Special Section
The ESM Before the Courts

German Constitutional Foundations of, and Limitations to, EU Integration: A Systematic Analysis

*By Erich Vranes**

A. Introduction

The relationship between EU law and German constitutional law, and the respective dialogue between the ECJ and the German Federal Constitutional Court (FCC), have considerably shaped the EU integration process by creating fields of tension and demarcating possible legal boundaries. The decisions of the German Federal Constitutional Court and the European Court of Justice concerning the European Stability Mechanism are only the most recent examples of this phenomenon. These developments have, of course, spilled over to other EU Member States. The German constitutional bases of, and limits to, EU integration—especially as articulated in the relevant decisions of the German Federal Constitutional Court—have therefore become a field of particular interest for EU and public lawyers. This article gives an up-to-date overview of relevant constitutional rules, court decisions, and the academic debate in Germany. It does so by systematically distinguishing between an analysis of the German constitutional foundations of EU integration (section B.), constitutional limits to the further transfer of powers to the EU through amendments of EU *primary* law (section C.I.), and the constitutional confines for the legal effects of EU *secondary* law in Germany (section C.II.).

B. Constitutional Foundations of EU-Membership

I. Overview

One of the most conspicuous features of the German Basic Law[1] is its comparative openness to EU and international law, which is reflected most notably in its Preamble and in Articles 23, 24, 25, 26 and 59 II. This openness has to be seen in the light of the experiences of World War II, since the opening-up of the constitutional order was

* Professor of European, public, international and international economic law, Vienna University of Economics and Business. This paper is an abbreviated version of an outcome of the project National Constitutional Law and European Integration, which examined the constitutional bases and limits for EU integration in eight EU Member States. It was carried out for the EU Parliament in 2010 and 2011 and was led by Prof. Stefan Griller in cooperation with Dr. Stephan Keiler, Dr. Thomas Kröll, Prof. Georg Lienbacher and Prof. Erich Vranes (author of the chapter on Germany). This paper was updated in November 2012.

[1] *See* GRUNDGESETZ FUR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBI. I (Ger.).

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perceived, after 1945, as a means of re-integrating Germany into the international order.[2] It has also been used, by the Federal Constitutional Court, as a basis for inferring the "constitutional principle of openness towards international law" (*Völkerrechtsfreundlichkeit*)[3] and the "principle of openness towards European law" (*Europarechtsfreundlichkeit*).[4]

Articles 24 and 23 do not only serve as bases for integration. They also function as barriers to integration: implicit limitations to integration have been inferred by the Federal Constitutional Court from Article 24, read in context with other provisions of the Basic Law. In 1992 these limitations were codified in Article 23.[5] Even in these introductory remarks, however, it must be mentioned that some of the limitations are spelled out in Article 23, but many additional barriers result from the cross-reference in Article 23 to Article 79 II, which contains formal boundaries, and Article 79 III, which sets forth substantive constraints. Further restraints have been derived, by the Federal Constitutional Court, from the electoral guarantees that are laid down in Article 38. This was the distinct contribution of the Court's decisions in its famous *Maastricht* and *Lisbon* rulings.[6] The Federal Constitutional Court clarified, in the *Maastricht Case* and in its 2012 decisions on the European Stability Mechanism (ESM) and the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG), that these limits also apply to the interaction between German constitutional law and legal instruments other than the EU treaties, namely international instruments that are closely intertwined with EU integration, such as the ESM and the TSCG.[7]

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[2] *See for example* Karl-Peter Sommermann, *Offene Staatlichkeit*, 2 HANDBUCH IUS PUBLICUM EUROPAEUM 3, 6 (2008); Kammerentscheidungen des Bundesverfassungsgerichts [Chamber Decisions of the Federal Constitutional Court], Case No. 2 BvE 2/08, June, 30, 2009, 9 BVERFGK 174, 186, para 222 (Ger.) [herinafter *Lisbon* ruling]; Christian Joerges, *The Lisbon Judgment*, *in* THE GERMAN CONSTITUTIONAL COURT'S LISBON RULING 27, 30-31 (ZERP-Diskussionspapier, Andreas Fischer-Lescano, Christian Joerges & Arndt Wonka eds., 2010).

[3] *See* Bundesverfassungsgericht [BVerfG - Federal Consitutional Court], case No. X BvR 31 BVerfGE 58, 75-76; FCC, decisions BVerfGE 111, 307, 317, 112, 1, 26 (Ger.); *Lisbon* ruling, *supra* note 2; RUDOLF GEIGER, GRUNDGESETZ UND VÖLKERRECHT. MIT EUROPARECHT 2-3 (2009).

[4] *See Lisbon*, *supra* note 3.

[5] *See infra*, Section C.I.3.

[6] *C.f. infra*, Section C.

[7] *See* Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], June 19, 2012, 2 BvF 4/11, June 19, 2012, 2012 DIE ÖFFENTLICHE VERWALTUNG (DÖV) 605 (Ger.); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 1390/12, Sep. 12, 2012, 2012 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 3145 (Ger.)

II. The Individual Legal Provisions

1. Article 24 I

For two reasons at least, it is important to be familiar with Article 24 I of the Basic Law, although it has been superseded meanwhile by Article 23 as a *lex specialis* in matters of EU integration. First, several landmark rulings of the Federal Constitutional Court, such as the *Solange I* and *Solange II* cases, have been rendered under Article 24 I. Second, the constitutional barriers to EU integration developed in these rulings (decided on the basis of Article 24 I) have meanwhile been codified in the evolving versions of the superseding Article 23.[8]

Article 24 I reads: "The Federation may by a law transfer sovereign powers to international organizations."

Article 24 I serves several functions. On the one hand, it authorizes the "transfer of sovereign powers" to international organizations. Article 24 was therefore seen as the constitutional foundation for German EC/EU membership and as the lever opening up the German constitutional order for the direct validity and application of supranational law.[9] Moreover, it has been regarded as the legal basis for the recognition of the primacy of EU law.[10] "Sovereign powers" in the sense of this provision are commonly understood as the competence of the state to regulate legal relationships through legislation, administration and adjudication.[11] The Federal Constitutional Court has stressed that the wording "transfer of sovereign powers" is imprecise, given that Article 24 opens the national legal order in such a manner that the exclusive sovereignty of Germany within the area of application of the Basic Law is revoked, thus permitting EU law to have direct validity and application within Germany.[12] This opening-up of the legal order has also been understood as a constitutional decision to abstain from exercising certain national sovereign competences and to accept the common exercise, in the EU framework, of respective

[8] *See* Rupert Scholz, ART. 23, *in* GRUNDGESETZ. KOMMENTAR, LOSEBLATTSAMMLUNG (Theodor Maunz & Günter Dürig eds., 56th instalment, 2009); Wolff Heintschel von Heinegg, ART. 23, *in* GRUNDGESETZ BECK'SCHER ONLINE-KOMMENTAR (Volker Epping & Christian Hillgruber eds., 2010).

[9] *See* Ingolf Pernice, ART. 23, *in* GRUNDGESETZ. KOMMENTAR, (Horst Dreier ed. 2nd ed., 2006).

[10] *See* Geiger, *supra* note 3, at 165; STEFAN GRILLER, FRANZ MAISLINGER & ANDREAS REINDL, FUNDAMENTALE RECHTSGRUNDLAGEN EINER EG-MITGLIEDSCHAFT 15 and 182 (1991).

[11] *See* MICHAEL SCHWEITZER, STAATSRECHT III 23 (2008); Rudolf Streinz, ART. 23, *in* GRUNDGESETZ. KOMMENTAR (Michael Sachs ed., 5th ed. 2009).

[12] *See* Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvL 52/71, May 29, 1974, 37 BVERFGE 271 (Ger.) [hereinafter *Solange I*].

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supranational competences.[13] The constitutional limits to integration, which have been derived from Article 24, will be discussed below.[14]

2. Article 23

1.1 Overview

With the advent of the Maastricht treaty and its widening of EC/EU competences, Article 24 was commonly[15] regarded as an insufficient anchor for further integration.[16] Therefore, Article 23 was inserted in an effort to overcome such constitutional concerns and to enhance the democratic legitimacy of EU integration by strengthening the role of the German *Bundestag* and the rights of the German *Länder* in matters of European integration.

Article 23 is considered as a compromise provision characterized by insufficient clarity.[17] The rather complex structure of Article 23 is arguably due to the plurality of aims pursued with this provision. On the one hand, Article 23 I constitutes the central legal basis for German participation in EU integration. On the other hand, Article 23 I sets forth the main legal barriers to integration. Article 23 Ia was introduced in 2009 in order to operationalize the right, granted to national parliaments by the Lisbon Treaty,[18] to bring subsidiarity complaints before the ECJ. Articles 23 II-VII deal with the participation of the *Bundestag* and the *Bundesrat* in matters concerning the EU.[19] Article 23 VI was amended in 2006 as part of Germany's extensive federalism reform.[20] It is commonly pointed out that few

[13] *See* Schweitzer, *supra* note 11, at 23; Christian Hillgruber, ART. 23, *in* KOMMENTAR ZUM GRUNDGESETZ (Bruno Schmidt-Bleibtreu, Franz Klein, Hans Hofmann & Axel Hopfauf eds., 2008).

[14] *See infra*, Section C.I.2.

[15] For a sceptical view see Pernice, *supra* note 9.

[16] *See* Hillgruber, *supra* note 13; Streinz, *supra* note 12; Pernice, *supra* note 9.

[17] *See* Streinz, *supra* note 11.

[18] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, 2007 O.J. (C 306).

[19] In the 2012 ruling on the ESM and the Fiscal Compact (FCC, 2 BvE 4/11, 19 June 2012), the FCC clarified that international treaties that are closely related to EU law constitute matters of EU integration in the sense of Article 23 II, thus triggering the German Government's obligation to comprehensively inform the German Bundestag in due time so as to enable the latter to effectively exercise its rights to participation in EU affairs.

[20] *See* Heintschel von Heinegg, *supra* note 8; Act of 26, August 2006 [BGBL. I] at 2034 (Ger.).

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constitutions have such elaborate provisions on EU integration.[21] In view of this paper's focus, the following analysis concentrates on Article 23 I.[22]

1.2 Article 23 I

Article 23 I consists of three sentences of quite different legal import:

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

Article 23 I 1 has several normative implications. On the one hand, it concretizes the Preamble, in that it implies that the aim of a united Europe is to be pursued specifically within the EU integration project.[23] Article 23 I 1 thus determines a constitutional objective of the state.[24] On the other hand, Article 23 I 1 spells out structural requirements for the EU that are to be promoted by German organs. To the extent these requirements constitute barriers to integration, they are analyzed below.[25]

In its first-mentioned "positive" integrationist function, Article 23 I 1 is perceived as a legal mandate that is incumbent on all organs of the German Federation and its *Länder*,

[21] *See e.g.* Pernice, *supra* note 9.

[22] On the other paragraphs of Article 23 and the federalism reform see *e.g.* Scholz, *supra* note 8; Heintschel von Heinegg, *supra* note 8; Stefanie Schmahl, ART. 23, *in* GRUNDGESETZ. BECK'SCHER KOMPAKT-KOMMENTAR (Helge Sodan ed., 2009).

[23] *See, e.g.*, Hillgruber, *supra* note 13.

[24] *See Lisbon* ruling, *supra* note 2, at para 225; Sommermann, *supra* note 2, at 30.

[25] *See infra*, Section C.

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including representatives of the German State in the EU, in particular in the Council.[26] These organs are subject to a constitutional law yardstick,[27] which necessarily[28] leaves them wide discretion in EU matters.[29] EU organs are not addressees of this provision. But the EU and other Member States may indirectly be affected by the limits ensuing from this provision.[30] According to the Federal Constitutional Court and academic writings, Article 23 I 1 does not establish a determinate obligation to pursue the objective of creating a European federal state, a confederation, or a given intermediate form.[31] In the literature, Article 23 I 1 is also regarded as a German constitutional counterpart of the EU principle of loyalty,[32] which is now enshrined in Article 4 III of the EU Treaty.

Article 23 I 2 contains the second main clause of this fundamental provision. Using a construction similar to Article 24, Article 23 I 2 authorizes the Federation to "transfer sovereign powers by a law" to the EU. The term "sovereign powers" essentially has the meaning that phrase is given under Article 24;[33] it includes the judicial competence to develop the law through judicial interpretation (*Rechtsfortbildung*), which, according to the Federal Constitutional Court,[34] has lawfully been vested in the ECJ.[35] As in the case of Article 24, the notion "transfer [of] sovereign powers" is somewhat deceptive, given that Article 23 I 2 also is seen as opening the national legal order for the direct validity and applicability of EU law and as an authorization for courts and administrative authorities to recognize the supremacy of EU law.[36] Article 23 I 2 thereby permits substantive changes of the Basic Law, even if such amendments of the constitution are not explicitly incorporated

[26] Claus Dieter Classen, ART. 23, *in* KOMMENTAR ZUM GRUNDGESETZ, (Hermann von Mangoldt, Friedrich Klein & Christian Starck eds., 2005); Scholz, *supra* note 8; Heintschel von Heinegg, *supra* note 8.

[27] *See* Pernice, *supra* note 9; Heintschel von Heinegg, *supra* note 8.

[28] This follows inter alia from the fact that the objective of EU integration can only be realized in cooperation with the other EU Member States. *See, e.g.*, Classen, *supra* note 26.

[29] This appears to be the unanimous view in academic writings. *See, e.g.*, Scholz, *supra* note 8; Heintschel von Heinegg, *supra* note 8; Streinz, *supra* note 11; Hillgruber, *supra* note 13.

[30] On these barriers see *infra*, Section C.

[31] *See Lisbon* ruling, *supra* note 2; Streinz, *supra* note 11.

[32] *See* Classen, *supra* note 26.

[33] *See, e.g.*, Schweitzer, *supra* note 11 at 23; Streinz, *supra* note 11.

[34] Regarding the legal boundaries, see Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BvR 2134/92, Oct. 12, 1993, 89 BVERFGE 155 (Ger.) [hereinafter *Maastricht* ruling].

[35] *See* Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 687/85, Apr. 8, 1987, 75 BVerfGE 223 (Ger.).

[36] *See* Streinz, *supra* note 11.

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in the text of the Basic Law.[37] Article 23 I 2 is regarded as not being pertinent for the intergovernmental fields of EU action.[38]

Formally, Article 23 I 2 requires that every "transfer" of competences is effectuated by means of a federal law. As compensation for the general loss of *Länder* competences in the framework of EU integration, the *Bundesrat* has to consent to every transfer that further opens the legal order, irrespective of whether it actually concerns specific powers of the German *Länder*.[39] As formerly under Article 24, an amendment of the EU treaties formally must satisfy (by way of a federal law known as an *Integrationsgesetz* or *Zustimmungsgesetz* in the sense of Article 23 I 2) the terms of Article 59 II (*Vertragsgesetz*).[40]

Article 23 I 3 sets forth formal and substantive barriers to integration, which aim to secure the fundamental structures of the German constitution. Article 23 I 3 is therefore discussed in detail below, in the context of the German constitutional barriers to EU integration.[41]

C. Constitutional Limits to EU-Integration

I. Limits to the (Further) Transfer of Powers to the EU

1. Introductory Remarks

The constitutional limits to the transfer of competences to the EU through treaty amendments have been developed primarily in the jurisprudence of the Federal Constitutional Court. The early rulings such as *Solange I* and *Solange II*, which were rendered under Article 24 of the Basic Law, do not clearly distinguish between limits to the transfer of competences through treaty amendments, on the one hand, and barriers to the effects of EU secondary law, on the other hand. Nonetheless, these rulings contain considerations that confine the legality of transfers of power to the EU level, as follows

[37] *See* Horst Dreier, *Grundlagen und Grundzüge staatlichen Verfassungsrechts: Deutschland*, *in* HANDBUCH IUS PUBLICUM EUROPAEUM (Armin von Bogdandy et al. eds., 2008).

[38] According to *Schweitzer* and *Streinz*, these fields are only indirectly regulated by the Basic Law. *See* Schweitzer, *supra* note 11, at 23; Streinz, *supra* note 11.

[39] Article 23 I 2 states that "the Federation may transfer sovereign powers by a law with the consent of the Bundesrat."

[40] On this double function of federal laws in the sense of Article 23 I 2, see Streinz, *supra* note 11. On the legal questions raised in this context, see Streinz, *supra* note 11.

[41] *C.f. infra*, Section C.I.3.d.

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from the wording of these decisions[42] and from the fact that, in the meantime, their principles have been codified in Article 23.[43]

2. Limits Developed under Article 24

In the first of these foundational rulings, *Solange I*, the Federal Constitutional Court held that Article 24 "does not open the way to amending the basic structure of the Basic Law, which forms the basis of its identity, without a formal amendment to the Basic Law."[44] The Court explained that

> the part of the Basic Law dealing with fundamental rights is an inalienable, essential feature of the valid Basic Law of the Federal Republic of Germany and one which forms part of the constitutional structure of the Basic Law. Article 24 of the Basic Law does not without reservation allow it to be subjected to qualifications.[45]

In the next argumentative steps of it's reasoning the Court described the conditions under which it would be prepared to give up its scrutiny of secondary law. The aforementioned statement has, however, been understood as also indicating limits to the constitutionality of transfers of competences.[46]

Similarly, in *Solange II*, the Federal Constitutional Court ruled that

> the power conferred by Article 24 (1) of the Basic Law, however, is not without limits under constitutional law. The provision does not confer a power to surrender by way of *ceding sovereign rights to international institutions* the *identity* of the prevailing constitutional order of the Federal Republic by breaking into its basic framework, that is, into its very structure. That applies in particular to legislative instruments of the international institution which, perhaps as a result of a corresponding interpretation

[42] *See infra* Subsection 3.

[43] *Id.*

[44] *See Solange I*, *supra* note 12.

[45] *See Solange I*, *supra* note 12.

[46] *See e.g.*, Griller, Maislinger & Reindl, *supra* note 10, at 19.

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> or development of the underlying treaty law, would undermine *essential, structural parts of the Basic Law*. *An essential part* which cannot be dispensed with and belongs to the basic framework of the constitutional order in force is constituted in any event by *the legal principles underlying the provisions of the Basic Law on fundamental rights*.[47]

It followed from these rulings that the Federal Constitutional Court classified the protection of German fundamental rights as constitutional requirements for EU membership and treaty amendments.[48] Shortly thereafter the Court implied that it also considered the German constitutional commitment to federalism to be a barrier to the transfer of competences.[49]

3. Limits Developed under Article 23

1.1 Preliminary Remarks

The Federal Constitutional Court's decisions in the *Maastricht Case*[50] and *Lisbon Case*[51] have established a considerable number of additional constitutional boundaries for EU membership, further transfers of competences, and amendments of EU primary law.[52]

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[47] *See* Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 197/83, Oct. 22, 1986, 73 BVERFGE 339 (Ger.) [hereinafter *Solange II*].

[48] See Griller, Maislinger & Reindl, *supra* note 10, at 21.

[49] *See* Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], 2 BvG 1/89, Apr. 11, 1989, 80 BVERFGE 74 (Ger.); Griller, Maislinger & Reindl, *supra* note 10, at 21.

[50] *See Maastricht* ruling, *supra* note 34.

[51] *See* Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvE 2/08, June 30, 2009, 123 BVERFGE 267. On this ruling see also the many contributions in the German Law Journal. *See, e.g.*, Christian Wohlfahrt, *The Lisbon Case: A Critical Summary*, 10 GERMAN L.J. 1277, 1286 (2009); Matthias Niedobitek, *The Lisbon Case of 30 June 2009*, 10 GERMAN L.J. 1267, 1267 (2009); Christoph Schönberger, *Lisbon in Karlsruhe:* Maastricht's *Epigones at Sea*, 10 GERMAN L.J. 1201, 1201 (2009); Alfred Grosser, *The Federal Constitutional Court's Lisbon Case: Germany's "Sonderweg": An Outsider's Perspective*, 10 GERMAN L.J. 1263 (2009); Daniel Halberstam & Christoph Möllers, *The German Constitutional Court Says "Ja zu Deutschland!"*, 10 GERMAN L.J. 1241, 1241 (2009); Frank Schorkopf, *The European Union as An Association of Sovereign States: Karlsruhe's Ruling on the Treaty of Lisbon*, 10 GERMAN L.J.. 1219, 1219 (2009); Armin Steinbach, *The Lisbon Judgment of the German Federal Constitutional Court–New Guidance on the Limits of European Integration?*, 11 GERMAN L.J. 367, 367–90 (2010); Philipp Kiiver, *German Participation in EU Decision-Making after the Lisbon Case,* 10 GERMAN L.J. 1287, 1287 (2009); Christian Tomuschat, *The Ruling of the German Constitutional Court on the Treaty of Lisbon*, 10 GERMAN L.J. 1260, 1260 (2009).

[52] Furthermore, the *Maastricht* judgment contains important barriers for secondary EU law. These are analyzed below. *See infra*, Section II.3.

Since these rulings were rendered under Article 23 I of the Basic Law in particular, the following analysis is structured in accordance with the three sentence architecture of Article 23 I, which was described earlier.

1.2 Barriers Derived from Article 23 I 1

a) Legal Relevance in General

As noted above, Article 23 I 1 does not only set forth the constitutional aim of establishing a united Europe within the framework of the European Union. It also defines barriers to German participation in EU integration. This becomes clear already from the wording of this provision:

> With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law.[53]

The explicit barriers defined in this clause (the so-called structure-securing clause or *Struktursicherungsklausel*[54]) are the foundational principles of Germany's post-war constitutional order, as expressed in various provisions of the Basic Law, including the principles of democracy, social justice, federalism and subsidiarity, the rule of law, and the protection of basic rights. Some authors also infer barriers from the notion "Europe" itself.[55]

As mentioned above, these requirements – although they are aimed at the EU – set forth obligations only for *German* state organs. In particular, it is inferred from this obligation that German organs are only required to cooperate in a Union that lives up to these requirements.[56] According to the Federal Constitutional Court and some commentators,

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[53] *See* GRUNDGESETZ FUR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBI. I (Ger.).

[54] *See Lisbon* ruling, *supra* note 2.

[55] *See* Scholz, *supra* note 8; *see* Heintschel von Heinegg, *supra* note 8 (arguing that the term "Europe" does not cover Turkey, thus posing a constitutional obstacle for Turkey's accession to the EU. This viewpoint is not shared by other commentators). *See* Pernice, *supra* note 9 (emphasizing the semantic openness of this term.)

[56] *See* Streinz, *supra* note 11.

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should the EU break out of these constitutional constraints, Germany would be obliged to withdraw from the EU.[57] Second, it has to be emphasized that these substantive requirements do not demand "structural congruence"—in the sense that the EU would have to comply with "German" standards as regards the foundational principles of Germany's constitutional order. It is unanimously held in the literature, and has been confirmed in the Federal Constitutional Court's *Lisbon* ruling,[58] that these requirements take on a "European" meaning in the sense of setting forth standards that are commensurate to the status and the function of the Union.[59] An important exception in the context of Article 23 I 1 is the protection of fundamental rights. Article 23 calls for protection of basic rights on the EU level that is "*essentially* comparable to that afforded by this Basic Law." Thus, the aim is not a European, but a (mitigated) German standard. The potential for constitutional clashes resulting, in the scrutiny of secondary law, from this express link to German standards has meanwhile been defused in the jurisprudence of the Federal Constitutional Court.[60]

b) The EU and the Principle of Democracy

The requirements arising from the democratic principle under Article 23 I 1 have been elaborated by the Federal Constitutional Court in the *Maastricht* and *Lisbon* cases, which, *inter alia*, concerned constitutional complaints that were brought under Article 38 of the Basic Law. Article 38 guarantees the fundamental right to vote.[61] In both decisions, the German Court has especially emphasized that the principle of democracy cannot be balanced against other legal interests. The principle of democracy, the Court has insisted, is inviolable under the Basic Law[62] where it is protected by the eternity guarantee (Article 79 III).[63] The Court has equated the structures and protections permanently secured by

[57] *See Lisbon* ruling, *supra* note 2; *see* Hillgruber, *supra* note 13; Armin von Bogdandy, *Prinzipien der Rechtsfortbildung im europäischen Rechtsraum. Überlegungen zum Lissabon-Urteil des BVerfG*, NEUE JURISTISCHE WOCHENSCHRIFT 1, 3 (2010) (according to whom the Basic Law only contains a duty of integration, no obligation to withdraw from the EU.)

[58] *See Lisbon* ruling, *supra* note 2 (with regard to the democratic principle).

[59] *See* Streinz, *supra* note 11; Pernice, *supra* note 9; *Lisbon* ruling, *supra* note 2.

[60] *C.f. infra,* Section II.

[61] *See* GRUNDGESETZ FUR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBI. I (Ger.) ("Members of the German Bundestag shall be elected in general, direct, free, equal and secret elections. They shall be representatives of the whole people, not bound by orders or instructions, and responsible only to their conscience").

[62] *See Maastricht* ruling, *supra* note 34.

[63] *See* GRUNDGESETZ FUR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBI. I (Ger.) ("Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.").

Article 79 III with German "constitutional identity."[64] Nonetheless, according to the Federal Constitutional Court, the principle of democracy is *open* to the objective of integrating Germany into the EU. Thus, the EU is "not schematically subject to the requirements of a constitutional state applicable on the national level."[65] More precisely, the "specific requirements imposed by the democratic principle depend on the *extent* of the sovereign powers that have been transferred and on the *degree* of the independence that European decision-making procedures have reached."[66] Yet, the Federal Constitutional Court also points to the borderline of this possibility for structural adaptations of the democratic principle: this possibility applies as long as "the limit of the inalienable constitutional identity," i.e. Article 79 III, is not transgressed.[67] Should an imbalance arise between the character and extent of EU competences and the degree of its democratic legitimization, then the German organs would be constitutionally required to work towards change, and "if the worst comes to the worst, even to refuse to further participate in the European Union."[68] Having declared this *ultima ratio*, the Federal Constitutional Court demarcates the space that is left, under the democratic requirements of the German Constitution, for EU integration. It does so by adopting a new twofold *Solange* formula, in which the principle of conferral is central:

> As long as the European order of competences according to the principle of conferral in cooperatively shaped decision-making procedures, exists taking into account the states' responsibility for integration, and as long as a well-balanced equilibrium of the competences of the Union and the competences of the states is retained, the democracy of the European Union cannot, and need not, be shaped in analogy to that of a state. Instead, the European Union is free to look for its own ways of democratic supplementation by means of additional, novel forms of transparent or

[64] *See Lisbon* ruling, *supra* note 2; Andreas Voßkuhle, *Der europäische Verfassungsverbund,* NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 1, 1 (2010); on the notion of constitutional identity see also Dreier, *supra* note 37; to an introductory overview of the *Lisbon* ruling see e.g. Christian Wohlfahrt, *The Lisbon Case: A Critical Summary*, 10 GER. LAW. J. 1267, 1277-86 (2009).

[65] *See Lisbon* ruling, *supra* note 2.

[66] *See id.*

[67] *See id.*

[68] *See id.*

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> participative political decision-making procedures . . . .[69]

Still, the possibilities thus bestowed on the EU are legally confined. Despite its repeated emphasis of the fact that the EU need not develop democratically as a state would,[70] the Federal Constitutional Court maintains that the EU's democratic deficit, "when measured against requirements on *democracy in states,*"[71] cannot be remedied by relevant democratic elements brought about by the Treaty of Lisbon. In particular, a number of Lisbon's innovations are insufficient, including double qualified majority voting in the Council, the institutional recognition of national parliaments in subsidiarity control, and mechanisms of participative, associative and direct democracy.[72] Moreover, the Federal Constitutional Court has sketched a new barrier to integration by indicating that many of Lisbon's democratic innovations can only assume a complementary function.[73] Under the heading of the democratic principle, the Federal Constitutional Court also has delineated another barrier to German integration, requiring that the independence of the Commission could not be "promoted even further without directly originating from an election by the demos in which due account is taken of equality."[74] As in *Maastricht*, the Federal Constitutional Court in *Lisbon* designated the European Parliament as nothing more than an "*additional* independent source of democratic legitimization."[75] As regards the present legal situation, including the changes introduced through the *Lisbon* treaty, the Court takes the view that the barriers derived from the Basic Law had not been infringed.[76] (Further constraints ensue from the *third* sentence of Article 23 I, which protects the principle of democracy *in Germany*. These barriers are discussed below.)

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[69] *See id.*; Ulrich Everling, *Europas Zukunft unter der Kontrolle der nationalen Verfassungsgerichte*, EUROPARECHT 97, 97 (2010).

[70] *See Lisbon* ruling, *supra* note 2.

[71] *See id.*

[72] *See id.*

[73] *See id.*

[74] *See id.*

[75] *See id.*

[76] The restrictive wording is noteworthy: "*Taking into account the provisos that are specified in the grounds*, there are no decisive constitutional objections . . . ." *See Lisbon* ruling, *supra* note 2. On this, see Everling, *supra* note 69 at 93, who points out that the extent of the binding effect of grounds of a FCC ruling are disputed; see also the critical remarks by Peter-Christian Müller-Graff, *Das Karlsruher Lissabon-Urteil: Bedingungen, Grenzen, Orakel und integrative Optionen*, integration 331 (2009); Matthias Niedobitek, *The Lisbon Case of 30 June 2009*, 10 GERMAN L.J. 1267, 1267 (2009).

These facets of the judgment have attracted criticism. On the one hand, it has been argued that the Federal Constitutional Court's reasoning is circular, in that it stressed that the EU is not subject to the democratic requirements of a state but nonetheless assesses the EU on the basis of state-centered democratic standards.[77] On the other hand, the ruling has been critiqued for upholding a conception of democracy that is fixated on states and state citizens, thus tending to abnegate the possibility of adequate democratic mechanisms beyond the nation state.[78] Furthermore, it has been submitted that two of the premises on which the *Lisbon* ruling purportedly relies – namely the conceptions that the individual right to vote can have a notable directive influence on policy-making and that there is a close connection between the democratic principle and the extent of competences – are questionable.[79] Several commentators have argued that the European Parliament, and its contribution to democratic legitimization of EU policy-making, tend to be unduly marginalized in the Federal Constitutional Court's judgment.[80] Likewise, it has been held that the contribution of double qualified majority voting for democratic legitimacy did not receive sufficient attention in the *Lisbon* ruling.[81]

c) The EU and the Rule of Law

Article 23 I 1 designates the principle of the rule of law as a second barrier to integration. Like the other structural specifications in Article 23 I 1, this requirement must be respected by German organs in their decisions about transfers of competences to the EU level, in their participation in the EU legislature, and in the implementation of EU law. Like other requirements in this clause, the principle of the rule of law takes on a "European" meaning in the sense of a standard flowing from common European constitutional traditions. Exactly defining the contents of such a principle on an abstract level is almost impossible, as the expectations regarding the rule of law tend to vary greatly in European states.[82] Nonetheless, in academic writings, it is generally held that the current shape of the EU does not lead to evident tensions with this principle. It is argued that the EU complies with

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[77] *See* Müller-Graff, *supra* note 76 at 331. For a critique of this part of the judgment, see Arndt Wonka, *Accountability Without Politics?*, *in* THE GERMAN CONSTITUTIONAL COURT'S LISBON RULING: LEGAL AND POLITICAL SCIENCE PERSPECTIVES 55 (Andreas Fischer-Lescano, Christian Joerges & Arndt Wonka eds., 2010).

[78] *See, e.g.*, Everling, *supra* note 69, at 98. *But see* Christian Joerges, *The Lisbon Judgment*, *in* THE GERMAN CONSTITUTIONAL COURT'S LISBON RULING: LEGAL AND POLITICAL SCIENCE PERSPECTIVES 27, 30 (Andreas Fischer-Lescano, Christian Joerges & Arndt Wonka eds., 2010) (arguing that this focus on citizens and individual rights is e.g. in line with Kantian and Habermasian premises, according to which those subject to the law must be able to understand themselves as its authors).

[79] Müller-Graff, *supra* note 76, at 331. The first premise is also questioned by Wonka, *supra* note 77, at 47, 55.

[80] *See, e.g.*, Von Bogdandy, *supra* note 57, at 1, 3; Everling, *supra* note 69, at 92, 97.

[81] *See, e.g.*, Everling, *supra* note 69, at 98.

[82] On this, see Classen, *supra* note 26, at margin number 35.

core notions associated with the rule of law, given that: the EU has been constituted by law and its institutions are bound by law; there are sufficient (law-based) checks and balances in EU governance; the principle of conferral (which restricts the enactment of secondary law) applies; and the European Court of Justice guarantees effective legal protection, legal security and proportionality.[83] While this principle was not elaborated in the *Lisbon* ruling, the Federal Constitutional Court has recognized, in the criminal law context, the risks for the protection of the rule of law implicated by the transfer of sovereign powers.[84]

d) The EU and the Principle of Social Justice

The exact substance of the principle of social justice is as difficult to determine as that of the rule of law, especially if one tries to take a broader European perspective.[85] This is confirmed also by the *Lisbon* judgment, which, in line with the prevailing opinion in the German literature, holds that the requirements placed on the EU under this principle of the Basic Law "are clearly limited," as they are in need of political and legal concretization.[86] Instead the Court emphasized that securing an individual's livelihood must remain a primary task of the Member States.[87] Arguably, this reasoning is in accord with the demands of the principle of subsidiarity.[88]

e) The EU and the Principle of Federalism

Like the other requirements of Article 23 I 1, the principle of federalism is directed at the EU.[89] Its legal import, however, is disputed. According to some authors, it is meant especially to prevent the EU from developing into a central state. In this approach, the principle of federalism also guarantees German statehood.[90] Other commentators argue that centralization is excluded by the principle of subsidiarity and that the principle of

[83] Classen *supra* note 26, at margin number 35; Streinz *supra* note 11, at margin number 27; Pernice, *supra* note 9 at margin number 56; Hillgruber, *supra* note 13, at margin number 10 (pointing out that it is problematic that EU competences are interpreted extensively); von Heinegg, *supra* note 8, at margin numbers 11–11.1.

[84] *Lisbon* ruling, *supra* note 2, at para. 359.

[85] *See e.g.*, Pernice, *supra* note 9, at margin number 64.

[86] *Lisbon* ruling, *supra* note 2, at paras. 257–59; *see also* Streinz, *supra* note 11, at margin numbers 30; Classen, *supra* note 26, at margin number 40.

[87] *Lisbon* ruling, *supra* note 2, at para. 257–59.

[88] *See, e.g.*, Pernice, *supra* note 9, at margin number 64.

[89] *Id.* at margin number 65.

[90] *Id.* at margin number 65; *see also* Christoph Schönberger, *Lisbon in Karlsruhe: Maastricht's Epigones At Sea*, 10 GERMAN L.J. 1201, 1201-18 (2009).

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federalism obliges the EU to respect national federal structures.[91] In line with the general thrust of Article 23 I 1, the latter view, if correct, could be understood only as an obligation incumbent on German organs when engaging in EU matters.[92] Whatever interpretation the principle is given, it is generally held that it is impossible to infer precise guidelines from this constraint[93] and that this is an issue requiring further judicial concretization by the Federal Constitutional Court.

f) The EU and the Principle of Subsidiarity

The principle of subsidiarity, which originally was not an explicit part of the Basic Law, has been inspired by the Maastricht Treaty.[94] On the one hand, this principle constitutes a mandate for German governmental representatives to proactively control the exercise of supranational competences in EU institutions and for the German legislature to exercise its control competences. On the other hand, the principle serves to protect the autonomy of the German *Länder* and communal self-administration,[95] even though this can be effectuated only indirectly through the participation of German organs in the EU.[96]

g) The EU and Fundamental Rights

The Federal Constitutional Court's landmark judgments on the nexus between supranational EU governance and German fundamental rights have principally concerned the question of the extent to which German fundamental rights can serve as barriers to the legal effects of secondary law. This issue is discussed below. Nonetheless, Article 23 I 1 is also relevant, as a barrier for treaty amendments implicating fundamental rights because German non-judicial state organs—in particular the *Bundestag*, the *Bundesrat* and representatives of the government—are also obliged to promote the protection of fundamental rights within the EU.[97]

[91] Classen, *supra* note 26, at margin number 42.

[92] *See, e.g.*, Streinz, *supra* note 11, at margin number 32.

[93] Streinz, *supra* note 11, at margin number 33.

[94] *See, e.g.*, Pernice, *supra* note 9, at margin number 14.

[95] Pernice, *supra* note 9, at margin number 14; Streinz, *supra* note 11, at margin number 37; Hillgruber, *supra* note 13, at margin number 13.

[96] Classen, *supra* note 26, at margin number 45.

[97] *See* Streinz, *supra* note 11, at margin number 51.

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1.3 Barriers derived from Article 23 I 2

Article 23 I 2 has both a positive function, namely authorizing the transfer of competences to the EU level, and a negative one, as it is understood as also containing boundaries for integration. While the first function has already been described, the present section addresses the barriers ensuing from Article 23 I 2.

As early as its *Maastricht* ruling, starting out from a state-centered premise, the Federal Constitutional Court emphasized that democratic legitimacy can only be derived from the Member States as long as the European Community consists of European peoples (in the plural) and not a single European people. The Court concluded that Member States need their own sufficiently important spheres of activity in which the people of each can develop and articulate itself. From this "it follows that functions and powers of substantial importance must remain for the German *Bundestag*."[98] Thus, there would be a breach of the German Constitution if the Act that opens up the German legal system to the direct validity and application of EC law "does not establish with sufficient certainty the powers that are transferred and the intended programme of integration."[99] In *Lisbon*, the Federal Constitutional Court has placed special emphasis on this point, holding that the German legislature must only consent to transfers of competences, and treaty amendments affecting the exercise of such competences more generally, whose effects are foreseeable for the German legislature. This constitutional version of a doctrine of "informed consent" has led the Court to rule that Article 23 I 2 applies to *any amendments* of the text of primary law, be they simplified revisions of the treaties, the rounding off of EU competences (Article 352 TFEU), or changes of decision-making procedures.[100] The Court's reasoning regarding the German legislature's special responsibility for integration is clearly interwoven with the democratic principle enshrined under Article 23 I 3.[101]

For the same substantive reasons – foreseeability and protection of democracy – German authors take the view that Article 23 I 2 only permits the transfer of individual competences,[102] which implicitly prohibits the relinquishing of German sovereignty[103] and, according to several commentators, protects German statehood.[104]

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[98] *See Solange II*, *supra* note 47.

[99] *Maastricht*, *supra* note 50.

[100] *Lisbon* ruling, *supra* note 2, at para. 243

[101] *See* the following section.

[102] *See, e.g.*, Hillgruber, *supra* note 13, at margin number 26.

[103] Sommermann, *supra* note 2, at 3, 21.

[104] Hillgruber, *surpa* note 13, at margin number 27. *Contra* Pernice, *supra* note 9, at margin number 92.

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1.4 Barriers Derived from Article 23 I 3

On one hand, Article 23 I 1 sets forth structural requirements, to be promoted by German organs, *for the EU*. On the other hand, Article 23 I 3 aims at protecting the *German Constitution* against undue legal effects of the EU integration project. Article 23 I 3 is, therefore, frequently referred to as a clause securing the *acquis* of the Basic Law ("*Bestandssicherungsklausel*").[105] In contrast to Article 23 I 1,[106] the barriers laid down in Article 23 I 3 have a "German meaning."[107]

Article 23 I 3 subjects changes of the treaty foundations of the EU and comparable regulations that amend or supplement the Basic law, or make such amendments or supplements possible, to a formal and a substantive barrier: in formal respect, by cross-referring to Article 79 II, Article 23 I 3 declares that such measures require a law that is carried by two thirds of the Members of the *Bundestag* and two thirds of the votes of the *Bundesrat*. As regards the substantive barrier, by referring to Article 79 III (the Basic Law's so-called eternity guarantee[108]), Article 23 I 3 clarifies that such measures may not amount to amendments that affect the division of the Federation into *Länder*, their participation in the legislative process, or the principles laid down in Article 1 (human dignity, inviolable and inalienable human rights) and Article 20 (the democratic principle, the social state principle, the federal state principle, and the rule of law principle). These foundational principles are commonly regarded as the "constitutional identity" and the fundamental structure of the Basic Law.[109] As Article 79 III refers to Article 20, the eternity clause is seen as also protecting German statehood.[110] Due to the eternity guarantee, Germany's constitutional identity is not susceptible to the constitution-amending legislature.[111] Therefore, pursuant to Article 23 I 3, the Basic Law can be adapted to the development of the EU, but only subject to the ultimate limit set by Article 79 III.[112]

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[105] *See, e.g.*, Sommermann, *supra* note 2, at 3, 24.

[106] *See id.*

[107] Hillgruber, *supra* note 13, at margin number 29.

[108] *See, e.g.*, CHRISTOPH DEGENHART, STAATSRECHT I. STAATSORGANISATIONRECHT 82-83 (24th ed. 2008).

[109] *Lisbon* ruling, *supra* note 2; Andreas Haratsch, *Änderungen des Grundgesetzes*, *in* GRUNDGESETZ: BECK'SCHER KOMPAKT-KOMMENTAR margin number 31 (Helge Sodan ed., 1st ed. 2009).

[110] *Id.* at margin number 31. *Contra* Classen *supra* note 26, at margin number 23.

[111] *Lisbon* ruling, *supra* note 2, at para. 216; Degenhart, *supra* note 108, at 82–83.

[112] *Lisbon* ruling, *supra* note 2, at para. 231.

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a) EU Integration and German Democracy

The barriers protecting German democracy that ensue from Article 23 I 3 have been concretized in the *Maastricht* and *Lisbon* judgments. To begin, as regards the constitutional empowerment to *transfer competences* to the EU level, the Federal Constitutional Court has defined three conditions in *Lisbon*: Germany's sovereign statehood must be maintained on the basis of an integration programme that is based on the principle of conferral; this programme is to respect the constitutional identity of "the Member States"; and "the Member States" must not "lose their ability to politically and socially shape living conditions on their own responsibility".[113] From this it follows for the FCC that the EU may not be transformed into a federal state,[114] the Member States remaining the "masters of the Treaties," as EU competences are only derived from the Member States.[115] Hence, there may be no transfer of legislative *Kompetenz-Kompetenz*, and, in the same vein, there must not be brought about an independence of EU powers through "steadily increased [EU] competences and by gradually overcoming existing unanimity requirements or rules of state equality" against the will of the people.[116]

Moreover, according to the Federal Constitutional Court, the national parliament must retain substantial influence. Although the Court emphasized that it is not possible, in principle, to legally determine a given number, or types of, non-transferable competences, it declared that there are certain "essential areas of democratic formative action,"[117] which comprise:

> *inter alia*, citizenship, the civil and the military monopoly on the use of force, revenue and expenditure including external financing and all elements of encroachment that are decisive for the realisation of fundamental rights, above all as regards intensive encroachments on fundamental rights such as the deprivation of liberty in the administration of criminal law or the placement in an institution. These important areas also include cultural issues such as the disposition of language, the shaping of circumstances concerning the family and education, the ordering of

[113] *See id.* at para. 226–27.

[114] *See id.* at para. 228.

[115] *See id.* at para. 229–31.

[116] *See id.* at para. 233.

[117] *See id.* at para. 244.

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> the freedom of opinion, of the press and of association and the dealing with the profession of faith or ideology.[118]

In this context, the Federal Constitutional Court enumerated several constitutional constraints, all of which are inferred from the principle of democracy. Thus, for example, as regards criminal law, harmonization must be restricted to cross-border criminal enterprises, and the Member States must retain substantial space of action.[119] The deployment of the German *Bundeswehr* abroad is made dependent, in line with standing case-law, to approval by the German *Bundestag*.[120] There may be no supranationalization of the determination of the character and the amount of the levies affecting Germany's citizens, as this would undermine the space for political discretion requisite for German national democracy.[121]

Furthermore, the *Lisbon* ruling also lays down a series of national constitutional barriers for *simplified treaty amendments*. In view of the fact that the legal implications of a simplified revision of EU primary law (in line with Article 48 VI TEU) are regarded, by the Federal Constitutional Court, as being hardly predictable for the *Bundestag*, the Court finds that there is a constitutional obligation to generally treat the simplified revision procedure like a transfer of competences, requiring the approval of two thirds of the members of the German *Bundestag* and two thirds of the votes of the *Bundesrat*. [122] Analogous provisions in primary law (e.g. Articles 42 II 1 TEU, Article 25 II TFEU, Article 318 VIII 2 2 TFEU) are subject to similar requirements.[123] Moreover, the use of the general brigding clause (Article 48 VII TEU), constituting a "Treaty amendment under primary law," requires a law within the meaning of Article 23 I 2 and, if necessary, Article 23 I 3. This requirement is applied also to the special bridging clause in Article 81 III 2.[124] Such a law is not necessary,

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[118] *See id.* at para. 249.

[119] *See id.* at para. 253. On this aspect of the ruling, see, for example, Frank Meyer, *Die Lissabon-Entscheidung des BVerfG und das Strafrecht*, NEUE ZEITSCHRIFT FÜR STRAFRECHT 657 (2009).

[120] *Lisbon* ruling, *supra* note 2, at para. 254. *But see* Josef Isensee, *Integrationswille und Integrationsresistenz des Grundgesetzes. Das Bundesverfassungsgericht zum Vertrag von Lissabon*, ZEITSCHRIFT FÜR ROMANISCHE PHILOLOGIE 35 (2010) (submitting that the argumentation of the FCC is "bold" ("*verwegen*") and hardly reconcilable with the wording and meaning of the treaties; *see also* Andreas Fischer-Lescano, *Judicial Sovereignty Unlimited?* in THE GERMAN CONSTITUTIONAL COURT'S LISBON RULING: LEGAL AND POLITICAL SCIENCE PERSPECTIVES 63, 67 (Andreas Fischer-Lescano, Christian Joerges & Arndt Wonka eds., 2010).

[121] *Lisbon* ruling, *supra* note 2, at para. 256.

[122] *See id.* at para. 312.

[123] *See id.* at para. 313–14.

[124] *See id.* at para. 319.

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according to the Federal Constitutional Court, if special bridging clauses are restricted to areas already sufficiently determined by primary law. With regard to such clauses, however, a special "responsibility for integration" arises, requiring a prior approval by the *Bundestag* and, if necessary, the *Bundesrat*, i.e., a parliamentary authorization that precedes the consent given by the representative of the German government in the European Council or in the Council.[125]

In the same vein, and given that the flexibility clause (Article 352 TFEU) makes it possible to amend the treaty foundations of the EU in almost the entire area of application of primary law without participation of the legislative bodies, its use requires ratification by the *Bundestag* and the *Bundesrat* under Article 23 I 2 and 23 I 3, before the German representative in the Council approves a pertinent proposal of the Commission.[126]

Finally, further barriers have been erected by the Federal Constitutional Court for *competences* that have been *newly conferred* on the EU by the *Lisbon* treaty. With respect to the areas of judicial cooperation in criminal and civil matters, external trade, common defense and social policy, the Court insisted, especially, that the pertinent competences must be exercised by the EU in such a way that tasks of sufficient weight remain for the Member States, as this is considered a precondition for a living democracy.[127] In particular, the competences pertaining to criminal law must be interpreted strictly,[128] and the use of the emergency brake proceedings is subjected, by the Federal Constitutional Court, to the additional constitutional requirement of an instruction of the German legislative bodies.[129]

As would be expected, the boundaries erected by the Court have been quite intensively discussed in the academic reactions to the *Lisbon* ruling. On a general level, it has been held that, despite the fact that the judgment designates integration as a constitutional obligation,[130] it appears even more restrictive than the *Maastricht* judgment.[131] More specifically, it has been criticized that the Basic Law's eternity clause (Article 79 III), which

[125] *See id.* at para. 320 , 401.

[126] *See id.* at para. 235–328, 401.

[127] *See id.* at para. 351.

[128] *See id.* at para. 358.

[129] *See id.* at para. 365, 401.

[130] On this, see also the comment by the President of the FCC, Voßkuhle, *supra* note 64, at 1, 2.

[131] Von Bogdandy, *supra* note 57, at 1; *see also* Alfred Grosser, *The Federal Constitutional Court's* Lisbon *Case: Germany's "Sonderweg": An Outsider's Perspective*, 10 GERMAN L.J. 1263, 1263-66 (2009); Daniel Halberstam & Christoph Möllers, *The German Constitutional Court says "Ja zu Deutschland!,"* 10 GERMAN L.J. 1263, 1241-58 (2009); Frank Schorkopf, *The European Union as An Association of Sovereign States: Karlsruhe's Ruling on the Treaty of Lisbon*, 10 GERMAN L.J. 1219, 1219-40 (2009).

is seen as being meant to protect Germany against dictatorship, is now turned into a shield against integration;[132] an appraisal which has, however, not remained uncontested.[133] It has also been argued that there is a tendency in the judgment to sanctify national democracy and to abnegate EU democracy, a bias contrasting unfavorably with judicial approaches in other countries, e.g. with the Czech Constitutional Court's statement that its commitment to European integration lies in the basis of its being law-based and democratic.[134] Also, it has been argued that the Federal Constitutional Court's stance is paradoxical in that it insinuates that a (welcomed) further augmentation of democratic structures at EU level would lead to EU statehood, which, however, is prohibited on the basis of the Court's reading of the Basic law.[135]

According to other commentators, the constitutional right to vote has been overstated by the Federal Constitutional Court. According to this critique the Court's interpretation of this right has resulted in the possibility that constitutional complaints can be brought by any individual person claiming that German statehood or constitutional identity is endangered by EU integration.[136] While some authors have argued that this remarkable emphasis on individual rights amounts to a legal misconception[137] or is at least disturbing in terms of traditional constitutional law doctrine,[138] others have observed that, by empowering the individual in this way, the Court has followed in the footsteps of the ECJ.[139] The difference in the two courts' approaches on this issue being, of course, that the Federal Constitutional Court's move can be perceived as having an opposite effect, namely that of decelerating integration.[140]

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[132] Von Bogdandy, *supra* note 57, at 1.

[133] See Josef Isensee, *supra* note 120, at 34, 35-36, who argues that the eternity guarantee has always had a broader thrust than the protection against dictatorship, which was due to Germany's historic experiences.

[134] Damian Chalmers, *A Few Thoughts on the Lisbon Judgment*, *in* THE GERMAN CONSTITUTIONAL COURT'S LISBON RULING: LEGAL AND POLITICAL SCIENCE PERSPECTIVES 7 (Andreas Fischer-Lescano, Christian Joerges & Arndt Wonka eds., 2010).

[135] Jörg Philipp Terhechte, *Anmerkungen zum Lissabon-Urteil des BVerfG,* EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 724 (2009); Frank Schorkopf, *Die Europäische Union im Lot–Karlsruhes Rechtsspruch zum Vertrag von Lissabon*, EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 718, 720 (2009).

[136] Müller-Graff, *supra* note 76, at 331.

[137] Martin Nettesheim, *Ein Individualrecht auf Staatlichkeit? Die Lissabon-Entscheidung des BVerfG*, NEUE JURISTISCHE WOCHENSCHRIFT 2867, 2868 (2009).

[138] Isensee, *supra* note 120, at 33; *see also* Jörg Philipp Terhechte, *Anmerkungen zum Lissabon-Urteil des BVerfG,* EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 724, 726-27 (2009).

[139] Josef Isensee, *supra* note 120, at 33.

[140] *See also* Terhechte, *supra* note 138, at 724.

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Furthermore, the Federal Constitutional Court's aforementioned enumeration of "essential areas of democratic formative action" has attracted considerable criticism. Even advocates of EU-critical parts of the *Lisbon* judgment have held that this "textbook-style" enumeration of essential state functions is hardly in keeping with supranational reality.[141] Moreover, the requirements of ratification for simplified treaty amendments and uses of the flexibility clause – introduced by the Federal Constitutional Court under the aforementioned heading "special responsibility for integration" – have come under severe criticism for several reasons. On the one hand, it has been submitted that these requirements might be contrary to EU law.[142] On the other hand, many commentators have held that these requirements unduly restrict the flexibility of German government representatives in negotiations at the EU level, [143] even though non-German observers have pointed out that, as respects the degree of parliamentary scrutiny of EU matters resulting from the *Lisbon* ruling, Germany is still in the "moderate camp" when compared with other Member States.[144]

b) Further Barriers Protecting the German Constitution

As noted above, Article 23 I 3 in conjunction with Article 79 III defines further substantive barriers, beside the democratic principle, that protect the German Constitution against undue legal effects of EU integration of chief significance here are the principles of the rule of law, social justice, and federalism.

The principle of the *rule of law* in Germany (ensuing from Article 23 I 3 read together with Article 79 III and Article 20 II 2 and 20 III) is regarded, in principle, as not being endangered by the EU integration process. Only selected issues are seen as potentially giving rise to tensions, such as the primacy of supranational law, in particular.[145]

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[141] Isensee, *supra* note 120, at 36; a similar critique has been voiced by Wonka, *supra* note 77, at 47, 60; on this debate see also Matthias Ruffert, *An den Grenzen des Integrationsverfassungsrechts: Das Urteil des Bundesverfassungsgerichts zum Vertrag von Lissabon,* DEUTSCHE VERWALTUNGSBLATT 1197, 1204–05 (2009); Everling, *supra* note 69 at 92, 100; Schorkopf, *supra* note 135, at 718, 721; Armin Steinbach, *The Lisbon Judgment of the German Federal Constitutional Court – New Guidance on the Limits of European Integration?*, 11 GERMAN L.J. 367, 367–90 (2010).

[142] von Bogdandy, *supra* note 57, at 1, 3.

[143] *See, e.g.*, von Bogdandy, *supra* note 57, at 1, 4; Isensee, *supra* note 120, at 33.

[144] Philipp Kiiver, *German Participation in EU Decision-Making after the* Lisbon *Case,* 10 GERMAN L.J. 1287 (2009).

[145] *See e.g.*, Hillgruber, *supra* note 13, at margin number 30; Classen, *supra* note 26, at margin number 39; *Hillgruber* and *Classen id.* with further references. As indicated above, the Lisbon judgment has stressed, however, that the Member States must retain sufficient space for the political formation of the social circumstances of life, including social security; *cf. also Lisbon* ruling, *supra* note 2, at para. 249.

Similarly, it is held that the *principle of social justice* (guaranteed by Article 23 I 3 read together with Article 79 III and Article 20 I) is strained in individual contexts, particularly by the market-opening effect of the fundamental freedoms. Yet, to this point, no infringements of this principle have been stated in the literature.[146]

The *federal structure* of the German state is protected by Article 23 I 3 in conjunction with Article 79 III. Because Article 79 III does not guarantee that the *Länder* retain concretely determined competences, it is hardly possible to establish the "turning point" at which the transfer of competences to the EU level would become unconstitutional as a violation of federalism.[147]

c) Constraints on German Participation in the EMU

Additional limits are inferred, by the Federal Constitutional Court, from Article 38, which provides for the right to vote. In the *Maastricht* ruling, the Court reasoned for the first time that the right to vote encompasses a right to exercise actual influence on the political process. Consequently, the Court ruled that the German Parliament may not give up its legislative and control functions by transferring competences to the EU to an extent that would void the principle of democracy. Therefore, the legislator may only assent to an integration program that is sufficiently foreseeable.[148]

This guiding idea of parliamentary foreseeability is also relevant for German participation in the EMU and related budgetary issues. According to the *Maastricht* ruling, the future developments within the EMU were sufficiently predictable, at least under the very reduced degree of scrutiny applied by the Federal Constitutional Court in this context.[149] Similarly, the Court held in the 2011 case on emergency help for Greece that the German Parliament's budgetary rights are but the opposite side of the coin of the democratic principle and that, therefore, the German Parliament must not give its consent to a direct or indirect communitarization of debts, to the extent that the resulting budgetary implications could lead to an unforeseeable abandonment of the room necessary for democratic policy-making in Germany. Yet, the Federal Constitutional Court indicated that it is required to respect the estimations of the legislator in principle and that it will exercise its scrutiny only if there are evident transgressions of the outermost limits.[150]

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[147] *See* Hillgruber, *supra* note 13, at margin number 31; Classen, *supra* note 26, at margin number 44.

[148] *Maastricht* ruling, *supra* note 50.

[149] *Id.*

[150] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 987/10, 2 BvR 1485/710, 2 BvR 1099/10, Sept. 7, 2011, 129 BVERFGE 124, paras. 130–32 (Ger.).

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These standards have been re-applied in the September 2012 judgment on the European Stability Mechanism (ESM) and the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, where the Federal Constitutional Court added that "the larger the financial amount of the commitments to accept liability or of commitment appropriations is, the more effectively must the German Bundestag's rights to approve and to refuse and its right of monitoring be elaborated."[151] The Court once more stressed that its review is restricted to extreme cases in which parliamentary "budget autonomy, at least for an appreciable period of time, was not merely restricted but effectively failed".[152]

II. Scrutiny of Secondary Legislation

1. Main Types of Constitutional Constraints

While the preceding Section has examined the limits on the transfer of competences by means of treaty amendments, the present Section examines the German constitutional barriers that are relevant for the legal effects of secondary law. In the case of Germany, it is important to distinguish two main types of such constraints, namely the "fundamental rights barrier," which is derived from the fundamental rights enshrined in the German Basic Law, and the "competence barrier," under which EU secondary law is subjected to *ultra vires* scrutiny by the Federal Constitutional Court.[153]

2. Limits Developed under Article 24

1.1 Solange I and Solange II

The first key ruling in this context is the Federal Constitutional Court's *Solange I* decision, which is commonly seen as the beginning of a judicial "dialogue" between national courts and the ECJ.[154] In this judgment,[155] the Court held that in case of conflict between EC law and national fundamental rights, "the guarantee of fundamental rights in the Constitution

[151] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 1390/12, Sept. 12, 2012, 2012 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 3145, para. 212 (Ger.).

[152] *Id.* at para. 216.

[153] This section draws on Erich Vranes, *European Human Rights Protection and the Contested Relationship of the ECJ and National Courts - Convergent Solutions under International, European and National Law?* in THE EU BANANA DISPUTE - AN ECONOMIC AND LEGAL ANALYSIS 195 (Fritz Breuss, Stefan Griller & Erich Vranes eds., 2003). It is an abbreviated version of the respective subsections in the latter contribution, which was updated in 2012 so as to take into account the legal developments in Germany between 2000 and 2012.

[154] *See, e.g.*, FILIPPO FONTANELLI ET AL., SHAPING THE RULE OF LAW THROUGH DIALOGUE (2010).

[155] *See Solange I*, *supra* note 12.

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prevails *as long as* the competent organs of the Community have not removed the conflict of norms in accordance with the Treaty mechanism." Yet, the possibility of giving German fundamental rights protections priority in this way inverted the hierarchy of norms that the ECJ had developed as regards the conflict-loaded zone of fundamental rights. The Federal Constitutional Court, however, issued an important reservation implying that it's finding was based on the state of integration at the time of its judgment and was meant to apply provisionally. At that stage, in the view of the Court, the Community lacked a democratically legitimated Parliament directly elected by general suffrage, and "in particular a codified catalogue of fundamental rights". *As long as* (or in German: *solange*) this remained the case, national German fundamental rights standards would serve as grounds for rendering inapplicable EC legislative measures.[156]

A judicial re-orientation occurred in the Federal Constitutional Court's 1986 *Solange II* ruling, when, having taken into account the developments in fundamental rights protection on the Community level since the *Solange I* judgment, the Court pronounced that it would not exercise its review jurisdiction "*so long as* the European Communities, and in particular the case law of the European Court, generally ensure an effective protection of fundamental rights as against the sovereign powers of the Communities, which is to be regarded as *substantially similar* to the protection of fundamental rights required unconditionally by the Constitution, and in so far as they *generally* safeguard the *essential content* of fundamental rights."[157] The Federal Constitutional Court supported this finding with a detailed analysis of the ECJ's fundamental rights jurisprudence and several declarations made by Community organs on the protection of fundamental rights.[158]

The *Solange II* ruling showed that the German Court would only exercise its review competence in rare instances, but it also raised several intricate questions. For example, some commentators have seen the "real problem" of *Solange II*[159] to be the ambiguity in the Court's use of the standard "general safeguard," which might be intended to allow the Court to continue to rule in concrete cases or, alternatively, might mean that the Court would exercise its residual review authority only as a more general review of the

[156] For critical reviews of this ruling see e.g. Meier, *Annotation to the Solange I decision*, NEUE JURISTISCHE WOCHENSCHRIFT 1705 (1974); Riegel*, Annotation to the Solange I decision*, NEUE JURISTISCHE WOCHENSCHRIFT 2176 (1974); Hans Georg Rupp, *Annotation to the Solange II decision*, JZ 241 (1987); see also the analysis in the broader context of *Solange I*, *Solange II* and *Maastricht* judgment in the following sections.

[157] *See Solange I*, *supra* note 12.

[158] *Id.* at 581.

[159] *Cf.* Christoph Schmid*, Ein enttäuschender Rückzug. Anmerkungen zum Bananenbeschluss des BVerfG,* NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 249, 253; Peter M. Huber, *Das Kooperationsverhältnis zwischen BVerfG und EuGH in Grundrechtsfragen*, EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 159 (1997).

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Community fundamental rights protection *system* as such.[160] Furthermore, uncertainties persist as to the determination of the "essential content" of fundamental rights and as to the issue of whether the Federal Constitutional Court can actually determine its own jurisdiction—not only through interpretation but by overtly restricting or declining to exercise it.[161] Hence, the ensuing question is: under what conditions the Court's reserved competence can possibly be "revived"? As there are conceptual affinities between the *Solange II* ruling and the Court's *Bananas* decision of 2000, these issues will be addressed in the analysis of the *Bananas* decision below.

3. Limits Developed under Article 23

Under Article 23, the national "fundamental rights barrier" to secondary law that was developed under Article 24 has been reconfirmed, and elaborated, in particular in the 1993 *Maastricht* and the 2000 *Bananas* decisions of the Federal Constitutional Court.[162] Moreover, in *Maastricht*,[163] the Court mounted new constitutional barriers for secondary law, in that it scrutinized secondary law also under the angle of national constitutional restraints for Community *competences*.

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[160] *Cf. e.g.*, RUDOLF STREINZ, BUNDESVERFASSUNGSGERICHTLICHER GRUNDRECHTSSCHUTZ UND EUROPÄISCHES GEMEINSCHAFTSRECHT 283-284 (1989); *see also* Classen, *supra* note 175, at 1158 with further references.

[161] *Cf. e.g.*, Streinz, *supra* note 160, at 283-84; Huber, *supra* note 159, at 159; see also the analysis in Schmid, *supra* note 159, at 249, 253-254; it is notable that the then president of the FCC still held in 2000 that the court does not "exercise" its jurisdiction, cf. Jutta Limbach, *Die Kooperation der Gerichte in der zukünftigen europäischen Grundrechtsarchitektur, Vortrag am Walter-Hallstein-Institut Berlin vom 29. Juni 2000*, *available at* www.rewi.hu-berlin.de/WHI *Limbach*) marginal note 19.

[162] See in the following text.

[163] *See* Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 2134/92, 2 BvR 2159/92, Oct. 12, 1993, 1993 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 3047 (Ger.); *The* Maastricht *Judgment of the German Federal Constitutional Court and its Significance for the Development of the European Union*, YEARBOOK OF EUROPEAN LAW 1 (1994); Matthias Herdegen, Maastricht *and the German Constitutional Court: Constitutional Restraints for an "Ever Closer Union"* 31 COMMON MKT. L. REV. 235 (1994); Günther Hirsch, *Europäischer Gerichtshof und Bundesverfassungsgericht—Kooperation oder Konfrontation?*, NEUE JURISTISCHE WOCHENSCHRIFT 2457 (1996); Reimer Voss, Das *Maastricht-Urteil und die Folgen,* RIW 324 (1996); Ulrich Everling, *Will Europe slip on bananas? The* Bananas *Judgment of the Court of Justice and National Courts,* 33 COMMON MKT. L. REV. 401 (1996); Gert Nicolaysen, *Der Streit zwischen dem deutschen Bundesverfassungsgericht und dem Europäischen Gerichtshof*, *in* WELCHE VERFASSUNG FÜR EUROPA? 91, 101 (Thomas Bruha, Joachim Hesse & Carsten Nowak eds., 2001); Joseph H. H. Weiler*, European Democracy and its Critics: Polity and System*, *in* THE CONSTITUTION OF EUROPE: "DO THE NEW CLOTHES HAVE AN EMPEROR?" AND OTHER ESSAYS ON EUROPEAN INTEGRATION 238 (Joseph H. H. Weiler, 1999).

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1.1 The Fundamental Rights Barrier

In *Maastricht*, the Federal Constitutional Court re-addressed the fundamental rights barrier to secondary law, when dealing with a constitutional complaint for scrutiny with Article 38 (right to elections) of the *Grundgesetz*.[164] As regards fundamental rights, the Court introduced a new qualification according to which it exercises their jurisdiction on the applicability of secondary law in Germany "in a relationship of cooperation" with the ECJ.

It was unclear what the Court actually meant when it coined the new concept "relationship of cooperation." This offer of cooperation was criticized as amounting to a denial of the absolute supremacy of Community law and the accompanying superiority of the ECJ[165] and was read as perpetuating German control of secondary law.[166] Even after the *Maastricht* decision it remained unclear whether a complainant or referring tribunal would have to submit evidence that, in the concrete case, there was insufficient protection of fundamental rights or that the level of protection on the EC plane was too low in general for systemic reasons.[167]

Two further rulings, pronounced by the Federal Constitutional Court in 2000, shed more light on these issues. In *Alcan*, the Federal Constitutional Court held that there is no reason to assume that the ECJ fundamental rights jurisprudence "generally calls into question the indispensable fundamental rights protection required by the German Constitution."[168] Nonetheless, the Court undertook a hypothetical scrutiny under German

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[164] Article 38 on elections stipulates:

> (1) The deputies to the German Bundestag are elected in universal, direct, free, equal and secret elections. They are representatives of the whole people, are not bound by orders and instructions and are subject only to their conscience.
>
> (2) Anyone who has attained the age of eighteen is entitled to vote, anyone who has attained the age of twenty-five is eligible for election.
>
> (3) Details will be regulated by a Federal law.

[165] *See* Herdegen, *supra* note 163, at 235, 239; similarly e.g. Gert Nicolaysen and Carsten Nowak, *Teilrückzug des BVerfG aus der Kontrolle der Rechtmäßigkeit gemeinschaftlicher Rechtsakte: Neuere Entwicklungen und Perspektiven*, NEUE JURISTISCHE WOCHENSCHRIFT 1233, 34 (2001).

[166] Huber, *supra* note 159, at 159.

[167] *See e.g.* Frank Hoffmeister, *Annotation to the* Alcan *and* Bananas *Decisions of the German Constitutional Court,* 38 COMMON MKT. L. REV. 791 (2001).

[168] "Es ist nicht erkennbar, dass durch diese Vorentscheidung der vom Grundgesetz als unabdingbar gebotene Grundrechtsschutz generall in Frage gestellt würde." *Id.* at II.1.a.

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Constitutional law,[169] which indicated that the German Court intended to continue exercising some sort of "reserved" review authority.[170]

The details of this reserved review authority were further clarified in the *Bananas* decision. According to the Federal Constitutional Court, constitutional complaints and submissions by courts are inadmissible, if their grounds do not state that the evolution of EU law, including the rulings of the ECJ, has resulted in a decline below the indispensable standard of fundamental rights protection *after* the *Solange II* decision.[171] Any claim of an infringement by secondary EC law of the fundamental rights guaranteed in the Basic Law must thus "state in detail that the protection required unconditionally by the Basic Law is not *generally* assured in the *respective* case." The Court specified that this "requires a comparison of the protection of fundamental rights on the national and on the Community level similar to the one made by the Federal Constitutional Court [in *Solange II*]."[172] T he Federal Constitutional Court concluded this seminal case by emphasizing that the latter decision of the ECJ and the Federal Constitutional Court's jurisprudence[173] "illustrate that the judicial protection of fundamental rights by national courts of justice and Community courts of justice interlock on the European level."[174]

This milestone ruling on the fundamental rights barrier to secondary law was largely welcomed with approval.[175] Nevertheless, some comments are in order. First, the Federal Constitutional Court has made it clear that, from a formal point of view, it still claims a

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[169] "Even if one scrutinized the (lower court's decision which relies on the ECJ's judgment) under German Constitutional . . . ." *Id.* at II.1.b.

[170] On the extent of control that is legally permissible see the following.

[171] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvL 1/97, June 7, 2000, 102 BVERFGE 147 (Ger.).

[172] *Id.*

[173] See, for example, the 1995 decision on the grant of interim relief for German banana importers, which indicated that the banana market regulation 404/93 is flexible enough to enable interim relief measures in hardship cases. *See* Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 2689/94, 2 BvR 52/95, Jan. 25, 1995, 1995 EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT (EUZW) 126 (Ger.).

[174] *Id.*

[175] *See e.g.* Claus Dieter Classen, *Annotation to the 2000* Banana *Decision of the German Constitutional Court*, JZ 1158 (2000); Nicolaysen & Nowak, *supra* note 165, at 1233, 1234, 1236; Josef Franz Lindner, *Annotation to the 2000* Alcan *and* Banana *Decisions of the German Constitutional Court,* BAVARIAN OFFICIAL GAZETTE 758, 759 (2000); Hoffmeister, *supra* note 167, at 791, 802; Franz C. Mayer, *Grundrechtsschutz gegen europäische Rechtsakte durch das BVerG: Zur Verfassungsmäßigkeit der Bananenmarktordnung*, EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 685 (2000). *But see* Schmid, *supra* note 159, at 249 (speaking of a "disappointing retreat" of the Bundesverfassungsgericht); *see also* Angelika Emmerich-Fritsche, *Annotation to the 2000* Banana *Decision of the German Constitutional Court*, BAVARIAN OFFICIAL GAZETTE 758 (2000) (providing a very trenchant critique and bemoaning the "retrogression of the attainments of the *Maastricht* judgment.").

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"reserved" review authority for itself, as it again[176] emphasizes in the very first sentence of its reasoning that the decision is based on the present state of fundamental rights protection in the EU.[177] Yet, the hurdles that the Court introduced for the exercise of this jurisdiction (i.e. the requirement of a comparison of the protection of fundamental rights on the national and on the Community level similar to the one made by the Federal Constitutional Court in *Solange II*) are unanimously regarded in the academic literature as practically insurmountable.[178] (noting, however, that these hurdles may have been reduced in what appears to be a new approach in the *Data Retention Case*[179]). Second, even after this decision, uncertainties have persisted as to how one should exactly construe the qualifying term "general" decline in EU fundamental rights protection that the Court has upheld since the *Solange II* precedent and that it imposes as the essential precondition for the exercise of its jurisdiction. For some authors it is sufficient that there is a decline in a *concrete case* that entails a decline in fundamental rights protection below the indispensable level that is held to be essentially comparable to German Constitutional standards by the German Constitutional Court.[180] Others maintain that it is the *level in general* that has to decline, irrespective of a given concrete case. This would especially be true if there were a structural deficit in fundamental rights jurisprudence.[181] It is notable,

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[176] *See* the *Solange I* and *Solange II* decisions which also emphasized that they were to apply "provisionally"; on this see the preceding analysis.

[177] *See* B.I.:

> Submissions of cases to the Federal Constitutional Court for constitutional review under Article 100(1) GG which refer to rules that are part of secondary European Community law are only admissible if their grounds show in detail that *the present evolution* of law concerning the protection of fundamental rights in European Community law, especially in case law of the Court of Justice of the European Communities, does not generally ensure the protection of fundamental rights required unconditionally in the respective case.

[178] This view has recently also been taken by the President of the FCC. *See* Voßkuhle, *supra* note 64, at 1, 6; *see also e.g.* Classen, *supra* note 175, at 1158; Nicolaysen & Nowak, *supra* note 165, at 1233, 1234, 1236; Lindner, *supra* note 175, at 758, 759; Schmid, *supra* note 159, at 249; Hoffmeister, *supra* note 167, at 791, 802; Mayer, *supra* note 175, at 685; Emmerich-Fritsche, *supra* note 175, at 758; Rudolf Streinz, *Verfassungsvorbehalte gegenüber Gemeinschaftsrecht—eine deutsche Besonderheit? Die Schranken der Integrationsermächtigung und ihre Realisierung in den Verfassungen der Mitgliedstaaten*, *in* TRADITION UND WELTOFFENHEIT DES RECHTS: FESTSCHRIFT FÜR HELMUT STEINBERGER (Hans-Joachim Cremer et al. eds., 2002).

[179] See in the following text.

[180] *Cf., e.g.*, Emmerich-Fritsche, *supra* note 175, at 758; Nicolaysen & Nowak, *supra* note 165, at 1233, 1235; Schmid, *supra* note 159, at 249, 253 and Hoffmeister, *supra* note 167, at 791, 797.

[181] Manfred Zuleeg, *Bananen und Grundrechte—Anlaß zum Konflikt zwischen europäischer und deutscher Gerichtsbarkeit,* NEUE JURISTISCHE WOCHENSCHRIFT 1201 (1997); Huber, *supra* note 159, at 159, all with further references; Hoffmeister, *supra* note 167, at 791, 797; *see also* Hirsch, *supra* note 163, at 2457, 2460; Günther Hirsch, *Der EuGH im Spannungsverhältnis zwischen Gemeinschaftsrecht und nationalem Recht*, NEUE JURISTISCHE WOCHENSCHRIFT 1818 (2000); Limbach, *supra* note 161, at margin numbers 23; Jutta Limbach, *Das*

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in this context, that the then President of the Federal Constitutional Court repeatedly maintained in public after the *Bananas* decision was rendered that the Court will not exercise a case by case review of ECJ judgments.[182] Rather, while the protection of fundamental rights on the EU level may indeed drop below the German standard, the "reserved" review authority of the German Constitutional Court will only "revive" if the indispensable fundamental rights standard is generally not guaranteed by the ECJ, that is, if it falls below the standard recognized in *Solange II*.[183] According to a third reading, however, the "complete picture" of fundamental rights protection is decisive,[184] which means that a constitutional complaint must demonstrate a decrease of protection encompassing "all ranges of human activities that are protected by human rights."[185]

Shortly after the *Bananas* decision was issued, it emerged as probable that the Federal Constitutional Court was indeed pursuing a new judicial policy that is apt to give a new meaning to the much-criticized concept of the "relationship of cooperation." Thus, in a 2001 decision, it confirmed the *Bananas* decision,[186] and emphasized that it will monitor

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Bundesverfassungsgericht und der Grundrechtsschutz in Europa, NEUE JURISTISCHE WOCHENSCHRIFT 2913, 2915 (2001) with further references; Nicolaysen, *supra* note 163, at 101, 102.

[182] *Cf.* Limbach in a speech on 29 June 2000 at the Berlin *Walter Hallstein Institut*:

> Der Grundrechtsschutz auf europäischer Ebene darf hinter dem nationalen deutschen Grundrechtsschutz zurückbleiben," and "Da sich das Bundesverfassungsgericht auf die generelle Gewährleistung des unabdingbaren Grundrechtsschutzes beschränkt, können Grundrechtsverstöße von europäischen Organen nicht im Einzelfall geltend gemacht werden. Nur dann, wenn der unabdingbare Grundrechtsstandard generell nicht mehr gewährleistet ist, sind Verfassungsbeschwerden und Richtervorlagen zulässig. Also nur dann revitalisiert sich die Reservezuständigkeit, wenn die Rechtsprechung des EuGH allgemein hinter das im Jahre 1986 erreichte Schutzniveau zurückgefallen ist. Der Respekt vor der grundsätzlichen Letztentscheidungskompetenz des EuGH und die Leitidee vom Kooperationsverhältnis vertragen sich nicht mit einer Einzelfallkontrolle durch nationale Verfassungsgerichte und deren Einsatz als "watchdogs."

Limbach, *supra* note 161, at margin numbers 23 and 25.

[183] *See id*.

[184] Classen, *supra* note 175, at 1158 ("nicht der Einzelfall, sondern das Gesamtbild ist ausschlaggebend").

[185] Hoffmeister, *supra* note 167.

[186] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BVR 1036/99, Jan. 9, 2001, 2001 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 1267, para. 15 (Ger.). ("Gemeinschaftsrecht wird grundsätzlich nicht am Maßstab der Grundrechte durch das Bundesverfassungsgericht geprüft; Verfassungsbeschwerden und Vorlagen von Gerichten sind von vornherein unzulässig, wenn ihre Begründung nicht darlegt, dass die europäische

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the obligation of national courts of last instance to refer cases to the ECJ, which is competent to exercise the fundamental rights jurisdiction pursuant to *Community* fundamental rights.[187] Applying the concept of the multi-level European constitutional model,[188] which consists of at least two complementary constitutional layers, this means, first, that it is incumbent on national tribunals—acting as European tribunals— to refer cases involving fundamental rights protection to the ECJ. Second, it is the ECJ that is, in principle, solely competent to invalidate the legislative measures at issue. Third, this system is completed by the task of the Federal Constitutional Court (which it emphasized in this 2001 decision) of monitoring whether national authorities comply with their duty of referring pertinent cases to the ECJ[189] and by its "reserved" review authority that will be revived as an *ultima ratio*.[190]

In 2007, the Federal Constitutional Court transposed this reasoning to EU directives as well. It suspended its control of national implementing acts to the extent that EU law contains relevant binding provisions, which do not leave a margin of discretion to German state organs, as long as the ECJ in general guarantees an effective protection of fundamental rights that is essentially equivalent to the Basic Law's indispensable fundamental rights standards. German tribunals are required to review such requirements of EU law under EU fundamental rights standards and, if need be, to refer the case to the ECJ.[191]

A new approach appears to have been taken, however, in the 2010 *Data Retention Case*, in which the Federal Constitutional Court took the view that constitutional complaints against national acts implementing EU directives may be permissible, to the extent that relevant provisions in an EU directive do not leave any margin of discretion to national organs.[192] This ruling has been understood as possibly deviating from existing case law, in that the Court has indicated that it is prepared to declare as void legal acts in single concrete cases, i.e. without checking whether the level of fundamental rights protection is insufficient, at

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Rechtsentwicklung einschließlich der Rechtsprechung des Europäischen Gerichtshofs unter den erforderlichen Grundrechtsstandard abgesunken ist.").

[187] *Id.* at paras. 16.

[188] Pernice, *supra* note 9, at margin numbers 20; Ingolf Pernice, *Deutschland in der Europäischen Union* in HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND 225 (Josef Isensee and Paul Kirchhof eds., 1995).

[189] *See.* Pernice, *supra* note 9, at margin numbers 30–31.

[190] *See* Pernice, *supra* note 9; Schmid, *supra* note 159, at 249, 256.

[191] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvF 1/05, Mar. 13, 2007, 118 BVERFGE 79, paras. 69 (Ger.).

[192] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvR 256/08, 1 BvR 263/08, 1 BvR 586/08, Mar. 2, 2010, 125 BVERFGE 260, paras. 182 (Ger.) [hereinafter *Data Retention* ruling].

the EU level, in *general.*[193] Furthermore, there are indications in this judgment that the Court might subject legal acts, which may violate German fundamental rights, to the new mechanism of "constitutional identity review," which, too, may amount to a circumvention of the high hurdles erected in the *Solange II* and *Bananas* line of jurisprudence.[194] Moreover, this decision has been criticized as the first obvious infringement of EU law perpetrated by the Federal Constitutional Court. This would be the case because, with this reasoning, it has annulled the German implementing act, including parts of the act that were fully determined by the underlying EU directive.[195]

Finally, it should be mentioned that the Federal Constitutional Court had already addressed the issue as to whether EU action in intergovernmental policy fields remains subjected to full review under the German fundamental rights standards articulated in its *Maastricht* ruling. It held that, in such fields, "the protection of basic rights provided by the Basic law is not eclipsed by supranational legislation that may take precedence."[196] It has been argued that the Court's recent jurisprudence (notably in the *Arrest Warrant Case*[197]) and the entry into force of the Lisbon Treaty have not changed this legal situation.[198]

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[193] Matthias Bäcker, *Solange II* a *oder Basta I?* EuR 103, 107 (2011); *see also* Dietrich Westphal, *Leitplanken für die Vorratsdatenspeicherung,* EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 494 (2010).

[194] Data Retention at para. 218; on this see also Bäcker, *supra* note 193, at 103, 116; and Heiko Sauer, *Europas Richter Hand in Hand?,* EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 94 (2011).

[195] Bäcker, *supra* note 193, at 103, 116.

[196] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 2134/92, 2 BvR 2159/92, Oct. 12, 1993, 89 BVERFGE 155, part B 2 c5 (Ger.).

> In cases in which joint action and measures pursuant to Titles V and VI of the Maastricht Treaty impose a binding obligation upon the Member States under international law to interfere with basic rights, any such interference which takes place in Germany may be subjected to full review before the German courts. In this respect the protection of basic rights for which the Basic law provides is not eclipsed by supranational legislation which may take precedence.

Id.

[197] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 1826/09, Sept. 3, 2009, 16 BVERFGK 177 (Ger.).

[198] Stefanie Schmahl, Art. 23 in GRUNDGESETZ: BECK'SCHER KOMPAKT-KOMMENTAR margin number 25 (Helge Sodan ed., 1st ed., 2009).

1.2 Limits to EU Competences

a) FCC Case Law

The Federal Constitutional Court introduced a new additional barrier to the European integration process in its *Maastricht* decision, a barrier that concerns the exercise of EU competences and the scrutiny of secondary law. This barrier is derived from the consideration that the act opening up the German legal system to the direct validity and application of supranational law must "establish with sufficient certainty the powers that are transferred and the intended programme of integration."[199] On this basis, the Court has introduced a "review [of] legal instruments of European institutions and agencies to see whether they remain within the limit of the sovereign rights conferred on them or *transgress* them." Such legal acts transgressing limits of EU competences have become known as "*ausbrechende Rechtsakte*" (secondary legal acts "breaking out" of national constitutional constraints).

It follows from this judgment that the Federal Constitutional Court claims to be competent to decide whether an act of secondary law is "*ultra vires*" or falls within the "foreseeable integration programme." The Court therefore was understood as regarding itself as the final arbiter on these issues. Some authors even inferred from the *Maastricht* judgment that *any* German tribunal would be competent to decide on these issues of constitutional importance,[200] and, as several proceedings in the 1990s in the *Bananas* litigation showed, several German tribunals actually understood the *Maastricht* judgment in this way and started scrutinizing EC regulations for "constitutionality" when they suspected transgressions of EC competences.[201]

From the viewpoint of EU law, it is clear that this approach is problematic, at least as regards the extent of control that the Federal Constitutional Court purports to exercise, namely a continuous control of the EU legislature, since this endangers the unity of EU law. The Court's approach was heavily criticized by German and foreign commentators alike.[202]

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[199] *See* Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 2134/92, 2 BvR 2159/92, Oct. 12, 1993, 89 BVERFGE 155 (Ger.).

[200] *See* Everling, *supra* note 163, at 1, 11; Hirsch, *supra* note 163, at 2457, 2460.

[201] On this, see Vranes, *supra* note 153, at 195; Erich Vranes, *Introduction to the Problems of EU Fundamental Rights Protection, the Status of WTO Law Within the EU, and Community Liability for Infringements of WTO Law*, *in* THE EU BANANA DISPUTE—AN ECONOMIC AND LEGAL ANALYSIS 185.

[202] Everling, *supra* note 163, at 1, 18; Herdegen, *supra* note 163, at 235, 242; Nicolaysen, *supra* note 163, at 101, 102; Georg Ress, *Case note on the* Maastricht *Judgment,* AM. J. INT'L L. 539, 547 (1994).

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But it is widely held that the supremacy of supranational EU law depends on a corresponding authorization by national law.[203] By implication, it also follows that the issue of which court is the "final arbiter of constitutionality" in Europe[204] cannot be decided solely from the perspective of EU law, but has to take into account national law and—in the view of some authors—also public international law. Following the *Maastricht* judgment, an intense academic discussion therefore arose on the issue of which legal order—the European or the national legal order—was to serve as the "yardstick" for the exercise of EU competences, and on which court(s)—the ECJ or national courts—was competent to act as the "final arbiter of constitutionality" in Europe.

A new layer of complexity has been added by the *Lisbon* ruling, according to which the Federal Constitutional Court will, in the future, scrutinize the exercise of EU competences by means of an "identity review" in order to preserve the inviolable core content of the Basic Law's constitutional identity. This type of review will exist beside the "*ultra vires* review" just discussed. Apparently, both mechanisms function on a subsidiary basis, being evocable only *if* legal protection *cannot* be obtained at the EU level.[205] Both types of review can result in EU law being declared inapplicable in Germany, with the Federal Constitutional Court alone being competent in these proceedings.[206] In this context, it is of particular relevance that the Court has emphasized that this type of review is restricted to "*obvious* transgressions" of EU competences,[207] i.e. to situations where the mandatory constitutional order to apply EU law "is *evidently* lacking."[208] This review applies only "*exceptionally*, and under *special and narrow conditions*."[209]

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[203] *See* FRANZ C. MAYER, KOMPETENZÜBERSCHREITUNG UND LETZTENTSCHEIDUNG 140 (2000; *see also* Streinz, *supra* note 160, at 346 (arguing in a comparative perspective that there are constitutional restraints in all (of the then 12) Member States).

[204] *See e.g.* Theodor Schilling, *The Autonomy of the Community Legal Order: An Analysis of Possible Foundations,* 37 HARV. INT'L L.J. 389 (1996); Joseph H. H. Weiler, *The Autonomy of the Community Legal Order: Through the Looking Glass*, *in* THE CONSTITUTION OF EUROPE: "DO THE NEW CLOTHES HAVE AN EMPEROR?" AND OTHER ESSAYS ON EUROPEAN INTEGRATION 286 (Joseph H. H. Weiler, 1999); 415 (1998).

[205] *See Lisbon* ruling, *supra* note 2, at para. 240; Everling *supra* note 69, at 92, 102; *see also* Ruffert *supra* note 141, at 1197, 1205 (arguing that the exact preconditions for the exercise of this subsidiary reserve-competence of the FCC are not made clear in the *Lisbon* ruling).

[206] *Lisbon* ruling, *supra* note 2, at para. 239–40. On the instrument of identity review, see Frank Schorkopf, *The European Union as an Association of Sovereign States: Karlsruhe's Ruling on the Treaty of Lisbon*, 10 GERMAN L.J. 1219–40 (2009).

[207] *Lisbon* ruling, *supra* note 2, at para. 239.

[208] *Id.* at para. 339.

[209] *Id.* at para. 340.

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First academic reactions have held that the object of the identity review, which apparently is meant to apply even within those parts of the legal order that have constitutionally been opened up for the effects of EU law,[210] is uncertain.[211] Some commentators have taken the view that this new review mechanism will primarily be relevant for transfers of additional competences to the EU.[212] Others have read the *Lisbon* judgment as implying that every single EU legal act is potentially subject to scrutiny as to whether it infringes Germany's constitutional identity, the contents of which have been held to be ambiguous.[213] Against this backdrop the President of the Federal Constitutional Court has confirmed that the identity review will apply to possible violations of the substantive core of constitutional identity in the sense of Article 23 I in conjunction with Article 79 III.[214]

As has also been re-affirmed by the Court's President, the *ultra vires* review "theoretically" applies to legal acts of all EU institutions, including the ECJ.[215] Importantly, as an apparent reaction to academic writings that had argued that the relevant parts of the *Lisbon* ruling may have to be read as indicating an imminent intensification of the Court's control[216] (which, according to some observers may already have taken place after the *Lisbon* judgment[217]), the Court's President has also pointed out that the constitutional standard applicable within *ultra vires* review—and apparently also within identity review—is modified in accordance with Article 23 I, when German legal acts with EU-relevance are at issue.[218] Arguably, this may be in line with voices in the academic commentary that have argued that the identity review mechanism must be restricted to evident and extreme cases.[219]

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[210] *See, e.g.*, von Bogdandy, *supra* note 57, at 1, 4.

[211] Everling, *supra* note 69, at 92, 101; von Bogdandy, *supra* note 57, at 4.

[212] Everling, *supra* note 69, at 92, 101; *see also* Terhechte, *supra* note 138, at 724.

[213] von Bogdandy, *supra* note 57, at 1, 4; *see also* Schorkopf, *supra* note 135, at 718, 722.

[214] Voßkuhle, *supra* note 64, at 1, 6–7.

[215] *Id.* at 7 ("theoretisch Rechtsakte aller Gemeinschaftsorgane . . . auch Entscheidungen des EuGH").

[216] Christian Tomuschat, *The Ruling of the German Constitutional Court on the Treaty of Lisbon*, 10 GERMAN L.J. 1260 (2009).

[217] *See* von Bogdandy, *supra* note 57, at 1, 4, (according to whom the FCC has already struck a rougher tone vis à vis the ECJ in its 3 September 2009 ruling on the European arrest warrant. *See* Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 1826/09, Sept. 3, 2009, 16 BVERFGK 177 (Ger.).

[218] Voßkuhle, *supra* note 64, at 1, 6–7.

[219] Ruffert, *supra* note 141, at 1197, 1206; *see also* Heiko Sauer, *Kompetenz- und Identitätskontrolle nach dem Lissabon-Urteil*, ZEITSCHRIFT FÜR ROMANISCHE PHILOLOGIE 195, 196 (2009).

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b) Convergent Guidelines in EU Law, International and National Law?

This reading of the judgment shows conceptual affinities to views in the literature that had stressed, already before the *Lisbon* ruling, that there may be convergent guidelines under EU law, international law and national law that help delineate a framework solution to the problem of which court—the ECJ or national courts like the Federal Constitutional Court—is competent to address transgressions of EU competences (and violations of national fundamental rights):[220] a first key to this problem is constituted by the concept of necessity,[221] which is recognized in EU,[222] international, and German constitutional law.[223] An analogous approach to this problem is possible on the basis of the international law theory of evidence.[224] A third approach, which is apparently adopted by the Federal Constitutional Court in *Lisbon*[225] and has been reinforced in the 2010 *Honeywell* case,[226] is based on constitutional law. This draws on the claim that, because the EU is not yet a state, it follows that Member State courts retain a *restricted reserve* competence to review secondary law for *evident* and/or *serious* breaches of national law.[227] The approaches based on the concept of necessity and on the theory of evidence both lead to a

[220] On this and the following cf. Vranes, *supra* note 153, at 195 with further references.

[221] On this, seePernice, *supra* note 9, at margin numbers 29; Ingolf Pernice, *Les Bananes et les droits fondamentaux*, CAH. DR. EUROP. 427, 436 (2001). According to Pernice, the competence of the FCC is restricted to cases of evident, serious and general violations. *See* Pernice, *supra* note 188, at 225 margin number 59.

[222] On this reading of Articles 6 and 7 TEU see Vranes, *supra* note 153 at 195.

[223] *See* Pernice, *supra* note 9, at margin numbers 29 (referring to "constitutional necessity").

[224] This approach is taken by Schmid, *supra* note 197, at 415. A similar approach was proposed by GERHARD EIBACH, DAS RECHT DER EUROPÄISCHEN GEMEINSCHAFTEN ALS PRÜFGEGENSTAND DES BUNDESVERFASSUNGSGERICHTS 107 (1986).

[225] *Lisbon* ruling, *supra* note 2, at para. 334:

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

This consideration constitutes the basis for the FCC's claim to its competence to "exceptionally, and under special and narrow conditions" review, and declare inapplicable, EU law. *Id.* at para. 340.

[226] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 2661/06, July 6, 2010, 126 BVERFGE 286 (Ger.) [hereinafter *Honeywell*]; *see also* Heiko Sauer, *Europas Richter Hand in Hand?* EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 94 (2011); Mehrdad Payandeh, *Constitutional Review of EU Law after* Honeywell, 48 COMMON MKT. L. REV. 9 (2011).

[227] Stefan Griller, *Grundrechtsschutz in der EU und in Österreich. Gutachten zum 12. Österreichischen Juristentag* in 2 VERHANDLUNGEN DES ZWÖLFTEN ÖSTERREICHISCHEN JURISTENTAGES 7, 54-55 (1994).

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compulsory conciliation procedure, whose exact procedural requirements ensue from EU law in conjunction with national law, which are confirmed and complemented by relevant guidelines from international law.[228]

D. Concluding Remarks

As can be seen from this analysis, the relationship between EU law and German law is particularly complex and subject to developments that result in particular from the many landmark rulings of the Federal Constitutional Court. Most recently, this relationship has been shaped in particular by the Federal Constitutional Court decisions in the *Lisbon*, *Arrest Warrant*, *Data Retention* and the *EMU*-related cases. Many commentators disagree about the exact import of the many constraints that have been laid down in the *Lisbon* case. Still, there is a relatively clear, almost twenty year old leitmotif running from the *Maastricht* ruling to the 2011 and 2012 decisions on fiscal help for Greece, the ESM and the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union: the German Parliament may not give its consent to legal instruments that could lead to an unforeseeable abandonment of the room necessary for democratic policy-making in Germany. But the Court has also made it clear that it will normally[229] exercise its jurisdiction so as to "activate" these (and other constitutional constraints on integration) only quite exceptionally, namely "under special and narrow conditions"[230] and only if there are evident transgressions of outermost limits.[231]

[228] *See* Schmid, *supra* note 197, at 415; Vranes, *supra* note 153, at 195, 231.

[229] See the possible judicial re-orientation as regards fundamental rights in the data retention case in Section C.II.3.a.

[230] *Lisbon* ruling, *supra* note 2, at para. 340.

[231] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 987/10, 2 BvR 1485/10, 2 BvR 1099/10, Sept. 7, 2011, 129 BVERFGE 124, para. 130–32 (Ger.); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvE 1390/12, Sept. 12, 2012, 2012 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 3145, para. 212–16 (Ger.).

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