

[1994] 1 C.M.L.R. 57
1993 WL 965303 (BverfG (Ger))
(Cite as: [1994] 1 C.M.L.R. 57)

*57 Manfred Brunner and Others v. The European Union Treaty
(Cases 2 BvR 2134/92 & 2159/92)
Before the Bundesverfassungsgericht (2. Senat) (Federal Constitutional Court,
2nd Chamber)
BverfG (Ger)
(Presiding, Mahrenholz V.P.; Bockenforde, Klein, Graßhof, Kruis,
Kirchhof, Winter and Sommer JJ.)
12 October 1993
Direct Constitutionality Actions (Verfassungsbeschwerden).

Provisions considered:

TEU A, B(2), E, F(1), F(3), J, K, L, Title V, Title VI

E.C. 3b(1), (2), (3), 8b, 126 to 129, 138a, 235

Constitutional law. Germany. European Union. Currency.

Since Article 88 of the Constitution, as amended by the Constitutional Amendment (European Union) Act 1992, specifically authorises transfer of the functions and powers of the Bundesbank to the European Central Bank within the framework of the European Union, the implementation of that authority, including the replacement of the Deutsche Mark by the ECU, is not contrary to the basic rights contained in Articles 12(1) and 14(1) of the Constitution. [11]

Constitutional law. Germany. European Union. Human rights.

The sharing of human rights protection of German citizens between Germany and the European Union does not dilute and thereby reduce the protection of fundamental rights guaranteed by the German Constitution. [12]-[13] Re the Application of Wunsche Handelsgesellschaft (2 BvR 197/83): 73 BVerfGE 339, [1987] 3 C.M.L.R. 225, applied. *58

Constitutional law. Germany. European Union. European Court. Judicial review.

The exclusion (by Article L TEU) of European Court jurisdiction over acts pursuant to Parts V and VI of the E.U. Treaty does not result in an unconstitutional legal lacuna because the provisions affected do not produce instruments having direct effect on individuals. [14]

Constitutional law. Germany. European Union. Judicial review.

If common actions and measures under Titles V and VI TEU impose obligations on member-States, binding in international law, to make constitutionally relevant encroachments on private rights, all such encroachments, if they occur in Germany, will be subject to review in full by the German courts. In that respect, the protection of fundamental rights provided by the German constitution is not displaced by supra-national law that could claim precedence. Just as with any traditional international treaty, in so far as its implementation internally would infringe constitutional rights it is prohibited by German constitutional law. [22]

Constitutional law. Germany. European Union. Human rights. Judicial review. European Court. National courts.

If a Council decision made under Titles V or VI TEU were to be implemented by a legal measure of the European Communities and constitutional rights were infringed as a result, adequate protection of those rights would be assured by either the European Court of Justice or the German Federal Constitutional Court, which together are in a relationship of co-operation for the guarantee of constitutional protection, under which they complement each other. [23]

Constitutional law. Germany. European Union. Freedom of speech.

The fact that the exercise of free speech to political ends will under the Union extend to other decision centres than those under the German federation does not breach the freedom of expression guarantee in Article 5(1) of the Constitution. [24]

Constitutional law. Germany. European Union. Municipal elections.

The right to vote and stand as a candidate in elections is not infringed by Article 8b E.C. which extends the suffrage for local elections to nationals of other member-States. [30]

Constitutional law. Germany. European Union.

The E.U. Treaty establishes a European federation of States, which is based on the member-States and respects their identities. Germany's constitutional position is to be considered as membership of a supra-national organisation not as belonging to a European State. [33] & [52]

Constitutional law. European Union. Powers.

The functions of the European Union and the powers granted for their implementation are regulated in a sufficiently foreseeable manner, because the principle of attribution of powers is followed. No power to extend its powers is conferred on the European Union: any such extension of the powers of the Union and the Communities is made dependent on supplementation and amendment of the E.U. Treaty, and is therefore subject to the affirmative decision of the national parliaments. [33] & [59]

Constitutional law. Germany. European Union. Powers. Democracy.

The scope of the functions and powers granted to the European Union and the institutions of the European Communities and the means for forming political intentions laid down by the Union Treaty do not at present have the effect of reducing the content of the decision-making and supervisory powers of the German parliament (Bundestag) to an extent which infringes the democratic principle as laid down as unassailable in Article 79(3) of the German Constitution. [33] & [94]

Constitutional law. Germany. European Union. Democracy.

Entrenchment of the democratic process within the national (German) constitution does not mean that decision-making, and with it the national democratic control over it, can never be transferred to a wider community of States unless subject to a rule of unanimity. Unanimity as a universal requirement for such a transfer would inevitably set the wills of the particular States above that of the community of States itself and would put the very structure of such a community in doubt. Such a limitation was not intended by the original German Constitution of 1949, and even less by the express amendments of 1992 as expressed in the present texts of Articles 23 and 24. [37]

Constitutional law. Germany. European Union. Democracy.

The democratic principle entrenched in the German Constitution is complied with on the transfer of powers to the European Union by the involvement of the German parliament in giving its consent to such transfer. In the German ratification statute assenting to accession to a community of States is found the democratic legitimation both of the existence of the community of States itself and of its powers to take majority decisions which are binding on the member-States. But it is also a precondition for membership of the Union that a legitimation and an influence proceeding from the people are also secured inside the Union itself. [37]-[38]

Constitutional law. Germany. European Union. Democracy.

The democratic principle is potentially established within the European Union through the European Parliament as the source of a supplementary democratic support for the policies of the Union, and through the establishment of Union citizenship *60 whereby a legal bond is formed between the nationals of the individual member-States which is intended to be lasting and which, although it does not have a tightness comparable to the common nationality of a single State, provides a legally binding expression of the degree of de facto community already in existence. The influence flowing from the citizens of the Union can eventually become a part of the democratic legitimation of the European institutions to the extent that the conditions necessary for this purpose are met on the part of the peoples of

the Union. Those conditions, in so far as they do not yet exist, can develop in the course of time within the institutional framework of the Union. [40] & [42]

Constitutional law. Germany. European Union. Powers. Certainty.

If the Act authorising German accession to the European Union, thereby opening up the German legal system to the direct validity and applicability of the law of the (supranational) European Communities, does not establish with sufficient certainty the powers that are transferred and the intended programme of integration, it will not be clear to what extent and degree the German legislature has assented to the transfer of the exercise of sovereign powers. It would be equivalent to a general enablement of the Union and constitute a general surrender of powers which is forbidden by Article 38 of the German Constitution. Although specificity in a multilateral treaty cannot be defined so tightly as within a domestic parliamentary context, nevertheless what is decisive is that Germany's membership of the Union and the rights and duties that follow therefrom (and especially the immediately binding effect within the national sphere of the Communities' actions) should be defined in the Treaty so as to be predictable for the German legislature and be enacted by it in the Act of accession with sufficient certainty. That also means that subsequent important alterations to the integration programme set up in the Union Treaty and to the Union's powers of action would no longer be covered by the Act of German accession to the existing E.U. Treaty. [48]-[49]

Constitutional law. Germany. European Union. Powers. Expansion.

If European Union institutions or agencies (Einrichtungen und Organe) (quaere, including the European Court of Justice?) were to treat or develop the Union Treaty in a way that was no longer covered by the Treaty in the form that was the basis for the Act of German accession, the resultant legislative instruments would not be legally binding within the sphere of German sovereignty. The German state organs would be prevented for constitutional reasons from applying them in Germany. Accordingly, the Federal Constitutional Court will *61 review legal instruments of European institutions and agencies to see whether they remain within the limits of the sovereign rights conferred on them or whether they transgress them. [49] & [99]

Constitutional law. Germany. European Union. Political form. Sovereignty. Democracy.

The E.U. Treaty establishes a federation of States for the purpose of realising an ever closer union of the peoples of Europe (organised as States) and not a State based on the people of one European nation (see Article A). Given that, the question whether the German Constitution allows or prohibits German membership of a European State does not arise. All that has to be scrutinised is the statute assenting to German membership of a federation of States. [51]

Constitutional law. Germany. European Union. Powers. Sovereignty.

The member-States established the European Union in order to exercise a part of their functions in common and to that extent to exercise their sovereignty in common. Accordingly, the Union Treaty takes account of the independence and sovereignty of the member-States, by obliging the Union to respect the national identities of its member-States (Article F(1)). It equips the Union and the European Communities only with specific competences and powers in accordance with the principle of limited individual competences (Article E TEU, Article 3b(1) E.C.), and then establishes the principle of subsidiarity for the Union (Article B(2) TEU) and for the European Community (Article 3b(2) E.C.) as a binding principle of law. [52]

Constitutional law. Germany. European Union. Powers.

The competences and powers which are granted to the European Union and the Communities belonging to it remain essentially the activities of an economic union in so far as they are exercised through the implementation of the Communities' sovereign rights. Outside the European Communities, co-operation stays on an inter-governmental basis. Germany, therefore, even after the Union Treaty has come into force, will remain a member of a federation of States, the common authority of which is derived from the member-States and can only have binding effects within the German sovereign sphere by virtue of the German instruction that its law be applied. Germany is one of the 'Masters of the Treaties' with the intention of long-term membership; but it could also ultimately revoke its adherence by a contrary act. The validity and application of European law in Germany depend on the instruction to apply that law expressed in the Act of German accession. Germany thus preserves the quality of a sovereign State within the meaning of Article 2(1) of the United Nations Charter. [54]-[55]

Constitutional law. Germany. European Union. Powers. Harmonisation legislation.

*62 Harmonisation measures for the purposes of the specific objectives of Articles 126 to 129 E.C. may not be based on Article 235 E.C. [64]

Constitutional law. Germany. European Union. Powers.

Article F(3) TEU does not empower the European Union to provide itself by its own authority with the financial means and other resources it considers necessary for the fulfilment of its objectives. Rather, it merely makes a statement of intent in the context of policies and programmes to the effect that the member-States (which form the Union) wish to provide it with adequate resources under whichever particular procedure is necessary for that purpose. If European institutions were to interpret, and act under, Article F(3) in a sense contrary to its content as so defined and as so accepted by the German Act of Accession, such action would not be covered by the Act and would therefore not be legally binding within the German member-State. The organs of the German State would have to refuse to supply the personnel to implement any legal instruments based on such a treatment of Article F(3). [65]

Constitutional law. Germany. European Union. Identity.

Quaere whether the European Union possesses any separate legal personality, capable of holding autonomous powers, either in relation to the European Communities or to the member-States. [66]

Constitutional law. Germany. European Union. Powers. Economic and Monetary Union.

Move to the third stage of the Economic and Monetary Union is not automatic but depends on attainment of the convergence criteria set out in the E.U. and E.C. Treaties, a determination which is under the control of the Council, and hence of the member-States. [88]

Constitutional law. Germany. European Union. Economic and Monetary Union.

The concept of the currency union as a 'community based on stability' (Stabilitätsgemeinschaft) is the basis and subject-matter of the German Act of Accession. If the monetary union should fail to develop on a continuing basis the stability present at the beginning of the third stage of EMU within the meaning of the agreed mandate for stabilisation, it would be abandoning the Treaty conception and thereby fall outside the authority conferred in the Act of Accession. [90]

Constitutional law. Germany. European Union. Economic and Monetary Union.

Under the E.U. Treaty the monetary union (EMU) is no more able to give rise automatically to a political union than to an economic union. That would require an amendment of the Treaty, which could not happen without a decision of the national State institutions, including the German *63 parliament (Bundestag). Whether such a decision is taken is a political and not a legal matter. [93]

Constitutional law. Germany. European Union. Subsidiarity.

The subsidiarity principle (Article 3b(2) E.C.) does not establish any powers in favour of the European Community, but sets limits on the exercise of powers already given elsewhere. [101]

Constitutional law. Germany. European Union. Proportionality.

The principle of proportionality (Article 3b(3) E.C.), in contrast to the subsidiarity principle in the narrower sense of Article 3b(2), is applicable to all Community measures, whether based on an 'exclusive', or on some other, Community competence. [104]

The Treaty of European Union was signed in Maastricht on 7 February 1992 by all the member-States of the European Communities. Germany completed the legislative part of its ratification process on 18 December 1992, amending its Constitution on 21 December 1992 by the Constitutional Amendment (European Union) Act 1992, which added new Articles 23 and 45, and amended Articles 24, 28, 50, 52, 88 and 115. However, before the Federal President signed the formal instrument of ratification, constitutional complaints (Verfassungsbeschwerden) were lodged alleging that ratification would breach the federal Constitution. The second chamber of the Federal Constitutional Court on 12 October 1993 held that ratification was compatible with the Constitution. Thereupon the German ratification was immediately lodged with the Italian Government, the depositary State, thereby completing the 12 ratifications. In accordance with Article R(2) of the Treaty the Treaty then duly came into force on 1 November 1993. The complex nature of this judgment and the density of its analysis and argument make it very difficult to compile a normal narrative

headnote. The main features have been picked out above in the propositional headnotes, but readers are advised to give careful attention to the passages adjoining the paragraphs indicated. We shall here give only an outline of this very carefully structured judgment.

Part A

Facts, argument and procedure.

Part B

1. Admissibility of the complaint of infringement of the right in Article 38 of the Constitution to participate in the election of members of the Bundestag. The substance of this complaint is dealt with in Part C.

2. Inadmissibility of all other complaints:

(a) Articles 12(1) and 14(1) of the Constitution, when *64 considered in the light of the specifically amended Article 88, do not prevent accession to the monetary union nor do they prevent replacement of the Deutsche Mark by the ECU.

(b) The sharing of protection of fundamental rights between Germany and the Community, although no longer being a purely German affair, does not breach the constitutionally protected rights.

(c) Article L TEU does not create a legal lacuna by excluding the jurisdiction of the European Court of Justice as regards measures of the European Union, since the exclusion only applies where the measures have no direct effects on holders of constitutional rights. Any change in that situation would require Treaty amendment and so a fresh ratification scrutiny.

(d) Article 5(1) of the Constitution (freedom of expression) is not interfered with by the addition of Community institutions to the list of targets for political expression or by the multiplicity of languages used within the Union.

(e) Article 138a E.C. does not infringe the right under Articles 9 and 21 of the Constitution to act through political parties, merely because of the latter's European dimension.

(f) Allegations that the rules of the E.U. Treaty infringe the principles of the social state and the federal state are inadmissible under Article 93(1), no. 4a of the Constitution.

3. Inadmissibility of allegation that Articles 23 and 28 of the Constitution, as amended by the Act of December 1992, reduce participation in the democratic process guaranteed by Article 38 of the Constitution.

4. The right to resist under Article 20(4) of the Constitution is irrelevant.

5. Article 79(3) of the Constitution does not prevent proper amendment of the Constitution. Article 146 of the Constitution does not establish any individual justiciable right. Part C

Dismissal of complaint based on infringement of Article 38 of the Constitution.

I --Basic principles

1. Participation in the democratic process must not be voided of content through too all-embracing a transfer of the functions and powers of the German parliament (Bundestag): Articles 38, 23, 79(3) and 20 of the Constitution.

2. It is fundamental to the democratic process that the exercise of state functions and powers be derived from and answerable to the people of the state. But democratic legitimation is differently *65 produced in a community of States: Articles 79(3) and 23 of the Constitution.

3. Exercise of German democratic process is through the Bundestag approving transfer of powers to the Union. Such approval must however be specific to the powers transferred. Consequently there must be certainty at the stage of approval as to what is covered by the approval.

II --Application to present issues

The E.U. Treaty meets the above principles.

1. The member-States, including Germany, remain the ultimate masters of application of the Treaty. The Bundestag thus participates in both formation and application of Community power.

2. The E.U. Treaty meets the requirements of certainty in that it specifies the possible uses which can be made of the sovereign powers granted to the Union. In particular, transition to the third stage of Economic and Monetary Union is not automatic but requires the participation of the member-States in accordance with national constitutional law.

3. The grant of functions and powers to the European institutions under the E.U. Treaty still leaves sufficient functions and powers of substantial political weight to the German Bundestag.

4. The transfer of sovereign powers is limited and its scope legally ascertainable. It is therefore democratically legitimated.

Part D

With regard to the future, and the present weakness of the Union's own democratic processes, what is decisive, from the viewpoint both of the Treaties and of constitutional law, is that the democratic bases of the Union will be built up in step with the integration process, and a living democracy will also be maintained in the member-States as integration progresses.

Representation

Professor Dr. K.A. Schachtschneider for the first complainant.

Hans-Christian Strobele, of the Berlin Bar, and Professor Dr. Ulrich K. Preu for the second, third, fourth and fifth complainants.

The following cases were referred to in the judgment:

Bundesverfassungsgericht

1. 5 BVerfGE 85
2. 28 BVerfGE 17
3. 30 BVerfGE 1
4. 37 BVerfGE 271 (Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel), 29 May 1974: [1974] 2 C.M.L.R. 540. Gaz:D740529 *66
5. 47 BVerfGE 253
6. 52 BVerfGE 303
7. 58 BVerfGE 1
8. 65 BVerfGE 227
9. 68 BVerfGE 1
10. 69 BVerfGE 315
11. 73 BVerfGE 339 (Re the Application of Wünsche Handelsgesellschaft--2 BvR 197/83), 22 October 1986: [1987] 3 C.M.L.R. 225. Gaz:D861022
12. 75 BVerfGE 223

13. 77 BVerfGE 170

14. 83 BVerfGE 60

15. 84 BVerfGE 90

European Court of Justice

16. Zwartveld (C-2/88 Imm), 13 July 1990: [1990] E.C.R. 3367, [1990] 3 C.M.L.R. 457. Gaz:2A/88

Ruling

1. The constitutional complaint of the complainant of the first part against the Act of 28 December 1992 on the Treaty of 7 February 1992 on European Union is dismissed. His constitutional complaint against the Act of 21 December 1992 amending the Constitution is dismissed as inadmissible.

2. The constitutional complaints of the complainants of the second part are dismissed as inadmissible.

Facts

A

These constitutional complaints concern German participation in the founding of the European Union by means of the Act of 21 December 1992 amending the Constitution¹ and the Act of 28 December 1992 on the Treaty of 7 February 1992 on European Union².

I

1. On 7 February 1992 the Treaty on European Union (hereinafter the 'Union Treaty') negotiated by the member-States of the European Communities was signed in Maastricht, Holland. Under the opening Article of the Treaty the process of European integration initiated by the founding of the European Communities has now reached a 'new stage in the process of creating an ever closer union among the peoples of Europe' (Article A(2) *67).

(a) By the Union Treaty the Contracting Parties are establishing a 'European Union' among themselves (Article A(1)). It has the task of organising relations between the member-States and their peoples in a manner demonstrating consistency and solidarity (Article A(3), second sentence). The Union sets itself the objectives, under the more specific provisions of Article B of the Treaty, of creating an area without internal frontiers, establishing an economic and monetary union (in the longer term including a single currency), asserting its identity on the international scene, especially through a common foreign and security policy (in the longer term also by the framing of a common defence policy), introducing a citizenship of the Union, developing co- operation in the areas of justice and home affairs, and maintaining and in full and further developing the 'acquis communautaire'. Under Article F(3) the Union will provide itself with the means necessary to attain its objectives and carry through its policies. The basis of the Union is formed by the three existing Communities (the European Economic Community (EEC) (henceforth the 'European Community' (E.C.)), the European Coal and Steel Community (ECSC) and the European Atomic Energy Community (Euratom)) and will be supplemented by two forms of co-operation introduced by the Union Treaty, the common foreign and security policy (Articles B, second indent, and J) and co-operation on justice and home affairs (Articles B, fourth indent, and K)--the so-called 'three pillars concept' (Article A(3)). The European Council, in which the Heads of State or of Government of the member-States and the President of the Commission meet, will provide the Union with the impetus necessary for its development and define the general political guidelines thereof (Article D).

(b) What has hitherto been the 'European Economic Community' is extended to become a 'European Community' with additional tasks and powers (Article G). Accordingly, the Treaty establishing the European Economic Community (the 'EEC Treaty') is amended. In its new version (as the Treaty establishing the European Community--hereinafter the 'E.C. Treaty') it adheres to the principle of limited individual powers (Articles 3b(1), 4(1), second sentence, 4a, 4b and 189(1) of the E.C. Treaty). Under the principle of subsidiarity (Article 3b(2)) the Community will only take action, in areas not falling within its exclusive competence, if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the member-States and can therefore, by reason of the scale or effects of the proposed action, be better

¹ [1992] I Bgb1. 2086.

² [1992] II Bgb1. 1251.

achieved by the Community. Article 3b(3) goes on to provide that any action by the Community may not go beyond what is necessary to achieve the objectives of the Treaty.

(b.1) The Union Treaty introduces a citizenship of the Union, which derives from the holding of the nationality of a member-State (Article 8 of the E.C. Treaty), sets out the right of free movement and *68 residence (Article 8a), establishes the right to vote and stand as candidate in local elections of the member-State of residence, and also gives the right to vote in European Parliament elections on the basis of residence, freeing it from the requirement of nationality in that case (Article 8b). Every Union citizen is to enjoy subsidiary diplomatic and consular protection from any member-State in accordance with the provisions of Article 8c. In addition the Union Treaty contains a programme for a common visa policy (Article 100c of the E.C. Treaty; Article K(1), no. 2, of the Union Treaty).

(b.2) The Union Treaty establishes further tasks and powers of the European Community in respect of education policy (Article 126 of the E.C. Treaty), vocational-training policy (Article 127), cultural policy (Article 128), public health policy (Article 129), consumer protection (Article 129a) and trans-European networks (Articles 129b to 129d). In Article 130d of the E.C. Treaty and in the Protocol on economic and social co-operation the Contracting Parties agree on a Cohesion Fund, which will make Community funds available for projects relating to the environment and trans-European networks in the area of transport infrastructure.

(b.3) The economic and monetary union planned since 1972 is now introduced through Title VI of the E.C. Treaty. Whereas the economic policies of the member-States are to be co-ordinated in accordance with Articles 102a et seq. and are made subject to broad guidelines from the Community to ensure convergence of the economic performances of the member-States, the monetary policy will be put on a Community basis by stages and placed in the hands of a European System of Central Banks (ESCB) (Articles 105 et seq.). The first stage of economic and monetary union (the convergence stage), which began on 1 July 1990, is intended to complete the European Monetary System (EMS) through the co-operation of all the member-States. It will be followed on 1 January 1994, under Article 109e of the E.C. Treaty, by the second stage (co-ordination stage) which prepares the way for completion of the economic and monetary union. To that end the member-States will have removed by national measures before 1 January 1994 all remaining restrictions on capital and payments movements and any credit facilities with, or privileged access to, central banks in favour of public bodies (Article 109e(2)a, first indent) and will have taken measures to achieve price stability, sound public financing and reasonable levels of government deficit (Article 109e(2)(a), second indent). At the start of the second stage the European Monetary Institute will be established; it is the predecessor of the European Central Bank (ECB) and is to prepare the activities to be taken over by the ECB in the third stage (Article 109f). In the third stage the competences of the member-States over monetary policy as a whole (policies on currency, credit, interest-rates and exchange rates) will be taken over by the Community. To this end *69 the ESCB and the independent ECB will be established (Article 4 in conjunction with Articles 105 et seq. of the E.C. Treaty). Entry into the third stage depends on whether enough member-States satisfy specified requirements on price stability, non-excessive government deficit, exchange-rate stability and interest-rate levels (the convergence criteria) (Article 109j(3) of the E.C. Treaty in conjunction with the Protocol on convergence criteria). By the end of 1996 at the latest the Council of the European Communities (composed of the Heads of State or Government) must decide by qualified majority whether a majority of the member-States fulfil the necessary conditions and whether it is appropriate to enter the third stage. If the Council so decides, the date can be set for the establishment of the ECB and introduction of a common currency (Article 109j(3)). Otherwise the third stage is to start on 1 January 1999 (Article 109j(4)).

(c) Annexed to the Union Treaty is an Agreement on social policy concluded between the member-States other than the United Kingdom of Great Britain and Northern Ireland. Under the Agreement the Community will support and complement the member-States' activities for the improvement, in particular, of the working environment and the shaping of working conditions, the information and consultation of workers, equality of opportunity between the sexes on the labour market and equal treatment at work, and the integration into vocations of persons excluded from the labour market. For these purposes the Council can issue directives laying down minimum requirements, subject to the conditions in Article 2 of the Agreement.

2. The Act of 21 December 1992 to amend the Constitution, which inter alia inserts Articles 23, 28(1), third sentence, 53(3a) and 88, second sentence, into the Constitution, was published in Part I of the Bundesgesetzblatt (Federal Legislative Gazette) for 24 December 1992 and came into force on 25 December 1992³.

³ [1992] I Bgb1. 2086. See also [1993] 2 Commercial Laws of Europe F337, for the text in German, and [1994] 1 Commercial Laws of Europe 1, for an English translation.--Ed.

Article 23(1) of the Constitution as amended by the Act reads as follows: In order to bring a United Europe into being the Federal Republic of Germany will co-operate in the development of the European Union, which is subject to the principles of democracy and of the rule of law, social and federal principles and the principle of subsidiarity, and guarantees a protection of fundamental rights which is essentially comparable with this Constitution. The Federation may transfer sovereign powers for these purposes with the consent of the Bundesrat. Article 79(2) and (3) are applicable in relation to the establishment of the European Union and to amendments of its basic treaty provisions and to similar rules under which the content of this Constitution may be altered or supplemented or which enable such alteration or supplementation to be made.*70 After Article 28(1), second sentence, the following provision was inserted as the third sentence:

In elections for local and district authorities persons having the nationality of a member-State of the European Union shall also be entitled to vote and be candidates in accordance with the provisions of the law of the European Community.

Article 52 of the Constitution was supplemented by the addition of a paragraph (3a), as follows:

In European Union matters the Bundesrat may form a European Chamber, the resolutions of which shall have the effect of resolutions of the Bundesrat; Article 51(2) and (3) shall have corresponding application. To Article 88, on the Bundesbank (German Central Bank), a second sentence was added, as follows: Its functions and powers may, within the framework of the European Union, be transferred to the European Central Bank, which is independent and is subject to the primary objective of price stability.

3. The German Bundestag passed the Act of Accession to the Union Treaty at the final reading on 2 December 1992 by 543 of the 568 votes cast⁴; the Bundesrat gave its assent to the Act unanimously on 18 December 1992⁵. The Act was published in the Bundesgesetzblatt on 30 December 1992 and came into force on the next day⁶. At the session of 2 December 1992 the Bundestag passed a resolution on economic and monetary union, which included the following: ...

3. The German Bundestag recognises that the Treaty on European Union creates a basis for a stable European currency in the future, especially by ensuring the independence of the European Central Bank and the agreement of stability criteria for the member-States taking part.

For these purposes the stability criteria are to be interpreted narrowly and strictly on the transition to the third stage. The decision to move to the third stage can only be taken on the basis of proven stability, concurrence of the basic economic data, and proven durable solidity of the budgetary and financial policy of the member- States taking part. It cannot be taken on the basis of the opportunities that may be available but must be guided by the real economic circumstances. The nature of the criteria means that their fulfilment cannot be verified solely by reference to statistics. That they will be fulfilled on a durable basis must also be substantiated from the progress of the convergence process. The future European currency must be, and remain, as stable as the German Mark.

The German Bundestag will oppose any attempt to relax the stability criteria which were agreed in Maastricht. It will keep watch to see that the transition to the third stage of economic and monetary union is determined strictly in accordance with those criteria.

The transition to the third stage of economic and monetary union also requires an assessment by the German Bundestag. The Federal Government accordingly requires the concurring opinion of the Bundestag for its voting conduct as regards decisions of the Council under *71 Article 109j(3) and (4) of the Treaty establishing the European Union. The opinion to be given by the Bundestag relates to the same subject-matter as the assessment to be made by the Council of the Economic and Finance Ministers and the decision of the Council composed of the Heads of State or Government.

4. The German Bundestag asks the Federal Government to make it clear that it will respect such an opinion of the Bundestag. 5. It asks the Federal Government to inform the other member-States and the European Commission and Parliament of this mode of procedure.

6. The Bundestag asks the Federal Government to lay before it a report annually, beginning in 1994, on the development of convergence in the European Union⁷.

At its session of 18 December 1992 the Bundesrat produced a resolution in largely the same terms⁸.

On 2 April 1993 the Federal Finance Minister, Dr. Waigel, sent a letter to the President of the Bundestag European Committee, Dr. Hellwig, which included the following:

I have already confirmed at the plenary session of the Bundestag on 2 December 1992 that the Federal Government will 'secure the endorsement of the legislative bodies' before taking the important step into monetary union. In so doing I took account of the 'concurring opinion' referred to in the resolutions made in similar terms by the Bundestag and the Bundesrat respectively.

⁴ Sten. Ber. 12/126, p. 10879 Et Seq.

⁵ BRDrucks. 810/92, Sten. Ber. der 650. Sitzung, 18 December 1992.

⁶ [1992] II Bgbl. 1251

⁷ BTDrucks. 12/3906; Sten. Ber. 12/126, p. 1087.

⁸ BRDrucks. 810/92, p. 6.

I have also stated that I am prepared, acting with the Federal Foreign Minister, to inform our Partners in the Community of the procedure agreed between Parliament and the Federal Government. Such information should be given immediately after deposit by the Federal Government of the ratification instrument by which our ratification process will be concluded.

4. Under Article R(1) of the Union Treaty the Treaty must be ratified by all member-States in accordance with their constitutional requirements; the ratification instruments are to be deposited with the Italian Government. After the complainants had applied for an interim injunction to prevent German adherence to the Union Treaty under international law the Federal President stated (through the Head of the Federal Presidential Office) that he would not sign the ratification instrument until the Federal Constitutional Court had decided on the merits. The Federal Government pledged that it would not deposit the instrument before then.

II

The constitutional complaints are directed against the Act of Accession to the Union Treaty and the Act to amend the Constitution. The complainant of the first part objects to a breach of his constitutional rights and equivalent guarantees under Articles 1(1), 2(1), 5(1), 9(1) in conjunction with 21(1), second sentence, 12(1), 14(1), 38(1) and 20(4) in conjunction with 93(1), no. 4 *72, of the Constitution. The complainants of the second part are Members of the European Parliament elected in the Federal Republic of Germany, but make the complaint as citizens of the Federal Republic and are essentially claiming that there is a breach of their rights equivalent to basic rights under Articles 20(4) and 38(1) and (2) of the Constitution.

1.

(a) The first complainant submits that there is a breach of his right under Article 38 of the Constitution, which guarantees every citizen a right to democratically legitimated representation in the German Bundestag, and protects his right to participate in the exercise of state power (Article 20(2), second sentence). That right to participate is said to be substantially diminished because the Union Treaty 'transfers' essential competences of the Bundestag to institutions of the European Communities and in Article F(3) even confers on the Union a power to give itself powers, which it could use to draw further areas of jurisdiction to itself at will. After such an extension of areas of Community competence state power in Germany will essentially no longer be exercised by the elected representatives of the whole German people in the Bundestag, and therefore will no longer be exercised by the German people. There is also said to be a breach of Article 38 of the Constitution because of an insufficient degree of democracy at Community level: the real legislature in the European Union is the Council, which is to say the governments and in the event the heads of government; the European Parliament essentially has only an advisory role. Accordingly the democratic principle and the requirement of administration according to legislation are reversed, because the executive, which implements the laws, itself makes the laws. Nor is this defect compensated for by an adequate degree of participation by the member-States' parliaments in legislation at Community level. By contrast, every citizen has the right (says the complainant) to require that the act of voting retains its essential content, which is to elect the real legislative body. The complainant is further prejudiced as regards his freedom of action as a person entitled to vote and stand as candidate, because Union citizens from other member-States will be granted those rights in German local elections.

(b) The complainant makes the further objection that there is an infringement of his rights under Articles 1(1), 2(1), 5(1), 9(1) in conjunction with 21(1), second sentence, 12(1) and 14(1) of the Constitution. The Act of Accession to the Union Treaty is said to surrender German statehood in numerous areas which are of constitutional relevance, or at least to prejudice it substantially and thus supplant the addressees and guarantors of the constitutional duty to protect basic rights. The protection of human dignity becomes subject to *73 fundamental change if, instead of the German people, the people of a European Union (Articles 8 et seq. of the E.C. Treaty) exercises powers of state, even though the qualitative nature of such protection may not deteriorate. The complainant sees an infringement of his general right of liberty, and in particular of a 'basic right to legislation in accordance with the Constitution', in the fact that after the Union Treaty comes into force legislation will no longer be adequately legitimated under German constitutional law and will not have a sufficient degree of democratic legitimation. In addition he will lose the constitutional protection provided by the Federal Constitutional Court. To the extent that Article L of the Union Treaty excludes the jurisdiction of the Court of Justice of the European Communities (the 'European Court') there is a lacuna in legal protection that is unconstitutional. The complainant argues, furthermore, that there is an infringement of his economic and political freedoms because he will henceforth be subject to European institutions and legislation, and bound into a European entity and its system of political will-formation. That is said to be demonstrated especially by the unconstitutional introduction of a monetary union: every German will lose the economic basis of trust resulting from the specific monetary order built on the German Mark. When the third stage of economic and monetary union starts the

complainant will no longer be able to receive remuneration, keep assets or undertake financial transactions in German Marks. That is a direct and existing infringement of his basic rights under Articles 2(1) and 14 of the Constitution, because on the entry into force of the Union Treaty Germany will enter the monetary union 'automatically' and will no longer be able to leave it; any requirement of prior assent by the Bundestag and Bundesrat will be legally irrelevant as regards the other member-States. The exercise of the German vote in the Council when the third stage of economic and monetary union is decided upon cannot usefully be made the object of a constitutional complaint; furthermore Germany could be out-voted in the Council. The complainant supports his objection based on Article 5(1) of the Constitution on the argument that the conditions for the communication of opinions would be substantially altered if, instead of German institutions, Community institutions will have to be influenced from now on. The complainant also sees in the new Article 138a of the E.C. Treaty an infringement of his constitutionally protected freedom under Article 9(1) in conjunction with Article 21(1), second sentence, of the Constitution to establish and participate in political parties, in so far as the new provision directs parties to establish a European awareness.

(c) Finally, the complainant bases his constitutional complaint on Article 20(4) in conjunction with Article 93(1), no. 4, of the Constitution. He characterises those provisions as containing the *74 attribution of an extra-ordinary jurisdiction to the Constitutional Court, in its capacity as 'protector of the constitutional order', to make other remedies available on the application of any German if there is a threat that the constitutional foundations laid down in Article 20(1) to (3) will be removed. The effect of the rule of peaceful conduct is that all Germans must be able to claim those remedies in order to make unnecessary the breach of the peace entailed by an assertion of the right to resist under Article 20(4). The complainant sees an attempt to remove the established order of the constitution especially in individual amendments to the Constitution made by the Act of 21 December 1992, which he also attacks as unconstitutional legislation. He says that Article 23 in its new form does not provide any constitutional basis for the granting of sovereign powers because it is itself unconstitutional. It recognises the Federal Government's sole power of decision as regards German participation in the legislation of the European Union. In view of the authority allowed to the Federal Chancellor to give guidelines and of his legal status in relation to the Ministers, a principle of pure executive leadership is in the event being adopted into the Constitution. The complainant also regards it as an infringement of his voting rights that the newly introduced Article 28(1), third sentence, of the Constitution enables the introduction of local-election voting rights for nationals of other member- States, and Article 8b of the E.C. Treaty makes use of that authorisation. The Act amending the Constitution (Article 23(2) and (4) to (6) of the Constitution as amended in conjunction with Article 52(3a) as amended), the Act of Accession and the Union Treaty are also said to contravene the principle of the federal state. Participation in legislation by the Lander is prejudiced, contrary to Article 79(3) of the Constitution; that is not compensated for by the participation rights provided for the Bundesrat by Article 23 as amended. Furthermore the transfer of competences of the Bundesrat to the European Chamber in the new Article 52(3a) diminishes the rights and status of the Lander. The principle of the social state is said to be breached by the Union Treaty because Germany's social responsibilities are extended to the whole European Union. The principle that Germany is a social state might possibly be overcome by introducing a new constitution, but not by amendment.

2.

(a) In the view of the complainants of the second part the Act of Accession contravenes fundamental principles of the Constitution which, under its Article 79(3), are immune from any amendment. Article 20(4) in conjunction with Article 93(1), no. 4a, enables a constitutional complaint to be made against that being done.

The democratic principle and the separation of powers required by the principle of the rule of law are said to be infringed in so far as the *75 Union Treaty takes extensive legislative areas and the regulation of fundamental matters away from the Bundestag and transfers them to the executive. Community legislation is a matter for the Council and the Commission as parts of the executive; the European Parliament is not a legislature. Unlike the Bundestag, the 'E.C. Legislator' has no direct democratic legitimation at Community level but derives it from the indirect democratic legitimation given to the members of government in the member-States. Furthermore the existence of the Federal Republic of Germany as an independent sovereign State, something which under Article 79(3) of the Constitution likewise cannot be subject to constitutional amendment, will be under threat on the entry into force of the Union Treaty since this effects a new stage of integration, which introduces development towards the covert and irrevocable institution of a European federal state. The creation of the monetary union will also create forms of factual compulsion, which in practical terms will make the journey towards European union irreversible. The functions and powers of the Community would be extended beyond the existing Economic Community to include all matters relevant to the formation of a state. The legislature has thereby accorded powers to itself which belong only to the people as the holders of the power to make a constitution. Accordingly, if what is involved is the defence of the constitutional core that cannot be subject to any amendment, every German has a right 'to defend the constitutional order' under Article 20(4) of the Constitution. The reference to the right of resistance among the rights assertable by constitutional complaint in Article 93(1), no. 4, does not only mean that the right to resist can be 'asserted by legal action' as such

(which would be largely meaningless in practice) but offers the constitutional complaint as a possibility of making 'other remedies' available, which counteracts the exercise of the right to resist and, therefore, the danger of civil war.

(b) The complainants also argue specifically that there is a direct and existing breach of their rights equivalent to constitutional rights under Article 38(1) and (2) of the Constitution, rights which by virtue of its Article 93(1), no. 4a, and of section 91 of the Federal Constitutional Court Act can also be asserted by complaint. In their view the Act of Accession to the Union Treaty should not have been passed without legitimation by the people as the holders of the constitution-making power, because, like the new Article 23 of the Constitution, it encroaches on the unamendable constitutional core- element of Article 79(3).

The right to participate in the democratic process of forming the will of the state provided for in Article 38(2) of the Constitution is said to be applicable to plebiscites as well. Therefore, in addition to the individually assertable right to have a parliamentary election carried out and the claim to take part in the democratic exercise of state power, there follows from Article 38 a basic right to have a direct decision by the people carried out as required by the Constitution.

III

1. Of the persons entitled under section 94, in conjunction with section 77, of the Federal Constitutional Court Act to express views to the Court, the Federal Government, the Bundestag and the Bundesrat have stated opinions. They regard the present constitutional complaints as inadmissible or at least as unfounded.

2. The Court has heard, as qualified informants on questions of economic and monetary union, the President of the Bundesbank, Prof. Helmut Schlesinger, and the Director of the Bundesbank, Dr. Wolfgang Rieke. At the Court's request the Commission of the European Communities sent the head of its legal service, Director-General Jean-Louis Dewost, to take part in the oral procedure. He gave his views on the interpretation of specific provisions of the Treaty.

JUDGMENT

B

[1] The only constitutional complaint which is admissible in the present case is that of the complainant of the first part against the Act of Accession to the Union Treaty in so far as he objects to an infringement of rights under Article 38 of the Constitution. In other respects the complaints are inadmissible.

[2] A constitutional complaint is only admissible if the complainant asserts that through the act of sovereign power in issue he has suffered a direct and presently existing infringement of a right which can be subject to constitutional complaint (Article 93(1), no. 4a, of the Constitution, section 90(1) of the Federal Constitutional Court Act). The complainant must make a sufficiently substantiated case to show that such an infringement appears possible⁹.

1

[3] The first complainant has made out a case to show that the Act of Accession to the Union Treaty is capable of infringing the right conferred on him by Article 38(1) of the Constitution.

[4] (a) Article 38(1) and (2) of the Constitution guarantees to Germans entitled to vote the individually assertable right to participate in the election of deputies to the German Bundestag¹⁰. In the act of voting the power of the state proceeds from the people. The Bundestag then exercises state power as a legislative body, which also chooses the Federal Chancellor and controls the government (Article 20(2), first and second sentences). Article 38 not only contains a safeguard to ensure that the citizen is accorded the right to elect the German Bundestag and that in the election the constitutional principles of electoral law will be upheld, the safeguard also extends to the fundamental democratic content of that right: what is guaranteed to Germans entitled to vote is the individually assertable right to participate in the election of the Bundestag and thereby to co-operate in the legitimation of state power by the people at federal level and to have an influence over its exercise. In this respect the right no doubt requires more detailed definition. In the present case that is only necessary in so far as the exercise of sovereign power by supra-national organisations in the context of achieving a united Europe (Article 23) is in issue.

[5] If the Bundestag surrenders functions and powers, especially on legislation and the choice and control of other persons exercising state authority, that affects the matters to which the democratic content of Article 38 of the

⁹ See 28 BVerfGE 17 at 19; 52 BVerfGE 303 at 327; 65 BVerfGE 227 at 232 Et Seq.

¹⁰ See 47 BVerfGE 253 at 269.

Constitution relates. As regards the European Union and the Communities belonging to it, Article 23(1) of the Constitution enables the federal legislature, under the conditions there specified, to grant the Union the right to exercise sovereign powers independently up to the limits imposed by Article 79(3) (third sentence of Article 23(1)). This constitutional provision was created by the legislature in the course of constitutional amendment specifically for the purposes of European integration and the progress thereof. In so doing, it also defines the substance of the guarantee provided by the right established under Article 38. This Article excludes the possibility, in matters to which Article 23 applies, of reducing the content of the legitimation of state power and the influence on its exercise provided by the electoral process by transferring powers to such an extent that there is a breach of the democratic principle in so far as it is declared unassailable by Article 79(3) in conjunction with Article 20(1) and (2).

[6] The complainant's right arising from Article 38 of the Constitution can therefore be infringed if the exercise of the powers within the competence of the Bundestag is transferred to an institution of the European Union or European Communities formed by the member-States' governments to such an extent that the minimum requirements, which under Article 20(1) and (2) in conjunction with Article 79(3) may not be dispensed with, for the democratic legitimation of the sovereign power exercised in respect of citizens are no longer satisfied.

[7] (b) The complainant, citing estimates by E.C. Commission President Delors¹¹ and by Commissioner Bangemann¹², submits that at present already nearly 80 per cent. of regulations in the economic *78 sphere are determined by Community law and nearly 50 per cent. of all German legislation is occasioned by Community law. He says that the Union Treaty will now substantially extend these areas of competence of the Council as an executive organ with legislative power, and will deprive the Bundestag of decision-making competence over a wide range, especially in the context of the future monetary union--which will in fact lead to an economic and social union--and of educational and vocational training policy, cultural policy, health policy, consumer protection, visa policy, the construction and extension of trans-European networks in the area of transport, telecommunications and energy infrastructures, and industrial policy. For these purposes the Treaty establishes the majority principle in the Council for a range of competences, and thus allows legislation by the executive as regards Germany even against the will of the German organs concerned. In the monetary union monetary policy will be withdrawn from any parliamentary influence and other democratic legitimation. The powers and competences of the Bundestag will finally become devoid of all substance as a result of Article F(3) of the Union Treaty, which gives the Union a power to extend its own powers, since it enables it to provide itself with any necessary powers and competences.

[8] Finally the complainant submits that the Union Treaty is subject to a dynamic of constant and irreversible extension of areas of jurisdiction; that arises in particular from Articles B(1), fifth indent, and C, as well as from the Protocol on the transition to the third stage of economic and monetary union.

[9] (c) In the event it appears possible on the arguments set out above that the Act of Accession to the Union Treaty is an infringement of the complainant's rights under Article 38 of the Constitution.

2

[10] The first complainant's constitutional complaint is inadmissible in so far as he claims that there is an infringement of his basic rights under Articles 1(1), 2(1), 5(1), 12(1) and 14(1) of the Constitution.

[11] (a) In so far as he submits that there is an infringement of his basic rights under Articles 12(1) and 14(1) of the Constitution because of the legislative assent to the monetary union, it is not evident in the first place that these basic rights exclude the replacement of the German Mark by the ECU. Article 88, second sentence, provides expressly that the functions and powers of the Bundesbank can be transferred to the European Central Bank within the framework of the European Union. By the creation of this power the development of a European monetary union is given constitutional recognition; this provision, introduced specifically for the foundation of the European Union, also means that the implementation of the power is not in itself contrary to basic rights.

[12] (b) The complainant's objection that his basic rights are *79 infringed because henceforth they are not guaranteed solely for Germany and through German institutions, and that as European rights they will have a different content, is likewise inadmissible. The readiness to accept European integration stated in the Preamble to the Constitution and regulated in Articles 23 and 24 of the Constitution has the consequence that constitutionally relevant encroachments

¹¹ Address to European Parliament, 4 June 1988, [1988] E.C. Bull. No. 7/8, p. 124.

¹² Bruckner (ed.), Europa transparent: Informationen, Daten, Fakten, Hintergründe (1991), P. 5.

could also come from European institutions, and a protection of basic rights must therefore be guaranteed for the whole of the area to which such measures apply; as a result there is an extension, in particular, of the territorial area to which rights to liberty apply and of the comparative aspects of the application of the rule of equal treatment.

[13] That does not entail a decrease in constitutional standards to a substantial degree. The Federal Constitutional Court by its jurisdiction guarantees¹³ that an effective protection of basic rights for the inhabitants of Germany will also generally be maintained as against the sovereign powers of the Communities and will be accorded the same respect as the protection of basic rights required unconditionally by the Constitution, and in particular the Court provides a general safeguard of the essential content of the basic rights. The Court thus guarantees this essential content as against the sovereign powers of the Community as well¹⁴. Acts done under a special power, separate from national powers of the member-States, exercised by a supra-national organisation also affect the holders of basic rights in Germany. They therefore affect the guarantees of the Constitution and the duties of the Constitutional Court, the object of which is the protection of constitutional rights in Germany--in this respect not merely as against German state bodies¹⁵. However, the Court exercises its jurisdiction on the applicability of secondary Community legislation in Germany in a 'relationship of co-operation' with the European Court, under which that Court guarantees protection of basic rights in any particular case for the whole area of the European Communities, and the Constitutional Court can therefore restrict itself to a general guarantee of the constitutional standards that cannot be dispensed with¹⁶.

[14] (c) The complainant's objection that Article L of the Union Treaty creates an unconstitutional legal lacuna, because it establishes no jurisdiction for the European Court as against the measures of the European Union, is incorrect. Article L only excludes the European Court's jurisdiction in respect of provisions of the Union Treaty which do not confer powers on the Union to take measures which have direct effects on holders of constitutional rights within the territory of member-States. If at some future date measures of constitutional relevance are envisaged in the course of co-operation under Articles J and K *80 , a further assenting Act will be needed for those purposes, which can then be scrutinised in its turn to see if there are any gaps in legal protection.

[15] The Federal Government has confirmed that it is the unanimous intention of the member-States that Article L will not lead to any gaps in legal protection.

[16] (c.1) Articles A to F of the Union Treaty contain no bases for conferring powers to take action of any kind as against holders of constitutional rights. In the Titles on the common foreign and security policy (Title V, Articles J to J.11) and co-operation in the fields of justice and home affairs (Title VI, Articles K to K.9) the Council is only empowered initially to adopt joint positions (Articles J.2(2) and K.3(2)(a)). The taking of such positions will from the outset be devoid of any binding effects on individuals which are of constitutional relevance.

[17] (c.2) In so far as it is provided in Titles V and VI of the Union Treaty that the Council may adopt joint action and take joint measures to implement co-operation on justice and home affairs, the position is no different in the end. Regardless of the binding effect on the member-States in international law of such Council decisions¹⁷, which must either be taken unanimously or at least refer back to a Council decision taken unanimously (Articles J.3, no. 2, J.8(2), K.3(2)(b), K.4(3)) no law may be passed by them which is directly applicable in member-States and can claim precedence.

[18] Although the areas of the foreign and security policy and the justice and home affairs policy are objects of European co-operation within the framework of the Union, the member-States have deliberately not incorporated them into the supra-national jurisdiction system of the European Communities. As early as in the provisions on the bases of the Union in Article A(3) there is a distinction between the (supra-national) European Communities and their supplementation by the policies and forms of co-operation newly introduced under Titles V and VI of the Union Treaty. This separation is confirmed by Article E with its provision that the European institutions exercise their powers either under the conditions of the primary law of the European Communities in its amended form or in accordance with the other provisions of the Union Treaty. The Council therefore cannot rely on the supra-national forms of action under European Community law if it wishes to take measures in the areas of the foreign and security policy or justice and home affairs. The position is only different in so far as the Treaty declares provisions of the E.C. Treaty to be applicable in those areas. Although Articles J.11(1) and K.8(1) do impose such an extension of the validity of some provisions of the E.C. Treaty, they exclude its Article 189, which defines the E.C. legislation that has direct effect.

¹³ See 37 BVerfGE 271 At 280 et Seq.; 73 BVerfGE 339 (Wunsche) at 376 et Seq.

¹⁴ See 73 BVerfGE 339 At 386.

¹⁵ Diverging from 58 BVerfGE 1 at 27.

¹⁶ See 73 BVerfGE 339 At 387.

¹⁷ See Article J.3, No. 4; Without Express Provision to That Effect, Article K.3(2)(b).

*81 [19] In the case of Title VI, Article K.9 ensures that the transfer of inter-governmental co-operation in the relevant areas to the supra-national jurisdiction of the European Community has to be preceded by a (simplified) amendment to the Treaty, which all member-States must ratify.

[20] (c.3) If Article K.2(1) of the Union Treaty provides that the justice and home affairs matters subject to co-operation are to be dealt with in compliance with the European Human Rights Convention and the Geneva Convention on the Status of Refugees, this does not allow the conclusion that under Title VI of the Union Treaty direct encroachments on constitutional rights are to be permitted. Rather, Article K.2(1) confirms the human rights obligations to which all the member-States are subject and which have to be taken into account as soon as the question of direct infringements of basic rights arises in the case of common measures if their implementation by member-States could lead to infringements of basic rights.

[21] (c.4) If co-operation in the areas of justice and home affairs under Article K.3(2)(c) takes place in the form of international conventions, these could confer a jurisdiction on the European Court (Article L.(b)). To that extent no unconstitutional lack of legal protection can be said to arise at present. Furthermore such conventions require a further act of ratification, which will also be subject to review by the Constitutional Court when it arises.

[22] (c.5) If common actions and measures under Titles V and VI of the Union Treaty impose obligations, binding in international law, on member-States to make encroachments which are of constitutional relevance, all such encroachments, if they occur in Germany, will be subject to review in full by the German courts. In this respect the protection of basic rights provided by the Constitution is not displaced by supra-national law that could claim precedence. An international law obligation on the Federal Republic of Germany cannot in any event diminish the existing protection of basic rights available as against German state powers, and therefore any European action decided on under Titles V or VI which would require an infringement of basic rights by the exercise of German sovereign power also cannot restrict the protection of such rights by the German courts. In this respect the position is no different from that with a traditional international convention: in so far as its internal implementation would infringe constitutional rights it is prohibited by constitutional law.

[23] If a Council decision made in accordance with Titles V or VI of the Union Treaty should be implemented by a legal measure of the European Communities (for example, under Article 228a of the E.C. Treaty) and constitutional rights were infringed as a result, then the European Court or alternatively the Federal Constitutional Court *82 would offer adequate protection of those rights¹⁸. Here, too, the Constitutional Court and the European Court are in a relationship of co-operation for the guarantee of constitutional protection, under which they complement one another.

[24] (d) The breach of Article 5(1) of the Constitution alleged by the complainant as a result of the Act of Accession to the Union Treaty is excluded in limine. The freedoms of communication protect the unhindered participation in any public communications process, but do not guarantee any particular consequence from such participation or any specific conditions under which exchanges of opinion take place. The freedom of individuals to inform themselves from European sources and to attempt to influence the public in other member-States and thus to influence the European communications process is not interfered with by the Treaty and its accompanying instruments; the language problems arising in this regard are due to the multiplicity of languages within the European Union, and for that reason alone cannot be classed as a hindrance to the exercise of this basic right.

[25] (e) In so far as the complainant argues that Article 138a of the E.C. Treaty is contrary to Articles 9 and 21 of the Constitution his complaint is likewise inadmissible. It is not evident why the recognition of political parties as a factor of integration into the Union should cause legally binding handicaps or restrictions on the programmes and objectives of any particular party or its members.

[26] (f) In so far as the complainant regards the rules of the Union Treaty as infringing the principles of the social state and the federal state, these objections are not admissible under Article 93(1), no. 4a, of the Constitution.

3

[27] The first complainant's constitutional complaint directed against the Act of 21 December 1992 to amend the Constitution in reliance on Article 38 of the Constitution is inadmissible so far as concerns the insertion by the Act of the new Articles 23 and 28, third sentence.

¹⁸ See 73 BVerfGE 339 At 387.

[28] (a) Article 23(1) of the Constitution confers a special power to co-operate in the development of the European Union in order to bring about a United Europe¹⁹. But under Article 23(1), third sentence, that power is expressly confined within the limits of Article 79(3), and they define the restrictions on the power to make constitutional amendments. Therefore no discrepancy can arise between the essential democratic content of Article 38 and the new Article 23.

[29] (b) The objection that the underlying principles of the European Union referred to in the first sentence of the new Article 23(1) of the Constitution have not in fact materialised is likewise inadmissible. It is not possible to deduce from Article 38 what specific form the institutional framework of the European Union should take.

[30] (c) The complainant's objection is also inadmissible in so far as he claims that his right to vote and stand as candidate in elections is infringed because the new Article 28(1), third sentence, introduced by the Constitutional Amendment Act of 21 December 1992 confers a power, of which Article 8b of the E.C. Treaty has made use, to give nationals of other member-States a right to vote in local elections. Article 38 of the Constitution at any rate in the case of local elections grants no right enabling an individual to protect himself as regards the exercise of his right to vote or be a candidate by an 'aggrieved competitor's action' under election law against non-German candidates or electors.

4

[31] In so far as the complaints are based on Article 20(4) of the Constitution and seek 'other remedies' from the Federal Constitutional Court, they are likewise inadmissible. Whatever interpretation is to be given to Article 20, the problem of the right to resist does not arise apart from any other reasons because, as the present proceedings show, opportunities are available to the complainants within the rule of law to oppose the ratification of the Treaty on European Union.

5

[32] The constitutional complaints of the complainants of the second part are inadmissible as a whole. In so far as they rely on Article 20(4) of the Constitution, that has already been explained. The further objections, to the effect that the Act of Accession to the Union Treaty infringes a right available to them under Article 38 directly or by analogy to have a national referendum carried out because the Act encroaches on the core of the Constitution that under Article 79(3) may not be amended, is likewise inadmissible. The Constitution only protects individual rights within the framework of the constitutional order, but not as regards the procedure for introducing, or the content of, a new constitution. Article 79(3) binds the development of the German state to the essential content of the constitutional order specified therein, and seeks thus to fortify the constitution in force against a development aimed at a new order, without being able itself to lay down rules binding on the constitution-making power. Accordingly it sets limits on the power to amend the Constitution, and thus formally excludes the possibility of legitimising by way of plebiscite any amending legislation which encroaches on the core of the Constitution that may not be amended. Article 146 also does not establish any individual right assertable by constitutional complaint (Article 93(1), no. 4a).

C

[33] In so far as the first complainant's constitutional complaint is admissible it is unfounded. In the present case the Federal Constitutional Court can only scrutinise the granting of sovereign powers to the European Union and the Communities belonging to it by reference to the standard of the guarantees contained in Article 38 of the Constitution (see I below). The content of those guarantees is not infringed by the Act of Accession, as appears from the content of the Treaty: the Treaty establishes a European federation of states, which is based on the member-States and respects their identities; it concerns Germany's membership of supra-national organisations, not its belonging to a European state (II.1 below). The functions of the European Union and the powers granted for their implementation are regulated in a sufficiently foreseeable manner, because the principle of limited individual powers is adhered to, no power to extend its powers is conferred on the European Union, and the claiming of further functions and powers by the European Union and the Communities is made dependent on supplementation and amendment of the Treaty, and is therefore subject to the affirmative decision of the national parliaments (II.2). The scope of the functions and powers granted to the European Union and to the institutions of the European Communities and the means of formation of political intentions laid down by the Treaty do not at present have the effect of reducing the content of the decision-

¹⁹ See Government Reasons for the Draft Act, BTDrucks. 12/3338, p. 6.

making and supervisory powers of the Bundestag to an extent which infringes the democratic principle in so far as it is declared by Article 79(3) of the Constitution to be unassailable (II.3).

I

1

[34] The right guaranteed by Article 38 of the Constitution to participate in the legitimation of state power and to acquire influence on its exercise through the electoral process excludes the possibility, within the sphere of application of Article 23, of its being made so devoid of content through the transfer of the functions and powers of the Bundestag that there is a breach of the democratic principle in so far as it is declared by Article 79(3), in conjunction with Article 20(1) and (2), to be unassailable (see B.1.a above).

2

[35] It is part of the unassailable content of the democratic principle *85 under Article 79(3) of the Constitution that the carrying-out of state functions and the exercise of state powers is derived from the people of the state and the persons doing so are fundamentally answerable to the people. That necessary relationship of responsibility is established in various ways and not just in one specific form. What is decisive is that a sufficiently effective content of democratic legitimation, that is, a specific level of legitimation, should be achieved²⁰.

[36] (a) If the Federal Republic of Germany becomes a member of a community of states that is entitled to act on its own in sovereign matters, and if that community is given the right to exercise independent sovereign powers--both of which are expressly allowed by the Constitution for the purposes of achieving a united Europe (Article 23(1) of the Constitution)--then democratic legitimation for these purposes cannot be produced in the same way as it is within a national order governed uniformly and conclusively by a state constitution. If sovereign rights are granted to international institutions, then the representative body elected by the people--the German Bundestag--and along with it the citizens entitled to vote, necessarily lose some influence on the processes of political will-formation and decision-making. Any entry into an international community has the consequence that a member of the community is bound to adhere to its decisions. The member-State--like its citizens--no doubt also obtains possibilities of exercising influence through participation in the formation of the community's political will in order to pursue common (and also its own) purposes, the outcome being binding on all the member-States and therefore presupposing a recognition by each of its own obligation.

[37] This readiness to accept obligations within the international community and within the narrower legal association of a community of particular States is a characteristic of a democratic state which--as the Preamble to the Constitution presupposes and Articles 23 and 24 expressly provide--wishes to participate in international institutions as an equal member, especially in the development of the European Union. The member-States participate in the formation of the will of the association of States in accordance with its rules of organisation and procedure, but are then obliged by the results of such will-formation regardless of whether or not those results are in fact attributable to the nature of their own participation. The conferring of sovereign powers has the consequence that their exercise no longer depends solely on the will of one member-State all the time. To see that as a breach of the constitutional principle of democracy would not only contradict the openness of the Constitution to integration, which was intended, and stated expressly, by the makers of the Constitution in 1949; it would also entail a conception of democracy that would make every democratic state incapable of any integration going *86 beyond the principle of unanimity. Unanimity as a universal requirement would inevitably set the wills of the particular States above that of the community of States itself and would put the very structure of such a community in doubt. The wording and sense of Articles 23 and 24 show that such a result is not intended. The conferring of sovereign powers, which those Articles authorise, requires a prior legislative resolution. The requirement of a statute (Articles 23(1), second sentence, and 24(1)) gives the political responsibility for conferring sovereign rights to the Bundestag (together with the Bundesrat) as the national representative body; it has to debate the wide-ranging consequences (not least for the competences of the Bundestag itself) bound up with the assent to such a course, and has to reach a decision on them. In the statute assenting to accession to a community of States is found the democratic legitimation both of the existence of the community of States itself and of its powers to take majority decisions which are binding on the member-States. In any event the majority principle, in accordance with the requirement of mutual consideration entailed by loyalty to the community, finds its limits in the constitutional principles and basic interests of the member-States.

²⁰ See 83 BVerfGE 60 At 72.

[38] (b) The democratic principle thus does not prevent the Federal Republic of Germany from becoming a member of a community of States (organised on a supra-national basis). But it is a pre-condition for membership that a legitimation and an influence proceeding from the people is also secured inside the federation of States.

[39] (b.1) The European Union is, according to its understanding of itself as a union of the peoples of Europe (Article A.2 of the Union Treaty), a federation of democratic States whose objectives include a dynamic development (see e.g. Articles B.1, last indent, and C(1)). If the Union carries out sovereign tasks and exercises sovereign powers for those purposes, it is first and foremost the national peoples of the member-States who, through their national parliaments, have to provide the democratic legitimation for its so doing.

[40] At the same time, with the building-up of the functions and powers of the Community, it becomes increasingly necessary to allow the democratic legitimation and influence provided by way of the national parliaments to be accompanied by a representation of the peoples of the member-States through a European Parliament as the source of a supplementary democratic support for the policies of the European Union. With the establishment of union citizenship by the Maastricht Treaty, a legal bond is formed between the nationals of the individual member-States which is intended to be lasting and which, although it does not have a tightness comparable to the common nationality of a single state, provides a legally binding expression of the degree of de facto community already in existence (see especially Article 8b(1) and (2) of the E.C. Treaty). The influence *87 flowing from the citizens of the Union can eventually become a part of the democratic legitimation of the European institutions to the extent that the conditions necessary for this purpose are fulfilled on the part of the peoples of the European Union.

[41] Democracy, if it is not to remain a merely formal principle of accountability, is dependent on the presence of certain pre-legal conditions, such as a continuous free debate between opposing social forces, interests and ideas, in which political goals also become clarified and change course [FN21] and out of which comes a public opinion which forms the beginnings of political intentions. That also entails that the decision-making processes of the organs exercising sovereign powers and the various political objectives pursued can be generally perceived and understood, and therefore that the citizen entitled to vote can communicate in his own language with the sovereign authority to which he is subject²¹.

[42] Such factual conditions, in so far as they do not yet exist, can develop in the course of time within the institutional framework of the European Union. Such development depends to no small extent on there being a process for imparting the objectives of the Community institutions and the effects of their decisions to the individual nations. Parties, associations, the press and broadcasting organs are both a medium as well as a factor of this process, out of which a European public opinion may come into being (see Article 138a of the E.C. Treaty). The European Council is also eager for more openness and transparency in the European decision-making process²².

[43] (b.2) In the federation of States formed by the European Union, therefore, democratic legitimation necessarily comes about through the feed-back of the actions of the European institutions into the parliaments of the member-States; and within the institutional structure of the Union there is the additional factor (increasing to the extent that the European nations grow closer together) of the provision of democratic legitimation by way of the European Parliament elected by the citizens of the States. Already at the present stage of development the legitimation provided by the European Parliament has a supporting function, which could become stronger if it were to be elected by equivalent electoral rules in all the member-States in accordance with Article 138(3) of the E.C. Treaty and if its influence on the policies and legislation of the European Community were to increase. What is decisive is that the democratic bases of the European Union are built-up in step with integration, and that as integration proceeds a thriving democracy is also maintained in the member-States. An excess weight of functions and powers within the *88 responsibility of the European federation of States would effectively weaken democracy at national level, so that the parliaments of the member-States could no longer adequately provide the legitimation for the sovereign power exercised by the Union.

[44] If the peoples of the individual States provide democratic legitimation through the agency of their national parliaments (as at present) limits are then set by virtue of the democratic principle to the extension of the European Communities' functions and powers. Each of the peoples of the individual States is the starting point for a state power relating to that people. The States need sufficiently important spheres of activity of their own in which the people of each can develop and articulate itself in a process of political will-formation which it legitimates and controls, in order

²¹ See 5 BVerfGE 85 At 135, 198 and 205; 69 BVerfGE 315 At 344 et Seq.

²² See Birmingham declaration: 'A Community Close to its Citizens', nos. 2, 3, BullBReg. No. 115 of 23 October 1992, p. 1058; Final Conclusions of the European Council Presidency in Edinburgh, 11/12 December 1992, Pt. A, Section 7, and Annex 3, BullBReg. No. 140 of 28 December 1992, pp. 1278, 1284 Et Seq.

thus to give legal expression to what binds the people together (to a greater or lesser degree of homogeneity) spiritually, socially and politically²³.

[45] From all that it follows that functions and powers of substantial importance must remain for the German Bundestag.

[46] (c) The exercise of sovereign power through a federation of States like the European Union is based on authorisations from States which remain sovereign and which in international matters generally act through their governments and control the integration process thereby. It is therefore primarily determined governmentally. If such a community power is to rest on the political will-formation which is supplied by the people of each individual State, and is to that extent democratic, that presupposes that the power is exercised by a body made up of representatives sent by the member-States' governments, which in their turn are subject to democratic control. The passing of European legal regulations, too, may (without prejudice to the consequent need for a democratic control of the governments) lie with an institution composed of representatives of the member-States' governments, that is to say, on an executive basis, to a greater extent than would be constitutionally acceptable at national level.

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[47] Because the German elector essentially exercises his right to participate in the democratic legitimation of the institutions and agencies entrusted with sovereign powers by means of the elections for the German Bundestag, the Bundestag must also decide on German membership of the European Union and on its continuation and development.

[48] There is accordingly a breach of Article 38 of the Constitution if an Act that opens up the German legal system to the direct validity and application of the law of the (supra-national) European Communities does not establish with sufficient certainty the powers that are *89 transferred and the intended programme of integration²⁴. If it is not clear to what extent and degree the German legislature has assented to the transfer of the exercise of sovereign powers, then it will be possible for the European Communities to claim functions and powers that were not specified. That would be equivalent to a general enablement and would therefore be a surrender of powers, something against which Article 38 of the Constitution provides protection.

[49] In view of the fact that the text of an international treaty must be worked out between the parties, the same requirements cannot be set for the certainty and tightness of the rules of a treaty as are imposed in the case of an Act by the requirements of parliamentary jurisdiction²⁵. What is decisive is that Germany's membership and the rights and duties that follow therefrom (and especially the immediately binding legal effect within the national sphere of the Communities' actions) have been defined in the Treaty so as to be predictable for the legislature and are enacted by it in the Act of Accession with sufficient certainty²⁶. That also means that subsequent important alterations to the integration programme set up in the Union Treaty and to the Union's powers of action are no longer covered by the Act of Accession to the present Treaty²⁷. Thus, if European institutions or agencies were to treat or develop the Union Treaty in a way that was no longer covered by the Treaty in the form that is the basis for the Act of Accession, the resultant legislative instruments would not be legally binding within the sphere of German sovereignty. The German state organs would be prevented for constitutional reasons from applying them in Germany. Accordingly the Federal Constitutional Court will review legal instruments of European institutions and agencies to see whether they remain within the limits of the sovereign rights conferred on them or transgress them²⁸.

II

[50] The Union Treaty satisfies the above-stated requirements in so far as it falls to be scrutinised in the present proceedings.

²³ See H. Heller, *Politische Demokratie und soziale Homogenität*, Gesammelte Schriften, Vol. 2 (1971) at p. 427 Et Seq.

²⁴ See 58 BVerfGE 1 At 37.

²⁵ See 77 BVerfGE 170 At 231 et Seq.

²⁶ See 58 BVerfGE 1 At 37; 68 BVerfGE 1 At 98 et Seq.

²⁷ See *Ibid.*; Mosler in *Handbuch des Staatsrechts*, Vol. VII (1992) s. 175, Note 60.

²⁸ See 58 BVerfGE 1 At 30 et Seq.; 75 BVerfGE 223 At 235, 242.

[51] The Union Treaty (as explained) establishes a federation of States for the purpose of realising an ever closer union of the peoples of Europe (organised as States) and not a state based on the people of one European nation (Article A of the Union Treaty). Given that subject-matter, the question raised by the first complainant as to whether the Constitution allows or prohibits German membership of a European state does not arise. All that has to be scrutinised is the Act assenting to German membership of a federation of States.

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[52] (a) The member-States have established the European Union in order to exercise a part of their functions in common and to that extent to exercise their sovereignty in common. In their resolution made on 11 and 12 December 1992 in Edinburgh²⁹ the heads of state and government united in the European Council stressed that in the context of the Treaty on the European Union independent and sovereign States have resolved of their own free will to exercise some of their powers in common consistently with the existing Treaties. Accordingly the Union Treaty takes account of the independence and sovereignty of the member-States, since it obliges the Union to respect the national identities of its member-States (Article F(1) of the Union Treaty³⁰), it equips the Union and the European Communities only with specific competences and powers in accordance with the principle of limited individual competences (Article E of the Union Treaty, Article 3b(1) of the E.C. Treaty), and then establishes the principle of subsidiarity for the Union (Article B(2) of the Union Treaty) and for the European Community (Article 3b(2) of the E.C. Treaty) as a binding principle of law.

[53] As to the question of where a process of European integration will eventually lead after further amendments to the Treaties, the term 'European Union' may indicate a concern for further integration, but as regards the intended objective the question is ultimately open³¹. In any event the establishment of a 'United States of Europe', in a way comparable to that in which the United States of America became a state, is not at present intended³². The new Article 88-1 inserted into the French Constitution in view of the Union Treaty also speaks of member-States which exercise some of their competences in common within the European Union and the European Communities.

[54] The competences and powers which are granted to the European Union and the Communities belonging to it remain essentially the activities of an economic union in so far as they are exercised through the implementation of sovereign rights. The central areas of activity of the European Community in this respect are the customs union and the free movement of goods (Article 3(a) of the E.C. Treaty), the internal market (Article 3(c)), the assimilation of laws to ensure the proper functioning of the common market (Article 3(h)), co-ordination of the member-States' economic policies (Article 3a(1)), and the development of a monetary union. Outside the European Communities, co-operation stays on an inter-governmental *91 basis; that applies particularly in the case of foreign and security policy and the fields of justice and home affairs (see B.2.c above).

[55] The Federal Republic of Germany, therefore, even after the Union Treaty comes into force, will remain a member of a federation of States, the common authority of which is derived from the member-States and can only have binding effects within the German sovereign sphere by virtue of the German instruction that its law be applied. Germany is one of the 'Masters of the Treaties', which have established their adherence to the Union Treaty concluded 'for an unlimited period' (Article Q) with the intention of long-term membership, but could also ultimately revoke that adherence by a contrary act. The validity and application of European law in Germany depend on the application-of-law instruction of the Accession Act. Germany thus preserves the quality of a sovereign State in its own right and the status of sovereign equality with ther States within the meaning of Article 2(1) of the United Nations Charter of 26 June 1945.

[56] (b) The necessary influence of the Bundestag is guaranteed in the first place because, under Article 23(1) of the Constitution, German membership of the European Union, and the further development of the Union through a change in its treaty bases or an extension of its powers all require legislation, which under the conditions of the third sentence of that Article require the qualified majorities of Article 79(2) of the Constitution. In addition, the Bundestag participates in the exercise of German membership rights within the European institutions. It co-operates in the formation of the will of the Federation in these matters in accordance with Article 23(2) and (3) of the Constitution and the Act on the co-operation of the Federal Government and the German Bundestag in European Union matters of 12

²⁹ Part B, Annex 1, BullBReg. No. 142 of 28 December 1992, p. 1290.

³⁰ See too the Final Conclusions of the European Council in Birmingham of 16 October 1992, BullBReg. No. 115 of 23 October 1992, p. 1057.

³¹ Delors, 'Entwicklungsperspektiven der Europäischen Gemeinschaft', in *Aus Politik und Zeitgeschichte* (Annex to 'Das Parlament') 1/93, at P. 4.

³² See Federal Chancellor's speech of 6 May 1993 in Cologne, BullBReg. No. 39 of 17 May 1993, at p. 343 Et Seq.

March 1993³³ passed for the implementation of those provisions. These interrelated powers are to be exercised by the Federal Government and the Bundestag in a spirit of institutional loyalty.

[57] Finally, the Bundestag also influences the European policy of the Federal Government through the latter's responsibility to Parliament (Articles 63 and 67 of the Constitution³⁴). This function of initiation and control, which it basically exercises in public proceedings, causes the general public and the political parties to take positions on the government's European policy and thus becomes a factor in the citizen's voting decisions.

[58] The governments of the member-States also stressed, in connection with the signing of the Union Treaty, the great significance attributed to the parliaments of the individual States in the Union: their Declaration on the role of the parliaments of individual States in the European Union³⁵ stresses the necessity for a greater involvement *92 by the parliaments in the activities of the European Union, and requires the governments to provide the parliaments with information in good time about the Commission's proposals in order to enable them to be examined.

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[59] The Union Treaty satisfies the requirements of certainty because it lays down the future course of implementation, that is to say, the possible uses to be made of the sovereign powers granted, in a manner which is sufficiently predictable³⁶: that establishes that the Act of Accession adheres to the requirements of parliamentary responsibility. There are no grounds for the complainant's concern that the European Community will be able, because of its widely set objectives, to develop into a political union having unspecified sovereign rights without a renewed parliamentary instruction for its laws to apply. The Union Treaty adopts the principle of limited individual empowerment, which already applied to the European Communities, and strengthens it (see a) below); this principle is not put in doubt by Article F(3) of the Union Treaty, which does not give the Union a power to determine its powers ((b) below); the possibilities for conferring further duties and powers on the European Union and the European Community are restricted by sufficiently precise rules ((c) below); in so far as provision is made for evolution into a European monetary union, that is also laid down in a manner which is sufficiently foreseeable ((d), (e), (f) below).

[60] (a) Under Article B(2) of the Union Treaty the objectives of the Union will be achieved as provided in the Treaty and in accordance with the conditions and timetable set out therein. Under Article E the European Parliament, the Council, the Commission and the Court may only act if and in so far as an enabling provision under the Treaties confers competences and powers on them. Under Article D the European Council is restricted to giving the Union the necessary impetus for its development and defining its general political guidelines. If legislative instruments are required, recourse must be had to the existing bases of authorisation under the Treaties.

[61] The opening-up of fields of activity for the European Communities has at all times followed the principle that the Communities may only act in accordance with the Treaty and the timetable laid down therein (Article 3 of the EEC (now E.C.) Treaty; Article 2 of the Euratom Treaty), so that the inference from the existence of the function to the existence of the power is not permissible. The same will apply after the coming into force of the Union Treaty. This principle of limited individual empowerment³⁷ is confirmed in Article 4(1), second sentence, of the E.C. Treaty and *93 Article 3(1), second sentence, of the Euratom Treaty, under which every Community institution acts within the limits of the power conferred on it by the Treaty, and in Article 189(1) of the E.C. Treaty and Article 161(1) of the ECSC Treaty, which only allow legal acts by Community institutions in accordance with the Treaty. The initial clause of Article 3 of the ECSC Treaty, under which the Community institutions are to fulfil their functions within the limits of their respective powers, also remains unaffected by the Union Treaty, as does its Article 5(1), which requires the Community to fulfil its duties with a limited measure of intervention under the conditions laid down in the Treaty.

[62] To those established rules is added the new Article 3a of the E.C. Treaty, which makes it clear as regards the future economic and monetary policies of the European Community that there too the Community may only act in accordance with the provisions of the Treaty and the timetable set out therein. Article 4a extends that principle to the European System of Central Banks and the European Central Bank, and Article 4b extends it to the European Investment Bank.

³³[1993] I Bgb1. 311.

³⁴ See 68 BVerfGE 1 At 109 et Seq.

³⁵ [1992] II Bgb1. 1321.

³⁶ See 58 BVerfGE 1 At 37; 68 BVerfGE 1 At 98 et Seq.

³⁷ See Oppermann, *Europarecht* (1991), note 432.

[63] In the same way the new fundamental principle of Article 3b of the E.C. Treaty emphasises in its first paragraph that the Community may only act within the limits of the powers conferred on, and the objectives assigned to, it in the Treaty. The provisions of the subsidiarity principle (paragraph (2)) and of the rule of proportionality (paragraph (3)) which then follow are formulated as restrictions on the exercise of powers. The European Council in Edinburgh on 11 and 12 December 1992, in the context of an over-all approach to the application of the subsidiarity principle³⁸, stressed that Article 3b(1) of the E.C. Treaty laid down a strict limit on Community action. The requirement of an attribution of powers under the Treaties had always been a basic feature of the Community legal order; the powers of the individual States have always been the rule, those of the Community, the exception.

[64] In addition, the E.C. Treaty makes a clear distinction between the nature and the intensity of the powers conferred in every case. Thus Articles 105 to 109m of the E.C. Treaty mark out the three-stage way to a monetary union in detail, covering the conditions for its creation and its increasing functions; by contrast, the general economic policy essentially remains restricted to a co-ordinating function (Articles 3a and 102a et seq.). In individual fields of activity (Article 3(m), (n), (o), (p) and (s)) the Community has to restrict itself to 'encouragement' or a 'contribution'; here Community measures are only allowed for the strengthening of co-operation between the member-States or for the support or supplementation of their actions³⁹ in the relevant areas. In the new provisions of Articles 126 to 129 the activity of the Community in the areas of general and vocational education and youth, culture, and public health are restricted to encouragement of co-operation between the member-States and support for their measures, and harmonisation of their laws and regulations is expressly excluded. For that reason harmonisation measures for the purposes of the specific objectives of these Articles may not be based on Article 235 of the E.C. Treaty⁴⁰.

[65] (b) This system of rules is not penetrated or unhinged by Article F(3) of the Union Treaty. The requirement of an adequate level of legal certainty for the sovereign rights conferred, and therefore of the existence of parliamentary responsibility as regards the conferring of such rights, would no doubt be breached if Article F(3) established a power to extend its powers in favour of the European Union as a Community of sovereign States. But Article F(3) does not empower the Union to provide itself by its own authority with the financial means and other resources it considers necessary for the fulfilment of its objectives; rather, Article F(3) merely makes a statement of intent in the context of policies and programmes to the effect that the member-States (which form the Union) wish to provide it with adequate resources under whichever particular procedure is necessary for that purpose. If European institutions were to interpret, and act under, Article F(3) in a sense contrary to the content of this Treaty provision as accepted by the German Act of Accession, such action would not be covered by the Act and would therefore not be legally binding within the German member-State. The organs of the German state would have to refuse to supply the personnel to implement any legal instruments based on such a treatment of Article F(3).

[66] (b.1) It is also an argument against the view that Article F(3) confers on the Union a power to take powers that the Union Treaty at no point gives any evidence of an agreed intention of the Contracting Parties to establish an independent legal subject through the Union, which would be the holder of its own powers. In the view of the Federal Government the Union possesses no separate legal personality either in relation to the European Communities or to the member-States. That view was also confirmed by Director-General Dewost in the oral hearing.

[67] (b.2) It is equally difficult to conclude from the wording of Article F(3), under which the Union will provide 'itself' with means, that it is the holder of a power to extend its powers. The Union provides 'itself' with means in the same way as it sets 'itself' objectives in Article B: the Union Treaty does not understand the Union here as being an independent legal subject, but as the designation for the⁹⁵ member-States acting jointly; it is they who provide the Union with objectives and means under the Treaty.

[68] (b.3) An interpretation of Article F(3) which would give the Union a power to extend its powers would also contradict the consistently expressed intention of the Contracting Parties to define by Treaty provisions the principle of restricted specific empowerment and to set clear limits to individual rules conferring powers. If Article F(3) were the basis for a power to take powers, it would cut across the whole system of competences under the Union Treaty, as well as the Treaties establishing the European Communities, the subsequent Treaties, and the Acts amending or supplementing them, and make them largely meaningless. Such an interpretation is also contradicted by Article M, which excludes any implied amendment of the existing Treaties by the Union Treaty.

³⁸ Part A, Annex 1, of the Final Conclusions of the Presidency, BullBReg. No. 140 of 28 December 1992, p. 1280.

³⁹ See, on Articles 126, 128 and 129, European Council in Edinburgh, Loc. Cit., Footnote 38 Above, P. 1281, Note 1.

⁴⁰ As stated by the European Council, Ibid.

[69] (b.4) The derivation of a power to take powers from Article F(3) would also be contrary to the conscious decision of the member-States not to fit the foreign and security policies and the areas of justice and home affairs into the supra-national decision-making structure. Thus, if the objectives of Article B, second and fourth indents, could be realised by means of sovereign powers specific to the Union in reliance on Article F(3), it would be impossible to understand why Article K.9 makes the simplified transfer of parts of the areas of justice and home affairs to the jurisdiction of the European Community dependent on prior ratification by the member-States. In the same way Article B, fifth indent, provides as regards the further development of the 'acquis communautaire', that consideration will be given, through the procedure of Article N(2) (that is, the revision of the Treaty, which requires ratification) to the question of how far the policies and forms of co-operation introduced by the Treaty may need to be revised with the aim of ensuring the effectiveness of the mechanisms and institutions of the Community.

[70] (b.5) Finally, Article F(3) lacks the procedural-law supplementation which might be able to make it into a rule conferring powers. In the case of such rules in the Community Treaties a specific right to make decisions is always conferred on a specific institution, and the decision-making procedures, especially the participation of other institutions, are dealt with; in addition, the majority required for making the relevant decision is generally specified. This is shown, for example, in the provision for extension of powers in Article 235 of the E.C. Treaty. Article F(3) simply does not exhibit any such structure.

[71] Nor can Article F(3) be fleshed-out, as the complainant would argue, by recourse to Articles 145 and 148 of the E.C. Treaty to supply the provisions on institutional competence and decision-making procedures which are indispensable for a rule conferring powers. Both provisions apply solely to matters under the E.C. Treaty; they can therefore only achieve validity under the other instruments forming *96 the pillars of the Union by virtue of an express instruction in the Treaties. The referential provisions of Articles J.11(1) and K.8(1) of the Union Treaty do not include Articles 145 and 148(1) of the E.C. Treaty. Even within the sphere of application of the latter Treaty these Articles could not raise Article F(3) to the level of a power to take powers. Article 145, second indent, of the E.C. Treaty does not establish any decision-making power in favour of the Council; it presupposes that such a power has been otherwise established 'in accordance with the provisions of this Treaty' (Article 4(1), second sentence is also relevant). Article 148(1), as a sweeping-up provision, provides for simple-majority voting in the case of decision-making powers conferred elsewhere, but leaves the principle of specific transfers of competence untouched.

[72] (b.6) Accordingly, not only the Federal Government and the Bundestag, but also the member-States and the E.C. Commission are in agreement on the legal view that the Union Treaty does not establish any power to take powers in favour of the Union. The Conclusions of the Presidency of the European Council in Edinburgh on 11 and 12 December 1992 do not contradict that view.

[73] In the opinion that it submitted on these constitutional complaints the Federal Government stated that Article F(3) of the Union Treaty did not establish any power to take powers in favour of the Union, but only contained a declaration of intent in the context of a programme. The Minister of State at the Foreign Office, Frau Seiler-Albring, in the Bundestag Special Committee 'European Union (the Maastricht Treaty)' characterised the provision as a principle of a programme, which still had to be made specific in the course of negotiations⁴¹.

[74] The German Bundestag expressed the same view in the final recommendation and report of the Special Committee on 'European Union (Maastricht Treaty)' of 1 December 1992⁴²: The Committee places weight on the finding that Article F, paragraph 3, under which the Union is to provide itself with the means necessary to attain its objectives and implement its policies, does not confer any power on the Union to extend its powers. It is a principle of a programme and not an enabling provision. Article F, paragraph 3, is to be read in conjunction with Article B, last paragraph, which makes the activities of the Union subject to the conditions and timetable of the Treaty and adherence to the subsidiarity principle.

[75] The Federal Government has made it clear, and informed this Court, that its view of the interpretation of Article F(3) of the Union Treaty is shared by the other member-States.

[76] In the Commission's view, as well, Article F(3), as stated by Director-General Dewost at the oral hearing, does not confer a power, still less a power to take powers, on the Union.*97 [77] The conclusions of the Presidency of the European Council in Edinburgh on 11 and 12 December 1992 do not contradict this interpretation⁴³. Although it is explained there in connection with the subsidiarity principle that this principle must not call into question the principle laid down in Article F(3) of the Union Treaty, that statement is made in the context of the general assertion that

⁴¹ Record of the 2nd session of the Special Committee on 29 October 1992, Prot. 2/15.

⁴² BTDrucks. 12/3895, p. 17.

⁴³ Part A, Annex 1, BullBReg. No. 140, 28 December 1992, p. 1280 Et Seq.

application of the subsidiarity principle must not affect the established principles of Community law (rule of limited individual powers, maintenance of the 'acquis communautaire', precedence of Community law). These established principles do not include a power for the Community to extend its powers. In the immediate vicinity of that assertion it is also expressly recognised that Community powers must be conferred by the Treaty in every case, as is laid down in Article 3b(1) of the E.C. Treaty. The guidelines on the application of the subsidiarity principle also emphasise once more the rule of the attribution of powers by the Treaty, citing Article 3b(1). But the Heads of State or Government meeting in the European Council stressed above all the general view of the member-States that the States themselves would continue to remain the masters of the Treaties and their further development⁴⁴.

[78] (c) The member-States have given the European Union objectives in Article B of the Union Treaty, and laid down that these may only be achieved as provided in the Treaty. In addition they have defined the tasks and powers of the three European Communities in detail and confined the European institutions and agencies to carrying them out (see Article E of the Union Treaty and Articles 3b(1), 4(1), second sentence, 4a and 4b of the E.C. Treaty). Any alterations and extensions of those definitions of tasks and powers are subject to their prior formal agreement, which restricts the possibilities for further legal developments on the basis of the existing Treaty⁴⁵. Accordingly, Article B, fifth indent, of the Union Treaty provides a connection between the further development of the 'acquis communautaire' and the procedure for amending the Treaty under Article N. The agreement of the member-States for these purposes can also be stated in an abbreviated procedure in accordance with special Treaty provisions (see in particular Article K.9 of the Union Treaty, Articles 8e(2) and 201(2) of the E.C. Treaty) apart from the formal amendment procedure (Article N). But any such alterations or extensions of the Treaty presuppose that the member-States give their consent in accordance with their rules of constitutional law. Article 23(1), second sentence, of the Constitution requires federal legislation for every further transfer of sovereign rights. Changes in the Treaty bases of the Union and similar rules under which the content of the Constitution may be altered or supplemented, or which enable such change or supplementation to be made, require the consent of two-thirds of the *98 members of the Bundestag by virtue of Articles 23(1), third sentence, and 79(2) of the Constitution.

[79] (d) As regards the stages laid down by the Union Treaty for its completion, the Treaty also accords with the responsibilities of the Bundestag in so far as it regulates the development towards, and continuation of, the monetary union.

[80] (d.1) The monetary union is conceived under Title VI, Chapter 2, of the E.C. Treaty as a community based on stability (Stabilitätsgemeinschaft), which has to guarantee price stability as a matter of priority (Articles 3a(2) and 105(1), first sentence of the E.C. Treaty). For that reason every member-State is obliged under Article 109e(2)(a), second indent, of the E.C. Treaty, to establish long-term programmes in so far as necessary even before the commencement of the second stage for the realisation of economic and monetary union, which are to guarantee the necessary lasting convergence, especially as regards price stability and sound public finances. The Council will assess the progress made towards convergence in the economic and monetary sphere under Article 109e(2)(b). The standards for the progress towards economic and monetary union are factually clarified in Article 109j(1) and are quantified in more detail in the Protocol on the convergence criteria. Article 6 of that Protocol reserves the making of a detailed definition of the criteria to a unanimous decision of the Council. Fulfilment of the convergence criteria is a pre-condition for a member-State's entry into the third stage of the monetary union.

[81] (d.2) Even though it is not foreseeable at present how the monetary union will develop in its specific stages as regards its economic significance, the member-States participating and the timetable, the Act of Accession to the Union Treaty satisfies the requirements of Parliamentary responsibility.

[82] (1) The Treaty on European Union constitutes an international agreement on a federation of member-States with the aim of further development. It is dependent on the member-States continuously breathing life into the Treaty; the implementation and development of the Treaty must be carried by the will of the contractual partners. For that reason Article N of the Union Treaty allows initiatives by any member-State for amendments to the Treaties, which will take effect after they have been ratified by all member-States in accordance with their own constitutional requirements. In 1996 a revision conference will take place, at which the representatives of the member-States' governments will examine individual Treaty provisions in accordance with the objectives set out in Articles A and B; these objectives must also be taken to include bringing citizens close to decisions, the achievement of objectives solely in accordance with the Treaty, and the subsidiarity principle. But the implementation of Treaties in force also depends on the readiness of the member-States to co-operate: the *99 economic and monetary union foreseen in Article 102a et seq. of

⁴⁴ Part B, Annex 1, loc. cit., p. 1290; cf. 75 BVerfGE 223 At 242.

⁴⁵ 75 BVerfGE 223 At 240 et Seq.

the E.C. Treaty, because of the reciprocal basis of the monetary union agreed under the Treaty and of the assumed development into an economic union as well, will only be realised if there is a continuing and serious readiness for completion on the part of all member-States.

[83] Given that conditional nature of the content of the Treaty and the factual convergences it presupposes, the time for the commencement of the third stage of economic and monetary union must also be understood as a target rather than as a legally enforceable date. Although the member-States are obliged under European Law to make serious efforts to achieve the date specified in the Treaty, as Director-General Dewost confirmed at the oral hearing, the purpose of setting target dates according to established Community tradition tends to be to encourage and accelerate the integration process rather than to realise it within the time limit in all circumstances⁴⁶.

[84] The ECSC Treaty, too, leaves the further development of the European Union in the hands of the member-States. Under Article A of the Union Treaty the ECSC Treaty is one of the bases of the Union, but it ceases to have effect, under its Article 97, in the year 2002, which thus makes a new accord between the member-States necessary.

[85] (2) In addition to that, the obligation of the European Central Bank to aim primarily to secure price stability (Articles 3a(2) and 105(1) of the E.C. Treaty) also satisfies a separate constitutional obligation on the Federal Republic of Germany as a member-State of the European Community (Article 88, second sentence, of the Constitution). This constitutional obligation has significance within the Community inasmuch as the European Community is a community in law and, under Article 5 of the EEC Treaty, the principle of loyal co-operation applies within it. This principle not only imposes obligations on the member-States as regards the Community, it also imposes corresponding duties on the Community institutions to co-operate loyally with the member-States⁴⁷. This obligation of loyalty was explained by Director-General Dewost at the oral hearing as meaning that the Community institutions always take seriously any emphatic references by the member-States to incompatible constitutional law, and would strive to find a solution which takes account of the constitutional law of the State concerned.

[86] (3) The concern of the German Bundestag to retain the right to make its own examination regarding the transition to the third stage of economic and monetary union, and thus to oppose any relaxation of the stability criteria, derives support from Article 6 of the Protocol on the Convergence Criteria in particular. In that Article the adoption of *100 provisions on the details of the convergence criteria laid down in the Treaty, so as to replace the definitions in the Protocol, is reserved for unanimous decision by the Council. This means firstly that the criteria set out in Article 109j(1) of the E.C. Treaty as such are not subject to the disposition of the Council, especially as otherwise the basic concept of the monetary union as a stable-currency union (see the sixth recital of the Preamble to the Union Treaty) would not be realised. In the second place, it can be deduced from Article 6 of the Protocol that the assessment, (which under Article 109j(2) is to be used by the Council as the basis for its recommendations) as to whether individual member-States satisfy the convergence criteria for the introduction of a single currency may not evade the full effect of the criteria by being made on a mere majority decision. The requirement of majority decisions can only mean that in the context of the remaining areas for exercising discretion as regards estimates, assessments and forecasts, differences of opinion can be cleared up on a majority basis. The same applies inasmuch as the Council in the composition of the Heads of State or Government has to use those recommendations as the basis of its majority decisions under Article 109j(3) and (4). Regardless of the scope for discretion open to the Council in making estimates, assessments and forecasts, the wording of the Treaty does not allow it to release itself from the basis of its decision in making the recommendations under Article 109j(2) and, therefore, from the convergence criteria laid down by the Treaty in Article 109j(1) and defined in more detail in the Protocol. That provides a sufficient guarantee that without German agreement--and therefore without the substantial co-operation of the German Bundestag--the convergence criteria cannot be relaxed.

[87] (4) In addition, the Protocol on the transition to the third stage of economic and monetary union recognises that the irreversible entry into the third stage depends on the 'preparatory work' of the member-States concerned. Such preparatory work will also proceed subject to the requirements of the national constitutional law of each of them, and can be reserved to the jurisdiction of the parliaments there⁴⁸. In this respect, too, the Bundestag can give effect to its

⁴⁶ See e.g. Article 8a inserted into the EEC Treaty by the Single European Act, and the Declaration thereon by the Final Conference of the representatives of member-States' governments of 17/28 February 1986.

⁴⁷ See European Court decision of 13 July 1990 in Case C-2/881, *Zwartveld*: [1990] I E.C.R. 3367, [1990] 3 C.M.L.R. 457.

⁴⁸ Oppermann, 'Der Maastrichter Unionsvertrag--Rechtspolitische Wertung', in: Hrbek (ed.) *Der Vertrag von Maastricht in der wissenschaftlichen Kontroverse* (1993) at p. 116, referring to Pescatore, *Die 'neue europäische Architektur'--Maastricht und danach?* (1992) now printed in: *Die Weiterentwicklung der EG nach Maastricht*, Cahiers de l'IDHEAP No. 90 (1992) at p. 27.

intention that the future monetary union shall only commence subject to the preconditions of strict stability criteria and in any event within the framework of Article 23(3) of the Constitution, of the Resolution of 2 December 1992 (to be interpreted in a spirit of institutional loyalty) on economic and monetary union as a community of stability, and of the Finance Minister's letter of 2 April 1993.

[88] (5) In the event, therefore, the Federal Republic of Germany by *101 ratification of the Union Treaty is not subjecting itself to an 'automatic' progress to a monetary union, which is unsupervisable and the momentum of which puts it beyond control; the Treaty opens the way to a further integration of the European legal Community by stages, which at every further step is subject either to conditions which are already foreseeable so far as the legislature is concerned or to a further assent from the Federal Government which may be influenced by parliamentary means.

[89] (e) The development of the monetary union is subject to predictable rules even after the movement to the third stage, and to that extent is within the requirements of parliamentary responsibility. The Union Treaty governs the monetary union as a community which is permanently obliged to maintain stability and, in particular, to guarantee the stability of the value of the currency. Although it cannot be predicted whether the stability of an ECU currency on the basis of the arrangements made in the Treaty can be permanently ensured, the fear that efforts towards stability will fail to materialise, with the consequence that the member-States could make further concessions on financial policy, is insufficiently plausible to ground the conclusion that the Treaty is legally uncertain. The Treaty sets up long-term targets which impose the objective of stability as the standard for monetary union, which seek to achieve that objective through institutional arrangements, and which finally, as the last resort, do not prevent withdrawal from the Community in the event of the community based on stability failing to materialise. Under Article 105(1) of the E.C. Treaty the maintenance of price stability is the primary obligation of the ESCB. It is given an independent role in the exercise of its functions under Article 107. It is already apparent from the sixth recital of the Preamble to the Union Treaty that the member-States are determined to make a stable currency the basis for the establishment of the economic and monetary union. Article 2 of the E.C. Treaty states the tasks of the European Community as including the achievement of non-inflationary growth and a high degree of convergence of economic performance. The introduction and implementation of the common currency and exchange rate policy envisaged in the Treaty is set out in Article 3a(2) as having the primary objective of maintaining price stability. In addition, the E.C. Treaty makes arrangements so that the member-States will support and encourage the stability of the European currency by their economic policies. Article 3a(3) also sets up as guiding principles for member-States' activities the maintenance of price stability, sound public finances and monetary conditions, and a sustainable balance of payments (see, too, Article 102a, second sentence). The member-States' economic policies are declared to be matters of common concern, and are to be co-ordinated and monitored by Council recommendation (Article 103). Article 104 also prohibits national *102 central banks from granting overdrafts or credits to public authorities or undertakings of member-States or purchasing debt instruments from them directly. Such authorities or undertakings may not be granted privileged access to financial institutions except for prudential considerations (Article 104a). Article 104b excludes liability for, or assumption of, the commitments of public authorities or undertakings of a member-State by the Community or another member-State, so that a State cannot simply pass-on to others the consequences of its irresponsible financial policies. Finally, Article 104c, in conjunction with the Protocol on the excessive deficit procedure, imposes a duty on member- States to avoid excessive public deficits, and makes them subject to monitoring by the Commission in that respect. The Council can decide on the basis of a Commission recommendation that an excessive deficit exists in a member-State, and can take measures for its reduction.

[90] This conception of the currency union as a community based on stability is the basis and subject-matter of the German Act of Accession. If the monetary union should not be able to develop on a continuing basis the stability present at the beginning of the third stage within the meaning of the agreed mandate for stabilisation, it would be abandoning the Treaty conception.

[91] (f) Finally, the factual connection between the currency union and an economic union is also no grounds for holding that the content of the Treaty is uncertain. Although there might be plausible reasons for holding that the currency union could only be meaningfully implemented as a matter of practical politics if it were simultaneously supplemented by an economic union, which would go beyond a co-ordination of the economic policies of the member-States

and the Community, such supplementation presupposes proceedings for a Treaty amendment under Article N of the Union Treaty and accordingly a further parliamentary vote of assent. In this respect it is at present an open question whether the currency union will have such an economic union as a consequence, or whether the lack of a will on the

part of the member-States for a communalised economic policy and the 'dominant Community budget' bound up therewith⁴⁹ will entail the future abandonment of the currency union and a corresponding amendment of the Treaty.

[92] Furthermore, it has been pointed out by important contributors to the debate that a currency union, especially between States which are oriented towards an active economic and social policy, can ultimately only be realised in common with a political union (embracing all essential economic functions) and cannot be realised independently thereof or as a mere preliminary stage on the way to it. The President of the Bundesbank, Prof. Schlesinger, also expressed *103 his opinion to that effect at the oral hearing. This view may also be supported by reference to the gradual development of German national unity in the 19th century: unification of the currency did not precede the political union of the national States, it followed the formation of the North German Federation and the German Empire of 1871 through the Coinage Act of 9 July 1873⁵⁰. Before that, although the German Customs Union had existed for decades and there were also trade treaties and agreements on other matters relating to economics, there was neither a monetary federation nor a single unit of currency⁵¹.

[93] This does not raise a question of constitutional law, however, but of politics. The decision to agree on a monetary union and put it into operation without a simultaneous or immediately subsequent political union is a political one, for which the institutions with competence on the matter must take political responsibility. If it emerges that the desired monetary union cannot in reality be achieved without a (not yet desired) political union, a fresh political decision will be required as to how to proceed further. There is room for such a decision as a matter of law, because under the present Treaty the monetary union is no more able to give rise automatically to a political union than to an economic union; that would require an amendment of the Treaty, which could not happen without a decision of the national state institutions, including the German Bundestag. Whether that decision is taken is again--in the context of what is constitutionally permissible--a political matter.

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[94] The granting of functions and powers to the European institutions provided for in the Union Treaty still leaves sufficient functions and powers of substantial political weight to the German Bundestag. The Treaty also imposes a sufficiently reliable limit on the dynamic towards further integration which it engenders, and that preserves a balance between the structure of governmental decision-making in the European federation of states and the matters reserved to the decision of the German Bundestag together with its rights of co-decision.

[95] (a) The possibilities for influence by the Bundestag, and therefore by the electorate, on the exercise of sovereign powers by European institutions have no doubt been taken away almost completely in so far as the European Central bank has been made independent as regards the European Community and the member-States (Article 107 of the E.C. Treaty). An essential political area, in which individual freedom is supported through maintenance of the value of the currency and, through the money supply, the state of *104 public finances and the political spheres dependent thereon are determined, has been excluded from the powers of state authorities to give instructions and also (subject to any possible Treaty amendment) from parliamentary supervision of areas of responsibility and methods of action. Placing most of the tasks of monetary policy on an autonomous basis in the hands of an independent central bank releases the exercise of sovereign powers of the state from direct national or supra-national control in order to withdraw monetary matters from the reach of interest groups and holders of political office concerned about re-election⁵².

[96] This restriction of the democratic legitimation which proceeds from the voters in the member-States affects the principle of democracy, but, as a modification of that principle provided for in Article 88, second sentence, of the Constitution, is compatible with Article 79(3). The supplementation of Article 88 undertaken in view of the European Union allows a transfer of powers of the Bundesbank to a European central bank if to do so accords with 'the strict criteria of the Maastricht Treaty and the Statute of the European System of Central Banks regarding the independence of the Central Bank and the priority of maintaining the value of the currency'⁵³. The will of the legislature in amending the Constitution, therefore, is clearly aimed at creating a constitutional basis for the monetary union provided for in the Union Treaty, but restricting the creation of the powers and institutions which are connected therewith and given independence in the manner explained to that case. This modification of the democratic principle for the purpose of

⁴⁹ See Seidel, 'Zur Verfassung der Europäischen Gemeinschaft nach Maastricht', [1992] EuR at 134.

⁵⁰ [1873] Rgb1. 233.

⁵¹ See E.R. Huber, *Deutsche Verfassungsgeschichte seit 1789*, Vol. IV (1969) p. 1053 Et Seq.

⁵² As stated in the Government Draft of the Bundesbank Act, BTDrucks. 2/2781, p. 24 Et Seq.

⁵³ See Recommendation and Report of Special Committee on 'European Union (Maastricht Treaty)', 1 December 1992, BTDrucks. 12/3896 p. 21.

protecting the confidence placed in the redemption value of a currency is acceptable because it takes account of the special characteristic (tested and proven--in scientific terms as well--in the German legal system) that an independent central bank is a better guarantee of the value of the currency, and thus of a generally sound economic basis for the state's budgetary policies and for private planning and transactions in the exercise of rights of economic freedom, than state bodies, which as regards their opportunities and means for action are essentially dependent on the supply and value of the currency, and rely on the short-term consent of political forces. To that extent the placing of monetary policy on an independent footing within the sovereign jurisdiction of an independent European Central Bank (a jurisdiction not transferable to other political areas) satisfies the constitutional requirements under which a modification may be made to the principle of democracy⁵⁴.

[97] (b) In other respects, too, the functions and powers of the European Union and the Communities belonging to it, as already *105 explained, are defined in terms of restricted factual circumstances, so that the wide-ranging statement of objectives in the Preamble to, and Article B of, the Union Treaty do not sanction the exercise of sovereign powers, but only emphasise the political intention to realise an ever closer union of the peoples of Europe. The Union Treaty therefore satisfies the requirement, concomitant with the increasing closeness of integration, that possibilities for action by the European institutions not only should be defined in relation to their objectives, but should also be framed in factual terms as regards the means available to them, so as to set objective limits to their functions and powers.

[98] The Union Treaty and the E.C. Treaty, in particular, adhere to the principle of limited individual powers ((2.a) above). Although under that principle a specific provision conferring duties or powers can be interpreted in the light of Treaty objectives, a Treaty objective is not by itself enough to create or extend duties or powers⁵⁵. In addition, the Treaty by express references to the requirement of an amendment (Article N) or an extension of the Treaty (Article K.9) makes clear the dividing line between a legal development within the terms of the Treaties⁵⁶ and a making of legal rules which breaks through its boundaries and is not covered by valid Treaty law. Article 23(1) of the Constitution adopts that criterion when it requires an assenting Act for amendments to the treaty bases of the European Union and similar rules.

[99] Inasmuch as the Treaties establishing the European Communities, on the one hand, confer sovereign rights applicable to limited factual circumstances and, on the other hand, provide for Treaty amendments (through a normal procedure and a simplified one) this distinction is also important for the future treatment of the individual powers. Whereas a dynamic extension of the existing Treaties has so far been supported on the basis of an open-handed treatment of Article 235 of the EEC Treaty as a 'competence to round-off the Treaty' as a whole, and on the basis of considerations relating to the 'implied powers' of the Communities, and of Treaty interpretation as allowing maximum exploitation of Community powers ('effet utile')⁵⁷, in future it will have to be noted as regards interpretation of enabling provisions by Community institutions and agencies that the Union Treaty as a matter of principle distinguishes between the exercise of a sovereign power conferred for limited purposes and the amending of the Treaty, so that its interpretation may not have effects that are equivalent to an extension of the Treaty. Such an interpretation of enabling rules would not produce any binding effects for Germany.

[100] (c) The way in which this principle of limited individual *106 empowerment is to be treated is then clarified and further restricted by the subsidiarity principle. For the European Community the subsidiarity principle is embodied in Article 3b(2) of the E.C. Treaty. By the reference in Article B(2) of the Union Treaty to this basic rule it is extended to the Union's policies and forms of co-operation dealt with outside of the E.C. Treaty, and is also taken up again in Article K.3(2)(b) of the Union Treaty. In addition, individual powers, such as those conferred by Articles 126 to 129b, 130 and 130g of the E.C. Treaty, restrict Community activity to the supplementation of the policies of the member-States, which in principle have precedence.

[101] The subsidiarity principle therefore does not establish any powers in favour of the European Community, but sets limits on the exercise of powers already given elsewhere⁵⁸. Under Article B(2) of the Union Treaty the objectives of the Union can only be achieved as provided by the Treaty and in accordance with the conditions and timetable set out in it; at the same time regard is to be had to the subsidiarity principle. Accordingly Article 3b(1) of the E.C. Treaty specifies as a primary condition for action by the Community that a power has been conferred upon it by the Treaty, and its exercise is then subject to the subsidiarity principle by virtue of Article 3b(2).

⁵⁴ FN54 See 30 BVerfGE 1 At 24; 84 BVerfGE 90 At 121.

⁵⁵ H. P. Ipsen, *Europaisches Gemeinschaftsrecht* (1972), p. 559.

⁵⁶ See 75 BVerfGE 223 At 240 et Seq.

⁵⁷ See Zuleeg in: von der Groeben/Thiesing/Ehlermann, *EWG-Vertrag* (4th edn, 1991) Art. 2, note 3).

⁵⁸ See European Council in Edinburgh, *Conclusions of Presidency*, Loc. Cit., P. 1281.

[102] That means that, if there is a power under the Treaty to take action, the subsidiarity principle determines whether and how the Community may act. If the Community legislature wishes to exercise a power conferred upon it to pass a law, it must first make sure (and also, by virtue of Article 190 of the E.C. Treaty, show plausibly) that the objectives of the measure in question could not be sufficiently achieved by the member-States at national level. This finding must then justify the further conclusion that, in view of the scale and effects of the measure, the objectives can be better achieved at Community level.

[103] Through this principle of subsidiarity, adherence to which is a matter for the European Court to scrutinise, the national identities of the member- States are to be preserved and their powers to be retained⁵⁹. How far the subsidiarity principle will counteract an erosion of the jurisdictions of the member-States, and therefore an exhaustion of the functions and powers of the Bundestag, depends to an important extent (apart from the case law of the European Court relating to the subsidiarity principle) on the practice of the Council as the Community's real legislative body. It is there that the Federal Government has to assert its influence in favour of a strict treatment of Article 3b(2) of the E.C. Treaty and so fulfil the constitutional duty imposed on it by Article 23(1), first sentence, of the Constitution. The Bundestag for its part has the opportunity, by using its right of co-operation in the formation of Germany's internal political intentions established by Article 23(3) of the Constitution, to have an effect on the Council's practices and to exercise an influence on them within the *107 terms of the subsidiarity principle. In so doing the Bundestag will also be performing a constitutional duty incumbent upon it under Article 23(1), first sentence, of the Constitution. In addition, it is to be expected that the Bundesrat, too, will pay particular attention to the subsidiarity principle⁶⁰.

[104] (d) Article 3b(3) of the E.C. Treaty incorporates the rule of proportionality as the third fundamental principle of the Community constitution. This principle in the first place contains a prohibition on excessive measures, which concerns basic rights; but, in the framework of a federation of states which is not an entity organised as a state, it can also restrict the intensity of Community action in the service of the obligation under Article F(1) of the Union Treaty, and so protect the national identities of the member-States--and therefore the functions and powers of their parliaments--against an excess of European regulation. The principle of proportionality embodied in Article 3b(3)--in contrast to the subsidiarity principle in the narrower sense of Article 3b(2)--is applicable to all Community measures, whether based on an 'exclusive', or on some other, Community competence.

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[105] In the result, the Union Treaty makes provisions for limited powers of action by the agencies and institutions of the three Communities, the exercise of the powers being graduated as regards the means of implementation and the intensity of regulation. The Treaty confers sovereign rights of which the scope is legally ascertainable; that could be done within the sphere of parliamentary responsibilities, and is therefore democratically legitimated. The development of integration set up in the Union Treaty and the Treaties on the European Communities is not derived from the imposition of general objectives but from specific tasks and powers of action.

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[106] The Maastricht Treaty confers further essential functions and powers on European organs--especially by the extension of E.C. areas of competence and the inclusion of the monetary policy--which at Treaty level are not yet supported by a corresponding strengthening and extension of the democratic bases. It sets up a new stage of European unification, which according to the stated intentions of the Contracting Parties is to enhance further the democratic and efficient functioning of the institutions (fifth recital of the Preamble). For these purposes democracy and efficiency are not to be separated; it is also expected of the strengthening of the democratic principle that it will improve work at Community level in all its organs. At the same time the Union, in accordance with Article F(1) of the Union Treaty, will respect the national identities of its member-States, the governmental *108 systems of which are based on democratic principles. To that extent the Union preserves the democratic bases already existing in the member-States and builds on them.

[107] Any further development of the European Union cannot escape from the conceptual framework set out above. The legislature in amending the Constitution took that into account in connection with this Treaty by the insertion of Article 23 into the Constitution, since express mention is made there of the development of the European Union, which is subject to the principles of democracy and the rule of law, social and federal principles, and the subsidiarity principle. What is decisive, therefore, from the viewpoint both of the Treaties and of constitutional law, is that the

⁵⁹ See European Council in Edinburgh, *Loc. Cit.*, P. 1280 Et Seq.

⁶⁰ See Goppel, 'Die Bedeutung des Subsidiaritätsprinzip,' [1993] *EuZW* 367.

democratic bases of the Union will be built up in step with the integration process, and a living democracy will also be maintained in the member-States as integration progresses.