therefore sets content-related limits to the transfer of sovereign powers, limits which do not already result from the inalienability of the constituent power and of state sovereignty. 247

bb) The safeguarding of sovereignty, demanded by the principle of democracy in the valid constitutional system prescribed by the Basic Law in a manner that is open to integration and to international law, does not mean that a pre-determined number or certain types of sovereign rights should remain in the hands of the state. The participation of Germany in the development of the European Union, which is permitted by Article 23.1 first sentence of the Basic Law, also comprises a political union, in addition to the creation of an economic and monetary union. Political union means the joint exercise of public authority, including legislative authority, even reaching into the traditional core areas of the state’s area of competence. This is rooted in the European idea of peace and unification especially when dealing with the coordination of cross-border aspects of life and when guaranteeing a single economic area and area of justice in which citizens of the Union can freely develop (Article 3.2 Lisbon TEU). 248

cc) European unification on the basis of a treaty union of sovereign states may, however, not be achieved in such a way that not sufficient space is left to the Member States for the political formation of the 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 in public discourse in the party political and parliamentary sphere of public politics. Essential areas of democratic formative action comprise, *inter alia*, citizenship, the civil and the military monopoly on the use of force, revenue and expenditure including external financing and all elements of encroachment that are decisive for the realisation of fundamental rights, above all in major encroachments on fundamental rights such as deprivation of liberty in the administration of criminal law or placement in an institution. These important areas also include cultural issues such as the disposition of language, the shaping of circumstances concerning the family and education, the ordering of the freedom of opinion, press and of association and the dealing with the profession of faith or ideology. 249

dd) Democracy not only means respecting formal principles of organisation (see BVerfGE 89, 155 <185>) and not just a cooperative involvement of interest groups. Democracy first and foremost lives on, and in, a viable public opinion that concentrates on central acts of determination of political direction and the periodic allocation of highest-ranking political offices in the competition of government and opposition. Only this public opinion shows the alternatives for elections and other votes and continually calls them to mind also in decisions relating to individual issues in order that they may remain continuously present and effective in the political opinion-formation of the people via the parties, which are open to participation for all citizens, and in the public information area. To this extent, Article 38 and Article 20.1 and 20.2 of the Basic Law also protect the connection between political decisions on facts and the will of the majority constituted by elections, and the resulting dualism between government and opposition in a system of a multiplicity of competing parties and of observing and controlling formation of public opinion. 250

Even if due to the great successes of European integration, a common European polity that engages in issue-related cooperation in the relevant areas of their respective states is visibly growing (see on this already BVerfGE 89, 155 <185>; Trenz, *Europa in den Medien, Die europäische Integration im Spiegel nationaler Öffentlichkeit*, 2005), it cannot be overlooked, however, that the public perception of factual issues and of political leaders remains connected to a considerable extent to patterns of identification related to the nation-state, language, history and culture. The principle of democracy as well as the principle of subsidiarity, which is also structurally required by Article 23.1 first sentence of the Basic Law, therefore require factually to restrict the transfer and exercise of sovereign powers to the European Union in a predictable manner, particularly in central political areas of the space of personal 251

development and the shaping of living conditions by social policy. In these areas, it is particularly necessary to draw the limit where the coordination of cross-border situations is factually required.

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). 252

(1) As regards the preconditions for criminal liability as well as the concepts of a fair and appropriate trial, the administration of criminal law depends on cultural processes of previous understanding that are historically grown and also determined by language, and on the alternatives which emerge in the process of deliberation which moves the respective public opinion (see on this Weigend, *Strafrecht durch internationale Vereinbarungen - Verlust an nationaler Strafrechtskultur?*, ZStW 1993, p. 774 <785>). The common characteristics in this regard, but also the differences, between the European nations is shown by the relevant case law of the European Court of Human Rights concerning procedural guarantees in criminal proceedings (see the contributions by Bank <chapter 11>; Grabenwarter/Pabel <chapter 14> and Kadelbach <chapter 15> in: Grote/Marauhn, EMRK/GG, 2006; Gollwitzer, *Menschenrechte im Strafverfahren: MRK und IPBPR*, 2005). The penalisation of social behaviour can, however, only partially be normatively derived from values and moral premises that are shared Europe-wide. Instead, the decision on punishable behaviour, on the ranking of legal interests and the meaning and the measure of the threat of punishment, is much more particularly left to the democratic decision-making process (see BVerfGE 120, 224 <241-242>). 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 (see BVerfGE 113, 273 <298-299>). 253

(2) A similarly determined limit is drawn by the Basic Law as regards decisions on the deployment of the German *Bundeswehr*. Except in case of defence, the deployment of the *Bundeswehr* abroad is only permitted in systems of mutual collective security (Article 24.2 of the Basic Law), with specific deployment mandatorily depending on the approval of the German *Bundestag* (see BVerfGE 90, 286 <381-382>; 100, 266 <269>; 104, 151 <208>; 108, 34 <43>; 121, 135 <153-154>*;* established case law*).* The *Bundeswehr* is a “parliamentary army” (BVerfGE 90, 286 <382>), on whose deployment the representative body of the people must decide (see BVerfGE 90, 286 <383 et seq.>). The deployment of armed forces is of paramount importance for the individual legal standing of soldiers and of others affected by military action and in- 254

volves danger of far-reaching implications.

Even if the European Union were to be further developed into a peacekeeping regional system of mutual collective security within the meaning of Article 24.2 of the Basic Law, supranationalisation involving primacy of application with a view to the specific deployment of German armed forces would be inadmissible here because of the precept of peace and democracy, which precedes the integration authorisation of Article 23.1 of the Basic Law in this respect. The constitutive requirement of parliamentary approval for the deployment of the *Bundeswehr* abroad is not open to integration. This, however, does not raise an insurmountable obstacle under constitutional law to a technical integration of a European deployment of armed forces via joint general staffs, nor to the formation of joint forces or to agreement on and coordination of joint European weapons procurement. Only the decision on any specific deployment depends on the constitutive approval of the German *Bundestag*. 255

(3) A transfer of the right of the *Bundestag* to adopt the budget and control its implementation by the government which would violate the principle of democracy and the right to elect the German *Bundestag* in its essential content would occur if the determination of the type and amount of the levies imposed on the citizen were supranationalised to a considerable extent. 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. Therefore the parliamentary debate on the budget, including the extent of public debt, is regarded as a general debate on policy. Not every European or international obligation that has an effect on the budget endangers the viability of the *Bundestag* as the legislature responsible for approving the budget. The openness to legal and social order and to European integration which the Basic Law calls for, include an adaptation to parameters laid down and commitments made, which the legislature responsible for approving the budget must include in its own planning as factors which it cannot itself directly influence. What is decisive, however, is that the overall responsibility, with sufficient political discretion regarding revenue and expenditure, can still rest with the German *Bundestag*. 256

(4) The principle of the social state establishes a duty on the part of the state to ensure a just social order (see BVerfGE 59, 231 <263>; 100, 271 <284>). The state must carry out this obligation on the basis of a broad discretion; for this reason, concrete constitutional obligations to act have only been derived from this principle in very few cases. The state must merely create the minimum conditions for its citizens to live in human dignity (see BVerfGE 82, 60 <80>; 110, 412 <445>). The principle of the social state sets the state a task, but it does not say anything about the means with which the task is to be accomplished in individual cases. 257

The requirements under constitutional law as regards social integration or a “social union” are clearly limited. It is true that pursuant to Article 23.1 first sentence of the Basic Law, Germany’s participation in the process of integration depends, *inter alia*, on the European Union’s commitment to social principles. Accordingly the Basic Law not only defensively safeguards social tasks for the German state union against supranational demands but aims at committing the European public authority to social responsibility in the spectrum of tasks transferred to it (see Heinig, *Der Sozialstaat im Dienst der Freiheit*, 2008, pp. 531 et seq.). The institutions of the European Union, however, are subject to the principle that the social state necessarily requires political and legal concretisation in order for it to have an effect. 258

Accordingly, the essential decisions in social policy must be made by the German legislative bodies on their own responsibility. In particular the securing of the individual’s livelihood, which is a responsibility of the state that is based not only on the principle of the social state but also on Article 1.1 of the Basic Law, must remain a primary task of the Member States, even if coordination which goes as far as gradual approximation is not ruled out. This corresponds to the legally and factually limited possibilities of the European Union to shape the structures of a social state. 259

(5) Finally, democratic self-determination relies on the possibility to assert oneself in one’s own cultural area, especially relevant in decisions made concerning the school and education system, family law, language, certain areas of media regulation, and the status of churches and religious and ideological communities. Those activities of the European Union that may be already observed in these areas intervene in society on a level that is the primary responsibility of the Member States and their component parts. The manner in which curricula and the content of education and, for 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. Here, democratic self-determination requires that a political community bound by such traditions and convictions remains the subject of democratic legitimation. 260

b) The structure-securing clause of Article 23.1 first sentence of the Basic Law restricts the objective of participation addressed in the determination of the objective of the state to a European Union which in its elementary structures complies with the core principles protected also from amendment by the constitution-amending legislature by Article 79.3 of the Basic Law. The development of the European Union in respect of a transfer of sovereign powers, institutions and decision-making procedures must correspond to democratic principles (Article 23.1 first sentence of the Basic Law). The specific requirements placed on the democratic principles depend on the extent of the sovereign powers that have been transferred and on the degree of independence achieved by European decision-making procedures. 261

aa) The constitutional requirements placed by the principle of democracy on the organisational structure and the decision-making procedures of the European Union depend on the extent to which sovereign responsibilities are transferred to the Union and the degree of political independence in the exercise of the sovereign powers transferred. Increased integration may be unconstitutional if the level of democratic legitimation is not commensurate with the extent and the importance of supranational power. As long as, and in so far as, the principle of conferral is adhered to in an association of sovereign states with clear elements of executive and governmental cooperation, the legitimation provided by national parliaments and governments complemented and sustained by the directly elected European Parliament is sufficient in principle (see BVerfGE 89, 155 <184>). 262

If however, the threshold were crossed to a federal state and to the giving up of national sovereignty, this would require a free decision of the people in Germany beyond the present applicability of the Basic Law and the democratic requirements to be complied with would have to be fully consistent with the requirements for the democratic legitimation of a union of rule organised by a state. This level of legitimation could no longer be prescribed by national constitutional orders. 263

A structural democratic deficit that would be unacceptable pursuant to Article 23 in conjunction with Article 79.3 of the Basic Law would exist if the extent of competences, the political freedom of action and the degree of independent opinion-formation on the part of the institutions of the Union reached a level corresponding to the federal level in a federal state, i.e. a level analogous to that of a state, because for example the legislative competences, essential for democratic self-determination, were exercised mainly at Union level. 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. 264

bb) To safeguard democratic principles, it may be necessary to clearly emphasise the principle of conferral in the treaties and in their application and interpretation, in order to maintain the balance of political forces of Europe between the Member States and the level of the Union as the precondition for the allocation of sovereign powers in the association. 265

In order to comply with democratic principles on the part of the European Union, Article 23.1 first sentence of the Basic Law, however does not demand “structural congruence” (see on this concept Kruse, *Strukturelle Kongruenz und Homogenität, in: Mensch und Staat in Recht und Geschichte, Festschrift für Herbert Kraus*, 1954, p. 112 <123>) or even the accordance of the institutional order of the European Union to the order prescribed by the principle of democracy of the Basic Law for the national level. What is required, however, is a democratic elaboration commensurate with the 266

status and the function of the Union (see Hobe, *Der offene Verfassungsstaat zwischen Souveränität und Interdependenz*, 1998, p. 153; Pernice, in: Dreier, GG, vol. II, 2nd ed. 2006, Art. 23, para. 48; Rojahn, in: von Münch/Kunig, GG, vol. 2, 5th ed. 2001, Art. 23, para. 21; Röben, *Außenverfassungsrecht*, 2007, p. 321: „*strukturelle Kompatibilität*"). It follows from the sense and purpose of the structure-securing clause that the Basic Law's principle of democracy need not be realised at European level in the same way, something still called for in the 1950s and early 1960s for intergovernmental institutions within the meaning of Article 24.1 of the Basic Law (see for instance Kruse, loc cit., p. 112 <123>; Friauf, *Zur Problematik rechtsstaatlicher und demokratischer Strukturelemente in zwischenstaatlichen Gemeinschaften*, DVBl. 1964, p. 781 <786>).

In principle, the principle of democracy is open to the requirements of a supranational organisation, not in order to adapt the normative content of its provisions to the respective factual situation of the organisation of political rule but to preserve the same effectiveness under changed circumstances (see BVerfGE 107, 59 <91>). Consequently, Article 23.1 first sentence of the Basic Law assumes that in the European Union, democratic principles cannot be realised in the same manner as in the Basic Law (see *Bundestag* printed paper 12/3338, p. 6). 267

cc) In modern territorial states, the self-determination of a people is mainly realised in the election of bodies of a union of rule, which exercise public authority. The bodies must be created by the majority decision of the citizens, who can periodically influence the fundamental direction of policy in respect of persons and subjects. A free public opinion and a political opposition must be able to critically observe the major elements of the decision-making process and ascribe it correctly to those responsible, i.e. usually to a government (see Article 20.2 second sentence of the Basic Law; BVerfGE 89, 155 <185>; 97, 350 <369>; with a comparative law approach Cruz Villalón, *Grundlagen und Grundzüge staatlichen Verfassungsrechts: Vergleich*, in: von Bogdandy/Cruz Villalón/Huber, *Handbuch Ius Publicum Europaeum*, vol. I, 2007, § 13, paras 102 et seq., with further references). 268

The practical manifestations of democracy lend concrete shape to these guidelines, account being taken of the principles of freedom and electoral equality either in a single parliamentary representative body which undertakes the task of forming a government like for example the United Kingdom, Germany, Belgium, Austria and Spain - or in a presidential system with the highest level of the executive power being directly elected in addition - like, for example in the United States, France, Poland and Bulgaria. The direct will of the people may be expressed by electing a (parliamentary) representation of the people or by electing the highest-ranking representative of the executive (President) as well as by majority decisions in referenda about factual issues. Presidential systems like the ones in the United States or in France are dualistically constituted representative democracies, while the United Kingdom or Germany have systems of monistic parliamentary representation. In Switzerland, on the other hand, parliamentary monism is complemented by strong plebiscitary elements, which 269

also fulfil part of the functions of a parliamentary opposition (see Loewenstein, *Verfassungslehre*, 2nd ed. 1959, provided with a supplement 1969, pp. 67 et seq.; Sommermann, *Demokratiekonzepte im Vergleich*, in: Bauer/Huber/Sommermann, Demokratie in Europa, 2005, pp. 191 et seq.; Mastronardi, *Verfassungslehre, Allgemeines Staatsrecht als Lehre vom guten und gerechten Staat*, 2007, pp. 268-269).

In a democracy, the people must be able to determine government and legislation in free and equal elections. This core content may be complemented by plebiscitary voting on factual issues; such voting could be made possible also in Germany by an amendment of the Basic Law. In a democracy, the decision of the people is the focal point of the formation and retention of political power: Every democratic government knows the fear of losing power by being voted out of office. In its judgment banning the Communist Party of Germany, the Federal Constitutional Court in 1956 described democracy as the procedurally regulated “battle for political power” that is waged to gain the majority. According to the Federal Constitutional Court, this battle is about the will of the actual majority of the people ascertained in carefully regulated procedures and preceded by a free discussion. It was regarded as constitutive of the democratic organisation of state authority that a majority “can always change”, that a multiparty system and the right to “organised political opposition” exist (see BVerfGE 5, 85 <198-199>). 270

The European Union itself acknowledges this democratic core concept as a general European constitutional tradition (see Article 3.1 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms of 20 March 1952 <First Protocol to the ECHR> <Federal Law Gazette 2002 II p. 1072>; CSCE, Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, EuGRZ 1990, pp. 239 et seq., para. 7) by placing corresponding structural requirements on the Member States and declaring their factual continued existence to be a precondition for participating in the European integration (Article 6.1 TEU; Article 2 Lisbon TEU; see already Presidency Conclusions of the Copenhagen European Council <21/22 June 1993>, Bulletin EU 6-1993, I.13; Agenda 2000, COM(97) 2000 final, vol. I, p. 52). Because and in so far as the European Union itself only exercises derived public authority, it need not fully comply with the requirements. At European level, the Council is not a second chamber as it would be in a federal state but the representative body of masters of the Treaties and accordingly, it is not constituted by proportional representation but according to the idea of the equality of states. As a representative body of the peoples directly elected by the citizens of the Union, the European Parliament is an additional independent source of democratic legitimation (see BVerfGE 89, 155 <184-185>). As a representative body of the peoples in a supranational community, characterised as such by a limited willingness to unite, it cannot, and need not, as regards its composition, comply with the requirements that arise at state level from the equal political right to vote of all citizens. The Commission also as a supranational, special body, also the Commission need not extensively fulfil the conditions of a government that is fully accountable either to Parliament or to the 271

majority decision of the electorate because the Commission itself is not bound by the will of the electorate in a comparable manner.

As long as European competences are ordered according to the principle of conferral in cooperatively shaped decision-making procedures, and taking into account state responsibility for integration, and as long as an equal balance between the competences of the Union and the competences of the states is retained, the democracy of the European Union cannot, and need not, be shaped in analogy to that of a state. Instead, the European Union is free to look for its own ways of reducing the democratic deficit by means of additional, novel forms of transparent or participative political decision-making procedures. It is true that the merely deliberative participation of the citizens and of their societal organisations in the political rule - their direct involvement in the deliberations of the institutions with the power to take binding political decisions - cannot replace the legitimising connection based on elections and other votes. Such elements of participative democracy can, however, complement the legitimation of European public authority. This encompasses in particular forms of legitimation to which civic commitment can contribute in a more direct, more specialised and more profoundly issue-related manner, for example by providing the citizens of the Union and the societally relevant associations (Article 11.2 Lisbon TEU: “representative associations”) with the possibility of expressing their views in an appropriate manner. Such forms of decentralised participation based on the division of labour and has a potential to increasing legitimacy for their part contribute to making the primary representative and democratic connection of legitimation more effective. 272

II.

As specified in the grounds, the Treaty of Lisbon and the Act Approving the Treaty of Lisbon comply with the constitutional requirements as stated (1.). There are also no constitutional objections to the Act Amending the Basic Law (Articles 23, 45 and 93) (2.). The Act Extending and Strengthening the Rights of the Bundestag and the Bundesrat in European Union Matters does not comply with the requirements under Article 38.1 in conjunction with Article 23.1 of the Basic Law and must be re-drafted in accordance with constitutional requirements before the ratification of the treaty (3.). 273

1. The Act Approving the Treaty of Lisbon is compatible with the requirements of the Basic Law, in particular with the principle of democracy. The right to vote under Article 38.1 of the Basic Law is not violated. In the free and equal election of the Members of the German *Bundestag* and in corresponding votes in the *Länder*, the German people still decides essential political issues in the Federation and in the *Länder*. Through the election of the German contingent of Members of the European Parliament the right to vote of the citizens of the Federal Republic of Germany is supplemented by the possibility of participation in the system of European institutions, thus providing for a sufficient level of legitimation in the system of conferred powers. 274

The level of legitimation of the European Union still complies with constitutional requirements in respect of transferred powers and the degree of independence of the 275

decision-making procedures in so far as the principle of conferral is safeguarded procedurally beyond the extent provided for in the treaties (a). The Treaty of Lisbon neither transfers constituent power, which cannot be affected by the constitutional bodies, nor does it abandon state sovereignty of the Federal Republic of Germany (b). The German *Bundestag* still retains sufficiently onerous responsibilities and competences of its own (c).

a) The present status of integration is such that even with entry into force of the Treaty of Lisbon the European Union does not attain a form that corresponds to the level of legitimation of a democracy constituted as a state. 276

Not just from the point of view of the Basic Law does the participation of Germany not mean the transfer of the model of a federal state to the European level but an extension of the constitutional federal model by a supranational cooperative dimension. The Treaty of Lisbon also decided against the concept of a European federal Constitution in which the European Parliament would become the focus as the representative body of a new federal people constituted by it. A will aiming at founding a state cannot be ascertained. Measured against the standards of free and equal elections and the requirement of a viable majority rule, the European Union also does not correspond to the federal level in a federal state. Consequently, the Treaty of Lisbon does not alter the fact that the *Bundestag* as the representative body of the German people is the focal point of an intertwined democratic system. 277

The European Union complies with democratic principles as a qualitative assessment of the organisation of its responsibilities and authority reveals that its structure is precisely not analogous to that of a state. The claim made in the applications and the constitutional complaint which is the focal point of the challenges, namely that the Treaty of Lisbon moves the subject of democratic legitimation, is incorrect. Even as an association with its own legal personality, the European Union remains the creation of sovereign democratic states. In the present state of integration, it is therefore not required to democratically develop the system of the European institutions in analogy to that of a state. In view to the continued validity of the principle of conferral, and with an interpretation according to the wording and the meaning and purpose of the competences newly established by the Treaty of Lisbon, the composition of the European Parliament does not need to do justice to equality in such a way that differences in the weight of the votes of the citizens of the Union depending on the Member States' population figures are eliminated. 278

aa) The democratic basic rule of equal opportunities of success ("one man, one vote") only applies within a people, not within a supranational representative body, which remains a representation of the peoples linked to each other by the treaties albeit now with special emphasis on citizenship of the Union. 279

Measured against requirements in a constitutional state, even after the entry into force of the Treaty of Lisbon, the European Union lacks a political decision-making body created in equal elections by all citizens of the Union and with the ability to uni- 280

formly represent the will of the people. In addition, connected with this is the lack of a system of organisation of political rule in which a European majority will carries the formation of the government sustained by free and equal electoral decisions and thus genuine competition, transparent for citizens, between government and opposition can come about. Even in the new wording of Article 14.2 Lisbon TEU, and contrary to the claim that Article 10.1 Lisbon TEU seems to make according to its wording, the European Parliament is not a representative body of a sovereign European people. This is reflected in the fact that it is designed as a representation of peoples in the respective national contingents of Members, not as a representation of Union citizens in unity without differentiation, according to the principle of electoral equality.

281 The structure of the Treaty of Lisbon also does not allow competences for the European Union to create an independent people's sovereignty for all Union citizens. If a narrow decision between opposing political groupings is taken in the European Parliament, there is no guarantee of the majority of votes cast also represents a majority of Union citizens. Therefore the formation, from within Parliament, of an independent government vested with the competences that are usual in states would meet with fundamental objections. There would be a possibility that a minority of citizens with numbers based on the existing ratio of representation by a majority of Members of the European Parliament would thus govern against the political will of a majority opposition of Union citizens which would not be reflected as a majority in numbers. It is true that the principle of electoral equality, only if applied on the strictest conditions of proportional representation, will secure the most accurate reflection of the will of the people. However, even in majority voting systems, there is in any case a sufficient guarantee of electoral equality for votes in terms of the value counted and the chance of success, whereas this is not the case if any appointment of seats according to numbers is established.

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

283 Electoral equality is not a special characteristic of the German legal order. It belongs to the legal principles binding on all European states. Article 3 of the First Protocol to the ECHR guarantees the right to participate in the elections of the legislative bodies of a Contracting State, i.e. to the individual right to vote and to stand for election. It is true that the Contracting States have a wide margin of appreciation in shaping the details of their electoral law, including taking into account of national particularities and historical development. The fact that elections are to guarantee the "free expression of the opinion of the people", however, leads the European Court of Human Rights to conclude that this essentially includes the principle of equality of treatment of all citizens in the exercise of their right to vote. The European Court of Human Rights explicitly includes the value of votes counted into this equal treatment, whilst allowing exceptions for equal contribution towards success and for equal chances of victory

for the candidates (European Court of Human Rights, judgment of 2 March 1987, Application no. 9267/81, Case of Mathieu-Mohin and Clerfayt v. Belgium, para. 54; judgment of 7 February 2008, Application no. 39424/02, Case of Kovach v. Ukraine, para. 49; on the application of Article 3 of the First Protocol to the European Parliament as a “legislature”: European Court of Human Rights, judgment of 18 February 1999, Application no. 24833/94, Case of Matthews v. United Kingdom, para. 40 = NJW 1999, p. 3107 <3109>).

cc) Against this background, as seats are allocated to the Member States, the European Parliaments factually remains a representation of the peoples of the Member States. The degressively proportional composition prescribed for the European Parliament by Article 14.2(1) third sentence Lisbon TEU stands between the principle of equality of states under international law and the state principle of electoral equality. According to the primary law provisions, which begin to flesh out the principle of degressive proportionality, the maximum number of Members of the European Parliament shall be 750 (plus the President); no Member State shall be allocated more than 96 seats and none shall be allocated less than six seats (Article 14.2(1) second to fourth sentence Lisbon TEU). As a result the weight of the vote of a citizen from a Member State with a small population may be about twelve times the weight of the vote of a citizen from a Member State with a large population. 284

On 11 October 2007, the European Parliament submitted a draft decision that already anticipates the validity of Article 14.2(2) Lisbon TEU (European Parliament Resolution of 11 October 2007 on the Composition of the European Parliament, OJ 2008 no. C 227 E/132, Annex 1). It was approved by the Intergovernmental Conference (see Declaration no. 5 on the Political Agreement by the European Council Concerning the Draft Decision on the Composition of the European Parliament). The decision can only be adopted by the European Council after the entry into force of the Treaty of Lisbon. According to the draft decision, the principle of degressive proportionality is to be applied in such a way that the minimum and maximum numbers of contingents of mandates must be fully utilised, that the number of seats allotted to a Member State is roughly proportionate to the size of its population and that the number of inhabitants represented by a mandate is higher in more populous Member States (Article 1 of the draft decision). The Federal Republic of Germany is allotted 96 seats (Article 2 of the draft decision). According to the draft decision, a Member of the European Parliament elected in France would represent approximately 857,000 citizens of the Union and thus as many as a Member elected in Germany, who represents approximately 857,000 as well. In contrast, a Member of the European Parliament elected in Luxembourg would, however, only represent approximately 83,000 Luxembourg citizens of the Union, i.e. a tenth of them, in the case of Malta, it would be approximately 67,000, or only roughly a twelfth of them; as regards a medium-sized Member State such as Sweden, every elected Member of the European Parliament would represent approximately 455,000 citizens of the Union from that country in the European Parliament (for the population figures on which these calculations 285

are based see Eurostat, Europe in figures, Eurostat yearbook 2008, 2008, p. 25).

In federal states, such marked imbalances are, as a general rule, only tolerated for the second chamber existing beside the parliament; in Germany and Austria, the second chamber is the *Bundesrat*, in Australia, Belgium and the United States, it is the Senate. They are, however, not accepted in the representative body of the people because otherwise that could not represent the people in a way that does justice to equality based on the principle of personal freedom. The arrangement of the right to vote in the European Union need, however, not be a contradiction to Article 10.1 Lisbon TEU, which provides that the functioning of the Union shall be founded on representative democracy; for the democracies of the Member States with their majorities and decisions on political direction are represented at the level of the European institutions in the Council and also in the Parliament. Thus, this arrangement of representation of the Member States only indirectly represents the distribution of power in the Member States. This is a cogent reason for the fact that it would be perceived as insufficient if for example a small Member State were represented in the European Parliament by only one Member of Parliament if the principle of electoral equality were observed more strictly. The states affected argue that otherwise it would no longer possible to reflect national majority situations in a representative manner at European level. This consideration alone shows that it is not the European people that is represented within the meaning of Article 10.1 Lisbon TEU but the peoples of Europe organised in their states, with their respective distribution of power brought about by democratic elections taking into account the principle of equality and pre-determined by party politics. 286

This consideration at the same time clarifies why representation in the European Parliament is not linked to the equality of citizens of the Union (Article 9 Lisbon TEU) but to nationality, a criterion that is actually an absolutely prohibited distinction for the European Union. For political projects such as the economic union to be able to succeed, it has been a central idea of the European union of integration since its foundation to prohibit or restrict discrimination on grounds of nationality (Article 12, Article 18 ECT; Article 18, Article 21 TFEU). The concept of the internal market is based on the conviction that it does not make any difference from which Member State goods or services originate, where workers or entrepreneurs come from and what the origin of investment is. However, precisely this criterion of nationality is intended to be decisive pursuant to Article 14.2(1) third sentence Lisbon TEU when it comes to giving the possibility of exerting influence in the European Union to its citizens. The European Union thus shows an assessment of values in contradiction to the basic concept of a citizens' Union, as it regards itself; this contradiction can only be explained by the character of the European Union as an association of sovereign states. 287

It is true that the democracy of the European Union is approximated to federalised state concepts; if measured against the principle of representative democracy, however, it would show an excessive degree of federalisation. With the personal composition of the European Council, of the Council, the Commission and the Court of Jus- 288

tice of the European Union, the principle of the equality of states remains linked to national rights of determination, rights which are, in principle, equal. Even for a European Parliament elected having due account to equality, this structure would constitute a considerable obstacle for the expression of the representative will of the parliamentary majority with regard to persons or subject- areas. For example, after the entry into force of the Treaty of Lisbon, the Court of Justice must still be composed according to the principle “one state, one judge” and under the determining influence of the Member States regardless of their number of inhabitants. The functioning of the European Union continues to be characterised by the influence of the negotiating governments and the subject-related administrative and formative competence of the Commission even if on the whole the rights of participation of the European Parliament have been strengthened. Within this system, the influence of Parliament has been consistently further developed granting it the right of veto in central areas of legislation. The ordinary legislative procedure in the Treaty of Lisbon regulates what is already decisive in fact under the currently applicable law in many areas: in the codecision procedure, a directive or a regulation cannot be adopted against the will of the European Parliament.

dd) The deficit of European public authority that exists when measured against requirements on democracy in states cannot be compensated for by other provisions of the Treaty of Lisbon and, to that extent, it cannot be justified. 289

(1) The European Union tries to compensate for the existing excessive degree of federalisation in particular by strengthening citizens’ and associations’ rights aimed at participation and transparency, as well as by enhancing the role of the national parliaments and of the regions. The Treaty of Lisbon strengthens these elements of participative democracy aimed at procedural participation. Beside the elements of complementary participative democracy, such as the precept of appropriately providing the citizens of the Union and the “representative” associations with the possibility of communicating their views, the Treaty of Lisbon also provides for elements of associative and direct democracy (Article 11 Lisbon TEU). They include the dialogue between the institutions of the Union and “representative” associations and civil society as well as the European citizens’ initiative. The European citizens’ initiative gives an opportunity to invite the Commission to submit any appropriate proposal on the regulation of political matters. Such an invitation is subject to a quorum of not less than one million citizens of the Union who have to be nationals of a “significant number of Member States” (Article 11.4 Lisbon TEU). The citizens’ initiative is restricted to issues within the framework of the powers of the Commission and it requires further definition of its procedures and conditions under secondary law by a regulation (Article 24.1 TFEU). At the same time, the European citizens’ initiative is considered as a measure aimed at promoting the development of a European public area, which was called for in the Laeken Declaration. 290

(2) As a justification for the inequality of the election to the European Parliament, reference is made, *inter alia* by the Federal Government (see *Bundestag* printed paper 291

16/8300, p. 133 <135-136>), to the other track of legitimation of the European public authority: the participation of the Council in the lawmaking process, which acts with weighted votes in majority decisions. The so-called double qualified majority is intended to avoid the majority of inhabitants constituting the majority in the Council. Accordingly, to reach a majority of votes in the Council, not only a majority of 55 per cent of the Member States would have to be achieved but in addition a majority of 65 per cent of the "population of the Union" (Article 16.4 Lisbon TEU). The present system of weighting of votes, which assigns to the Member States a number of votes according to their size, is intended to disappear after a transitional period.

Admittedly, with this approach in the Treaty of Lisbon, the European Union returns to the classical principle under international law of the equality of states - one state, one vote. The new corrective factor of the majority of the population, however, adds another element of calculation which consists of the peoples of the Member States of the Union, while making reference not to the citizens of the Union as the subjects of political rule but to the inhabitants of the Member States as the expression of the strength of representation of the representative of in the Council the respective Member State. In future, a numerical majority of the people living in the European Union is intended to support a decision of the Council. Admittedly, this weighting, which depends on the number of inhabitants, counteracts excessive federalisation, without, however, complying with the democratic precept of electoral equality. As regards electoral equality and the mechanism of direct parliamentary representation, the democratic legitimation of political rule is also in party democracies based on the category of the individual's act of voting and not assessed according to the number of those affected. 292

(3) The institutional recognition of the Member States' parliaments by the Treaty of Lisbon also cannot compensate for the deficit in the strand of legitimation of the European public authority directly based on the election of the Members of the European Parliament. The status of national parliaments is considerably curtailed by the reduction of decisions requiring unanimity and the supranationalisation of police and judicial cooperation in criminal matters. As agreed in the oral hearing, compensation, provided for by the treaty by the procedural strengthening of subsidiarity shifts existing political rights of self-determination to procedural possibilities of intervention and legally assertable claims to participation. 293

(4) Neither the additional rights of participation, which are strongly interlocked as regards the effects of their many levels of action and in view of the large number of national parliaments, nor rights of petition which are associative and have a direct effect *vis-à-vis* the Commission are suited to replace a majority rule established by elections. Nevertheless, they are intended to, and indeed can, ultimately increase the level of legitimation all the same under the conditions of an association of sovereign states (*Staatenverbund*) with restricted tasks. 294

Mere participation of the citizens in political rule which would take the place of repre- 295

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

ee) The development of the institutional architecture by the Treaty of Lisbon not only contains rights of participation and improves the transparency of decision-making for example as regards the legislative activity of the Council. It also contains contradictions because with the treaty, the Member States follow the construction model for a federal state without being able to create the democratic basis for this under the treaties in the form of the equal election of an appropriate representation of the people and of a parliamentary European government that is based on the legitimising power of the people of the Union alone. 296

Under the present law the European Commission has already grown into the function of a European government, shared with the Council and the European Council. It is not apparent how this process of political independence could be promoted without it directly originating from an election by the demos in which due account is taken of equality, an election which includes the possibility of being voted out of office and thereby becomes politically effective. If the shift of the focus of political action towards the Commission were to continue as it is intended in conceptual proposals for the future of the European Union, and if the President of the Commission were elected legally and factually by the European Parliament alone (see Article 17.7 Lisbon TEU), the election of the Members of Parliament would at the same time decide on a European government beyond the extent regulated today. As regards the legal situation according to the Treaty of Lisbon, this consideration confirms that without democratic origins in the Member States, the action of the European Union lacks a sufficient basis of legitimation. 297

b) As a supranational organisation the European Union must comply, as before, with the principle of conferral exercised in a restricted and controlled manner. Especially after the failure of the project of a Constitution for Europe, the Treaty of Lisbon has shown sufficiently clearly that this principle remains valid. The Member States remain the masters of the Treaties. In spite of a further extension of competences, the princi- 298

ple of conferral is retained. The provisions of the treaty can be interpreted in such a way that the constitutional and political identity of the fully democratically organised Member States is safeguarded, as well as their responsibility for the fundamental direction and elaboration of Union policy. After the entry into force of the Treaty of Lisbon, the Federal Republic of Germany will also remain a sovereign state and thus a subject of international law. The substance of German state authority, including the constituent power, is protected (aa), the German state territory remains assigned only to the Federal Republic of Germany (bb), there are no doubts concerning the continued existence of the German state people (cc).

aa) Sovereign state authority is preserved according to the rules on the distribution and delimitation of competences (1). The new provisions on treaty amendments under primary law are not contrary to this (2). The continued existence of sovereign state authority is also shown in the right to withdraw from the European Union (3) and is protected by the Federal Constitutional Court's right to pass a final judgment (4). 299

(1) The distribution of the European Union's competences, and their delimitation from those of the Member States, occurs according to the principle of conferral (a) and according to other protection mechanisms relating to specific competences (b). 300

(a) The principle of conferral is a protection mechanism to preserve Member States' responsibility. The European Union is competent for an issue only in so far as the Member States have conferred such competence on it. Accordingly, the Member States are the constituted primary political area of their respective polities, the European Union has secondary, i.e. delegated, responsibility for the tasks conferred on it. The Treaty of Lisbon explicitly confirms the current principle of conferral. "The Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein" (Article 5.1 first sentence and 5.2 Lisbon TEU; see also Article 1.1, Article 3.6, Article 4.1, Article 48.6(3) Lisbon TEU; Article 2.1 and 2.2, Article 4.1, Article 7, Article 19, Article 32, Article 130, Article 132.1, Article 207.6, Article 337 TFEU; Declaration no. 18 in Relation to the Delimitation of Competences; Declaration no. 24 Concerning the Legal Personality of the European Union). 301

A protection mechanism with a formal approach is the categorisation and classification of the European Union's competences according to exclusive competences, competences shared with the Member States, and competences to carry out actions to support, coordinate or supplement the actions of the Member States, carried out for the first time (see Rossi, *Die Kompetenzverteilung zwischen der Europäischen Gemeinschaft und ihren Mitgliedstaaten*, in: Scholz, *Europa als Union des Rechts - Eine notwendige Zwischenbilanz im Prozeß der Vertiefung und Erweiterung*, 1999, p. 196 <201>). 302

Admittedly, the transparency provided by this categorisation of competences is restricted in that the "parallel" competences, claimed by the Member States and the European Union alike, are not clearly assigned to a category in the Treaty of Lisbon (see 303

Article 2.5(1) and Article 4.3 and 4.4 TFEU), the Common Foreign and Security Policy and the coordination of economic and employment policies are outside the three competence categories and the so-called open method of coordination is not mentioned. However, these derogations from the systematising fundamental approach do not affect the principle of conferral, and their nature and extent also does not call the objective of clear delimitation of competences into question.

(b) However, protection mechanisms under substantive law, in particular provisions concerning the exercise of competences, are intended to ensure that the powers conferred at European level are exercised in such a way that the competences of the Member States are not affected. The provisions concerning the exercise of competences include the precept of respecting the Member States' national identities (Article 4.2 Lisbon TEU), the principle of sincere cooperation (Article 4.3 Lisbon TEU), the principle of subsidiarity (Article 5.1 second sentence and 5.3 Lisbon TEU) and the principle of proportionality (Article 5.1 second sentence and 5.4 Lisbon TEU). These principles are confirmed, and partly rendered more precise as regards their content, by the Treaty of Lisbon. 304

In addition, the principle of subsidiarity is procedurally strengthened by Protocol no. 2 on the Application of the Principles of Subsidiarity and Proportionality (Subsidiarity Protocol). This is done by involving the national parliaments through the so-called early warning system (Article 12 lit b Lisbon TEU, Articles 4 et seq. of the Subsidiarity Protocol) in the monitoring of adherence to the principle of subsidiarity, and by extending the group of those entitled to bring an action for annulment before the Court of Justice of the European Union to include the national parliaments and the Committee of the Regions. The effectiveness of this mechanism depends on the extent to which the national parliaments will be able to make organisational arrangements that place them in a position to make appropriate use of the mechanism within the short period of eight weeks (see Mellein, *Subsidiaritätskontrolle durch nationale Parlamente*, 2007, pp. 269 et seq.). It will also be decisive whether the standing of the national parliaments and of the Committee of the Regions to bring an action will be extended to the question, which precedes the monitoring of the principle of subsidiarity, of whether the European Union has competence for the specific lawmaking project (see Wuermeling, *Kalamität Kompetenz: Zur Abgrenzung der Zuständigkeiten in dem Verfassungsentwurf des EU-Konvents*, EuR 2004, p. 216 <225>; von Danwitz, *Der Mehrwert gemeinsamen Handelns*, *Frankfurter Allgemeine Zeitung* of 23 October 2008, p. 8). 305

(2) The controlled and justifiable transfer of sovereign powers to the European Union, which is the only way in which this is possible under constitutional law, is also not called into question by individual provisions of the Treaty of Lisbon. The institutions of the European Union may neither in the ordinary (a) and simplified revision procedures (b) nor via the so-called bridging clauses (c) or the flexibility clause (d) independently change the foundations of the European Union under the treaties and the order of competences *vis-à-vis* the Member States. 306

(a) The ordinary revision procedure for the foundations of the European Union under the treaties (Article 48.2 to 48.5 Lisbon TEU) corresponds to the classical amendment procedures of comparable multilateral treaties. A Conference composed of representatives of the Member States convened by the President of the European Council is empowered to adopt treaty amendments. These amendments, however, only enter into force after being ratified by all Member States in accordance with their respective constitutional requirements (Article 48.4(2) Lisbon TEU). The Treaty of Lisbon makes it clear that these amendments may serve either to increase or to reduce the competences conferred on the Union in the treaties (Article 48.2 second sentence Lisbon TEU). 307

This legal situation is not altered by the fact that this classic treaty amendment procedure is preceded by a procedure that has evolved from the process of European integration, according to which usually a Convention largely consistent with the principle of equality of states composed of representatives of the national Parliaments, of the Heads of State or Government of the Member States, of the European Parliament and of the Commission, shall participate (Article 48.3(1) Lisbon TEU). The Convention procedure joins the amendment procedures under international law, which focus on the Member States, and thus takes due account of the institutional particularities of the European Union. The Convention examines the proposed amendments and adopts by consensus a recommendation to a conference of representatives of the governments of the Member States (Article 48.3(1) third sentence Lisbon TEU). There is no constitutional objection as long as the Member States are not legally bound by the results achieved by the Convention and as long as they can freely decide which treaty amendments they ultimately wish to agree under international law (see Article 48.4 Lisbon TEU). 308

(b) (aa) In addition, the Treaty of Lisbon introduces a simplified revision procedure (Article 48.6 Lisbon TEU). While treaty amendments in the ordinary procedure must be agreed by an Intergovernmental Conference, if necessary after convening the Convention, and require ratification by all Member States, the simplified revision procedure merely requires a decision adopted by the European Council, which shall enter into force after approval by the Member States “in accordance with their respective constitutional requirements” (Article 48.6(2) Lisbon TEU). It is explicitly made clear that the decision adopted by the European Council shall not increase the competences conferred on the Union in the treaties (Article 48.6(3) Lisbon TEU). The differentiation between ordinary and simplified treaty revision procedures shows that fundamental amendments are reserved to the ordinary procedure because a higher degree of legitimation is intended to be achieved by means of the Convention method, which is to be the norm. Nevertheless, even in the ordinary revision procedure the European Council may decide by a simple majority, after obtaining the consent of the European Parliament, not to convene a Convention, should this not be justified by the extent of the proposed amendments (Article 48.3(2) Lisbon TEU). 309

The simplified treaty revision procedure, for which only some individual provisions in the current treaties provide (see Article 17.1 TEU - introduction of a common defence; Article 42 TEU - applicability of Title IV of the Treaty establishing the European Community on police and judicial cooperation in criminal matters; Article 22.2 ECT - extension of the rights of the citizens of the Union; Article 190.4 ECT - introduction of a uniform procedure for the election of the European Parliament; Article 269.2 ECT - determination of the European Community's own resources), is, pursuant to the Treaty of Lisbon, applicable to amendments of provisions relating to the internal policies set out in Part Three of the Treaty on the Functioning of the European Union (Article 48.6(2) first sentence Lisbon TEU). 310

The implications of the authorisation to amend provisions of Part Three of the Treaty on the Functioning of the European Union can only be determined to a limited extent; as regards substance, they are hardly predictable for the German legislature. Article 48.6 Lisbon TEU allows the European Council a broad scope for amendments of primary law. The possible content of future amendments in the field of internal policies, a total of 172 Articles, policies which include the Single Market and the Economic and Monetary Union, is solely restricted by the prohibition of extending competences already conferred on the European Union (Article 48.6(3) Lisbon TEU). 311

The Federal Constitutional Court already ruled in its judgment on the Treaty of Maastricht that amendments of primary law can also be carried out in an abbreviated procedure if the Member States assent pursuant to their constitutional requirements (*gemäß ihren verfassungsrechtlichen Vorschriften*) (see BVerfGE 89, 155 <199>). The different wording as compared to Article 48.4(2) Lisbon TEU, which says that approval of the Member States is necessary in accordance with their respective constitutional requirements (*im Einklang mit ihren jeweiligen verfassungsrechtlichen Vorschriften*) does not mean, however, that the national requirements placed on the ratification of "simplified" treaty amendments are reduced in contrast to those placed on "ordinary" ones. The "approval" of the Federal Republic of Germany in simplified revision procedures pursuant to Article 48.6 Lisbon TEU always requires a law within the meaning of Article 23.1 second sentence of the Basic Law as a *lex specialis* with regard to Article 59.2 of the Basic Law (see BVerfGE 89, 155 <199>; as regards the reference to the national ratification requirements see also Decision no. 2007-560 DC of the *Conseil constitutionnel* of 20 December 2007, nos. 26 et seq.). The reference of a decision pursuant to Article 48.6 Lisbon TEU to the European Union's order of competences establishes an obligation generally to treat the simplified revision procedure like a transfer of sovereign powers within the meaning of Article 23.1 second sentence of the Basic Law (see also Pernice, in: Dreier, GG, vol. II, 2nd ed. 2006, Art. 23, para. 86), without a further determination of the possible amendments being required. Amendments of the treaties which amend or supplement the content of the Basic Law or which make such amendments or supplements possible require the approval of two thirds of the members of the German *Bundestag* and two thirds of the votes of the *Bundesrat* (Article 23.1 third sentence in conjunction with Article 79.2 of 312

the Basic Law; see BVerfGE 89, 155 <199>).

(bb) The Treaty of Lisbon incorporates other provisions into the Treaties which are worded in analogy to Article 48.6 Lisbon TEU but which are restricted to a specific area and are extended by Treaty of Lisbon (see Article 42.2(1) Lisbon TEU - introduction of a common defence; Article 25.2 TFEU - extension of the rights of the citizens of the Union; Article 218.8(2) second sentence TFEU - accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms; Article 223.1(2) TFEU - introduction of a uniform procedure for the elections of the European Parliament; Article 262 TFEU - competence of the European Union for the creation of European intellectual property rights; Article 311.3 TFEU - determination of the European Union's own resources). 313

The constitutional considerations as regards the simplified revision procedure also apply to these treaty amendment procedures contained in individual treaty provisions in so far as Article 23.1 second sentence of the Basic Law does not already apply anyway because the provisions on amendment do not contain a prohibition, corresponding to Article 48.6(3) Lisbon TEU, to extend the competences conferred on the European Union under the treaties. 314

(c) Beside the ordinary and the simplified revision procedures, the Treaty of Lisbon provides for the so-called general bridging procedure as another treaty amendment procedure (Article 48.7 Lisbon TEU). In addition, the Treaty of Lisbon contains special bridging clauses in individual provisions (see Article 31.3 Lisbon TEU - decisions on the Common Foreign and Security Policy in cases other than those mentioned in Article 31.2 Lisbon TEU; Article 81.3(2)(3) TFEU - measures concerning family law with cross-border implications; Article 153.2(4) TFEU - measures in the areas concerning the protection of workers where their employment contract is terminated, representation and collective defence of the interests of workers and employers and conditions of employment for third-country nationals; Article 192.2(2) TFEU - measures in the area of environmental policy; Article 312.2(2) TFEU - determination of the multiannual financial framework; Article 333.1 and 333.2 TFEU - voting procedures in the context of enhanced cooperation in accordance with Articles 326 et seq. TFEU). The bridging procedures can change the voting conditions in the Council and the legislative procedure that is applied. 315

Under the general and the special bridging clauses, the European Council or the Council may adopt a decision authorising the Council to act by a qualified majority and not by unanimity in a certain area or in a specific case (Article 48.7(1) first sentence Lisbon TEU; Article 31.3 Lisbon TEU; Article 312.2(2), Article 333.1 TFEU) or allowing for the adoption of acts within the area of application of the Treaty on the Functioning of the European Union in accordance with the ordinary legislative procedure, not in accordance with the special legislative procedure (Article 48.7(2) Lisbon TEU; Article 81.3(2), Article 153.2(4), Article 192.2(2), Article 333.2 TFEU). In the majority of cases, the result of the transition from the special to the ordinary legislative 316

procedure is that the Council decision is no longer adopted by unanimity but by a qualified majority (see Article 289.1 in conjunction with Article 294.8 and 294.13 TFEU). Decisions with military or defence implications are explicitly excluded from the possibility of passing over to qualified majority voting in the Council (Article 31.4, Article 48.7(1) second sentence Lisbon TEU). The European Council or the Council shall adopt a decision on the treaty amendment by unanimity and - in the area of application of the general bridging clause - after obtaining the consent of the European Parliament (Article 48.7(4) Lisbon TEU). In addition, the general bridging clause as well as the special bridging clause provide for the participation of the national parliaments in the area of family law with cross-border implications. Every national parliament can make known its opposition to a decision proposed by the European Council or the Council within six months after its being notified of it, with the consequence that the decision may not be adopted at European level (Article 48.7(3) Lisbon TEU; Article 81.3(3) TFEU).

317 Unlike the simplified revision procedure pursuant to Article 48.6 Lisbon TEU, the general and the special bridging clauses make treaty amendments possible only with a view to the two above-mentioned procedural provisions in the Treaty on the Functioning of the European Union and in Title V of the Treaty on European Union. Beyond this, the European Council or the Council do not have any freedom of action. As according to the Treaty of Lisbon qualified majority voting in the Council and the ordinary legislative procedure are the normal procedures for lawmaking (Article 16.1 and 16.3; Article 14.1 Lisbon TEU, Article 289.1 in conjunction with Article 294 TFEU), the total extent to which the influence of the German representative in the Council will be reduced by the introduction of qualified majority voting can at least be ascertained in a general manner. What is not possible, however, is a complete exercise of the responsibility for integration with a view to the question of whether the level of democratic legitimation of Union power is still commensurate with the extent of the competences that have been conferred and above all with the degree of independence of European decision-making procedures in so far as it has been increased in the bridging procedure.

318 The loss of German influence in the Council which accompanies the exercise of the general and special bridging clauses must be predictable also in individual cases at the time of the ratification of the Treaty of Lisbon by the German legislature. Only if this is the case, the approval given in advance by a Member State to a later treaty amendment is sufficiently democratically legitimised. The unanimity in the European Council or in the Council required by the bridging clauses for the amendment of the procedural provisions is not a sufficient guarantee for this because it may not always be sufficiently ascertainable for the representatives of the Member States in the European Council or in the Council to what extent the Member States' possibility of veto in the Council is thereby waived for future cases. In addition to the requirement of unanimity in the European Council or in the Council, the bridging clauses impose varying procedural requirements. Contrary to the general bridging clause in Article 48.7(3)

Lisbon TEU, the special bridging clauses, with the exception of Article 81.3(3) TFEU, do not provide for a right of the Member States' parliaments to make known their opposition.

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

320 A law within the meaning of Article 23.1 second sentence of the Basic Law is not required in so far as special bridging clauses are limited to subject areas which are already sufficiently defined by the Treaty of Lisbon. However, in such cases, it is incumbent on the *Bundestag* and, in so far as the legislative competences of the *Länder* are affected, on the *Bundesrat*, to assert its responsibility for integration in another appropriate manner. The right of veto in the Council may not be waived without the participation of the competent legislative bodies even as regards subject-areas which have already been factually defined in the treaties. The representative of the German government in the European Council or in the Council may therefore only approve an

amendment of primary law through the application of one of the special bridging clauses on behalf of the Federal Republic of Germany if the German *Bundestag* and, in so far as required by the provisions on legislation, the *Bundesrat*, have approved this decision within a period yet to be determined in accordance with the purpose of Article 48.7(3) Lisbon TEU (see on this also the constitutive requirement of parliamentary approval pursuant to Section 6 of the UK European Union <Amendment> Act 2008 <c. 7>, which, however, is not subject to a time-limit). It would be incompatible with the constitutional requirement of a parliamentary decision if the requirement of a time-limit could construe in concrete terms the possible silence on the part of the legislative bodies as their approval. If this requirement is complied with, the corresponding provisions of the Treaty of Lisbon may be applied in Germany.

This constitutional requirement applies to the application of Article 31.3 Lisbon TEU, Article 312.2(2) and Article 333.1 TFEU, which permit passing over form unanimity to qualified majority voting. It must, however, also be extended to those treaty provisions that, like, Article 153.2(4), Article 192.2(2) and Article 333.2 TFEU, have as their subject the transition from the special to the ordinary legislative procedure because also in these cases, the Council can decide no longer unanimously but with a qualified majority (see Article 289.1 in conjunction with Article 294.8 and 294.13 TFEU). 321

(d) Finally, the Treaty of Lisbon does not vest the European Union with provisions that provide the European union of integration (*Integrationsverband*) with the competence to decide on its own competence (*Kompetenz-Kompetenz*). Article 311.1 TFEU (aa) as well as Article 352 TFEU (bb) can be construed in such a way that the integration programme envisaged in the provisions can still be predicted and determined by the German legislative bodies. 322

(aa) Pursuant to Article 311.1 TFEU, the European Union shall provide itself with the means necessary to attain its objectives and carry through its policies. The provision is identical with Article 6.4 TEU, which had been incorporated into primary law by the Treaty of Maastricht under the name “Article F.3”. In its decision on the Treaty of Maastricht, the Federal Constitutional Court, after comprehensively interpreting the legislative history of the provision, reached the conclusion that Article F.3 TEU did not empower the European Union to provide itself by its own authority with the financial means and other resources it considered necessary for the fulfilment of its objectives (BVerfGE 89, 155 <194 et seq.>; see also Puttler, in: Calliess/Ruffert, EUV/EGV, 3rd ed. 2007, Art. 6 EUV, paras 59-60; Hilf/Schorkopf, in: Grabitz/Hilf/Nettesheim, *Das Recht der Europäischen Union*, vol. I (EUV/EGV), 37th supplement, November 2008, Art. 6 EUV, para. 113). 323

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 objec- 324

tives and carry through its policies must take place within the existing competences. The new location of the provision in the Treaty of Lisbon confirms the interpretation that the provision only refers to financial means and not to additional means of action as well.

(bb) In contrast, Article 352 TFEU, which is intended to fill lacunae concerning the existing competences of the European Union, with respect to its objectives, does have the effect of a legal provision (see on the former Article 235 EECT BVerfGE 89, 155 <210>). The Treaty of Lisbon takes this provision - with amendments as regards its scope of application and the procedural requirements - from the existing primary law (now Article 308 ECT). 325

Article 352 TFEU not only establishes a competence for action for the European Union but at the same time relaxes the principle of conferral. Because action by the European Union in areas set out in the treaties is intended to be possible if the treaties have not provided the necessary specific competence but action by the European Union is required in order to attain the objectives set out in the treaties (Article 352.1 TFEU). 326

According to the current legal situation, Article 308 ECT appeared as a “lacuna-filling competence” (see BVerfGE 89, 155 <210>), which made possible a “further development, inherent in the Treaties” of European Union law “below the formal amendment of the Treaties” (see Oppermann, *Europarecht*, 3rd ed. 2005, § 6, para. 68). 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. This extension of the area of application is partly compensated by procedural safeguards. The use of the flexibility clause continues to require a unanimous decision by the Council on a proposal from the Commission which now requires the consent of the European Parliament (Article 352.1 first sentence TFEU). Moreover, the Commission is obliged to inform national parliaments of corresponding lawmaking proposals in the context of the procedure for monitoring compliance with the subsidiarity principle (Article 352.2 TFEU). Furthermore, such a lawmaking proposal shall not entail harmonisation of Member States’ laws or regulations in cases where the treaties otherwise exclude such harmonisation (Article 352.3 TFEU). The approval by the Member States in accordance with their respective constitutional requirements is not a requirement for the decision to enter into force. 327

The provision meets with constitutional objections with regard to the ban on transferring blanket empowerments or on transferring *Kompetenz-Kompetenz*, because the newly worded provision makes it possible substantially to amend treaty foundations of the European Union without the constitutive participation of legislative bodies in ad- 328

dition to the Member States' executive powers (see on the delimitation of competences: Laeken Declaration on the Future of the European Union of 15 December 2001, Bulletin EU 12-2001, I.27 <Annex>). The duty to inform the national parliaments set out in Article 352.2 TFEU does not alter this; for the Commission only needs to draw the national parliaments' attention to a corresponding lawmaking proposal. Because of the indefinite nature of future application of the flexibility clause, its use constitutionally requires ratification by the German *Bundestag* and the *Bundesrat* on the basis of Article 23.1 second and third sentence of the Basic Law. The German representative in the Council may not express formal approval on behalf of the Federal Republic of Germany of a corresponding lawmaking proposal of the Commission as long as these constitutionally required preconditions are not met.

(3) The treaty system covered by the Act Approving the Treaty of Lisbon clearly shows the existing principle of association (*Verbundprinzip*) in the system of the responsible transfer of sovereign powers and thus satisfies constitutional requirements. The treaty makes explicit for the first time in primary law the existing right of each Member State to withdraw from the European Union (Article 50 Lisbon TEU). The right to withdraw underlines the Member States' sovereignty and also shows that the current state of development of the European Union does not transgress the boundary towards a state within the meaning of international law (see Jouanjan, *Monodisziplinäre Stellungnahmen*, in: Kreis, *Der Beitrag der Wissenschaften zur künftigen Verfassung der EU*, 2003, p. 12 <16>). If a Member State can withdraw based on a decision made on its own responsibility, the process of European integration is not irreversible. The membership of the Federal Republic of Germany depends instead on its lasting and continuing will to be a member of the European Union. Its legal boundaries are set by the Basic Law. 329

Any Member State may withdraw from the European Union even against the will of the other Member States (see Article 54 lit a of the Vienna Convention on the Law of Treaties <VCLT> of 23 May 1969, Federal Law Gazette 1985 II pp. 926 et seq.). There is no obligation for the decision to withdraw to be implemented by a withdrawal agreement between the European Union and the Member State concerned. In the case of an agreement failing to be concluded, the withdrawal takes effect two years after the notification of the decision to withdraw (Article 50.3 Lisbon TEU). The right to withdraw can be exercised without further obligations because the Member State that wishes to withdraw does not need to state reasons for its decision. Article 50.1 Lisbon TEU merely sets out that the withdrawal of the Member State must take place "in accordance with its own constitutional requirements". Whether these requirements have been complied with in the individual case can, however, only be verified by the Member State itself, not by the European Union or the other Member States. 330

(4) With Declaration no. 17 Concerning Primacy annexed to the Treaty of Lisbon, the Federal Republic of Germany does not recognise an absolute primacy of application of Union law, which would meet with constitutional objections, but merely confirms the legal situation as interpreted by the Federal Constitutional Court. The alle- 331

gation of the complainant re III. is incorrect that the approval of the Treaty of Lisbon would *de facto* include in the treaty the “unrestricted primacy” of the law made by the institutions of the Union over the law of the Member States, as planned in the failed Constitutional Treaty, and that this would result in an inadmissible federal-state primacy of validity which would even allow for a derogation from contrary constitutional law of the Member States. The assumption that due to comprehensive gains in competence, it would be virtually impossible for the Federal Constitutional Court to examine compliance with the principle of conferral by the European Union and the ensuing legal effects in Germany, and that it would no longer be possible to safeguard the substance of constitutional identity and of German protection of fundamental rights is also incorrect (this opinion is advanced, however, by Murswiek, *Die heimliche Entwicklung des Unionsvertrages zur europäischen Oberverfassung*, NVwZ 2009, pp. 481 et seq.).

As primacy by virtue of constitutional empowerment is retained, the values codified in Article 2 Lisbon TEU, whose legal character does not require clarification here, may in the case of a conflict of laws not claim primacy over the constitutional identity of the Member States, which is protected by Article 4.2 first sentence Lisbon TEU and is constitutionally safeguarded by the identity review pursuant to Article 23.1 third sentence in conjunction with Article 79.3 of the Basic Law. The values of Article 2 Lisbon TEU, which are contained in part as principles in the current Article 6.1 TEU, do not provide the European union of integration with *Kompetenz-Kompetenz*, so that the principle of conferral also continues to apply in this respect. 332

(a) The European Treaties have assigned the interpretation of primary and of secondary law to their own European jurisdiction. The Court of Justice and the Court of First Instance, each within its jurisdiction, on the basis of the current Treaty establishing the European Community and - to a lesser extent - of the Treaty on European Union, ensure that in the interpretation of the treaties the law is observed (Article 220 ECT; Article 35 TEU). By means of preliminary rulings, the Court of Justice shall have jurisdiction to give binding rulings concerning the interpretation of the treaty and the validity and interpretation of acts of the institutions of the Community and of the European Central Bank (Article 234 ECT). Consequently, the treaty law makes the case law of the European Courts, especially that of the Court of Justice, binding on the courts of the Member States through national legislation adopted to give effect to the treaty concerned within the Member States. 333

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. 334

As prescribed by the Basic Law, federal law shall take precedence over conflicting 335

Land law (see Article 31 of the Basic Law). The supranationally based law does not have such a derogating effect to the extent that it annuls law. The primacy of application of European law does not affect the claim to validity of conflicting law in the Member States; it only inhibits its application to the extent required by the treaties and permitted by them under national legislation adopted to give effect to them within the Member States (see BVerfGE 73, 339 <375>). Law of a Member State that is contrary to Community and Union law is rendered inapplicable merely to the extent required by the conflicting regulatory content of Community and Union law.

336 This construction, which is rather theoretical in everyday application of the law because it often does not result in practical differences as regards its legal effects, does, however, have consequences for the relationship between judicial organs of the Member States and of Europe. Member States courts with a constitutional function may not, within the limits of the competences conferred on them - as is the position of the Basic Law - be deprived of the responsibility for the boundaries of their constitutional empowerment for integration and for the safeguarding of the inviolable constitutional identity.

337 With the idea of a Union-wide legal community inherent in the Basic Law's mandate of integration and in currently applicable European treaty law, these require the restriction of the exercise of Member States' judicial power. No effects endangering integration should occur because the uniformity of the Community's legal order is called into question by divergent decisions as to applicability on the part of Member State courts. The Federal Constitutional Court has suspended its general competence, which it had originally assumed, to review the application of European Community law in Germany against the standard of the fundamental rights of the German constitution (see BVerfGE 37, 271 <283>), in reliance on the Court of Justice of the European Communities performing this function accordingly (see BVerfGE 73, 339 <38>; confirmed in BVerfGE 102, 147 <162 et seq.>). In view of the position of the Community institutions, which is derived from international treaties however, the Federal Constitutional Court could recognise the final character of the decisions of the Court of Justice only "in principle" (see BVerfGE 73, 339 <367>).

338 In so far as complainants in the proceedings on the constitutionality of the German Act Approving the Treaty of Maastricht inferred from the final character of the rulings of the Court of Justice a complete power of disposition on the part of Community institutions over the law laid down in the treaties, and thus a constitutionally inadmissible transfer not of individual sovereign powers but of sovereignty as a whole, the Federal Constitutional Court refuted this argument already in its decision on the Treaty of Maastricht. The Federal Constitutional Court found that it reviews whether legal instruments of the European institutions and bodies remain within the limits of the sovereign powers conferred on them or if the Community courts interpret the treaties expansively tantamount to an inadmissible autonomous treaty amendment (BVerfGE 89, 155 <188, 210>; in similar fashion recently Czech Constitutional Court, judgment of 26 November 2008, file reference Pl. ÚS 19/08, Treaty amending the Treaty on Eu-

ropean Union and the Treaty establishing the European Community, para. 139).

339 The primacy of application of European law remains, even with the entry into force of the Treaty of Lisbon, a concept conferred under an international treaty, i.e. a derived concept which will have legal effect in Germany only with the order to apply the law given by the Act Approving the Treaty of Lisbon. This derivative connection is not altered by the fact that the concept of primacy of application is not explicitly provided for in the treaties but was developed in the early phase of European integration in the case law of the Court of Justice by means of interpretation. It is a consequence of the continuing sovereignty of the Member States that in any case in the clear absence of a constitutive order to apply the law, the inapplicability of such a legal instrument to Germany is established by the Federal Constitutional Court. Such determination must also be made if, within or outside the sovereign powers conferred, these powers are exercised with the consequent effect on Germany of a violation of its constitutional identity, which is inviolable under Article 79.3 of the Basic Law and is also respected by European treaty law, namely Article 4.2 first sentence Lisbon TEU.

340 The Basic Law strives to integrate Germany into the legal community of peaceful and free states, but does not waive the sovereignty contained in the last instance in the German constitution as a right of the people to take constitutive decisions concerning fundamental questions as its own identity. There is therefore no contradiction to the aim of openness to international law if the legislature, exceptionally, does not comply with international treaty law - accepting, however, corresponding consequences in international relations - provided this is the only way in which a violation of fundamental principles of the constitution can be averted (see BVerfGE 111, 307 <317-318>). The Court of Justice of the European Communities based its decision of 3 September 2008 in the Kadi case on a similar view according to which an objection to the claim of validity of a United Nations Security Council Resolution may be expressed citing fundamental legal principles of the Community (ECJ, Joined Cases C-402/05 P and C-415/05 P, EuR 2009, p. 80 <100 et seq.>). The Court of Justice has thus, in a borderline case, placed the assertion of its own identity as a legal community above the commitment that it otherwise respects. Such a legal 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 (see BVerfGE 31, 145 <174>; 37, 271 <280 et seq.>; 73, 339 <374 et seq.>; 75, 223 <235, 242>; 89, 155 <174-175>; 102, 147 <162 et seq.>).

341 (b) Contrary to the submissions made by the complainant re III., the Federal Constitutional Court's reserve competence is not affected by Declaration no. 17 on Primacy

annexed to the Final Act of the Treaty of Lisbon. The Declaration points out that in accordance with settled case law of the Court of Justice of the European Union, and under the conditions laid down in this case law, the treaties and the secondary law adopted by the Union on the basis of the treaties have primacy over the law of Member States.

342 The primacy of application first of all requires the direct applicability of European law in the Member States (see Oppermann, *Europarecht*, 3rd ed. 2005, § 7, paras 8 et seq. with further references). In the area of the Common Foreign and Security Policy, there is no provision for legal acts to which Declaration no. 17 on Primacy would apply. The treaty does not provide the Union with any sovereign powers that would permit supranational “access” to the Member States’ legal orders (see Article 24.1, Article 40 Lisbon TEU and Declaration no. 14 annexed to the Final Act of the Treaty of Lisbon).

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

344 bb) The Act Approving the Treaty of Lisbon does not abandon the state territory of the Federal Republic of Germany. It is true that the limiting element of the state territory, which becomes particularly clear by the territorial borders, which are, in principle, intended to prevent the exercise of foreign autonomous power to rule on the state territory, has become less important. International treaties amending and supplementing existing primary law have, in particular, created the internal market (Article 14.2 ECT) and have abolished border controls in the so-called Schengen area. The Treaty of Lisbon further decreases the importance of the limiting element by introducing an integrated management system for “external borders” (Article 77.1 lit c and 77.2 lit d TFEU). The European Union, however, exercises public authority in Germany on the basis of the competences transferred to it in the Act Approving the

Treaty of Lisbon, and thus not without express permission of the Federal Republic of Germany. Territory-related state authority (see Jellinek, *Allgemeine Staatslehre*, 3rd ed. 1921, p. 394) continues to exist unchanged under the changed conditions of cross-border mobility.

This is not countered by the fact that the "area without internal frontiers" (Article 14.2 ECT, Article 154.1 ECT) and the "area of freedom, security and justice", which has been supranationalised by the Treaty of Lisbon (Articles 67 et seq. TFEU), also reduces territorial sovereignty as an element of the state territory. Pursuant to the Treaty of Lisbon, the European Union does not have comprehensive territorial authority which replaces that of the Federal Republic of Germany. That it does not claim such authority even after the entry into force of the Treaty of Lisbon is shown by the fact that the treaty only makes reference to a "territorial scope" of the treaties (Article 52 Lisbon TEU; Article 355 TFEU). The territorial scope is ancillary to the state territory of the Member States, which in its sum determines the area of application of Union law (Article 52 Lisbon TEU; Article 355 TFEU). There is no territory belonging directly to the Union which would be free from this ancillary nature (on the extension of the area of applicability by the enlargement of a Member State's territory see Oppermann, *Europarecht*, 3rd ed. 2005, § 4, para. 36). 345

cc) After the ratification of the Treaty of Lisbon, the Federal Republic of Germany will continue to have a state people. The concept of the "citizen of the Union", meanwhile more strongly elaborated in Union law, is exclusively founded on treaty law. The citizenship of the Union is solely derived from the will of the Member States and does not constitute a people of the Union, which could exercise self-determination as a legal entity giving itself a constitution. 346

In particular, the introduction of citizenship of the Union does not permit the conclusion that a federal system has been founded. Historical comparisons, for example with the German foundation of a federal state through the North German Confederation of 1867 (see for example Schönberger, Unionsbürger, 2005, pp. 100 et seq.), do not help very much in this context. After the realisation of the principle of the sovereignty of the people in Europe, only the peoples of the Member States can dispose of their respective constituent powers and of the sovereignty of the state. Without the expressly declared will of the people, the elected bodies are not competent to create a new subject of legitimation, or to delegitimise the existing ones, in the constitutional areas of their states. 347

In this sense, the citizenship of the Union is nothing which culturally or normatively precedes the current treaty law and from which legal effects that shape the constitution could emerge. Citizenship of the Union, incorporated into primary law by past treaty amendments, is a derived status additional to national citizenship (Article 17.1 second and third sentences ECT; Article 9 third sentence Lisbon TEU). This status is also not altered by the rights connected with citizenship of the Union even though the Treaty of Lisbon extends these rights. Citizens of the Union are granted a right to par- 348

ticipate in the democratic life of the Union (Article 10.3, Article 11.1 Lisbon TEU), which emphasises a necessary structural connection between the civic polity and public authority. Additionally, the exercise of existing rights of the citizens of the Union in the area of protection by the diplomatic or consular authorities and of the documents of legitimation is facilitated (see Article 23.2, Article 77.3 TFEU).

Other amendments of primary law also do not result in citizenship of the Union being superimposed on the primary citizenship status. The overall context of the Treaty of Lisbon shows clearly that the changed wording of Article 9 third sentence Lisbon TEU as compared to Article 17.1 second sentence ECT (see Schrauwen, European Citizenship in the Treaty of Lisbon: Any Change at all?, MJECL 2008, p. 55 <59>), the use of the term “citizens of the Union” in connection with the European Parliament (Article 14.2(1) first sentence Lisbon TEU) and the decisive role of the citizens of the Union in the European citizens’ initiative (Article 11.4 Lisbon TEU) do not intend to create an independent personal subject of legitimation at European level. 349

Even after the elaboration of the rights of the citizens of the Union, the German state people retains its existence as long as the citizenship of the Union does not replace the citizenships of the Member States or is superimposed on it. The derived status of the citizenship of the Union and the safeguarding of national citizenship are the boundary of the development of the civic rights of the Union set out in Article 25.2 TFEU and in the case law of the Court of Justice of the European Union (see on the significance of citizenship of the Union ECJ, judgment of 12 May 1998, Case C-85/96, Martínez Sala, ECR 1998, p. I-2691 paras 62-63; ECJ, judgment of 20 September 2001, Case C-184/99, Grzelczyk, ECR 2001, p. I-6193 paras 31-32; ECJ, judgment of 17 September 2002, Case C-413/99, Baumbast, ECR 2002, p. I-7091 para. 82; ECJ, judgment of 7 September 2004, Case C-456/02, Trojani, ECR 2004, p. I-7573 para. 31; ECJ, judgment of 19 October 2004, Case C-200/02, Zhu, ECR 2004, p. I-9925 para. 25). Possibilities to differentiate on account of nationality thus continue to exist in the Member States. In the Member States, the right to vote and stand for election for the respective bodies of representation above local level remains reserved to Member State’s own citizens, whilst the duty to show financial solidarity between Member States in the form of social benefits paid to citizens of the Union remains restricted (see ECJ, judgment of 18 November 2008, Case C-158/07, Förster, EuZW 2009, p. 44 <45>). 350

c) With the Treaty of Lisbon the Member States extend the scope of competences and the political possibilities of action of the European association of integration. After entry into force of the Treaty of Lisbon, the existing and newly conferred competences will be exercised by the European Union, which will replace the European Community. Particularly the newly conferred competences in the areas of judicial cooperation in criminal (aa) and civil matters (bb), external trade relations (cc), common defence (dd) and with regard to social concerns can, and must, be exercised by the institutions of the European Union in such a way that at Member State level, tasks of sufficient weight in extent as well as substance remain which are the legal and practi- 351

cal conditions of a living democracy. The 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. To assess the challenge of an unconstitutional depletion of the competences of the German *Bundestag*, there is no need to decide how many legislative acts in the Member States have already been influenced, pre-formed or determined by the European Union (see most recently Hoppe, *Die Europäisierung der Gesetzgebung: Der 80-Prozent-Mythos lebt*, EuZW 2009, p. 168-169). What is decisive for the constitutional assessment of the challenge is not 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.

aa) (1) The Treaty of Lisbon considerably extends the European Union’s competences in the area of the administration of criminal law. The European Union is granted powers to establish “minimum rules” concerning the definition of criminal offences and sanctions in the areas of “particularly serious” crime which have a cross-border dimension “resulting from the nature or impact of such offences” or from “a special need to combat them on a common basis” (Article 83.1(1) TFEU). The areas of crime which can be considered for such cooperation are enumerated as examples but may be extended by the Council adopting a unanimous decision after obtaining the consent of the European Parliament (Article 83.1(3) TFEU). Beyond this competence for the approximation of laws in criminal law concerning particularly serious crime with a cross-border dimension, the Union is granted a related competence in criminal law, already assumed in the case law of the Court of Justice of the European Communities (see ECJ, judgment of 13 September 2005, Case C-176/03, Commission/Council, ECR 2005, p. I-7879, paras 47-48) in all policy areas which have been, or will be, subject to harmonisation measures (Article 83.2 first sentence TFEU). 352

In criminal procedure, the European Union may establish minimum rules concerning “mutual” admissibility of evidence, the rights of the accused, the rights of witnesses and of victims of crime, and any other specific aspects identified in advance by the Council by unanimous decision after obtaining the consent of the European Parliament (Article 82.2(1)(2) TFEU). Furthermore, measures to promote and support the action of Member States in the field of crime may be established (Article 84 TFEU). 353

Finally, the competences of Eurojust can be extended on the basis of the Treaty of Lisbon. In particular, Eurojust may be entrusted in the ordinary legislative procedure with initiating and coordinating criminal investigations and prosecutions (Article 85.1 TFEU), whilst formal acts of judicial procedure are reserved to the national prosecution authorities (Article 85.2 TFEU). In addition, Eurojust may be extended by a European Public Prosecutor’s Office by unanimous decision of the Council adopted after obtaining the consent of the European Parliament, which would be responsible for investigation, prosecution and the bringing of charges before the national courts, this responsibility being limited at first to combating offences against the European Union’s financial interests (Article 86.1 TFEU). 354

(2) Securing legal peace by the administration of criminal law has always been a central duty of state authority. As regards the task of creating, securing and enforcing a well-ordered social existence by protecting the elementary values of community life on the basis of a legal order, criminal law is an indispensable element to secure indestructibility of this legal order (see Sellert/Rüping, *Studien- und Quellenbuch zur Geschichte der deutschen Strafrechtspflege*, volume 1, 1989, p. 49). Every provision in criminal law contains a social and ethical judgment of unworthiness on the action which it penalises. The specific content of this judgment of unworthiness results from the constituent elements of the criminal offence and the sanction (see BVerfGE 25, 269 <286>; 27, 18 <30>). To what extent and in what areas a polity uses precisely criminal law as an instrument of social control is a fundamental decision. By criminal law, a legal community gives itself a code of conduct that is anchored in its values, and whose violation, according to the shared convictions on law, is regarded as so grievous and unacceptable for social co-existence in the community that it requires punishment (see Weigend, *Strafrecht durch internationale Vereinbarungen - Verlust an nationaler Strafrechtskultur?*, ZSW 1993, p. 774 <789>). 355

With the decision on punishable conduct, the legislature takes the democratically legitimised responsibility for a form of sovereign action that counts among the most intensive encroachments on individual freedom in a modern constitutional state. The legislature is in principle free to decide whether and how it wants to defend a specific legal interest whose protection it regards as essential, by means of criminal law (see BVerfGE 50, 142 <162>; 120, 224 <240>; on the delimitation between criminal wrongdoing and wrongdoing breaching administrative rules see BVerfGE 27, 18 <30>; 96, 10 <26>). Within the boundaries of the commitment to the constitution, it can additionally decide which sanction it will impose on culpable conduct. The investigation of crimes, the detection of the perpetrator, the establishment of his guilt and punishment are incumbent on the bodies administering criminal law, which, for this purpose and under the conditions determined by law, have to institute and conduct criminal proceedings and execute the sanctions imposed (see BVerfGE 51, 324 <343>). 356

Due to the integration of the German constitutional state into the order of international law of the community of states, the legislature's freedom of action may be constitutionally restricted by the obligation to enforce supranational law in its own area of responsibility. It may for example be required to impose sanctions on certain action for the purpose of enforcing essential norms of general international law *vis-à-vis* the individual (see BVerfGE 112, 1 <26>). This applies above all to the process of establishing an international criminal justice for genocide, crimes against humanity and war crimes (see BVerfGE 113, 273 <296-297>; Federal Constitutional Court - BVerfG, order of the 4th Chamber of the Second Senate of 12 December 2000 - 2 BvR 1290/99 -, NJW 2001, pp. 1848 et seq.). As a Member State of the European Union, Germany has entered into further commitments. With the construction and further development of the area of freedom, security and justice, which up to now has taken place 357

essentially according to the provisions in the intergovernmental “Third Pillar” of the law of the European Union, the European Union aims at combining the process of growing together and the opening of the borders for persons, goods, services and capital with an improved cooperation of the prosecution authorities. The Member States have agreed on creating provisions of criminal law and criminal procedure in specific areas which take into account the conditions of European cross-border situations.

Due to the fact that democratic self-determination is affected in an especially sensitive manner by provisions of criminal law and criminal procedure, the corresponding basic powers in the treaties must be interpreted strictly - on no account extensively -, and their use requires particular justification. The core content of criminal law does not serve as a technical instrument for carrying out international cooperation but represents the particularly sensitive democratic decision on a legal ethical minimum standard. This is explicitly recognised by the Treaty of Lisbon where it equips the newly established powers in the administration of criminal law with a so-called emergency brake which permits a member of the Council, which is ultimately responsible to its parliament, to veto directives with relevance to criminal law at least for its own country, invoking “fundamental aspects of its criminal justice system” (Article 83.3 TFEU). 358

(3) The fight against particularly serious crime, which takes advantage of the territorial limitation of criminal prosecution by a state, or which, as in the case of corruption, threatens the viability of the rule of law and democracy in the European Union, may be a special justification for the transfer of sovereign powers also in this context. In this connection, the Treaty of Lisbon says that such offences must have a cross-border dimension (Article 83.1(1) TFEU) resulting from the nature or impact of such offences or from a special need to combat them on a common basis (Article 83.1(1) TFEU). Such a special need does not already exist where the institutions have formed a corresponding political will. It also cannot be detached from the nature or impact of such offences as it cannot be ascertained from what the need to combat these offences on a common basis should result if not from the nature and the impact of the offences in question. 359

The narrow interpretation which is thus required to protect the democratic primary area in the understanding of the Basic Law must also be the basis of the decision of the German representative in the Council if a decision is to be adopted in the area of mutual recognition of judgments and judicial decisions and in the general area of the law of criminal procedure (Article 82.1 and 82.2 TFEU). 360

With regard to the area of the related competence which makes the approximation of criminal law possible in policy areas which have been subject to harmonisation measures (Article 83.2 TFEU), the Act Approving the Treaty of Lisbon can be assessed as being in conformity with the constitution for the sole reason that pursuant to the treaty, this competence is to be interpreted narrowly. The related competence 361

conceals a serious extension of the competence for the administration of criminal law as compared to the current legal situation. Whether the Union has powers for a harmonisation of law, it can, accordingly, establish minimum rules for the definition of criminal offences and sanctions by means of directives to ensure the “effective implementation of a Union policy”. Because this competence in criminal lawmaking carries the threat that it could be without limits, a provision grating 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.

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

363 The general empowerment concerning the definition of criminal offences and sanctions pursuant to Article 83.1 TFEU must be interpreted in a correspondingly limiting fashion. Indications of this are the list of particularly serious criminal offences under Article 83.1(2) TFEU and the precondition that it must concern particularly serious crime which has a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis. The list clarifies that the areas for which minimum rules may be established, which leave the Member States substantial scope of discretion, are typically areas of serious cross-border crime. Democratic self-determination is, however, affected in a particularly sensitive manner where a legal community is prevented from deciding on the punishability of conduct, or even the imposition of prison sentences, according to their own values. This applies all the more the more closer these values are connected with historical experience, traditions of faith and other factors essential to the self-esteem of the people and their society. In these areas, it is therefore only permitted to a limited extent to transfer the competence for criminal legislation, and it is at any rate necessary to comply with the requirements placed on a single act of transfer of a sovereign power (Article 23.1 second sentence of the Basic Law) if the list of areas of crime which fall under the competence of Union legislation is extended. The use of the dynamic blanket empowerment pursuant to Article 83.1(3) TFEU, to extend the list of particularly serious criminal offences with a cross-border dimension, “on the basis of developments in crime”, is factually tantamount to an extension of the codified competences of the Union, and it is therefore subject to the requirement of the enactment of

a statute under Article 23.1 second sentence of the Basic Law. When implementing the minimum rules, it must also be kept in mind that the European framework provisions only make reference to the cross-border dimension of a specific criminal offence. The Member States' power to punish, which is, in principle, not open to integration, could be preserved by the minimum rules not covering the complete area of a criminal offence (see Article 2.2 of the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States, OJ no. L 190/1), but merely part of the constituent elements of the offence.

Moreover, the competences of the European Union in the area of the administration of criminal law must be interpreted in a way that complies with the requirements of the principle of guilt. Criminal law is based on the principle of guilt. This principle presupposes a human being's own responsibility, it presupposes human beings who themselves determine their actions and can decide in favour of right or wrong by virtue of their freedom of will. The protection of human dignity is based on the idea of Man as a spiritual and moral being which has the capabilities of defining himself, and of developing, in freedom (see BVerfGE 45, 187 <227>). In the area of the administration of criminal law, Article 1.1 of the Basic Law determines the idea of the nature of punishment and the relationship between guilt and atonement (BVerfGE 95, 96 <140>). The principle that any sanction presupposes guilt thus has its foundation in the guarantee of human dignity under Article 1.1 of the Basic Law (see BVerfGE 57, 250 <275>; 80, 367 <378>; 90, 145 <173>). The principle of guilt forms part of the constitutional identity which is unassailable due to Article 79.3 of the Basic Law and which is also protected against encroachment by supranational public authority. 364

Against the background of the importance of criminal law to individual freedom, additional particular requirements must be placed on the provision which grants a Member State special rights in the legislative procedure (Article 82.3, Article 83.3 TFEU). From the perspective of German constitutional law, the necessary degree of democratic legitimation via the national parliaments can only be guaranteed by the German representative in the Council exercising the Member States' rights set out in Article 82.3 and Article 83.3 TFEU only on the instruction of the German *Bundestag* and, in so far as this is required by the provisions on legislation, the *Bundesrat* (see also the resolution of the German *Bundestag* of 24 April 2008 accompanying the Treaty of Lisbon <*Bundestag* printed paper 16/8917, p. 6, Minutes of *Bundestag* plenary proceedings 16/157, p. 16482 B>). All in all, the manner in which the empowerments are lent concrete shape in their implementation according to Article 82.2 and Article 83.1 and 83.2 TFEU is, as regards its significance, close to a treaty amendment and requires the exercise of the responsibility for integration of the legislative bodies in the context of the emergency brake procedure. 365

In so far as the European Union wishes to apply the general bridging procedure pursuant to Article 48.7 Lisbon TEU in the area of the administration of criminal law to the empowerment, provided for by Article 82.2(2) lit d TFEU, to establish minimum rules 366

for any other specific aspects of criminal procedure in order to move from unanimity required in the Council to qualified majority voting, the requirements set out for the general bridging procedure must apply. The representative of the German government in the European Council may only approve a treaty amendment of primary law if the German *Bundestag* and, to the extent that this is required by the provisions on legislation, the *Bundesrat*, have adopted a law within the meaning of Article 23.1 second sentence of the Basic Law within a period yet to be determined in accordance with the purpose of Article 48.7(3) Lisbon TEU. This equally apples to the case that the definition of other areas of crime pursuant to 83.1(3) TFEU were to be moved from unanimity to qualified majority decision-making via the general bridging procedure,.

bb) (1) The Treaty of Lisbon also extends the European Union's existing possibilities of action in the area of judicial cooperation in civil matters. The focus of the provision in Article 81 TFEU is the principle of mutual recognition of decisions. The principle has already played an important role in practice and is now codified in the treaty as the basis of judicial cooperation. The competence to approximate laws, up to now based on Article 65 ECT, is complemented in the Treaty of Lisbon by the competence for measures intended to ensure effective access to justice, the development of alternative methods of dispute settlement and support for the training of the judiciary and judicial staff (Article 81.2 lit e, g and h TFEU). The provision contains an exhaustive list of the groups of cases for harmonisation which requires the existence of a cross-border dimension. Whether the criterion of the need for harmonisation is to be interpreted so as to only relate to the smooth functioning of the internal market (see *Bundestag* printed paper 16/8300, p. 175), may remain open. In fact, the principle of subsidiarity already shows that the Treaty on the Functioning of the European Union only admits harmonisation on condition of necessity (Article 5.1 second sentence and 5.3 Lisbon TEU). In so far as the harmonisation measures concern family law, decisions are taken by the Council acting unanimously after consulting the European Parliament (Article 81.3(1) TFEU). In this area, the Council may unanimously decide to move to the ordinary legislative procedure as regards certain aspects of family law (Article 81.3(2) TFEU). National parliaments may make known their opposition to such transfer (Article 81.3(3) TFEU). 367

(2) Member State competence for the administration of justice is one of the areas which are, in principle, assigned to the Member States in the federal association of the European Union. It is true that the Member States are obliged by Community law to grant effective legal protection which may not be impaired by national legal provisions (see ECJ, judgment of 15. May 1986, Case 222/84, Johnston, ECR 1986, p. 1651 paras 17 et seq.; ECJ, judgment of 11 September 2003, Case C-13/01, Safalero, ECR 2003, p. I-8679 para. 50). However, this legal situation leaves the Member State competence for the organisation of the court system and its personal and financial resources unaffected. The overall context of Chapter 3 in Title V of the Treaty on the Functioning of the European Union shows that Article 81.2 TFEU did 368

not confer a corresponding competence on the European Union which would restrict this responsibility of the Member States. The guarantee of effective legal protection under Article 19.4 of the Basic Law and the right of recourse to a court, rooted in the principle of the rule of law, which are also recognised by Union law (see Nowak, in: Heselhaus/Nowak, *Handbuch der Europäischen Grundrechte*, 2006, § 51), are not restricted for example by the obligation to develop alternative methods of dispute settlement (Article 81.2 lit g TFEU). The access of a citizen to a court may not, in principle, be restricted by primary and secondary law or be made more difficult by the introduction of non-judicial preliminary proceedings.

In so far as according to Article 81.3(1) TFEU, in derogation of Article 81.2 TFEU, measures concerning family law with cross-border implications shall be established by the Council, acting in accordance with a special legislative procedure, this is merely a procedural derogation from the rules for general civil law which strengthens Member State competences, but not the possibility of an extension of the content of the Council's competences for family law measures which do not appear in the list according to Article 81.2 TFEU. 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. 369

cc) (1) Furthermore, the Treaty of Lisbon amends the provisions on the common commercial policy. This especially concerns foreign direct investment as well as the trade in services and the commercial aspects of intellectual property (Article 207.1 TFEU). 370

The common commercial policy, i.e. the worldwide external trade-policy representation of the internal market, is already an exclusive competence of the European Community according to current Community law (ECJ, opinion 1/94 of 15 November 1994, ECR 1994, I-5267 paras 22 et seq.). This has, however, not included foreign direct investment, the trade in services and the commercial aspects of intellectual property. The European Community currently does not have competence for direct investment; it only has concurrent competence for the trade in services and the commercial aspects of intellectual property (Article 133.5 ECT). This is intended to change with the Treaty of Lisbon. Pursuant to Article 3.1 lit e) TFEU in conjunction with Article 207.1 TFEU, the European Union shall have exclusive competence for the common commercial policy including the above-mentioned areas. 371

(1) Accordingly, treaties *inter alia* in the framework of the World Trade Organization (WTO) such as the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) fall under the exclusive competence of the Union. This abolishes the basis of the current case law of the Court of Justice of the European Communities, according to which, due to the mixed competence in this area, the Agreement Establishing the World Trade Organization (WTO Agreement) of 15 April 1994 (OJ 1994 no. L 336/3), as a so-called 372

mixed agreement, had to be concluded and ratified by the European Community and by the Member States (ECJ, opinion 1/94 of 15 November 1994, ECR 1994, p. I-5267, paras 98 and 105; on the mixed-agreement status of an international agreement see also ECJ, opinion 1/78 of 4 October 1978, ECR 1979, p. 2871 para. 2; ECJ, opinion 2/91 of19 March 1993, ECR 1993, p. I-1061, paras 13 and 39).

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

374 With the exclusive competence as set out above, the Union acquires the sole power of disposition over international trade agreements which may result in an essential reorganisation of the internal order of the Member States. The shift of competences by the Treaty of Lisbon concerns the Member States beyond the loss of their competence for concluding international trade agreements - together with the elimination of the legislative participation of the *Bundestag* and the *Bundesrat* pursuant to Article 59.2 of the Basic Law - also in so far as it might reduce the status of the Member States' membership in the World Trade Organization to a merely formal one. The right to vote in the bodies of the World Trade Organization could solely be exercised by the European Union. Furthermore, the Member States would lose their formal entitlement to be a party to the dispute settlement procedures of the World Trade Organization. Additionally, the Member States would be excluded from the global negotiations on new or amended agreements in the context of the extended common commercial policy, the so-called rounds of world trade talks (see on the details Tietje, *Das Ende der parallelen Mitgliedschaft von EU und Mitgliedstaaten in der WTO?*, in: Herrmann/Krenzler/Streinz, *Die Außenwirtschaftspolitik der Europäischen Union nach dem Verfassungsvertrag*, 2006, p. 161 <171 et seq.>).

375 There is no need to address whether and to what extent the membership of the Member States of the European Union in the World Trade Organization would no longer exist at the substantive level but only at the institutional and formal level. 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. 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. When the Federal Government informs the German *Bundestag* and the *Bundesrat* of the topics of the rounds of world trade talks and the negotiation directives adopted by the Council (Article 218.2 TFEU), thereby enabling them to review adherence to the integration programme and the monitoring of the Federal Government's activities, this is not only the normal exercise of its general task of information (see BVerfGE 57, 1 <5>; 70, 324 <355>; 105, 279 <301 et seq.>; 110, 199 <215>); it is constitutionally obliged to do so because of the joint responsibility for integration and the differentiation of tasks among the constitutional bodies under the separation of powers.

376 The idea that the Member States' own legal personality status in external relations gradually takes second place to a European Union which acts more and more clearly in analogy to a state is not in any way reflected in a predictable tendency, made irreversible by the Treaty of Lisbon, towards a formation of a federal state that would be the factually necessary consequence. The development to date of a membership that is cooperatively mixed and is exercised in parallel might, on the contrary, be a model for other international organisations and other associations of states. 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. Such a step, however, has not been taken by the Treaty of Lisbon.

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

Many states have concluded bilateral international agreements concerned with the protection of property in foreign assets. The vast majority of foreign assets, which for the Federal Republic of Germany amounted to 5,004 billion euros in 2007 (Bundesbank, *Das deutsche Auslandsvermögen seit Beginn der Währungsunion: Entwicklung und Struktur, Monatsbericht 10.2008*, p. 19 <table>), falls under the scope of application of 126 investment protection agreements currently in force (Federal Ministry of Economics and Technology, *Übersicht über die bilateralen Investitionsförderungs- und -schutzverträge <IFV> der Bundesrepublik Deutschland* <as per 27 May 2008>). At the end of 2007, a total of 2,608 bilateral investment protection agreements existed worldwide (see UNCTAD, World Investment Report 2008, Transnational Corporations, and the Infrastructure Challenge, p. 15). 378

The extension of the common commercial policy to “foreign direct investment” (Article 207.1 TFEU) confers exclusive competence on the European Union also in this area. Much, however, argues in favour of assuming that the term “foreign direct investment” only encompasses investment which serves to obtain a controlling interest in an enterprise (see Tietje, *Die Außenwirtschaftsverfassung der EU nach dem Vertrag von Lissabon*, 2009, p. 15-16). The consequence of this would be that exclusive competence only exists for investment of this type whereas investment protection agreements that go beyond this would have to be concluded as mixed agreements. 379

The continued legal existence of the agreements already concluded is not in question. International agreements of the Member States concluded before 1 January 1958 shall in principle not be affected by the Treaty establishing the European Community (Article 307.1 ECT; Article 351.1 TFEU). In many cases, this provision is not directly applicable because bilateral investment protection agreements have, as a general rule, been concluded more recently, but the legal concept that a legally existing factual situation in the Member States will in principle not be adversely affected by a later step of integration may nevertheless be inferred from this provision (see Bernhardt, *Die Europäische Gemeinschaft als neuer Rechtsträger im Geflecht der traditionellen zwischenstaatlichen Beziehungen*, EuR 1983, p. 199 (205); Schmalenbach, in: Calliess/Ruffert, EUV/EGV, 3rd ed. 2007, Art. 307 EGV, para. 5). In view of the mixed competence in investment issues, the existing investment protection treaties must be authorised by the European Union (see Council Decision of 15 November 2001 Authorising the Automatic Renewal or Continuation in Force of Provisions Governing Matters Covered by the Common Commercial Policy Contained in the Friendship, Trade and Navigation Treaties and Trade Agreements Concluded between Member States and Third Countries OJ no. L 320/13). This corresponds to the current practice, expressly declared or tacitly practised, concerning the continued validity of international treaties concluded by the Member States. 380

dd) The constitutive requirement of parliamentary approval for the deployment of the armed forces abroad will continue to exist even after the entry into force of the Treaty of Lisbon. The Treaty of Lisbon does not confer on the European Union the competence to use the Member States’ armed forces without the approval of the Member 381

State affected or its parliament.

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

The requirement of parliamentary approval under the provisions of the Basic Law concerning defence creates an effective right of participation for the German *Bundestag* in matters of sovereign decisions in foreign affairs. Without parliamentary approval, a deployment of armed forces is as a general rule not permissible under the Basic Law; only in exceptional cases is the Federal Government entitled - in the case of imminent danger - provisionally to resolve to deploy armed forces in order that the defence and alliance capabilities of the Federal Republic of Germany are not called into question by the requirement of parliamentary approval (see BVerfGE 90, 286 <388-389>). 383

(2) The wording of the Treaty of Lisbon does not oblige the Member States to provide national armed forces for military deployments by the European Union. The wording and legislative history of Articles 42 et seq. Lisbon TEU clearly show Member States' intention to retain the sovereign decision on the deployment of their armed forces which is rooted in the last instance in their constitutions. This interpretation of the Treaty of Lisbon is not countered by Article 42.7(1) first sentence Lisbon TEU, which for the first time introduces an obligation of mutual assistance by the Member States. In the case of armed aggression on the territory of a Member State, "the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter". 384

It needs not to be addressed whether legal literature rightly calls into question the legally binding effect of this obligation of mutual assistance (see Dietrich, *Die rechtlichen Grundlagen der Verteidigungspolitik der Europäischen Union*, ZaöRV 2006, p. 663 <694>; Regelsberger, *Von Nizza nach Lissabon - das neue konstitutionelle Angebot für die Gemeinsame Außen- und Sicherheitspolitik der EU*, integration 2008, p. 266 <271>; Missiroli, The Impact of the Lisbon Treaty on ESDP, European Parliament, January 2008, p. 15; Schmidt-Radefeldt, *Parlamentarische Kontrolle der internationalen Streitkräfteintegration*, 2005, p. 186; Thym, *Außenverfassungsrecht nach dem Lissabonner Vertrag*, in: Pernice, *Der Vertrag von Lissabon: Reform der EU ohne Verfassung?*, 2008, p. 173 <184-185>). 385

The wording and location of Article 42 Lisbon TEU makes it clear in any case that the Member States' obligation of assistance does not go beyond the obligation of assistance pursuant to Article 5 of the North Atlantic Treaty of 4 April 1949 (Federal Law 386

Gazette 1955 II p. 289). This obligation does not necessarily include the use of military means but grants the NATO Member States a scope of assessment as regards the content of the assistance to be rendered (see BVerfGE 68, 1 <93>). In addition, the obligation of mutual assistance explicitly shall not prejudice “the specific character of the security and defence policy of certain Member States”, (Article 42.7(1) second sentence Lisbon TEU), a statement which also appears in other places in the treaty (see Article 42.2(1) first sentence Lisbon TEU and Declarations no. 13 and 14 Concerning the Common Foreign and Security Policy annexed to the Final Act of the Treaty of Lisbon). This provides the Member States with the possibility, secured by primary law, of invoking fundamental content-related reservations as regards the obligation of assistance (see Graf von Kielmansegg, *Die Verteidigungspolitik der Europäischen Union*, 2005, pp. 396 et seq.). The requirement of parliamentary approval under the provisions of the Basic Law which concern defence can retain their effect in the area of application of this reservation.

(3) The requirement of parliamentary approval under the provisions of the Basic Law which concern defence also cannot be bypassed because of obligations to act on the part of the Member States based on secondary law. Admittedly, the Treaty of Lisbon grants the Council powers to adopt decisions on missions “in the course of which the Union may use civilian and military means” (Article 43.1 and 43.2 Lisbon TEU). The term “civilian and military means” could also include specific armed forces contingents of the Member States. However, the Member States’ current understanding in the context of the Common Foreign and Security Policy, however, argues against this view. Accordingly, military contributions have never been a legal but at most a political “obligation”. 387

Even if, however, Article 43.2 Lisbon TEU were interpreted expansively, the Council would have to adopt a corresponding decision unanimously (see Article 31.1 and 31.4, Article 42.4 Lisbon TEU). In this case, 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. In this case, the requirement of unanimity in the Council cannot be changed into a requirement of a qualified majority by a decision of the Council (see Article 31.2 and 31.3 Lisbon TEU). Decisions with “military implications or those in the area of defence” are excluded from the scope of application of the general bridging clause pursuant to Article 48.7(1) second sentence Lisbon TEU and of the special bridging clause pursuant to Article 31.4 Lisbon TEU. A possible political agreement by the Member States to deploy armed forces in the European alliance would not be capable of generating a legal obligation to act which could overrule the more specific constitutive requirement of parliamentary approval pursuant to Article 24.2 of the Basic Law as compared to Article 23 of the Basic Law. 388

(4) The Treaty of Lisbon empowers the Member States to take steps towards the progressive framing of a common defence policy. Such a common defence policy, already possible according to the current version of Article 17.1 TEU, will lead to a com- 389

mon defence, “when the European Council, acting unanimously, so decides” and the Member States have adopted such a decision “in accordance with their respective constitutional requirements” (Article 42.2(1) Lisbon TEU).

The requirement of ratification clarifies that the European Union does not yet take the step towards a system of mutual collective security under the current wording of primary law and under the law after entry into force of the Treaty of Lisbon. Should the Member States decide to adopt a decision to this effect, an obligation of military cooperation of the Member States would only exist in the context of international law. Even after the entry into force of the Treaty of Lisbon, the Common Foreign and Security Policy, including the Common Security and Defence Policy, will not fall under supranational law (see Article 24.1, Article 40 Lisbon TEU; Article 2.4 TFEU and Declaration no. 14 Concerning the Common Foreign and Security Policy annexed to the Final Act of the Treaty of Lisbon). 390

Should the European Council unanimously decide on a common defence, the principle of unanimity which applies to the area of the Common Foreign and Security Policy (see Article 31.1 and.4; Article 42.4 Lisbon TEU) would guarantee that no Member State could be obliged against its will to take part in a military operation of the European Union. In such a case, the requirement of parliamentary approval under the provisions of the Basic Law could not be bypassed by an ordinary treaty amendment (Article 48.2 to 48.5 Lisbon TEU) which would abolish the principle of unanimity in favour of qualified majority voting. The Federal Republic of Germany would be constitutionally prohibited to take part in such a treaty amendment. 391

ee) The Treaty of Lisbon does not restrict the democratic possibilities of the German *Bundestag* of shaping social policy in such a way that the principle of the social state (Article 23.1 third sentence in conjunction with Article 79.3 of the Basic Law) would be affected so as to raise constitutional objections and that the democratic scope for action necessary in this context would be inadmissibly curtailed. 392

The argument advanced by the complainants re V. that European economic policy is a purely market-oriented policy without a social-policy orientation and that its functional approach restricts the possibilities of the legislature in the Member States to conduct their own social policy is incorrect. The European Union is neither without any social-policy competences, nor is it inactive in this area. At the same time, the Member States have sufficient competences to take essential social policy decisions on their own responsibility. 393

Since the beginning of the integration process, the European Union has had to deal with the reproach of neglecting the social dimension of society and of inadmissibly restricting the Member States’ democratic capacity to shape social policy. The thesis of an exclusion of the social dimension from the objectives of the integration process was based on an unspoken comparison with a state order, even though functional integration, the objective of which is the establishment of an internal market, does not necessarily have to fulfil society’s expectations with regard to unity (see, however, 394

Scharpf, The European Social Model: Coping with the Challenges of Diversity, JCMS 2002, pp. 645 et seq.). In the negotiations on the Treaty establishing the European Economic Community, social issues were discussed and found their way into the text of the treaty, for example in the area of the agricultural market organisation and of equal pay for men and women (Article 141 ECT; Article 157 TFEU), Since that time, the subject of social issues has increased in importance with every reform of the legal basis of European integration, and has seen a commensurate strengthening in primary law (see on European social law Huster, *Europäisches Sozialrecht: eine Einführung*, 1999; Hanau/Steinmeyer/Wank, *Handbuch des europäischen Arbeits- und Sozialrechts*, 2002; Fuchs, *Europäisches Sozialrecht*, 4th ed. 2005; Marhold, *Das neue Sozialrecht der EU*, 2005; de Búrca, EU Law and the Welfare State, 2005; Eichenhofer, *Sozialrecht der Europäischen Union*, 3rd ed. 2006).

In 1997, the Social Agreement, which, due to a lack of political consensus, had first come into being as an independent instrument under international law beside the Treaty of Maastricht, was incorporated into Community law. Article 136 to Article 150 ECT contain competences *inter alia* in the areas of social security, basic and advanced vocational training, codecision, dialogue with the social partners and working conditions (see on the details for instance Kingreen, *Das Sozialstaatsprinzip im europäischen Verfassungsverbund*, 2003, pp. 295 et seq.). These provisions are complemented by Article 13 ECT, which is the legal basis of the non-discrimination directives, Article 39 ECT, which provides for the freedom of movement for workers, and by the social fundamental rights laid down in the Charter of Fundamental Rights, which devotes its entire Title IV to them under the heading of “Solidarity” (Article 27 to Article 38 of the Charter). 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 (see the contributions in Hatje/Huber, *Unionsbürgerschaft und soziale Rechte*, 2007, and Kadelbach, *Unionsbürgerrechte*, in: Ehlers, *Europäische Grundrechte und Grundfreiheiten*, 2nd ed. 2005, pp. 553 et seq.; Hailbronner, *Unionsbürgerschaft und Zugang zu den Sozialsystemen*, JZ 2005, pp. 1138 et seq.). 395

The Treaty of Lisbon follows this line of development. In its second recital, the Preamble of the Treaty on the Functioning of the European Union states it is resolved “to ensure the economic and social progress” of the Member States “by common action”. The objectives of the Treaty on European Union are adapted in such a way that the Union aims at a “highly competitive social market economy, aiming at full employment and social progress” (Article 3.3(1) Lisbon TEU). At the same time, the aim of “free and undistorted competition” is deleted from the operative part of the Treaty on European Union and is shifted to Protocol no. 27 on the Internal Market and on Competition. A new cross-sectional clause (Article 9 TFEU) is intended to ensure that re- 396

quirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion and a high level of education is taken into account in all policies and activities of the Union (other new elements in the social area are introduced by the Treaty of Lisbon through Article 5.3 <coordination of the Member States' social policies>, Article 21.3 <citizenship of the Union and social security>, Article 152 <role of the social partners> and Article 165.2 TFEU <social function of sport>; Protocol no. 29 mentions the connection of the existence of a system of public broadcasting with the social needs of each society).

Political initiatives and programmes which supplement the law and lend it concrete shape correspond to the legal framework of action. In its Presidency conclusions, the Brussels European Council of 11 and 12 December 2007 explicitly recognised that the subjects social progress and the protection of workers' rights, public services as an indispensable instrument of social and regional cohesion, the responsibility of Member States for the delivery of education and health services, the essential role and wide discretion of national, regional and local Governments in providing, commissioning and organising non-economic services of general interest Union are of high importance (Bulletin EU 12-2008, I-17 (Annex 1)). 397

Finally, the case law of the Court of Justice has to be taken into account, which, admittedly, has until most recently given rise to criticism of a "one-sided market orientation" of the European Union but has at the same time shown a series of elements for a "social Europe". In its case law, the Court of Justice has developed principles which strengthen the social dimension of the European Union. The Court of Justice has for instance recognised numerous important social concerns as mandatory requirements of the common good which can justify the restriction of the market freedoms of Community law. They include for example, the protection of workers (ECJ, judgment of 15 March 2001, Case C-165/98, Mazzoleni, ECR 2001, p. I-2189, para. 27), the financial equilibrium of the system of social security (ECJ, judgment of 13 May 2003, Case C-385/99, Müller-Fauré, ECR 2003, p. I-4509, para. 73), the requirements of the system of social assistance (ECJ, judgment of 17 June 1997, Case C-70/95, Sodemare, ECR 1997, p. I-3395, para. 32) and of the social order (ECJ, judgment of 21 October 1999, Case C-67/98, Zenatti, ECR 1999, p. I-7289, para. 31) and the protection against social dumping (ECJ, judgment of 18 December 2007, Case C-341/05, Laval, ECR 2007, p. I-11767, para. 103). In its decision of 11 December 2007, the Court of Justice even established the existence of a European fundamental right to strike (ECJ, Case C-438/05, Viking, ECR 2007, p. I-10779, para. 44; on criticism see Rebhahn, *Grundfreiheit vor Arbeitskampf - der Fall Viking*, ZESAR 2008, pp. 109 et seq.; Joerges/Rödl, Informal Politics, Formalised Law and the "Social Deficit" of European Integration: Reflections after the Judgments of the ECJ in Viking and Laval,, ELJ 2009, pp. 1 et seq., as well as the contributions on the symposium "*Die Auswirkung der Rechtsprechung des Europäischen Gerichtshofes auf das Arbeitsrecht der Mitgliedstaaten*" of the Federal Ministry of Labour and Social Affairs on 26 June 2008, http://www.bmas.de/). 398

Considering the legal situation described above, the development and the fundamental political direction in the European Union, the broad scope of discretion which exists also at European level as regards social issues, has in any case not been transgressed. Contrary to what the complainants re V. fear, there are also no indications justifying the assumption that the Member States are deprived of the right, and the practical possibilities of action, to take conceptual decisions regarding social security systems and other measures of social policy and labour market policy in their democratic primary areas. 399

In so far as Article 48.1 TFEU empowers the European Union to adopt such measures in the field of social security as are necessary to provide freedom of movement for workers, there is the possibility for a member of the Council to request, via the emergency brake procedure, that the matter be referred to the European Council thus to achieve the suspension of the ordinary legislative procedure (Article 48.2 TFEU). Just like in the emergency brake proceedings in the area of the administration of criminal law (Article 82.3 and Article 83.3 TFEU), the German representative in the Council may only exercise this right of the Member States on the instruction of the German *Bundestag* and, in so far as this is required by the provisions on legislation, the *Bundesrat*. 400

2. The Act Amending the Basic Law (Articles 23, 45 and 93) (Amending Act), which is a constitution-amending Act, meets neither with formal nor with substantive objections and is therefore constitutional. 401

In the case of a constitution-amending Act, the Federal Constitutional Court review whether the requirements placed by Article 79.3 of the Basic Law on amendments of the Constitution are satisfied (see BVerfGE 30, 1 <24>; 94, 12 <33-34>; 109, 279 <310>). According to the regulatory content of the Amending Act, it is not apparent by what the principles laid down in Article 1 and Article 20 of the Basic Law could be affected. 402

a) This especially applies to Article 1 no. 1 of the Amending Act, which introduces the right to bring a subsidiarity action into the constitution as a minority right (Article 23.1a second sentence of the Basic Law, new version). The meaning and purpose of the obligation of the German *Bundestag* to bring an action that is provided for is to preserve to the parliamentary minority the competence to assert the rights of the German *Bundestag* also where the latter does not wish to exercise its rights, in particular in relation to the Federal Government sustained by it. The possibility of recourse to the Court of Justice of the European Union is to be made available to the opposition parliamentary groups, and thus the organised parliamentary minority as the antagonist of the government majority, to allow them to actually assert the rights reserved to the Parliament in the system of European integration (see on *Organstreit* proceedings: BVerfGE 90, 286 <344>; 117, 359 <367-368>; on the elaboration of the subsidiarity action as a parliamentary minority right see also Article 88-6 § 3 of the French Constitution of 4 October 1958 in its version of 26 January 2009). 403

The insertion of a subsection 1a into Article 23 of the Basic Law does not meet with constitutional objections also as regards the quorum of one fourth of the Members of the German *Bundestag*. Admittedly, the obligation of the *Bundestag* to bring a subsidiarity action if one fourth of its Members demand this step (Article 23.1a second sentence of the Basic Law, new version) derogates from the majority principle set out in Article 42.2 of the Basic Law. This is, however, without objection already because this does not concern decisions with a regulatory effect but the power to go to court (see Article 93.1 no. 2 of the Basic Law). 404

b) The power of delegation provided for in Article 1 no. 2 of the Amending Act pursuant to Article 45 third sentence of the Basic Law, new version, does not infringe democratic principles within the meaning of Article 79.3 of the Basic Law. The *Bundestag* appoints a Committee on European Union Affairs. It may empower the Committee to exercise the rights of the *Bundestag* under Article 23 of the Basic Law. It may also empower the Committee to exercise the rights which are accorded to the *Bundestag* in the basic treaties of the European Union. Not the granting of the rights, but solely their exercise may, in individual cases, meet with constitutional objections. 405

3. The Act Extending and Strengthening the Rights of the Bundestag and the Bundesrat in European Union Matters (Extending Act) infringes Article 38.1 in conjunction with Article 23.1 of the Basic Law in so far as rights of participation of the German *Bundestag* and the *Bundesrat* have not been elaborated to the extent required. 406

a) The Extending Act, which has not yet been signed by the Federal President, is intended to create the national preconditions for the exercise of the rights of participation that are granted to the *Bundestag* and to the *Bundesrat*, which is to be deemed a chamber of a National Parliament in this context, by the Treaty of Lisbon (*Bundestag* printed paper 16/8489, p. 7). The Act regulates the exercise of the rights granted in the context of the monitoring of the application of the subsidiarity principle (Article 1 § 2 and § 3 of the Extending Act) and the right, explicitly provided for in the Treaty of Lisbon, to reject treaty-amending instruments of the European Union (Article 1 § 4 of the Extending Act) via the bridging procedure pursuant to Article 48.7(3) Lisbon TEU and Article 81.3(3) TFEU. 407

Furthermore, Article 1 § 5 of the Extending Act enables the plenary session of the *Bundestag* to grant the Committee on European Union Affairs, appointed by it pursuant to Article 45 of the Basic Law, powers to exercise the rights of the *Bundestag* - with the restrictions concerning the subsidiarity action resulting from the requirements placed on decision-making by the Extending Act, and with the rights to make known one's opposition in the context of the bridging procedures (see on this *Bundestag* printed paper 16/8489, p. 8) - *vis-à-vis* the institutions of the European Union (Article 1 § 5 of the Extending Act). 408

b) If the Member States elaborate European treaty law on the basis of the principle of conferral in such a way as to allow treaty amendment without a ratification procedure solely or mainly by the institutions of the Union, albeit with the requirement of 409

unanimity, a special responsibility is incumbent on the legislative bodies, apart from the Federal Government, as regards participation; in Germany, participation must, at national level, comply with the requirements under Article 23.1 of the Basic Law. The Extending Act does not comply with these requirements in so far as the *Bundestag* and the *Bundesrat* have not yet been accorded sufficient rights of participation in European lawmaking and treaty amendment procedures.

aa) The Extending Act has the function of reflecting the constitutionally required rights of participation of the legislative bodies in the process of European integration at the level of ordinary law and to give them concrete shape. The Agreement between the Federal Government and the Länder pursuant to § 9 of the Act on the Cooperation of the Federation and the Länder in European Union Matters (*Vereinbarung zwischen Bundesregierung und den Ländern nach § 9 des Gesetzes über die Zusammenarbeit von Bund und Ländern in Angelegenheiten der Europäischen Union*) of 28 September 2006 (Federal Law Gazette I p. 2177) is not sufficient for this due to its ambiguous legal nature (see Hoppe, *Drum prüfe, wer sich niemals bindet - Die Vereinbarung zwischen Bundesregierung und Bundestag in Angelegenheiten der Europäischen Union*, DVBl 2007, p. 1540 <1540-1541>) and due to its content (see *inter alia* the resolution of the German *Bundestag* of 24 April 2008 accompanying the Treaty of Lisbon <*Bundestag* printed paper 16/8917, p. 6, Minutes of *Bundestag* plenary proceedings 16/157, p. 16482 B>). The *Bundestag* and the *Bundesrat* must therefore have the opportunity of newly deciding on procedures and forms of their participation taking into account the reasons for the decision. 410

bb) In this new legislative decision, *Bundestag* and *Bundesrat* must take into account that they must exercise their responsibility for integration in numerous cases of dynamic development of the treaties: 411

(1) While the ordinary treaty amendment procedure (Article 48.2 to 48.5 Lisbon TEU) is subject to the classic requirement of ratification for international treaties, amendments of primary law in the simplified procedure (Article 48.6 Lisbon TEU) also constitutionally require an Approving Act pursuant to Article 23.1 second sentence and, where necessary, pursuant to third sentence of the Basic Law. The same requirement applies to amendment provisions which correspond to Article 48.6 Lisbon TEU (Article 42.2(1) Lisbon TEU; Article 25.2, Article 218.8(2) second sentence, Article 223.1(2), Article 262 and Article 311.3 TFEU). 412

(2) In the area of application of the general bridging procedure pursuant to Article 48.7 Lisbon TEU and the special bridging clauses, the legislature may not by the Extending Act withhold its necessary and constitutive approval, nor may it give such approval “in reserve” in abstract anticipation, in respect of an initiative of the European Council or of the Council to move from unanimity to qualified majority voting or from a special legislative procedure to the ordinary legislative procedure. With the approval of a primary law amendment of the treaties in the application of the general bridging clause and the special bridging clauses, *Bundestag* and *Bundesrat* determine the ex- 413

tent of the commitments based on an international treaty and bear political responsibility for this *vis-à-vis* the citizen (see BVerfGE 104, 151 <209>; 118, 244 <260>; 121, 135 <157>). In this context, legal and political responsibility of Parliament is, even in the case of European integration, not restricted to a single act of approval but extends to further treaty implementation. Silence on the part of the *Bundestag* and the *Bundesrat* is therefore not sufficient for their exercising this responsibility.

(a) In so far as the general bridging procedure under Article 48.7(3) Lisbon TEU and the special bridging clause under Article 81.3(3) TFEU grant the national parliaments a right to make known their opposition, this is not a sufficient equivalent to the requirement of ratification. It is therefore necessary that the representative of the German government in the European Council or in the Council may only approve the draft decision if empowered to do so by the German *Bundestag* and the *Bundesrat* within a period yet to be determined in accordance with the purpose of Article 48.7(3) Lisbon TEU, by a law within the meaning of Article 23.1 second sentence of the Basic Law. 414

Article 1 § 4.3 no. 3 of the Extending Act contradicts the function of the right to make known one's opposition to effectively protect the Member States against further, unpredictable treaty amendments to the extent that it provides for these clauses that the decision-making competence to exercise the right to make known one's opposition in cases of concurrent legislation shall only be incumbent on the *Bundestag* where the *Bundesrat* does not object. A differentiated elaboration of the exercise of the right to make known one's opposition as can be found in Article 1 § 4.3 no. 3 of the Extending Act does not do justice to the general responsibility for integration of the German *Bundestag*. It is therefore constitutionally required that the *Bundestag* be accorded the decision-making competence on the exercise of the right to make known one's opposition in these cases independently of a decision of the *Bundesrat*. 415

(b) On the basis of the other special bridging clauses in Article 31.3 Lisbon TEU, Article 153.2(4), Article 192.2(2), Article 312.2(2) and Article 333.1 and 333.2 TFEU, which do not provide for a right of making known their opposition for the national parliaments, lawmaking in the European Union can only be in a manner that is binding on the Federal Republic of Germany if the German *Bundestag* and, in so far as required by the provisions on legislation, the *Bundesrat*, have approved the respective draft decision within a period yet to be determined in accordance with the purpose of Article 48.7(3) Lisbon TEU; here, the silence of the *Bundestag* or the *Bundesrat* may not be construed as approval. 416

(3) In so far as the flexibility clause under Article 352 TFEU is used, this always requires a law within the meaning of Article 23.1 second sentence of the Basic Law. 417

(4) In the context of the emergency brake procedures according to Article 48.2, Article 82.3 and Article 83.3 TFEU, the Federal Government may act in the Council only on the corresponding instruction of the German *Bundestag* and, in so far as required by the provisions on legislation, the *Bundesrat.* 418

(5) In the area of judicial cooperation in criminal matters, the exercise of Article 83.1(3) TFEU requires a law within the meaning of Article 23.1 second sentence of the Basic Law. In so far as in the context of Article 82.2(2) lit d and Article 83.1(3) TFEU, the general bridging clause is to be applied, as in the other cases of application of the general bridging clause, this requires prior approval by the *Bundestag* and the *Bundesrat* in the form of a law pursuant to Article 23.1 second sentence of the Basic Law. If necessary, this applies *mutatis mutandis* in the cases of Article 86.4 TFEU (powers of the European Public Prosecutor's Office) and of Article 308 third sentence TFEU (statute of the European Investment Bank). 419

D.

Considering that the Act Approving the Treaty of Lisbon is compatible with the Basic Law only by taking into account the provisos specified in this decision and that the accompanying laws are unconstitutional in part, the complainants and applicants are to be reimbursed their necessary expenses in proportion to their success pursuant to § 34a.2 and 34a.3 of the Federal Constitutional Court Act. Accordingly, the complainant re III. is to be reimbursed one half, the complainants re IV. and VI., respectively, one fourth, and the complainants re V. and the applicant re II., respectively, one third of their necessary expenses of these proceedings. 420

E.

The decision was reached unanimously as regards the result, by seven votes to one as regards the reasoning. 421

Voßkuhle	Broß	Osterloh
Di Fabio	Mellinghoff	Lübbe-Wolff
Gerhardt		Landau

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ECLI ECLI:DE:BVerfG:2009:es20090630.2bve000208