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The Future of the Eurozone and the Role of the German Constitutional Court

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A. Introduction

Necessary reforms towards a deepened and increased European shaped economic, financial and budgetary policy, paraphrased with the term “fiscal union”, could possibly reach constitutional limits. In its EFSF judgment¹, the German Constitutional Court, following the Lisbon judgment in which certain government tasks were determined as being part of the “constitutional identity”², connected the budget right of the parliament via the principle of democracy to the eternity clause of Art. 79 para 3 Basic Law. A transfer of essential parts of the budget right of the German Bundestag, which would be in conflict with the German constitution, is said to exist when the determination of the nature and amount of the tax affecting the citizens is largely regulated on the supranational level and thereby deprived of the Bundestag’s right to disposition. A reform of the Economic and Monetary Union that touches the core of the budget right can, according to the German Federal Court, with regard to Art. 79 (3) of the Basic Law only be realized by way of Art. 146 of the Basic Law, thus with a new constitution given by the people that replaces the Basic Law.³

B. Relevant Aspects and Background of the Federal Constitutional Courts Lisbon Decision

I. The Context

The referenda in France and the Netherlands scuppered the European Constitutional Treaty signed in 2004. Ever since, a debate about the future prospects of the

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¹ *BVerfG* JZ 2011, 1004 ff. See the comments of *Thym* JZ 2011, 1011 ff.; *Ruffert* EuR 2011, 842 ff.; *Nettesheim* EuR 2011, 765 ff.; in advance *Calliess*, NVwZ 2012, 1 (4 ff.)

² Vgl. *BVerfGE* 123, 267; *Dingemann* ZEuS 2009, 491, 526; *Ruffert* DVBl. 2009, 1197, 1204 f.; *Nettesheim* NJW 2009, 2867, 2868; *Gärditz/Hillgruber* JZ 2009, 872, 879 f.; *Schorkopf* GLJ 10 (2009), 1219, 1229 f.; *Grimm* Der Staat 48 (2009), 475, 486 ff.; *Wahl* Der Staat 48 (2009), 587 ff.

³ Dazu bereits *BVerfGE* 123, 267, 343 ff.; *Schönberger* Der Staat 48 (2009), 553 ff.; *Nettesheim* NJW 2009, 2867, 2868; *Halberstam/Möllers* GLJ 10 (2009), 1241, 1255 f.; *Ruffert* DVBl. 2009, 1197, 1205 ff.; *Calliess* ZEuS 2009, 559, 574 ff.; *Cremer* JURA 2010, 296, 299 ff.

European Union (EU) has erupted in Germany too, often disguised as an argument about democracy⁴ and culminating in the judgement of the Federal Constitutional Court (BVerfG) over the Treaty of Lisbon⁵. The judgement in turn triggered a sometimes heated debate in the media and academia, which swung from initial approval to overriding criticism at least with regard to some aspects.⁶

Nevertheless, the Constitutional Courts decision demands respect. It receives attention well beyond the borders of Germany and also within the institutions of the EU. But some of the statements contained in it continue to invoke irritation, uncertainty and criticism. Given the European-wide respect enjoyed by the BVerfG, the questions being asked are: Is Germany going off the idea of the EU? What is the intention of the highest court in Germany? To what extent do Germans still think in European terms?⁷

The BVerfG indeed delivered an ambivalent verdict. On the one hand, one has to acknowledge, that, despite the argument of euro-sceptic ringleaders warning of a European super-state together with the “demise of the German Basic Law”⁸, it did make clear that the Treaty of Lisbon and the law approving it were constitutional, based on the European option enshrined in the Basic Law. Only in respect of the proposed simplified amendments to Article 48 of the ECT the BVerfG did require the active approval of the German legislature. Basis for this argument is a convincing principle of continuing parliamentary responsibility for European integration (so called “Integrationsverantwortung”).⁹

On the other hand, the judgements reasoning, its lengthy substantiation, adopts a rather restrained, at times even dismissive view of further European integration. This is particularly true of the overall context of the decision. The fundamental mistrust

⁴ cf. for instance *von Arnim*, Das Europa Komplott, Wie EU-Funktionäre unsere Demokratie verscherbeln, 2006, p. 39 ff.; *de Winter*, Wo steckt Europas Seele?, Der Spiegel 19/2004, p. 152 (158); *Heinig*, Europäisches Verfassungsrecht ohne Verfassungs(vertrag)?, JZ 2007, p. 905; *Darnstädt*, Erklärt Europa, Der Spiegel 29/2009, p. 34.

⁵ BVerfGE 123, p. 267. Recital numbers cited here all refer to this document.

⁶ Informative overview from *Ruffert*, Nach dem Lissabon-Urteil des Bundesverfassungsgerichts – zur Anatomie einer Debatte, Journal for Comparative Government and European Policy (ZSE) 2009, p. 381 ff.

⁷ According to *Grosser*, The Federal Constitutional Court’s Lisbon Case: Germany’s Sonderweg – An Outsiders Perspektiv, German Law Journal 10 (2009), 1263 ff., the verdict raised the question of whether the Germans were ever really serious about Europe;

⁸ *Murswiek*, Das Ende des Grundgesetzes, in the Süddeutsche Zeitung of 17 April 2009, p. 2.

⁹ BVerfGE 123, p. 267, marginal numbers 306 ff.

the BVerfG has of political protagonists, even the democratically elected legislature, is striking¹⁰. The court spells out a host of requirements for the future European policy of Germany and ventures well into the political arena. The “Yes, but” verdict of the court may well be the price for the extremely diverse make-up of the Second Senate of the BVerfG ultimately reaching a unanimous¹¹ decision that the Treaty of Lisbon is compatible with the German constitution. However, it was that very “but” aspect that triggered all the criticism of the verdict and compelled the President of the BVerfG to take the unusual step of attempting to explain and elucidate the decision.¹²

II. The Federal Constitutional Court's view of the EU

Not only the Lisbon judgement but also the legal view of the BVerfG on the subject of European integration as a whole is strongly influenced by the duality of constitutional and international law.¹³ However, imaging a river, the EU is currently operating somewhere between the international-law banks of an international organisation it has long since abandoned and the banks of federal republicanism it has not yet reached, and probably never will, in a traditional sense. It currently finds itself floating somewhere down the middle of that river. It is in the process of constitutionalisation something new, which could be described as a federal association of states, based on a multilevel constitution (“Staaten- und Verfassungsverbund”).¹⁴

The Lisbon decision does not do justice to this. It focuses quite clearly on the question of German sovereignty. For the BVerfG, the central question is therefore the principle of conferral. The court sees this as for the moment assured by the treaty’s intended distribution of competence between the EU and its member states.¹⁵ Nevertheless, its remarks about sovereignty extend well beyond aspects directly relevant to the decision, in defining, limiting and ring-fencing the role of Germany within the EU as follows:

¹⁰ Möllers, Was ein Parlament ist, entscheiden die Richter, FAZ No. 162 of 16 July 2009, p. 27; Kiiver, German participation in EU Decision-Making after the Lisbon Case: A Comparative View on Domestic Parliamentary Clearance Procedures, German Law Journal 10 (2009), 1287 (1291).

¹¹ The verdict of 7:1 votes was effectively unanimous in relation to the substantiation clausep.

¹² Voßkuhle, Fruchtbare Zusammenspiel, FAZ of 22 April 2010, p. 11.

¹³ BVerfGE 89, p. 155 (184 ff.).

¹⁴ Extensively in Calliess, Europe as Transnational Law – The Transnationalization of Values by European Law, German Law Journal Vol 10 No.10, 1169.

¹⁵ BVerfGE 123, p. 267, marginal numbers 272 ff.

1. Firstly, the BVerfG defines by interlinking sovereignty and democracy some specific subjects of state responsibility, which as apart of constitutional identity (“identitätsbestimmende Staatsaufgaben”) are not allowed to be touched by European measures. These are intended to ensure Germany still has sufficient scope for political determination of its economic, cultural and social living conditions. Aspects like citizenship, state monopoly on the use of force, fundamental fiscal decision-making, external financing, criminal law, cultural and social issues are all cited in this passage.¹⁶

2. Furthermore, the BVerfG raises the question of sovereignty in relation to the primacy of European over national law. With reference to one of its earlier judgements, it emphasises that such primacy is based on constitutional empowerment (Article 23 first sentence of the Basic Law).¹⁷ This leads the court to conclude that the primacy of European jurisdiction, when exercised in Germany, only extends as far as the Federal Republic has agreed to this in the Act Approving the Treaty of Lisbon and was constitutionally entitled to so. In that sense, the BVerfG specifies three review provisions¹⁸; in relation to European protection of fundamental rights, the exercise of European competence (“*ultra-vires* control”) and finally in respect of the constitutional identity of the German Basic Law which may not be violated by European integration.

Such national reservations are very sensitive issues from a European law perspective – on the basis that there is no unity without primacy. The rule of primacy in conjunction with the European Court of Justice (ECJ) ensures the uniform interpretation and application of common European law in all member states. If the 27 constitutional courts of the member states were to follow the example of the BVerfG, European law would become a fragmented legal system indeed. In response to overwhelming criticism from politicians as well as legal scholars,¹⁹ the BVerfG has since then partially corrected itself. In the Honeywell verdict,²⁰ it makes a submission to the European Court of Justice, in a formal sense, and a structural shift in competence, in a material sense, the prerequisite for its review of competence.

¹⁶ BVerfGE 123, p. 267, marginal numbers 249 ff.

¹⁷ BVerfGE 123, p. 267, marginal numbers 226 ff., 339.

¹⁸ BVerfGE 123, p. 267, marginal numbers 240 ff.

¹⁹ cf. only *Calliess*, Unter Karlsruher Totalaufsicht, FAZ of 27 August 2009, p. 8.

²⁰ BVerfG, verdict of 6 July 2010.

III. Democracy and the EU

However, the sovereignty element ultimately colours the BVerfG's view of the future of the EU. In its argumentation, the BVerfG links state sovereignty to the democratic principles of the Basic Law.

Foreign policy is traditionally the role of the executive, which is why – particularly at the level of classic international organisations like the United Nations (UN) or the World Trade Organisation (WTO) – there is generally an absence of democratic mechanisms. The democratic deficit of globalisation and internationalisation has its origins in the historical, symbiotic growth of nation state and democracy, which has defined most democratic theories to this day.

In that context, the BVerfG develops what appears at first glance to be the thoroughly correct argument that elections to the European Parliament (EP) reveal a democratic deficit when measured against the defining principle of electoral equality (“one man, one vote”).²¹ Such a structural deficit cannot be offset, according to the BVerfG, by the relative dominance of the “bigger” member states in the Council of the EU or the EP, but solely by greater involvement of the national parliaments. The BVerfG thus accords the EP a minor role, which is at odds with the legal, political and practical reality. However, democratic legitimacy cannot be measured by the election rules of the EP alone. In many federal systems such as that of the USA, Switzerland and even Germany itself, direct representation of citizens (1st chamber) and state representation (2nd chamber) amount to composite systems for the exercise of political power. The principle of sliding-scale proportionality itself is democratic to the extent that it serves to protect minorities and thus promotes acceptance of the EP in the smaller member states. The general elections for many national parliaments are conducted with minority quotas or in constituencies of unequal size.

Quite apart from that, the BVerfG rejects any approach for a specific European form of democracy. It does not accept the explicitly worded beginnings of a European principle of democracy in Articles 10 to 12 of the ECT – in particular the dual legitimacy approach, where both legitimacy strands of council and national

²¹ BVerfGE 123, p. 267, marginal numbers 276 ff, particularly 280 ff.

parliaments on the one hand and European Parliament on the other are seen as complementary.²²

Once again, in taking this view, the BVerfG is adopting an international law point of view. It is almost tragic that, in doing so, the Court is making a democratic example of the very organisation that – contrary to classic international organisations like the UN and WTO – actually has a parliament that is directly elected by its citizens and has wide-reaching decision-making and control powers.

In setting excessively high standards for the EU, is it not the case that the democratic principle is being played out against European integration? The current form of the EP does not meet the requirements of the (German) principle of democracy, yet the EU can only meet such standards if it becomes a federal state, which (by the so-called “eternity clause” of Article 79 third paragraph of the Basic Law) has supposedly been ruled out as an option.²³ In creating such a democratic dilemma, the BVerfG is effectively ring-fencing any further European integration from a German perspective and at the same time subjecting it to its own control.

C. The German Constitutional Court’s Decision on the Financial Aid to Greece and the EFSF

I. Introduction

The court starts the development of its review standards at by resuming its line of argument from the Lissabon judgment.²⁴ The decision concerning the public revenues and spending is a key element for the democratic decision-making process and democratic self-determination in the constitutional state.²⁵ As a core area of sovereign statehood and part of the German constitutional identity, the budget right is a characterization of the principle of democracy. This anchorage results in a link to the constitutional eternity clause in Art. 79 para 3 GG and therefore in a “europe resistant” budget right. Furthermore, the court states that the German Federal Parliament has to retain control over essential budgetary decisions even when operating in an intergovernmental system. It doesn’t have the right to confer its

²² See further *Calliess*, Die neue EU nach dem Vertrag von Lissabon, 2010, p. 167 f. and 250 ff.

²³ BVerfGE 123, p. 267, R. 276 ff.

²⁴ marginal number 120.

²⁵ marginal number 122.

budgetary responsibility - a specific characteristic of the responsibility for integration also developed in the Lisbon judgment – upon other actors by unspecified budgetary authorizations.

II. The Constitutional Limits on Financial Solidarity – the Example of Eurobonds

1. The European Perspective as a Starting Point

a) The Character of Eurobonds

Proposals of Eurobonds exist in various ways. A rough distinction can be drawn on the basis of two criteria: the degree of substitution of national issuances (full or partial) and the nature of the underlying guarantee (joint and several or several).²⁶ Eurobonds which only partially substitute national issuances and which are based on several guarantees are considered economically little effective but mostly in line with the Law of the European Union.²⁷ On the other hand Eurobonds with joint and several guarantees meet serious legal doubts in the view of the wording and the ratio of the so called “No-Bail-Out-Clause”.

b) The No-Bail-Out-Clause

Article 125 para 1 S. 2 TFEU basically aims to preclude the liability of a member state for financial commitments of another member state. The intention of this clause – together with Article 123 and 124 TFEU – is to secure in case of an increasing government debt that member states of the euro area are sanctioned via the financial markets by higher interest rates on their government bonds. That is why by all means no member state is obliged to be liable for the government debt of any other member state. Apart from that the interpretation of the “No-Bail-Out-Clause” is highly controversial in legal scholarship. Especially voluntary financial facilities and the allocation of credits are often regarded as not being covered by the “No-Bail-Out-Clause”.²⁸ As regards to Eurobonds one may put forward that the wording of the “No-

²⁶ *European Commission*, Green Paper on the feasibility of introducing Stability Bonds, COM (2011), 818 final, p. 12.

²⁷ *European Commission*, Green Paper on the feasibility of introducing Stability Bonds, COM (2011), 818 final, p. 18; *Mayer/Heidfeld*, Verfassungs- und europarechtliche Aspekte der Einführung von Eurobonds, NJW 2012, 422 (423).

²⁸ In detail *Calliess*, Perspektiven des Euro zwischen Solidarität und Recht – Eine rechtliche Analyse der Griechenlandhilfe und des Rettungsschirms, ZEuS 2011, 213 (pp. 260 et seq.).

Bail-Out-Clause” is anything but clear. It could be submitted that Eurobonds establish a joint and several guarantee of all Euro area member states which has to be distinguished from Article 125 TFEU dealing only with financial commitments of an isolated member state.²⁹ But in the end the ratio of Article 125 TFEU requires a strict interpretation. Only if financial facilities are prohibited comprehensively the “No-Bail-Out-Clause” can serve its purpose to incentive member states to avoid excessive government deficits via higher interest rates on their government bonds. The main purpose of (economically effective) Eurobonds is to constitute a joint and several liability of the Euro area member states. A Point that runs clearly against the ratio of the “No-Bail-Out-Clause” and the main principles of the Economic and Monetary Union: stability and financial self-responsibility. So therefore Eurobonds based on joint and several guarantees violate Article 125 para 1 S. 2 TFEU.³⁰ Besides of that it has to be stated that the “No-Bail-Out-Clause” could in no way be interpreted as setting its purpose against the preservation of the European Economic and Monetary Union. Considering the basic idea of Article 122 para 2 TFEU in a case of an unindebted financial distress of a euro area member state which effects the stability and existence of the Economic and Monetary Union as a whole the “No-Bail-Out-Clause” does not prohibit indispensable safeguard measures. According to that the creation of the European Financial Stability Facility (EFSF) was not prohibited by Article 125 TFEU. A fact which is now confirmed in the amendment of Article 136 TFEU.

c) The Amendment of Article 136 TFEU

A further question is therefore the legal implication of the new Article 136 para 3 TFEU. While confirming the European Law consistency of financial facilities as an *ultima ratio* aiming to safeguard the stability of the euro area as a whole one may consider the amendment of Article 136 TFEU as a sufficient legal basis for Eurobonds. But such a point of view – in its generality – would misjudge the legal nature of the new Article 136 para 3 TFEU. First of all the new clause only confirms the legal situation regarding the interpretation of the “No-Bail-Out-Clause” in

²⁹ Mayer/Heidfeld, Verfassungs- und europarechtliche Aspekte der Einführung von Eurobonds, NJW 2012, 422 (425).

³⁰ Mayer/Heidfeld, Verfassungs- und europarechtliche Aspekte der Einführung von Eurobonds, NJW 2012, 422 (425); Ruffert, Europäische Schuldenkrise vor dem Bundesverfassungsgericht – Anmerkung zum Urteil vom 7. September 2011 - , EuR 2011, 842 (854); European Commission, Green Paper on the feasibility of introducing Stability Bonds, COM (2011), 818 final, p. 11.

the light of the principle of solidarity.³¹ Therefore Article 136 para 3 TFEU does not confer any new competences to the European Union.³² His main purpose is declaratory. Secondly Article 136 para 3 TFEU could only be activated if it is indispensable to safeguard the stability of the euro area as a whole. Because of that the permanent issuance of Eurobonds is hardly possible on the basis of the new Article 136 para 3 TFEU.

With that said Article 136 para 3 TFEU is providing a reference point for the legal boundaries of Eurobonds. Eurobonds – such as the financial facilities provided by the EFSF – may only be consistent with European Law if they are a temporally limited *ultima ratio* to safeguard the stability of the euro area as a whole granted under strict conditionality. That implies that those Eurobonds approaches which only partially substitute national issuances are more in line with the legal requirements clarified in Article 136 para 3 TFEU because they can temporally limited step aside national issuances. As far as it is designated that an independent council or agency is taking over the issuance of Eurobonds, such an institution could possibly be based on Art. 352 TFEU which has been used as a legal basis for independent agencies in the past.³³

The only temporally limited issuance of Eurobonds may not suffice all economic capabilities associated with the concept of Eurobonds³⁴. But from a legal point of view Eurobonds as a permanent concept would require an amendment of the European Treaties. Depending on the detailed arrangement of Eurobonds it is probably most likely that such an amendment implies the conferral of new competences to the European Union. Especially when Eurobonds are connected with a more intrusive euro-area economic governance framework. Also considering the impact of Eurobonds on the basic principles of the Economic and Monetary Union, especially financial self-responsibility, the ordinary revision procedure should be applied.

d) Eurobonds and Enhanced Cooperation

Moreover the necessity of a treaty revision procedure could not be avoided by using enhanced cooperation. Because first and foremost rules based on enhanced

³¹ In detail *Calliess*, Perspektiven des Euro zwischen Solidarität und Recht – Eine rechtliche Analyse der Griechenlandhilfe und des Rettungsschirms, ZEuS 2011, 213 (pp. 268 et seq.).

³² See also *Mayer/Heidfeld*, Verfassungs- und europarechtliche Aspekte der Einführung von Eurobonds, NJW 2012, 422 (425).

³³ *Mayer/Heidfeld*, Verfassungs- und europarechtliche Aspekte der Einführung von Eurobonds, NJW 2012, 422 (424).

³⁴ See *European Commission*, Green Paper on the feasibility of introducing Stability Bonds, COM (2011), 818 final, pp. 4 et seq.

cooperation have to be in line with the legal framework of the European Union. Therefore the prohibition of permanent Eurobonds based on joint and several guarantees due to Article 125 para 1 S. 2 TFEU cannot be circumvented by using enhanced cooperation. As far as Eurobonds are temporally limited permitted by Article 136 para 3 TFEU there is actually also no need for enhanced cooperation. Because in this case the issuance of Eurobonds could be arranged either by an independent agency based on Article 352 TFEU or outside the legal framework of the European Union just as the EFSF.

Nonetheless the concept of a permanent common bond market for the euro area does fit in the political concept of differentiated integration. In this respect it is in line with the “Euro-Plus-Pact” or the latest “Treaty on Stability, Coordination and Governance”, the Fiscal Compact. All these measures may lead into a more or less deepened economic and political integration laying the foundation for Eurobonds. But from a strict legal point of view they do not provide any basis for Eurobonds.

2. The German Perspective

Statements on the Constitutional Court’s decision on the financial aid to Greece and the EFSF seem to show a major disagreement over the decision’s long-term impact, particularly with regard to the lawfulness of Eurobonds as well as further transfer of power within the area of economic and financial policy.

As far as this can be understood as a restriction on the Parliament to commit itself to measures impacting the government finances in an unpredictable way without essential prior consent, it cannot be interpreted as a clear and absolute limit for further reform plans. The expression “unforeseeable” is too indefinite to draw such a conclusion. Particularly the euro rescue fund intended for 2013 shouldn’t violate those criteria, especially because the establishment requires the approval of the German Parliament. Furthermore, it meets the criteria of a definitive aim, credit volume and basic modalities.³⁵ However, the widely discussed Eurobonds, the debt investments with joint liability issued by all member states, are already in a grey area. Much will depend on how they are implemented in practice: significant aspects are the approval of each involved member state, their limitation in time and volume and a link with clear conditions for a budgetary consolidation. In short, there should be no incentives for a permanent transfer union

³⁵ marginal number 139 f.

The Court's conclusion, that as a consequence of the democratic anchorage of the budgetary autonomy, the German Parliament is not allowed to approve a guarantee and payment automatism, appears to be consistent with the plans to build the ESM as long as the allowed loans are conditional as regards content and as long as the measures are accompanied sufficiently by Parliament. It only agreed upon an intergovernmental or supranational level. Secondly isn't bind by strict guidelines and could have unknown and unrestrictable effects and thirdly once up and running is withdrawn from his control and influence.

When it comes to implement future reform plans, another part of the judgment is of interest. The court constitutes that "no permanent measures coming from international law can be established if they result in an assumption of liabilities for decisions made by other states, especially if they may entail risks which are difficult to assess." Despite how it may seem at first glance the judicial guideline quoted above does not preclude a permanent ESM. The ESM doesn't lead to an assumption of liabilities. Furthermore, it may be designed as a permanent mechanism, but the single loans granted to the states that have to come under the rescue umbrella are conditional with regard to content and limited in time and volume. In view of this wording the implementation of Eurobonds could be quite critical, given that the main characteristic of Eurobonds is a joint liability for decisions made by another country in the Eurozone. But again it's only a question of implementing Eurobonds in practice. In particular the above mentioned limitation in time requires a distinction between the two concepts that have been considered for Eurobonds. In fact, only Eurobonds structured with regard to contents of the blue bond proposal seem to be legal under constitutional law because the parliament has to approve every new requirement. Consequently the issuance of the bonds wouldn't be permanent. The parliament would still be in charge of the way of how funds made available are dealt with.

Of particular interest - especially for the establishment of Eurobonds - is another aspect of the judgment: Resuming a passage from its Lisbon decision the court states that a transfer of power in the area of the parliament's budget right violates the principle of democracy and the right to vote in the elections for the federal parliament. This is especially the case when the specifications regarding the expense type and level are mostly transferred to the EU and are therefore not within the Parliaments power anymore. In particularly the aspect concerning the credit limit could cause a problem when transferring these statements to Eurobonds. The court itself didn't set

explicitly a clear limit for the assumption of liabilities and hence its decision is discussed controversy. According to some authors, there are no constitutional barriers limiting the credit volume and consequently the lawfulness of Eurobonds.³⁶ Aside, other authors pointed out that not mentioning an exact limit doesn't mean that there is none.³⁷ The court only took the legislators sphere of influence into account. Hence, a possible upper limit would be overstepped when the budgetary autonomy is totally undermined.³⁸

This is the link to the second opinion. In brief, it shows that the restrictions of guarantees are more difficult compared to the restrictions of the dept levels, because the probability of default has to be considered additionally.³⁹ Consequently they argue that the limit set by the constitution is exceeded when the refinancing of the guarantees is not possible any more. This might already be the case when Germany has to assume liability for the debts of just one of the bigger European countries. As a result, the complete replacement of national depts through Eurobonds would exceed the limit definitely as proposed by the Green Paper of the Commission.

III. At the Constitutional Limits?

The constitutional barriers addressed by the court towards a parliamentary self-restraint concerning the budget right may - mildly put - cause a tension (one could also speak of contradiction) with another section of the decision. In this other passage the court refers to his Maastricht decision and rightly points out again that the basis and the subject of the German act of sanctioning is a Monetary Union contractually conceived as a Union of stability.⁴⁰ The experiences of the past few months have shown that the with the Maastricht Treaty agreed and constitutionally required safeguarding of the stability is only possible with considerable restrictions. The crisis has to be seen and turned into an opportunity to complement the Monetary Union with the Economic and Fiscal Union along with a European budgetary surveillance. This treaty amendment is already overdue. By anchoring the budget right to the core of the democratic principle and therefore declaring it to an unchangeable part of the constitutional identity with regard to Art. 79 para 3 GG the

³⁶ *Möllers*, FAZ 20.10.2011, S.6.

³⁷ *Müller-Franken*, JZ 2012, 219 (223) m.w.N.; *Mayer/Heidfeld*, NJW 2012, 422 (426 f.)

³⁸ marginal number 135.

³⁹ *Mayer/Heidfeld*, NJW 2012, 422 (426 f.)

⁴⁰ marginal number. 129 respectively guiding principle 4

court seems to bar this way. According to the court's interpretation of the constitution, it requires on one hand a Monetary Unions in form of a stability community but on the other hand it sets barriers for the planned measures ensuring the sustainable assurance of the euro.

This dilemma in the court's decision not only raises the question if a more cautious judgment might be necessary with regard to the fact that more specific reform projects might have to be reviewed under constitution law. More important is its impact for the very controversially discussed debate over para 31 para 1 BVerfGG and the scope and binding effect of constitutional decisions. The BVerfG assumes in its established case law that the main ground of the decision is also binding for the addressees of para 31 para 1 BVerfGG.⁴¹ Contrarily, some legal literature only sees the operative part of the judgment, which in this case is the rejection of the constitutional appeal, as legally binding.⁴² However, the BVerfG furthermore states that future reform projects are not only bound by the operative provisions of the judgment but also by the ground of the decision as long as it is fundamental. This possibly applies to the above quoted statements, which form the third guiding principle.

This dilemmas judicial dissolution could be facilitated considerably when putting the court's considerations in the context with the integration order (Preamble, Art. 23 para 1 GG) and the identity guarantee (Art. 79 para 3 GG). This leads to dissolution of tensions during which the untouchable core of the budget right as protected by Art. 79 para 3 GG has to be exposed. Only an interference in this area could lead to an impermissible treaty amendment. Then again this can only be the conclusion on an individual case analysis.

If this is not possible, a reform of the treaties aiming at an approved protection of the community of stability is impossible. Although the BVerfG consistently demands for such a community, the consequences of a failed dissolution would affect the safeguarding measures for the stability of the Euro. They would have to remain under the necessary and politically realisable measures or the reform of the European Treaties could only be accomplished at the price of abandoning the existing constitution.

⁴¹ BVerfGE 1, 14 (37); 19, 377 (392); 20, 56 (87); 40, 88 (93 f.); 96, 375 (404); 104, 151 (197).

⁴² Com. the citation at *Heusch*, in: Umbach/Clemens/Dollinger (Hrsg.), BVerfGG, 2. Auflage 2005, para 31, Rn. 58 mit Fn. 176 ff.

IV. Conclusions

From a legal point of view, a distinction must be made between two levels of the German discussion on the EU.

At the micro-level, the court's ruling picks up a debate about the role of the Commission and the ECJ in the integration process, which has been the subject of critical debate for some time now in Germany. After both institutions adopted a politically sanctioned active role during the first decades of European integration, the treaty of Maastricht in 1992, at the very latest, marked a turning point in Germany. It was triggered by numerous and in some cases far-reaching transfers of power to the European level. The introduction of the subsidiarity principle into the Treaties as a counterbalance was the visible expression of this turning point. The Commission and ECJ, however, did not pick up on that but instead gave the impression that they wanted to continue being the "driving force of integration". That inflamed opposition, to the point where a newspaper article appeared with the headline "Stop the European Court of Justice"⁴³. It was written by the former German Federal President, Roman Herzog, who had previously been a prominent voice at the European level too – as Chairman of the Convention for the Charter of Human Rights. His very hard-hitting article sparked criticism but found also a great deal of approval. The lasting effect of this discussion might explain the limiting approach, especially the mentioned review provisions contained in the Lisbon decision of the BVerfG.

At the macro-level, the decision of the BVerfG picks up a widespread social unease, in Germany but as well in other member states, about European integration. The EU has now expanded to include 27, to some extent, very heterogeneous member states. At the same time, political integration, even in some rather sensitive areas, continues to advance. Increasingly people are asking where European integration, which so successfully brought peace and prosperity in the period following 1945, is heading. Should the EU, as it was formulated in the Preamble to the EEC Treaty of 1957, pursuing the open goal of an "ever closer union among the people of Europe" and thus shift to a kind of federation? That has been the intention of Germany's European policy since *Konrad Adenauer*, *Willy Brandt*, *Helmut Schmidt* through to

⁴³ *Herzog/Gerken*, Stoppt den Europäischen Gerichtshof, FAZ of 8 September 2008, p. 8.

Helmut Kohl. Or should the EU be reduced to a purely economically related community, an internal European market only?

Moreover the widening, most recently the inclusion of Bulgaria and Romania, and in future perhaps Turkey, is making the EU more and more heterogeneous, in a political and economic sense. On the opposite side of the coin, deeper political integration – at least in the minds of ordinary citizens – presupposes a certain degree of homogeneity. A debate over the extent of competition in the internal market invokes the fear, well known from the context of globalisation, that a decline in living standards is to be expected by putting pressure on the German (Western European) social model. Intuitively ordinary citizens are looking to “their own” state for protection.

Since the failed Constitutional Treaty, earlier discussion about the EU’s “remoteness from ordinary citizens” and “democratic deficit” was coupled with criticism of European integration as a “project of the elite”.⁴⁴ Ultimately, however, it is a matter of how political the EU is able and allowed to be. The more political the EU becomes, the more it needs broad democratic legitimacy. Member states have given their citizens the false impression for decades now that European integration is primarily an economic project that has little to do with their everyday lives. Since the Treaty of Maastricht, however, those same citizens have increasingly been confronted with the political reality of the EU. For instance, it is only now in the midst of this crisis that many are starting to realise that the euro also has a political dimension.

Since there has never been a referendum in Germany over the European treaties, the BVerfG seems keen to use its Lisbon decision as a vehicle for expressing the above described unease of many ordinary citizens. With its statements about the meaning of the EU and the constitutional limits of further European integration, the BVerfG has ventured well into the political arena.⁴⁵ In doing so, it failed not only to meet the perspective of integration, but also the historical consensus that European economic integration was not an end in itself but rather intended to pave the way for an ever closer political union among the peoples (and states) of Europe within the EU. To that end, the Basic Law requires Germany to become part of the EU and

⁴⁴ *Heinig*, Europäisches Verfassungsrecht ohne Verfassungs(vertrag)?, JZ 2007, p. 905 (908); *von Arnim*, Das Europa Komplott, Wie EU-Funktionäre unsere Demokratie verscherbeln, 2006, p. 39 ff.; *de Winter*, Wo steckt Europas Seele?, Der Spiegel 19/2004, p. 152 (158); *Darnstädt*, Erklärt Europa, Der Spiegel 29/2009, p. 34.

⁴⁵ *Nettesheim*, Entmündigung der Politik, FAZ No. 198 of 27 August 2009, p. 8.

contribute to the ongoing development of the EU and it also makes provision for the necessary adjustments to European requirements. The relevant article of the Basic Law about Europe (Article 23.1 first sentence) makes conformity with its fundamental constitutional principles a condition of integration. But it does not demand that the EU exactly meets the German standards of democracy, the rule of law and fundamental rights.

Finally the question arises as to how far the statements of the BVerfG have any binding effect on political exponents in Germany. This is firstly a question of the legal force of decisions made by the BVerfG. It relates only to the decision-making formula, but not to the elements of the decision that are contained in the reasons given for the verdict.⁴⁶ In so far as the sense of the decision-making formula can only be conveyed in the context of the underlying reasons, however, the binding principle also applies to them. Constitutional court decisions have a specific binding effect that extends even further, according to para 31 of the Federal Constitutional Court Act, but the extent of their reach is controversial. If the view of the BVerfG is to be followed, the underlying reasons for its decisions must also be considered along with the decision-making formula whenever the Treaty of Lisbon is applied in Germany. The underlying reasons are those that cannot be ignored without nullifying the specific decision-making outcome as it is expressed in the decision-making formula. This means that not every passage of the Lisbon decision is equally binding on all future European policies. To what extent the verdict of the BVerfG binds politicians in Germany to European integration can therefore only ever be determined on a case-by-case basis. No one-size-fits-all statement would be appropriate.

⁴⁶ BVerfGE 123, p. 267, R. 40 ff.



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