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The decision being challenged is based on the unconstitutional provisions of Section 19(1) of the Working Hours Order. It must therefore be quashed.

[Reports: *Euro, jaRecht* 1993, p. 183; *EuGRZ* 1992, p. 17; 85 *BVerfGE*, p. 191 (in German)]

Relationship of international law and municipal law—Conduct of foreign relations—Treaty-making power—Federal Republic of Germany—Constitutional review of exercise of treaty-making power—Treaty on European Union, 1992 (“Maastricht Treaty”) —Compatibility with Basic Law of the Federal Republic of Germany

Treaties—Conclusion and operation—Constitutional limitations — Accession of Federal Republic of Germany to Treaty on European Union—Extension of powers of European Community —Compatibility with Basic Law of the Federal Republic following enactment of Law amending Basic Law of 28 December 1992 — Article 23(1) of Basic Law — Whether providing satisfactory constitutional basis for accession of Federal Republic to Maastricht Treaty—Whether Federal Constitutional Court should obtain opinion of experts or Community institutions concerning interpretation of Treaty—Whether fundamental principle of democratic legitimacy in Federal Republic undermined by membership of European Union —Whether such membership violating Articles 20, 38 and 79(3) of Basic Law — Whether such membership irreversible—Scope of permissible transfer of sovereignty to Community institutions—Requirement that living democracy must be preserved in Member States during process of European integration—Condition that national parliaments should retain substantial level of authority — Whether acts of Community institutions are subject to national constitutional review to ensure that their powers are not exceeded

International organizations—European Community—Powers —Extension of powers by treaty—Treaty on European Union, 1992—Legal basis for extension of powers—Whether European Community developing into political union without clearly restricted powers—Distinction between pooling of sovereignty in economic sphere and inter-governmental co-operation in other spheres—Article A of Treaty—Principle of limited specific

attribution of powers to Community institutions—Article F(3) of Treaty—Whether granting Union competence to determine or extend its own powers—Effect of principle of subsidiarity—Establishment of common monetary and exchange rate policy—Whether automatically leading towards monetary union beyond control of Member States — Legal effect of target dates for achievement of monetary union—Requirement that extension of Community powers to be accompanied by enhancement of democratic foundations of Community institutions—Requirement that Union should respect national identities and existing democratic principles of Member States—Preamble and Article F(1) of Treaty

Human rights—Procedure for enforcement—Fundamental rights under Basic Law of Federal Republic of Germany—Treaty on European Union, 1992 and secondary legislation — Possible conflict with fundamental rights under Basic Law—Primary role of Court of Justice of European Community in ensuring respect for fundamental rights—Whether Federal Constitutional Court retaining ultimate right to secure compatibility of Community legislation with fundamental constitutional rights

International organizations—European Community—Institutions — Court of Justice — Powers — Treaty on European Union, Article L — Exclusion of jurisdiction of Court over certain provisions of Treaty—Whether affecting general jurisdiction of Court to interpret provisions of Community treaties

International organizations—European Community—Institutions —European Parliament—Position within institutional structure of European Union—Role of ensuring democratic legitimacy for Union — Whether any need for enhancement of powers — Significance of method of election by citizens of Member States —The law of the Federal Republic of Germany

MAASTRICHT TREATY 1992 CONSTITUTIONALITY CASE

(Case Nos 2 BvR 2134 and 2159/92)

Federal Republic of Germany, Federal Constitutional Court (BVerfG)

(Mahrenholz, *Vice President*; Böckenförde, Klein, Grasshof, Kruis, Kirchhof, Winter and Sommer, *Judges*)

12 October 1993

SUMMARY: The facts:—Dr Manfred Brunner, a former senior official of the European Commission, and a number of members of the European Parliament, lodged constitutional complaints against the Federal Law of 28 December 1992 approving the Treaty on European Union ("EUT") signed in Maastricht on 7 February 1992 and against the Federal Law of 21 December 1992 amending the Basic Law (*Grundgesetz*) so as to enable the Federal Republic to accede to the Maastricht Treaty. The complainants also applied for an interim order preventing the Federal Republic from being bound under international law by the Treaty. Although the Laws in question had been adopted by the Federal Parliament, the Federal President indicated that he would not sign the instrument of ratification for the Treaty until the Federal Constitutional Court had ruled on the merits of the constitutional challenge, and the Federal Government stated that it would not deposit the instrument of ratification for the present.

The Law of 21 December 1992 amending the Basic Law inserted a new Article 23(4) into the Basic Law, which provided:

With a view to creating a United Europe, the Federal Republic of Germany shall participate in the development of the European Union, which is committed to the principles of democracy and the rule of law, the social and federal principles, and the principle of subsidiarity, and which guarantees a protection of basic rights substantially comparable with this Basic Law. The Federal Republic may, to this end, by means of a law to which the Bundesrat has given its consent, transfer sovereign rights. For the purpose of establishing the European Union, and for the purposes of amendments to its treaty foundations or comparable rules amending or supplementing the content of this Basic Law or facilitating such amendments or additions, Article 79(2) and (3) shall apply.

Dr Brunner claimed that the laws in question violated a number of basic rights and that the new Article 23 of the Basic Law was itself unconstitutional and could not therefore provide a basis for the transfer of sovereign powers to the European Union. In particular, Article 38 of the Basic Law granted every citizen the right to democratically legitimated representation in the German *Bundestag* and protected the right to participate in the exercise of State authority. Dr Brunner argued that this right of participation was significantly reduced by the transfer of substantial competences under the EUT from the German *Bundestag* to European Community institutions. Article F(3) of the EUT even gave the European Union the power to determine and extend its own powers (*Kompetenz-Kompetenz*). State authority was thereby removed from the German people's representatives in the *Bundestag* and vested in the Council of the European Union, which became the real legislature. This produced a democratic deficit at Community level since the European Parliament had only an advisory function and the national parliaments were inadequately involved in the Community's law-making procedures. Furthermore, German nationals would henceforth be deprived of the protection of basic rights afforded by the Federal Constitutional Court. Article L of the EUT excluded the jurisdiction of the Court of Justice of the European Community over its provisions, other than those amending

the existing Community Treaties, thereby creating a gap in legal protection contrary to the Basic Law. Dr Brunner also asserted that political and economic freedoms were violated by citizens henceforth being bound by the acts of a common European entity, in particular in relation to the intended monetary union, into which Germany would enter "automatically" without any possibility of ever being able to leave.

The German members of the European Parliament, in their constitutional complaint, argued that the law approving the EUT violated fundamental principles which, pursuant to Article 79(3) of the Basic Law, were not subject to constitutional amendment. In particular, they considered that the Treaty violated the principles of democracy and the rule of law, in altering the separation of powers by removing legislative powers from the *Bundestag* and transferring them to the Council and Commission of the European Community, which were executive organs with no direct democratic legitimation at Community level. Furthermore, they argued that the Treaty threatened the very existence of Germany as an independent sovereign State, which was likewise not subject to constitutional amendment pursuant to Article 79(3), since it brought about a new stage of integration irrevocably leading towards a European Federal State, especially in so far as monetary union was concerned but also by extending Community competences beyond the economic field to all matters of State importance.

In addition to hearing the views of the Federal Government and Parliament, as it was required to do by law, the Federal Constitutional Court also consulted the President and Director of the Bundesbank, on questions of economic and monetary union, as well as inviting the Head of the Legal Department of the Commission of the European Community to take part in the oral hearings and to comment on the interpretation of the various Treaty provisions at issue.

Held:—The constitutional complaints were rejected.

(1) Within the area of application of Article 23 of the Basic Law, Article 38 precluded undermining the legitimation of and influence over the exercise of public authority, vested in the *Bundestag* as an elected body, through the transfer of responsibilities and powers in such a way that the democratic principle was violated contrary to Article 79(3) taken in conjunction with Article 20 of the Basic Law. The democratic principle did not exclude the Federal Republic of Germany from membership of a supranationally organized international community of States. However, the condition for such membership under Article 79(3) of the Basic Law was that legitimation and influence emanating from the people were also guaranteed within that community (pp. 214-5, 221-3).

(2) The European Union was a union of democratic States based on the principle of dynamic development. If it performed sovereign tasks, it was primarily for the citizens of the Member States to legitimate such action through a democratic process via their national parliaments, involving scrutiny of the activities of the European institutions. In addition, as the nations of Europe grew closer together, democratic legitimacy would increasingly be supplied, within the institutional structure of the European Union, by the European Parliament elected by the citizens of the Member

States. Since, at present, the citizens supplied democratic legitimacy via their national parliaments, the expansion of the responsibilities and authority of the European Community was limited by the requirements of democracy. The Member States needed to retain sufficiently significant spheres of activity in order to enable their populations to formulate, legitimate and control political objectives. The German *Bundestag* had to be left with a substantial level of such tasks and authority (pp. 223-5).

(3) Article 38 of the Basic Law was violated if an act opening up the German legal system to the direct effect and application of supra-national Community law did not determine with sufficient clarity the intended programme of integration and the rights transferred for that purpose. This meant that any substantial changes to the programme of integration set out in the EUT and to the powers contained therein would not be covered by the law approving the Treaty. Acts of Community institutions based on such changes would therefore not be binding on Germany. The Federal Constitutional Court was empowered to examine whether legal instruments adopted by the European institutions and bodies remained within or overstepped the boundaries of the sovereign rights granted to them¹ (pp. 225-6).

(4) The EUT (Article A) established a union of countries intended to create an ever closer union amongst the peoples of Europe (organized as States) rather than a State based on a European people. The States thereby sought to exercise in common some of their competences and, to that extent, to pool their sovereignty. But European Community competences still essentially covered only the economic sphere and other co-operation, in particular in relation to foreign and security policy and judicial and home affairs, remained inter-governmental in nature. The ultimate objective of the process of European integration remained open (pp. 226-8).

(5) The authority of the Community was derived from the Member States and the binding force of the EUT within their territory was dependent upon implementing acts of national law. Germany remained one of the "masters of the Treaties", who had based their commitment to be bound by the EUT (which was concluded for an unlimited period (Article Q)) on their intention to remain long-term members. In the last resort, however, they could equally well revoke that membership by adopting an act with the opposite effect (pp. 227-8).

(6) The necessary influence of the *Bundestag* was ensured by the facts that further development of the European Union was subject to its approval, by a qualified majority under Article 79(2) of the Basic Law, and that the Federal Government was accountable to parliament, the *Bundestag* having a supervisory role in relation to European policy. Indeed, the Heads of Government of the Member States had emphasized the great importance of the national parliaments for the Union by a Declaration in 1992 calling upon the Commission to draw up proposals for increasing the involvement of national parliaments in the activities of the Union (pp. 228-9).

(7) The concern that, because of its ambitious goals, the European Community might develop, without further national implementing legislation, into a political union with sovereign powers not determinable in advance,

was unfounded. The Union Treaty confirmed the principle of the limited specific attribution of powers, which already applied under the basic European Community Treaties. That principle was not brought into question by Article F(3) of the EUT, which did not give the Union any general power to determine or extend its competences (*Kompetenz-Kompetenz*). Neither did this provision empower the Union to procure the financial or other means which it deemed necessary for the fulfilment of its purposes. The scope of the powers of the Union and the European Community was limited in all areas by specific rules concerning their exercise, contained in the relevant treaties. In particular, Article 3(b), first paragraph, of the ECT laid down a strict limit on Community action and, in enunciating the principle of subsidiarity, made it clear that national powers were the norm and Community powers the exception (pp. 228-31).

(8) With regard to European Monetary Union, the EUT clearly set out the stages for its implementation and the requirements to be fulfilled at each stage. Although it was not yet possible to foresee how monetary union would develop in terms of its economic consequences and the precise dates of its implementation, this was not a bar to parliamentary approval. The key elements of sustainable economic and fiscal convergence, which were prerequisites for proceeding to the third stage of economic and monetary union, meant that the date set in the ECT (Article 109(j)(4)) was to be regarded as a target and not an absolute deadline. As the Director-General of the Legal Department of the Commission had confirmed, this accorded with the well-established Community tradition concerning the setting of target dates for the purpose of giving impetus to the process of integration. Any alteration of the convergence criteria laid down in the ECT (Article 109(j)(1)) would require the consent of national parliaments and, in the Protocol on Transition to the Third Stage, the Governments had acknowledged that such transition was dependent upon preparatory work to be done by the Member States concerned, which would be subject to national parliamentary control. By ratifying the EUT, the Federal Republic was therefore not submitting itself to an unpredictable "automatic" movement towards monetary union beyond its control (pp. 235-9).

(9) Hitherto the extension of Community powers had been based upon a liberal interpretation of Article 235 of the EEC Treaty, with recourse to the principles of "competence to perfect the Treaty", inherent implied powers and the need to give the fullest possible effect to existing Community powers. But in future, in interpreting the powers of Community institutions, it would need to be borne in mind that the EUT made a fundamental distinction between the exercise of sovereign powers conferred on a specific and limited basis, on the one hand, and amendment of the Treaty on the other hand. If an interpretation of Treaty rules on competence amounted to an extension of the Treaty, such an interpretation would not be binding upon Germany (pp. 243-4).

(10) The process of integration sanctioned by the EUT was derived not from general objectives but from the delimitation of specific tasks and powers, involving a significant extension of European Community competences. At treaty level this had not, so far, been underpinned by any corresponding enhancement of the democratic foundations of the Community. In the

¹ 93 ILR 439 at 457 (paragraph 19).

Preamble to the EUT, it was stated that the Governments desired to enhance further the democratic and efficient functioning of the Community institutions, and this was one of the reasons for their decision to establish the European Union. Article F(1) provided that the Union should respect the national identities of its Member States, whose systems of government were founded on the principles of democracy. In this respect, the Union preserved and built upon existing democratic foundations in the Member States. Any further development of the Union could not take place outside this context. Taking this into account, a new Article 23 had been inserted into the Basic Law. The crucial point therefore, from both the Treaty and a constitutional standpoint, was that development of the democratic foundations of the Union should keep pace with integration and a living democracy should continue to operate in the Member States (pp. 245-6).

(11) While Article L of the EUT did exclude the jurisdiction of the Court of Justice of the European Communities over certain provisions of the EUT (concerning inter-governmental co-operation), the provisions in question did not involve measures with a direct effect on the holders of fundamental rights in the Member States. If the implementation at national level of international treaty obligations would violate fundamental rights, it was prohibited by constitutional law. The commitments entered into under the EUT were no different in this regard. Accordingly, if a Council decision taken under Titles V or VI of the EUT gave rise to Community legislation infringing fundamental rights, it would be for the Court of Justice of the Community, and in the last resort the Federal Constitutional Court, to ensure the adequate protection of basic rights through their "relationship of co-operation" (pp. 218-19).

The following is the text of the judgment of the Court:

OPERATIVE PART OF THE JUDGMENT

1. The complaint of unconstitutionality entered by the complainant at 1 against the Law of 28 December 1992 on the Treaty on European Union of 7 February 1992 (*BGBI.* II, p. 1251) is rejected. His complaint of unconstitutionality against the Law Amending the Basic Law of 21 December 1992 (*BGBI.* I, p. 2086) is dismissed.
2. The complaints of unconstitutionality entered by the complainants at 2 are dismissed.

GROUNDS

A.

[429] The complaints of unconstitutionality concern German participation in establishing the European Union through the Law Amending the Basic Law of 21 December 1992 (*BGBI.* II, p. 2086) and the Law of 28 December 1992 on the Treaty on European Union of 7 February 1992 (*BGBI.* II, p. 1251).

I.

1. On 7 February 1992 the Treaty on European Union (hereinafter referred to as the Union Treaty (EUT)), negotiated between the Member States of the European Communities, [430] was signed in the Dutch town of Maastricht. According to the introductory article of that Treaty, the process of European integration initiated with the establishment 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, second paragraph, EUT).

(a) By the Union Treaty, the Contracting Parties establish among themselves a 'European Union' (Article A, first paragraph, EUT). Its task is to organize, in a manner demonstrating consistency and solidarity, relations between the Member States and between their peoples (Article A, third paragraph, second sentence, EUT). Under the more detailed provisions of Article B of the EUT, the Union sets itself the objectives of creating an economic and social area without internal frontiers, establishing economic and monetary union—ultimately with a single currency—asserting the Union's identity on the international scene, in particular through the implementation of a common foreign and security policy—including the eventual framing of a common defence policy—introducing a citizenship of the Union, developing co-operation on justice and home affairs and maintaining in full and building on the *acquis communautaire*.

Under Article F(3) of the EUT, the Union is to provide itself with the means necessary to attain its objectives and carry through its policies. The European Union is founded on the three existing European Communities (the European Economic Community (EEC)—now called the European Community (EC), the European Coal and Steel Community (ECSC), the European Atomic Energy Community (EAEC)), supplemented by two forms of co-operation established by the Union Treaty, the common foreign and security policy (Article B, second tiret, and Article J of the EUT) and co-operation on justice and home affairs (Article B, fourth tiret, and Article K of the EUT)—the so-called "three pillars concept" (Article A, third paragraph, EUT). The European Council, which brings together the Heads of State or of Government of the Member States and the President of the Commission, is to provide the Union with the necessary impetus for its development and define the general political guidelines thereof (Article D of the EUT).

(b) What has hitherto been the "European Economic Community" is expanded into a "European Community" with additional tasks and powers (Article G of the EUT). The Treaty establishing the European Economic Community (EEC) is amended accordingly. In its amended version too—as the Treaty establishing the European Community (hereinafter referred to as the ECT)—it adheres to the

principle of limited specific empowerment (Article 3(b), first paragraph; Article 4, first paragraph, second sentence; Article 4(a); Article 4(b); Article 189, first paragraph, ECT). In accordance with the principle of subsidiarity (Article 3(b), second paragraph, ECT) the Community is to take action in areas which do not fall within its exclusive competence only 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 achieved by the Community. Article 3(b), third paragraph, ECT then stipulates that any action by the Community must not go beyond what is necessary to achieve the objectives of the Treaty.

(b) (1) The Union Treaty establishes a citizenship of the Union derived from the holding of nationality of a Member State (Article 8 of the ECT), supplies the right to freedom of movement (Article 8(a) of the ECT), establishes the right to vote and to stand as a candidate at municipal elections in the Member State in which the citizen resides and also confers the right to vote and to stand as a candidate in elections to the European Parliament in the Member State in which the citizen resides, to that extent separating that right from nationality (Article 8(b) of the ECT). Every citizen of the Union is to be entitled to subsidiary protection by the diplomatic or consular authorities of any Member State by virtue of Article 8(c) of the ECT. Moreover, the Treaty contains the beginnings of a common visa policy (Article 100(c) of the ECT; Article K.1, point 2, ECT).

(b) (2) The Union Treaty establishes further tasks and powers for the European Community with regard to policy in the fields of education (Article 126 ECT), vocational training (Article 127 ECT), culture (Article 128 ECT), public health (Article 129 ECT), consumer protection (Article 129(a) ECT) and with regard to trans-European networks (Article 129(b) *et seq.* ECT). In Article 130(d) ECT and in the Protocol on economic and social cohesion, the Contracting Parties agree to set up a Cohesion Fund to provide Community financial contributions to projects in the fields of environment and trans-European networks in the area of transport infrastructure.

(b) (3) The Economic and Monetary Union envisaged since 1972 is now introduced by Title VI of the EC Treaty. While the economic policies of the Member States are to be coordinated under Article 102(a) *et seq.* ECT, and are subject to Community guidelines to ensure convergence of the economic performances of the Member States, monetary policy will be progressively communitized and placed in the hands of a European System of Central Banks (ESCB) (Article 105 *et seq.* ECT).

The first stage (convergence stage) of economic and monetary union, which began on 1 July 1990, is intended to complete the European Monetary System (EMS) through the participation of all

the Member States. Under Article 109(e) ECT it will be followed on 1 January 1994 by the second stage (coordination stage), which will prepare for the completion of economic and monetary union. To that end, the Member States will take national measures to eliminate before 1 January 1994 all remaining restrictions on the movement of capital and payments and any credit facilities or access privileges which the public authorities have at the central banks (Article 109(e) 2(a), first tirit, ECT) and will take precautions to achieve price stability, sound public finances and an appropriate level of public debt (Article 109(e) 2(a), second tirit, ECT). At the start of the second stage, the European Monetary Institute will be established. It will be the forerunner of the European Central Bank (ECB) and prepare the latter's activities in the third stage (Article 109(f) of the ECT).

In the third stage, the Member States' competences for monetary policy in toto (money, credit, interest rates and exchange rates) will be exercised by the European Community. To that end, an ESCB and an independent ECB will be established (Article 4(a) in conjunction with Article 105 *et seq.* ECT). Entry into the third stage depends on whether enough Member States fulfil specific requirements in the matters of price stability, government budget deficit, which must not be excessive, exchange rate stability and interest rate levels (convergence criteria) (Article 109(j)(1) of the ECT in conjunction with the Protocol on the Convergence Criteria). Not later than the end of 1996, the Council of the European Communities (in the composition of Heads of State or of Government) will, acting by a qualified majority, decide whether a majority of the Member States fulfil the necessary conditions and whether it is appropriate to enter the third stage. If the Council decides that it is, [431] the date for the establishment of an ECB and the adoption of a single currency may be set (Article 109(j)(3) of the ECT). If not, the third stage is to start not later than 1 January 1999 (Article 109(j)(4) of the ECT).

(c) Appended to the Union Treaty is an Agreement on Social Policy concluded between the Member States of the European Community with the exception of the United Kingdom of Great Britain and Northern Ireland. Under that Agreement, the Community will support and complement the activities of the Member States with a view to improvement of the working environment in particular and in the organization of working conditions, the information and consultation of workers, equality between men and women with regard to labour market opportunities and treatment at work and the integration of persons excluded from the labour market. To that end, the Council may adopt, by means of directives, minimum requirements, having regard to the conditions laid down in Article 2 of the Agreement.

2. The Law amending the Basic Law of 21 December 1992, which inserts *inter alia* Article 23, Article 28(1), third sentence, Article 52(3)(a) and Article 88, second sentence, into the Basic Law was promulgated in the Federal Law Gazette I (*BGBI.*) of 24 December 1992 (p. 2086) and entered into force on 25 December 1992.

Article 23(1) of the Basic Law, as amended, reads as follows:

With a view to creating a United Europe, the Federal Republic of Germany shall participate in the development of the European Union, which is committed to the principles of democracy and the rule of law, the social and federal principles, and the principle of subsidiarity, and which guarantees a protection of basic rights substantially comparable with this Basic Law. The Federal Republic may, to this end, by means of a law to which the *Bundesrat* has given its consent, transfer sovereign rights. For the purpose of establishing the European Union, and for the purpose of amendments to its treaty foundations or comparable rules amending or supplementing the content of this Basic Law or facilitating such amendments or supplements, Article 79(2) and (3) shall apply.

After Article 28(1), second sentence, of the Basic Law, the following sentence has been inserted:

At elections in counties (*Kreise*) and communes (*Gemeinden*), persons who are nationals of a Member State of the European Community, in accordance with the provisions of the law of the European Community, shall also be entitled to vote and to stand for election.

Article 52 of the Basic Law has been supplemented by the following paragraph (3)(a):

For matters of the European Union, the *Bundesrat* may set up a European chamber whose decisions shall be regarded as decisions of the *Bundesrat*. Article 51(2) and (3), second sentence, shall apply accordingly.

Article 88 of the Basic Law, which concerns the Bundesbank (Federal Bank), has gained a second sentence:

Its tasks and powers may, in the context of the European Union, be transferred to the European Central Bank, which shall be independent and committed to the primary objective of maintaining price stability.

3. On 2 December 1992, the German *Bundesrat* adopted the Law Approving the Union Treaty at its final reading by 543 votes out of 568 votes cast (stenographic record 12/126, p. 10879 *et seq.*). The *Bundesrat* gave its unanimous consent to the Law on 18 December 1992 (*BRDrucks.* 810/92, stenographic record of the 650th sitting of 18 December 1992). The Law was promulgated on 30 December 1992 in

the Federal Law Gazette and entered into force on 31 December 1992 (*BGBI.* II, p. 1251 *et seq.*). At the sitting of 2 December 1992, the *Bundesrat* passed a Resolution on Economic and Monetary Union which states as follows:

3. The German *Bundesrat* recognizes that the Treaty on European Union lays the foundations for a stable future European currency, in particular through the guarantee of the independence of the European Central Bank and the agreement as to stability criteria for the participating Member States.

In that regard, the stability criteria will have to be interpreted narrowly and strictly upon transition to the third stage of economic and monetary union. The decision to proceed to the third stage may only be taken on the basis of shown stability, of synchronism among the fundamental economic data and of shown, durable solidity in the participating Member States' budgets and finances. That decision must be guided not by considerations of opportunity, but rather by the economic realities. By their nature, the criteria cannot be fulfilled merely in statistical terms. The conviction that their fulfilment is durable must, rather, also be inspired by the progress of the convergence process. The future European currency must be and remain as stable as the German Mark.

The German *Bundesrat* will resist any attempt to weaken the stability criteria agreed on at Maastricht. It will also watch carefully to ensure that the transition to the third stage of economic and monetary union is guided strictly by those criteria.

The transition to the third stage of economic and monetary union also requires the German *Bundesrat* to give an assessment. Accordingly, in order to know which way to vote in Council decisions under Article 109(j)(3) and (4) of the Treaty establishing the European Union, the Federal Government needs the consenting vote of the German *Bundesrat*. The German *Bundesrat*'s vote covers the same subject-matter as the assessment by the Council of Economics and Finance Ministers and the decision of the Council in its composition of Heads of State or of Government.

4. The German *Bundesrat* calls on the Federal Government to state that it will respect this vote of the German *Bundesrat*.

5. The German *Bundesrat* calls on the Federal Government to notify the Contracting Parties, the European Commission and the European Parliament of this procedure.

6. The German *Bundesrat* calls on the Federal Government to submit to it annually from 1994 a report on the development of convergence in the European Union. (*BRDrucks.* 12/3906; stenographic record 12/126, p. 10879 *et seq.*).

At its sitting of 18 December 1992, the *Bundesrat* passed a largely identical resolution (*BRDrucks.* 810/92, p. 6 *et seq.*).

On 2 April 1993, the Federal Minister of Finance, Dr Waigel, sent the Chairman of the European Committee of the German *Bundesrat*, Dr Hellwig, a letter stating as follows:

I have stated already, at the plenary sitting of the German *Bundstag* on 2 December 1992, that before taking the important step into monetary union the Federal Government will "make sure it has the backing of the legislative bodies". I have referred in that connection to the "consenting vote" mentioned in the identical resolutions of the *Bundstag* and *Bundesrat*.

I have also said that I am prepared to cooperate with the Federal Foreign Minister in notifying our partners in the Community of the procedure chosen for use between Parliament and the Government.

That notification should take place immediately after the Federal Government has deposited the instrument of ratification, which deposit concludes the ratification procedure in Germany.

4. Under Article R(1) of the EUT, the Union Treaty requires all Member States to ratify the Treaty in accordance with their respective constitutional requirements. The instruments of ratification are to be deposited with the Government of the Italian Republic.

[432] After the complainants had applied for a provisional order preventing the Federal Republic of Germany from being bound by the Union Treaty under international law, the Federal President stated—through the Head of the Office of the Federal President—that he would not sign the instrument of ratification until the Federal Constitutional Court had ruled on the merits. The Federal Government gave an assurance that it would not deposit the instrument of ratification for the time being.

II.

The complaints of unconstitutionality are directed against the Law Approving the Union Treaty and against the Law Amending the Basic Law. The complainant at 1 asserts a violation of his basic rights (and guarantees equivalent to basic rights) under Article 1(1), Article 2(1), Article 5(1), Article 9(1) in conjunction with Article 21(1) second sentence, Article 12(1), Article 14(1), Article 38(1) and Article 20(4) in conjunction with Article 93(1), point 4(a), of the Basic Law. The complainants at 2 are Members of the European Parliament elected in the Federal Republic of Germany, but lodge their complaint of unconstitutionality as citizens of the Federal Republic of Germany and are essentially asserting a violation of their rights equivalent to basic rights under Article 20(4) and Article 38(1) and (2) of the Basic Law.

1 (a) The complainant at 1 argues that his right under Article 38 of the Basic Law, which grants every citizen the right to democratically legitimated representation in the German *Bundstag* and protects his right to participation in the exercise of State authority (Article 20(2), second sentence, of the Basic Law) is violated. That right of participation is, he claims, substantially reduced by the Union Treaty "transferring" substantial competences of the German *Bundstag* to institutions of the

European Communities and even, in Article F(3) of the EUT, giving the Union a power to provide itself with powers (*Kompetenz-Kompetenz*) which it can use to acquire any further competences which it chooses. Under this extension of the Community's competences, State authority in Germany is no longer exercised essentially by the elected representatives of the entire German people in the German *Bundstag* and thus no longer by the German people.

Moreover, the complainant argues, Article 38 of the Basic Law is also violated by a democratic deficit at Community level. The real legislature in the European Union is the Council, i.e. the Governments and, in the final analysis, the Heads of Government. The European Parliament has essentially only an advisory function. As a result, the principle of democracy and the requirement for the administration to comply with the rule of law are turned on their heads because the administration executing the laws itself makes the laws. Nor is that deficiency compensated for by adequate involvement of the Member States' Parliaments in Community law-making.

By contrast, the complainant argues, it is every citizen's right that the act of voting should retain its essential component, that of electing the real legislative body. The complainant argues that, furthermore, his freedom to vote and to stand as a candidate at elections is prejudiced because citizens of the Union from other Member States are granted the right to vote and to stand as candidates at municipal elections in Germany.

(b) The complainant further asserts violation of his basic rights under Article 1(1), Article 2(1), Article 5(1), Article 9(1) in conjunction with Article 21(1) second sentence, Article 12(1) and Article 14(1) of the Basic Law.

He claims that the Law Approving the Union Treaty renounces or at least substantially prejudices German statehood in numerous areas of basic rights and thus displaces the addressees and guarantors of the protection of basic rights under the Basic Law. The protection of human dignity changes fundamentally if, instead of the German people, a people of the European Union (Article 8 *et seq.* EUT) henceforth exercises State authority, even if the protection is not qualitatively worsened thereby. The complainant sees a violation of his general freedom, in particular of a "basic right to legislation in accordance with the constitution" in that, after entry into force of the Union Treaty, legislation will no longer be adequately legitimated in accordance with German constitutional law and will no longer have a sufficiently democratic basis. Moreover, he argues that he will lose the protection of basic rights afforded by the Federal Constitutional Court. In so far as Article L of the EUT precludes European Court of Justice jurisdiction, a gap in legal protection contrary to the Basic Law arises. The complainant further asserts a violation of his political

and economic freedoms because he is henceforth subject to European institutions and European legal acts and is bound by a common European entity and the formation of its will.

This is particularly apparent, he argues, in the introduction of a monetary union contrary to basic rights. Every German loses the basis for his economic confidence which ensues from the specific monetary situation based on the German Mark. With entry into the third stage of Economic and Monetary Union, the complainant will no longer be able to receive payments, keep assets and carry out financial transactions in German Marks. This violates his basic rights under Article 2(1) and Article 14 of the Basic Law directly and currently because Germany 'automatically' enters the monetary union after entry into force of the Union Treaty and may not then leave it again. A reservation making entry subject to the consent of the *Bundesrat* and the *Bundesrat* is irrelevant in law vis-à-vis the Contracting Parties. The complainant contends that the exercise of the German right to vote at the Council in votes on the third stage of economic and monetary union could not be a suitable subject for a complaint of unconstitutionality. Moreover, the Federal Republic could be out-voted there.

The complainant states, as the ground for his complaint based on Article 5(1) of the Basic Law, that the conditions of communication would change substantially if henceforth European rather than German institutions had to be influenced.

The complainant sees further in Article 138(a) of the ECT a violation of his freedom, protected as a basic right under Article 9(1) in conjunction with Article 21(1) second sentence of the Basic Law, to establish parties and participate in them, to the extent that that provision requires that political parties should form a European awareness.

(c) Finally, the complainant bases his complaint of unconstitutionality on Article 20(4) in conjunction with Article 93(1), point 4(a), of the Basic Law. He interprets those provisions as meaning that they assign to the Federal Constitutional Court, in its role as "guardian of the Constitution", an extraordinary competence to make another remedy available for every German on request if the foundations of the Constitution laid down in Article 20(1) to (3) of the Basic Law are in danger of being abolished. Following the sense of the obligation to maintain peace, all Germans must be able to apply for such remedy, in order to avoid the threat to peace inherent in resistance under Article 20(4) of the Basic Law.

The complainant sees an attempt to abolish the constitutional order of the Basic Law above all [433] in specific amendments to the Basic Law made by the Law of 21 December 1992, which he also attacks as unconstitutional. Article 23 of the Basic Law, as amended, does not

provide any basis under constitutional law for granting sovereign rights because it is itself unconstitutional. Article 23 of the Basic Law recognizes the Federal Government's exclusive power to decide on German participation in law-making acts of the European Union. With regard to the power of the Federal Chancellor to determine policy guidelines, and his legal status vis-à-vis ministers, a principle of purely executive leadership has in fact been incorporated into the Basic Law.

In addition, the complainant regards his right to vote as violated in that the newly inserted Article 28(1), third sentence, of the Basic Law authorizes the introduction of a right for nationals of other EC Member States to participate at municipal elections and Article 8(b) of the ECT makes use of that authorization.

Furthermore, the complainant argues, the Law amending the Constitution (Article 23(2) and (4) to (6) of the Basic Law, as amended, in conjunction with Article 52(3)(a) of the Basic Law, as amended), the Law approving the Union Treaty and the Union Treaty, all violate the principle of a federal State. The participation of the *Länder* (constituent States of the Federal Republic of Germany) in law-making is prejudiced contrary to Article 79(3) of the Basic Law. The participation rights of the *Bundesrat* provided for in Article 23 of the Basic Law, as amended, do not compensate for this. In addition, the transfer of the competences of the *Bundesrat* to the European chamber provided for in Article 52(3)(a) of the Basic Law, as amended, reduces the rights and status of the *Länder*.

The complainant contends that the principle of a social State is violated by the Union Treaty because Germany's social responsibility is expanded to the entire European Union. The principle of the German social State can at most be abolished by a new constitution, but not by amendment of the constitution.

2 (a) In the view of the complainants at 2, the Law approving the Union Treaty violates fundamental principles of the Basic Law which, under Article 79(3) of the Basic Law, are exempt from any constitutional amendment. By contrast Article 20(4) of the Basic Law, in conjunction with Article 93(1) point 4(a) of the Basic Law, allows the possibility of a complaint of unconstitutionality.

The principle of democracy, and the separation of powers required by the principle of a State subject to the rule of law, are violated when the Union Treaty removes wide areas of legislation and the settlement of fundamental substantive issues from the *Bundesrat* and transfers them to the executive. Community law-making is the business of the Council and the Commission as arms of the executive. The European Parliament is not a legislature. Unlike the *Bundesrat*, the "EC legislature" has no direct democratic legitimation at Community

level, but rather derives this from the indirect democratic legitimization given to members of Government in the Member States.

Furthermore, the complainants argue, the Federal Republic of Germany's existence as an independent sovereign State, which likewise under Article 79(3) of the Basic Law is exempt from constitutional amendment, is threatened upon the entry into force of the Union Treaty, since that Treaty brings about a new stage in integration which irrevocably initiates development towards the insidious creation of a European federal State. The establishment of a monetary union creates, in addition, material constraints which in fact make the path to European Union irreversible. The Community's tasks and competences are extended, beyond the economic community as it has existed hitherto, to all matters of importance to a State entity. The legislature thereby arrogates to itself powers to which only the people as the holders of the constituent power are entitled.

Accordingly, where it is a matter of defending the core of the Constitution, which is exempt from any constitutional amendment, every German has a "right to defend the constitutional order" under Article 20(4) of the Basic Law. The fact that the right to resist is mentioned among the rights which may be the subject of complaints of unconstitutionality, referred to in Article 93(1) point 4(a) of the Basic Law, means not only that the right to resist, as such, may be the subject of litigation—which, in practical terms, is largely absurd—but also opens up the complaint of unconstitutionality as a possible "other remedy" which helps avoid exercise of the right to resist and thus the danger of civil war.

(b) The complainants further assert a direct and current violation of their personal rights equivalent to basic rights under Article 38(1) and (2) of the Basic Law which, under Article 93(1) point 4(a) of the Basic Law and Section 90(1) of the Law on the Federal Constitutional Court (*BVerfGG*) may likewise be the subject of complaints of unconstitutionality. In their view, the Law approving the Union Treaty should not have been allowed to be adopted without legitimization by the people as the holder of the constituent power, since that law—just like the newly created Article 23 of the Basic Law—interferes with the core of the Constitution, referred to in Article 79(3) of the Basic Law as not being subject to any amendment.

The complainants claim that the right to participate in the process of forming the democratic will, governed by Article 38(2) of the Basic Law, should also be applied to referenda. Consequently, there follows from Article 38 of the Basic Law, in addition to the individual's right to the holding of an election to the *Bundestag* and the entitlement to participate in the democratic exercise of State authority, a basic right to the holding of a referendum required under constitutional law.

III.

1. Of the bodies entitled to comment under Section 94(4) in conjunction with Section 77 of the Law on the Federal Constitutional Court, the Federal Government, the *Bundestag* and the *Bundesrat* have stated their positions. The bodies entitled to comment consider the complaints of unconstitutionality to be inadmissible, or at least unfounded.

2. This Court has consulted the President of the German Bundesbank (Federal Bank), Prof. Dr Helmut Schlesinger, and Bundesbank Director, Dr Wolfgang Rieke, on questions of economic and monetary union. At the Court's request, the Commission of the European Communities sent the Head of its Legal Department, Director-General Jean-Louis Dewost, to take part in the oral hearing. He has commented on the interpretation of various provisions of the Treaty.

B.

Only the complaint of unconstitutionality directed against the Law Approving the Union Treaty entered by the complainant at 1 is admissible, in so far as by that complaint a violation of the rights under Article 38 of the Basic Law is claimed. The other complaints of unconstitutionality are inadmissible.

A complaint of unconstitutionality is admissible only if the complainant claims that a right which may be the subject of a complaint of unconstitutionality (Article 93(1), point 4(a), of the Basic Law and Section 90(1) of the Law on the Federal Constitutional Court) is directly and currently violated by the contested act of State. The complainant must provide sufficient evidence to demonstrate that such a violation appears possible (*cf. BVerfGE* 28, 17(19); 52, 303(327); 65, 227(232 *et seq.*)).

1. The complainant at 1 has sufficiently demonstrated that the Law Approving the Union Treaty may violate his right under Article 38(1) of the Basic Law.

[434] (a) Article 38(1) and (2) of the Basic Law guarantees Germans entitled to vote the right to take part in the election of deputies to the German *Bundestag* (*cf. BVerfGE* 47, 253 (269)). In the act of voting, State authority emanates from the people. The *Bundestag* then exercises State authority as an organ of the legislature, which at the same time elects the Federal Chancellor and controls the Government (Article 20(2), first and second sentences, of the Basic Law). Article 38 of the Basic Law guarantees more than that the citizen has the right to elect deputies to the German *Bundestag* and that at the election the constitutional principles relative to electoral law are adhered to. The guarantee extends also to the fundamental democratic content of that law: Germans entitled to vote are guaranteed the right to take part in the election of the German *Bundestag* and thereby to participate in the

legitimation of State authority by the people at federal level and to influence its exercise. In that regard, however, the law requires clarification. That is necessary in this case only in so far as the exercise of sovereign power by supranational organizations in the context of creating a united Europe (Article 23 of the Basic Law) is at issue.

If the German *Bundestag* gives up tasks and powers, in particular to legislate and to elect and control other holders of State authority, then that affects the substantive area to which the democratic content of Article 38 of the Basic Law relates. As regards the European Union and the Communities which it comprises, Article 23(1) of the Basic Law authorizes the Federal legislature, under the preconditions for European Union cited therein, to grant the European Union the autonomous exercise of sovereign powers up to the limit laid down in Article 79(3) of the Basic Law (Article 23(1), third sentence, of the Basic Law). That constitutional provision was created by the legislature amending the Constitution specially for the purpose of European integration and the progress thereof. To that extent, it also determines the scope of the guarantee contained in the right established by Article 38. Article 38 of the Basic Law precludes, within the scope of application of Article 23 of the Basic Law, the legitimation of State authority and the influencing of its exercise effected by means of elections, from being undermined by the transfer of tasks and powers of the *Bundestag* to such an extent that the principle of democracy, in so far as Article 79(3) in conjunction with Article 20(1) and (2) of the Basic Law declares it inviolable, is violated.

The complainant's right under Article 38 of the Basic Law can be violated, therefore, if the exercise of the German *Bundestag*'s competences passes to an institution of the European Union or of the European Communities set up by the Governments to such an extent that the essential minimum requirements under Article 20(1) and (2) in conjunction with Article 79(3) of the Basic Law for democratic legitimation of the sovereign power with which the citizen must contend are no longer fulfilled.

(b) The complainant argues, with reference to assessments given by the President of the Commission of the European Communities, Mr Delors, (speech to the European Parliament of 4 July 1988, EC Bulletin 1988, No 7/8, p. 111) and Member of the Commission, Bangemann, (in Brückner (publisher), *Europa transparent: Informationen, Daten, Fakten, Hintergründe*, 1991, p. 5), that already almost 80 per cent of all economic legislation is set by Community law and almost 50 per cent of all German laws are motivated by Community legislation. He contends that the Union Treaty now considerably extends those competences of the Council as an executive institution with legislative power and in many respects takes decision-making competences away from the German *Bundestag*, in particular in the

context of the future monetary union, which will in practice result in an economic and also a social union, but also in the policy fields of education and vocational training, culture, public health, consumer protection, visas, the establishment and development of trans-European networks in the areas of transport, telecommunications and energy infrastructures, and industry. The Treaty establishes in that connection the principle of majority voting in the Council for a range of competences, thus allowing the executive to make laws for Germany, even against the will of the German organs involved. The complainant claims that in the Monetary Union, monetary policy will be exempt from any parliamentary influence or other democratic legitimation. The competences and powers of the German *Bundestag* are finally undermined completely by Article F(3) of the EUT, which gives the Union a power to give itself powers (*Kompetenz-Kompetenz*) in that it authorizes the Union to provide itself, in each case, with the competences and powers which it needs.

Finally, the complainant argues that the Union Treaty is designed to achieve dynamics of continuous and irreversible expansion of competence; this emerges in particular from Article B, first paragraph, fifth tiret, and Article C of the EUT and also from the Protocol on the Transition to the Third Stage of Economic and Monetary Union.

(c) Consequently, it appears possible, on the basis of these submissions, that the Law Approving the Union Treaty violates the complainant's right under Article 38 of the Basic Law.

2. The complaint of unconstitutionality entered by the complainant at 1 is inadmissible in so far as he asserts a violation of his basic rights under Article 1(1), Article 2(1), Article 5(1), Article 12(1) and Article 14(1) of the Basic Law.

(a) In so far as he argues that the approval in law of Monetary Union violates his basic rights under Article 12(1) and Article 14(1) of the Basic Law, it is already hard to see how those basic rights would preclude replacing the German Mark with the ECU. Article 88, second sentence, of the Basic Law expressly provides that the tasks and powers of the German Bundesbank may be transferred to the European Central Bank in the context of the European Union. With that authorization, the development of a European Monetary Union is given constitutional recognition. That provision, which was introduced specially for the establishment of the European Union, also signifies that use of that authorization, as such, is not contrary to basic rights.

(b) The complainant's claim that his basic rights are violated by their henceforth not only being guaranteed for Germany and by German institutions, but rather as European basic rights having a different content, is also inadmissible. The openness to European integration enshrined in the Preamble to the Basic Law and governed

by Articles 23 and 24 of the Basic Law has as its result that interference with basic rights can also originate from European institutions and, accordingly, that a protection of basic rights must be guaranteed for the entire area of application of those measures. Thus, in particular, the territorial scope of the freedoms and the basis of comparison are expanded as regards the application of the principle of equality.

This does not involve any noteworthy reduction in the standard of basic rights. The Federal Constitutional Court guarantees, by virtue of its jurisdiction (*cf. BVerfGE* 37, 271 (280 *et seq.*);^[3] 73, 339 (376 *et seq.*)),^[4] that persons resident in Germany are assured in general of effective protection of basic rights, even in relation to the sovereign power of the Communities, and that this protection is essentially to be regarded as substantively equivalent to the protection of basic rights laid down as inalienable by the Basic Law, especially as the Court guarantees in general [435] the substance of the basic rights. The Federal Constitutional Court thus also safeguards that substance vis-à-vis the sovereign power of the Community (*cf. BVerfGE* 73, 339 (386)).^[4] The acts of a special public authority of a supranational organization, which is separate from the State authority of the Member States, also concern those entitled to basic rights in Germany. They thus affect the guarantees contained in the Basic Law and the tasks of the Federal Constitutional Court which have as their object the protection of basic rights in Germany and, to that extent, not only in relation to German State organs of State (deviation from *BVerfGE* 58, 1 (27)). However, the Federal Constitutional Court exercises its jurisdiction over the applicability of secondary Community law in Germany in a "relationship of cooperation" with the European Court of Justice. The European Court of Justice guarantees the protection of basic rights in each individual case for the entire territory of the European Communities and the Federal Constitutional Court is therefore able to confine itself to providing a general guarantee of the unalterable standard of basic rights (*cf. BVerfGE* 73, 339 (387)^[5]).

(c) The complainant's claim that Article L of the EUT creates a gap in legal protection contrary to the Basic Law, by failing to establish European Court of Justice jurisdiction over measures of the European Union, is not correct. Article L of the EUT precludes jurisdiction of the European Court of Justice only in respect of such provisions of the Union Treaty as do not empower the Union to take measures directly affecting the holders of basic rights in the territory of the Member States. If, in future, measures affecting basic rights were envisaged in the context of the cooperation provided for in Articles J and K of the

[³ 93 *ILR* 362 at 391.]
[⁴ 93 *ILR* 403 at 428.]

[⁴ 93 *ILR* 403 at 436.]
[⁵ *Ibid.* p. 436.]

EUT, a further law of approval would be required for that purpose, which could then itself be examined for any gaps in legal protection.

The Federal Government has given an assurance that, in the unanimous opinion of all the Member States, Article L of the EUT will not lead to any gaps in legal protection.

(c) (1) Articles A to F of the Union Treaty do not contain any basis of empowerment for actions of any kind affecting the holders of basic rights. In the Titles on the Common Foreign and Security Policy (Title V, Articles J to J.11 of the EUT) and Cooperation in the Fields of Justice and Home Affairs (Title VI, Article K to K.9 of the EUT), the Council is for the time being only authorized to define common positions (Article J.2(2) and Article K.3(2)(a) of the EUT). The defining of those positions in no way imposes on the individual a binding obligation affecting his basic rights.

(c) (2) In so far as Titles V and VI of the Union Treaty provide for the Council to be able to decide on joint action and adopt measures to implement co-operation in the fields of justice and home affairs, the result is no different. Regardless of any commitment under international law of the Member States as a result of such Council decisions (*cf. Article J.3(4) and Article K.3(2)(b) of the EUT*, where the rule is not explicitly stated), which must either be taken unanimously or at least originate from a Council decision taken unanimously (Article J.3(2), Article J.8(2); Article K.3(2)(b), Article K.4(3) of the EUT), they cannot establish law which is directly applicable in the Member States and claims precedence over national law.

Although the fields of foreign and security policy and justice and home affairs are objects of European co-operation within the Union framework, the Contracting States deliberately have not incorporated them into the supranational system of competences of the European Communities. The definition of the foundations of the Union given in Article A, third paragraph, EUT differentiates straight away between the—supranational—European Communities and their supplementation by the policies and forms of co-operation newly established by Titles V and VI of the Union Treaty. Article E of the EUT confirms this distinction with the rule that the European institutions must exercise their powers either under the conditions provided for in the primary law of the European Communities as amended or under the conditions provided for in the other provisions of the Union Treaty. Accordingly, the Council may not have recourse to the supranational forms of action provided for the European Community law if it is acting in the fields of foreign and security policy or justice and home affairs. The situation will only be otherwise where the Treaty declares provisions of the EC Treaty to be applicable in those fields. Article J.11(1) and Article K.8(1) of the EUT do prescribe such scope of application for some provisions of the EC

Treaty, but fail to mention Article 189, which defines those EC legal acts which have direct effect.

As regards Title VI, Article K.9 stipulates that the transformation of the intergovernmental co-operation referred to therein to the supranational competence of the European Community requires in advance a (simplified) amendment of the Treaty which all Member States must ratify.

(c) (3) Although Article K.2(1) of the EUT prescribes that the justice and home affairs matters subject to the cooperation shall be dealt with in compliance with the European Human Rights Convention and the Geneva Convention on the Status of Refugees, this does not permit the conclusion that under Title VI of the Union Treaty direct interference with basic rights is possible. On the contrary, Article K.2(1) of the EUT confirms those human rights obligations which are incumbent upon all Member States and which are to be respected in the context of joint measures, even before any question arises of basic rights being directly interfered with, if Member States' implementation of those measures may result in interference with basic rights.

(c) (4) If the co-operation in the fields of justice and home affairs takes the form of international conventions in accordance with Article K.3(2)(c) of the EUT, those conventions may give the European Court of Justice jurisdiction (Article L(b) of the EUT). To that extent, an unconstitutional deficit in legal protection cannot arise. Moreover, such agreements require a further instrument of ratification, which may also be examined by the Federal Constitutional Court.

(c) (5) If joint actions and measures under Titles V and VI of the Union Treaty commit Member States with binding force under international law to interfere with basic rights, all such interference, if carried out in Germany, is subject to full scrutiny by the German courts. To that extent, the protection of basic rights guaranteed by the Basic Law is not superimposed upon by supranational law which could claim precedence. At any rate, a commitment under international law incumbent upon the Federal Republic of Germany cannot reduce the protection of basic rights which German State authority has to provide. A European policy decided under Title V or VI of the Union Treaty, involving an encroachment upon basic rights by the German sovereign power, consequently cannot restrict the protection of basic rights by the German courts. To that extent, exactly the same applies as in the case of a conventional international agreement: if its implementation nationally would violate basic rights, it is prohibited by constitutional law.

[436] If a Council Decision taken in accordance with the provisions of Title V or VI of the Union Treaty were transposed by a legal act of the European Communities—on the basis of Article 228(a) of the ECT, for example—and basic rights were thereby interfered with, the

European Court of Justice or, failing that, the Federal Constitutional Court would provide adequate protection of basic rights (*cf. BVerfGE* 73, 339(387)⁶⁰). Here too, the Federal Constitutional Court and the European Court of Justice complement one another in a relationship of co-operation designed to guarantee protection of basic rights.

(d) The complainant's claim that Article 5(1) of the Basic Law is violated by the Law Approving the Union Treaty must be rejected from the outset. Freedom of communication safeguards unhindered participation in a process of open communication, but does not guarantee any specific success for that participation or a specific framework for the exchange of opinions. The individual's freedom to inform himself from European sources and to influence public opinion in the Member States and consequently the European communication process is not affected by the Treaty. The language problems which arise in this context are due to the multiplicity of languages within the European Union and for that reason are not in themselves an obstacle to the exercise of that basic right.

(e) In so far as the complainant claims that Article 138(a) of the ECT infringes Article 9 and Article 21 of the Basic Law, his complaint of unconstitutionality is likewise inadmissible. It is not obvious why the recognition of political parties as a factor for integration within the Union would predetermine or restrict the programme and objectives of an individual party or its members in a legally binding manner.

(f) In so far as the complainant sees in the rules of the Union Treaty a violation of the principle of a social State and the principle of a federal State, those complaints under Article 93(1)(4a) of the Basic Law are inadmissible.

3. The complaint of unconstitutionality entered by the complainant at 1, which relies on Article 38 of the Basic Law and is directed against the Law Amending the Basic Law of 21 December 1992, is inadmissible in so far as the latter law has incorporated Article 23 and Article 28(1), third sentence, as amended, into the Basic Law.

(a) Article 23(1) of the Basic Law constitutes special authorization to participate in the development of the European Union for the purpose of creating a United Europe (*cf. Explanatory Memorandum of the Federal Government to the Draft Law Amending the Basic Law, BTDrucks.* 12/3338, p. 6). Under Article 23(1), third sentence, of the Basic Law, however, that authorization is expressly bound by the limits laid down in Article 79(3) of the Basic Law which determine the confines of the authority to amend the Constitution. Consequently, no discrepancy can arise between the democratic core of Article 38 of the Basic Law and the new Article 23 of the Basic Law.

(b) The complaint that the structural principles of the European Union listed in Article 23(1), first sentence, of the Basic Law as amended are not translated into reality is likewise inadmissible. It cannot be inferred from Article 38 of the Basic Law what form should be given to the institutional framework of the European Union.

(c) Also inadmissible is the complainant's claim that his rights as a person entitled to vote and to stand at elections are violated in that the Law Amending the Basic Law of 21 December 1992 authorizes, in Article 28(1), third sentence, of the Basic Law, the introduction of a right for nationals of other EC Member States to participate at municipal elections and Article 8(b) of the ECT makes use of that authorization. Article 38 of the Basic Law does not, at any rate as regards the right to participate at municipal elections, grant the right for individuals to be able, when exercising the right to vote or to stand at elections, to resist non-German candidates or voters by bringing a "competition action" under electoral law.

4. In so far as the complaints of unconstitutionality are based on Article 20(4) of the Basic Law and constitute an application for "another remedy" from the Federal Constitutional Court, they are likewise inadmissible. However Article 20(4) of the Basic Law is to be interpreted, the problem of the right to resist does not arise precisely because, as the present proceedings show, the complainants have open to them, within the framework of the rule of law, constitutional possibilities for resisting ratification of the Treaty on European Union.

5. The complaints of unconstitutionality of the complainants at 2 are inadmissible in toto. In so far as they rely on Article 20(4) of the Basic Law, this has just been shown. The further complaint, that the Law Approving the Treaty on European Union violates a right of the complainants, flowing directly or by analogy from Article 38 of the Basic Law, to the holding of a referendum since that law interferes with the "amendment-proof" core of the Constitution referred to in Article 79(3) of the Basic Law, is likewise inadmissible. The Basic Law grants individual rights only in the context of the system of basic rights and not in respect of the procedure or content of an amended Constitution. Article 79(3) of the Basic Law binds the development of the German State to the core of the Basic Law system referred to in that article and seeks thus to consolidate the existing Constitution in the face of any development directed towards a new constitution, without itself being able to impose binding norms on the constituent authority. It therefore sets limits on the authority which has the power to amend the Constitution and thereby formally precludes a law amending the Constitution which affects the "amendment-proof" core of the Basic Law from being legitimated by means of a referendum. Neither does Article 146 of the Basic Law establish an individual right

which may be subject to a complaint of unconstitutionality (Article 93(1), point 4(a) of the Basic Law).

C.

In so far as the complaint of unconstitutionality entered by the complainant at 1 is admissible, it is unfounded. The Federal Constitutional Court can examine here the grant of sovereign powers to the European Union and the Communities which it comprises only by the criterion of the guarantees contained in Article 38 of the Basic Law (dealt with under I. below). Those guarantees are not violated by the Law Approving the Union Treaty, as can be seen from the content of the Treaty: the Treaty establishes a European Union of States which is to be borne by the Member States and respects their national identity. It relates to Germany's membership of supranational organizations, not membership of a European State (II.1 below). The tasks of the European Union and the powers granted for their exercise are laid down in a way which makes them sufficiently foreseeable: the principle of limited specific empowerment is adhered to, the European Union is not granted a power to determine its own competences (*Kompetenz-Kompetenz*) and the assumption by the European Union and the European Communities of further tasks and powers is made contingent upon additions and amendments to the Treaty, and therefore subject to the consent of the national [437] Parliaments (II.2 below). The extent of the tasks and powers granted, and the way in which the Treaty governs the formation of will in the European Union and in the institutions of the European Communities, do not go so far as to undermine the German *Bundestag*'s decision-making and scrutiny powers to the point where the principle of democracy, in so far as Article 79(3) of the Basic Law declares it inviolable, is violated (II.3 below).

I.

1. The right guaranteed by Article 38 of the Basic Law, to participate via elections in the legitimation of State authority and to gain influence over the exercise thereof precludes, within the scope of Article 23 of the Basic Law, that right from being undermined by the transfer of tasks and powers of the *Bundestag* to the point where the principle of democracy, in so far as Article 79(3) in conjunction with Article 20(1) and (2) of the Basic Law declares it inviolable, is violated (*cf.* B.1(a) above).

2. One of the inviolable aspects of the principle of democracy under Article 79(3) of the Basic Law is that those assuming State tasks and exercising State powers are fundamentally answerable to the people, from whom these tasks and powers are derived. This necessary relationship of accountability may establish itself in a variety of ways

and need not take one particular form. What is essential is that a sufficient measure of real democratic legitimation, a particular level of legitimation, is achieved (*cf. BVerfGE* 83, 60 (72)).

(a) If the Federal Republic of Germany becomes a member of a community of States with authority to act in a sovereign capacity, and if that community of States is granted autonomous sovereign powers—both are expressly permitted under the Basic Law for the purpose of creating a united Europe (Article 23(1) of the Basic Law)—then to that extent democratic legitimation cannot take the same form as within a State order governed in a uniform and definitive manner by a State constitution. If supranational organizations are given sovereign rights, the organ representing and elected by the people, the German *Bundestag*, and with it the citizens who are entitled to vote, necessarily lose influence over the forming of the political will and the decision-making process. Any accession to a community of States has as its result that the member who accedes to such a community is bound by that community's decisions. But the Member State, and with it its citizens, also gain possibilities for exerting influence by participation in the forming of the community's will in the pursuit of common—and therefore also the Member State's own—aims, the outcome of which is binding on all Member States and therefore also requires each Member State to acknowledge that binding effect upon itself.

This openness to commitments in the international community, and in the narrower legal union of a community of States, is inherent in a democratic State which, as outlined in the Preamble to the Basic Law and expressly laid down in Articles 23 and 24, seeks to participate as an equal partner in international institutions and in particular in the development of the European Union. The Member States participate in forming the will of the union of States in accordance with that union's organizational and procedural law, but are then bound by the results of that formation of will, regardless of whether those results originate from their own involvement or not. The grant of sovereign powers has as its result that their exercise does not always depend solely on the will of a Member State. To see in this a violation of the principle of democracy as enshrined in the Basic Law would not only contradict the Basic Law's openness to integration, which was sought and expressed by the framers of the Constitution in 1949, but would also imply a conception of democracy which would make every democratic State incapable of integration beyond the principle of unanimity. Having unanimity as a constant requirement would automatically set the individual will above that of the community of States itself and would thereby call the very foundations of such a community into question. Such a result is not the intention of the letter and spirit of Articles 23 and 24. The grant of sovereign powers which those articles authorize presupposes a law to that effect. Since

a law is required (Article 23(1), second sentence, and Article 24(1) of the Basic Law), the political responsibility for granting sovereign rights falls to the *Bundestag*, together with the *Bundesrat*, as the national representative body. It is incumbent on the *Bundestag* to discuss and decide upon the far-reaching consequences, not least for the competences of the *Bundestag* itself, which such consent entails. It is the law approving accession to a community of States which provides democratic legitimation, both of the existence of the community of States itself and of its powers to take majority decisions which bind the Member States. Nevertheless, in accordance with the requirement for mutual regard which flows from the notion of a community, the principle of majority voting has its limit in the constitutional principles and fundamental interests of the Member States.

(b) The principle of democracy therefore does not prevent the Federal Republic of Germany from being a member of a supra-nationally organized community of States. But it is a precondition of membership that, within the union of States too, there should be a guarantee of legitimation and influence emanating from the people.

(b) (1) The European Union, which sees itself as a union among the peoples of Europe (Article A, second paragraph, EUT), is a union of democratic States based on the principle of dynamic development (*cf.* for example Article B, first paragraph, last tiret; Article C, first paragraph, EUT). Where it assumes sovereign tasks and exercises sovereign powers to carry them out, it is first and foremost for the national peoples of the Member States to provide democratic legitimation via their national parliaments. Nevertheless, as the Community's tasks and powers are expanded, so the need grows to add to the democratic legitimacy and influence imparted through the national parliaments by securing the representation of the national populations of the Member States in a European Parliament, as a source of additional democratic underpinning for the policies of the European Union. In the Union citizenship established by the Maastricht Treaty, an enduring legal bond is formed between the nationals of the Member States. This bond, while not having a closeness comparable to common citizenship of a State, nevertheless gives legally binding expression to the existing degree of *de facto* community of interest (*cf.* in particular Article 8(b)(1) and (2) of the Treaty). The exertion of influence by the citizens of the Union can result in democratic legitimation for the European institutions to the extent that the prerequisites exist within the peoples of the European Union themselves.

For democracy not to remain merely a formal principle of [438] of accountability, it requires the existence of certain prerequisites such as a constant free exchange of views between opposing social forces, interests and ideas, in the course of which political objectives also

become clear and change (*cf. BVerfGE* 5, 855 (135, 198, 205); 69, 315, (344 *ff.*)) and from which public opinion gives initial shape to the political will. It also implies that the decision-making processes of the institutions exercising sovereign authority, and the political objectives pursued at any given time, must be generally clear and understandable. Equally, the citizen who is entitled to vote must be able to communicate in his own language with the sovereign authority to which he is subject.

Such conditions, in so far as they do not yet exist as a reality, may develop in the course of time in the institutional context of the European Union. Such a development will depend, not least, on the aims of the Community institutions and their decision-making processes being communicated to the nations. Political parties, associations, the press and broadcasting organizations are both instruments and factors in that communication process, from which a body of public opinion can be formed in Europe (*cf. Article 138(a) of the ECT*). The European Council too is endeavouring to ensure greater openness and transparency in the European decision-making processes (*cf. the Birmingham Declaration: A community close to its citizens*, paragraphs 2 and 3, *BullBRReg* No 115 of 23 October 1992, p. 1058; Conclusions of the Presidency of the Edinburgh European Council of 11 and 12 December 1992, Part A, Section 7 and Annex 3, *BullBRReg* No 140 of 28 December 1992, p. 1278, 1284f.).

(b) (2) Democratic legitimacy in the Union of States constituting the European Union is therefore necessarily conferred by feedback from the actions of the European institutions in the parliaments of the Member States. In addition, and increasingly as the European nations grow together, democratic legitimacy will be conferred within the structure of the European Union by the European Parliament elected by the citizens of the Member States.

Even at this early stage of the process, the legitimacy conferred by the European Parliament already has a supporting role which could be reinforced if that Parliament were elected in accordance with a uniform electoral law in all Member States, as provided for by Article 138(3) of the EC Treaty, and its influence on the politics and legislation of the European Communities were to grow. What is crucial is that development of the democratic foundations of the Union keeps pace with integration and that, as integration progresses, a living democracy continues to operate in the Member States. If the European Union of States were to have an excessive number of tasks and powers, that would permanently weaken democracy at Member State level, with the result that the parliaments of the Member States could no longer adequately confer legitimacy on the sovereign authority exercised by the Union.

Since, at present, the national populations impart democratic

legitimacy through their national parliaments, limits are therefore set, from the point of view of the principle of democracy, to the extension of the tasks and powers of the European Communities. Each national population is the starting point for State authority exercised in relation to it. The Member States need sufficiently significant spheres of activity of their own, in which the national population concerned can develop and express itself in a process of formulating political objectives which is legitimised and controlled by it, in order thereby to give legal expression to that which (relatively homogeneously) unites it intellectually, socially and politically (*cf.*, in this regard, H. Heller, *Politische Demokratie und soziale Homogenität, Gesammelte Schriften*, vol. 2, 1971, p. 421 (427 *ff.*)).

It follows from the above that tasks and powers of substantial importance must remain with the German *Bundestag*.

(c) The exercise of sovereign authority by a union of States such as the European Union is based on powers conferred by States which remain sovereign and which, at international level, always act through their governments and thereby control the process of integration. The exercise of such authority is therefore primarily governmentally determined. If the authority of such a Community is to rest on policies formulated by each individual population, and to that extent is to be democratic, this requires that it be exercised by an institution to which representatives are sent by the Member States' Governments, which are themselves subject to democratic control. Likewise the adoption of European legislation, notwithstanding the need for democratic control of the Governments concerned, may legitimately be the province of an institution composed of representatives of the Governments of the Member States, and thus an executive organ, to a greater extent than would be constitutionally acceptable at Member State level.

3. Because the German citizen entitled to vote exercises his right to participate in conferring democratic legitimacy on the institutions and bodies entrusted with the exercise of sovereign authority principally through the election of the German *Bundestag*, that parliament must also decide what is to be done about Germany's membership of the European Union, its continuance and development.

Article 38 of the Basic Law is accordingly infringed if a law, which opens up the German legal order to the direct effect and application of legislation of the (supranational) European Communities, does not define with sufficient precision the rights transferred for that purpose and the proposed programme of integration (*cf. BVerfGE* 58, 1 (37)). If it is not certain to what extent the German legislator has consented to the transfer of the exercise of sovereign rights, the European Communities will be able to assume unspecified tasks and powers.

That would amount to a general empowerment and would thus be an abandonment of powers such as to violate Article 38 of the Basic Law.

However, in view of the fact that the text of an international treaty has to be negotiated between the Contracting Parties, requirements as to the precision and level of detail of the treaty provisions cannot be laid down in the same way as normally applies from the outset in the case of a law which is subject to parliamentary approval (*cf. BVerfGE* 77, 170 (231 f.)). What is crucial is that the Federal Republic of Germany's membership and the rights and duties arising from it, including in particular the scope for legally binding direct intervention by the European Communities in the national area of jurisdiction, have been defined in the Treaty in a foreseeable manner for the legislator and laid down with sufficient precision by him in the law signifying parliamentary approval of the treaty (*cf. BVerfGE* 58, 1 (37); 68, 1 (98f.)). This also means that later substantial alterations to the programme of integration set out in the Union Treaty, and to the powers to act contained in it, are no longer covered by the Law approving the Treaty (*cf. BVerfGE* 58, 1 (37); 68, 1 (98f.); Mosler, *Handbuch des Staatsrechts* vol. VII (1992), Section 175 marginal number 60). If, for instance, European institutions or authorities were to apply or extend the Union Treaty in some way which was no longer covered by the Treaty in the form which constituted the basis of the German law approving it, [439] the resulting legal acts would not be binding on German sovereign territory. The German organs of State would be prevented, on constitutional grounds, from applying those legal acts in Germany. Accordingly, the Federal Constitutional Court examines whether legal acts of the European institutions and bodies keep within or exceed the limits of the sovereign rights granted to them (*cf. BVerfGE* 58, 1 (30f.); 75, 223 (235, 242)⁽¹⁾).

II.

In so far as it must be examined in the present proceedings, the Union Treaty satisfies the above mentioned requirements.

As has been stated, the Union Treaty establishes a union of States designed to create an ever closer union among the peoples of Europe organized as States (Article A of the Treaty on European Union), and not a State based on a European people. In view of the content of that provision, the question raised by the complainant at 1, namely whether the Basic Law allows or excludes German membership of a European State, does not arise. What must be examined is solely the law approving Germany's membership of a union of States.

1 (a) The Member States have established the European Union in order to exercise in common some of their competences and to that

extent to pool their sovereignty. In their Decision adopted at Edinburgh on 11 and 12 December 1992 (Annex 1 to Part B, *BullBReg.* No 140 of 28 December 1992, p. 1290), the Heads of State or Government, meeting within the European Council, stress that, within the framework of the Treaty on European Union, independent and sovereign States have freely decided, in accordance with the existing Treaties, to exercise in common some of their competences. 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) of the EUT; *cf.* also the Conclusions of the Presidency of the Birmingham European Council on 16 October 1992, *BullBReg.* No 115 of 23 October 1992, p. 1057), provides the Union and the European Communities with only specified competences and powers in accordance with the principle of limited specific attribution of powers (Article E of the EUT, Article 3(b), first paragraph, of the ECT) and then establishes the principle of subsidiarity as a binding principle of law for both the Union (Article B, second paragraph, of the EUT) and the European Community (Article 3(b), second paragraph, of the ECT).

As to where a European process of integration is eventually supposed to lead after further amendments to the Treaty, the answer may well be hinted at in the desire for further integration expressed symbolically in the term "European Union", but the intended objective ultimately remains open (Delors, *Entwicklungsperspektiven der Europäischen Gemeinschaft*, in: *Aus Politik und Zeitgeschichte* (supplement to *Das Parlament*) 1/93, p. 3 (4)). At any event, there is no intention at present to establish a "United States of Europe" along the lines of the United States of America (*cf.* speech by the Federal Chancellor in Cologne on 6 May 1993, *BullBReg.* No 39 of 17 May 1993, p. 341 (343 f.)). The new Article 88-1, which has been inserted in the French Constitution with the Union Treaty in mind, also speaks of Member States exercising in common some of their competences in the European Union and the European Communities.⁽²⁾ The competences and powers which are granted to the European Union and its constituent Communities remain essentially, in so far as they are exercised by upholding sovereign rights, activities of an economic community. The central fields of activity of the European Community are, in that respect, the customs union and the free movement of goods (Article 3(a) of the ECT), the internal market (Article 3(c) of the ECT), the approximation of laws in order to ensure that the Common Market is able to function properly (Article 3(h) of the ECT), the co-ordination of the Member States' economic policies (Article 3(a)(4) of the ECT) and the development of a monetary union

[¹ 93 ILR 439 at 457.]

[² See p. 180.]

(Article 3(a)(2) of the ECT). Outside the European Communities, co-operation remains intergovernmental. This applies in particular to the common foreign and security policy and the fields of justice and home affairs (*cf.* B. 2(c) above).

The Federal Republic of Germany therefore remains, even after the entry into force of the Union Treaty, a member of a union of States whose Community authority derives from the Member States and can have binding effect on German sovereign territory only by virtue of the German implementing order. Germany is one of the "masters of the Treaties", who have based their commitment to be bound by the Union Treaty, which is concluded "for an unlimited period" (Article Q of the EUT), on their intention to remain in long-term membership, but who could equally, in the final analysis, revoke that membership by adopting an act with the opposite effect. The validity and application of European law in Germany depend on the implementing order contained in the Law Approving the Treaty. Germany thus retains the quality of a sovereign State in its own right and the status of sovereign equality with other States within the meaning of Article 2(1) of the Charter of the United Nations of 26 June 1945 (*BGBI.* 1973 II, p. 430).

(b) The necessary influence of the *Bundestag* is ensured, firstly, by the fact that, under Article 23(1) of the Basic Law, German membership of the European Union and the further development of that Union, by amendment of its Treaty basis or extension of its powers, require a law which, subject to the conditions set out in its third sentence, must be adopted by a qualified majority as laid down in Article 79(2) of the Basic Law. In addition the *Bundestag* participates, within the European institutions, in the exercise of Germany's rights as a Member State. Under Article 23(2) and (3) of the Basic Law, and the Law of 12 March 1993 adopted for its implementation, concerning co-operation between the Federal Government and the German *Bundestag* in matters of the European Union (*BGBI.* I, p. 311), the *Bundestag* contributes to the formulation of the Federal Republic's opinion in those matters. These interlinked competences are to be exercised by the Federal Government and the *Bundestag* in a manner consistent with institutional loyalty.

Finally, the *Bundestag* also influences the Federal Government's European policy through the Government's accountability to Parliament (Articles 63, 67 of the Basic Law: *BVerfGE* 68, 1 (109 f.)). This creative and supervisory role which, in principle, the *Bundestag* discharges in an open manner, leads public opinion and the political parties to examine the Federal Government's European policy and thus becomes a factor in the citizens' voting decisions.

The Governments of the Member States have themselves underlined, in connection with the signing of the Union Treaty, the great

importance which is attached to the national parliaments in the Union. Their Declaration on the Role of National Parliaments in the European Union (*BGBI.* 1992 II, p. 1321) emphasises the need for greater involvement of the parliaments of the Member States in the activities of the European Union and requires the Governments [440] to inform the parliaments of Commission proposals in good time so that they can examine them.

2. The Union Treaty satisfies the requirements of precision because it regulates, in a sufficiently foreseeable manner, the future process of implementation and thus any exercise of the sovereign powers granted (*cf. BVerfGE* 58, 1 (37); 68 (1) (98 f.)). This justifies the parliamentary endorsement of the Law Approving the Treaty. The complainant's concern that, because of its ambitious goals, the European Community may develop, without renewed implementing orders from Parliament, into a political union with sovereign rights not determinable in advance, is unfounded. The Union Treaty incorporates the principle of limited specific attribution of powers, which already applied to the European Communities previously, and confirms it ((a), below). That principle is not called into question by Article F(3) of the EUT, which does not establish any power for the Union to determine its competence (*Kompetenz-Kompetenz*). The scope for assigning further tasks and powers to the European Union and the European Community is limited by sufficiently specific rules ((c), below). Finally, in so far as development towards European monetary union is regulated, that is done in a sufficiently foreseeable manner ((d), (e) and (f), below).

(a) Under Article B, second paragraph, of the Treaty on European Union, the objectives of the Union are to be achieved as provided for in that Treaty and in accordance with the conditions and the timetable set out therein. Under Article E of the Treaty on European Union, the European Parliament, the Council, the Commission and the Court of Justice may act only if and in so far as there is a provision in the Treaty which confers competences and powers upon them. The European Council is restricted, under Article D of the Treaty on European Union, to providing the Union with the necessary impetus for its development and to defining the general political guidelines thereof. If legislation is necessary, the existing basis of competence contained in the Treaty must be used.

The opening up of new fields of activity for the European Communities has always followed the principle that the Communities may act only as provided for in the Treaty and in accordance with the timetable set out therein (Article 3 of the EEC Treaty, now Article 3 of the ECT; Article 2 of the EAEC Treaty), which means that the power may not be inferred from the task. That principle of limited specific attribution of powers (*cf.* Oppermann, *Europarecht*, 1991,

marginal number 432) is confirmed in the second sentence of Article 4(1) of the ECT and the second sentence of Article 3(1) of the EABC Treaty, under which each Community institution shall act within the limits of the powers conferred upon it by the Treaty, and in Article 189, first paragraph, of the ECT and Article 161, first paragraph, of the EABC Treaty, which allow the Community institutions to adopt legal acts only as provided for in the Treaty. The introductory sentence of Article 3 of the ECSC Treaty, under which the institutions of the Community are to carry out their tasks within the limits of their respective powers, is unaffected by the Union Treaty, as is Article 5, first paragraph, of the ECSC Treaty, which requires the Community to carry out its tasks in accordance with the Treaty, with a limited measure of intervention.

In addition to those long-established provisions, there is now a new Article 3(a) of the ECT which, with regard to the future economic (paragraph 1) and monetary (paragraph 2) policies of the European Community, makes it clear that, in those areas also, the Community may act only as provided in the Treaty and in accordance with the timetable set out therein. Article 4(a) of the ECT extends that principle to the ESCB and the ECB, and Article 4(b) of the ECT extends it to the European Investment Bank.

In the same way, the new principle laid down in Article 3(b), first paragraph of the ECT, confirms that the Community will act only within the limits of the powers conferred upon it and of the objectives assigned to it in the Treaty. The provisions which then follow, dealing with the principles of subsidiarity (Article 3(b), second paragraph) and proportionality (Article 3(b), third paragraph), are formulated as limits on the exercise of Community competence. On 11 and 12 December 1992, the Edinburgh European Council emphasised, in the context of an overall approach to the application of the subsidiarity principle (Annex 1 to Part A of the Conclusions of the Presidency (*BullBRReg.* No 140 of 28 December 1992, p. 1280)), that Article 3(b), first paragraph, of the ECT lays down a strict limit on Community action. The requirement that powers must be conferred by the Treaty had always been a basic feature of the Community legal order. National powers were the rule and the Community's were the exception.

Moreover, the ECT distinguishes clearly the nature and intensity of the powers granted in each case. Thus, Articles 105 to 109(m) of the ECT map out in detail the three-stage route to a monetary union, setting out the conditions governing its creation and its growing tasks. In contrast, the common economic policy remains restricted essentially to a co-ordinating function (Article 3(a), Article 102(a) *ff.* of the ECT). In individual fields of activity (Article 3(m), (n), (o), (p) and (s) of the ECT), the Community has to restrict itself to "promotion",

"encouragement" or "contribution". In these cases Community measures are allowed only for the purpose of strengthening co-operation between the Member States or of supporting or supplementing their action in the areas concerned (*cf.* in this regard—on Articles 126, 128 and 129 of the ECT—the Edinburgh European Council, Conclusions of the Presidency, *loc. cit.*, p. 1281, Note 1). In the new provisions of Articles 126 to 129 of the ECT, Community activity in the fields of education, vocational training and youth, culture and public health is restricted to encouraging co-operation between Member States, and any harmonisation of the laws and regulations of Member States is explicitly ruled out. Such harmonisation measures in pursuit of the specific objectives laid down in those articles may not, therefore, be based on Article 235 of the ECT (according to the Edinburgh European Council, *loc. cit.*).

(b) This system of rules is not breached or undermined by Article F(3) of the EUT. However, the requirement of sufficient legal precision in the sovereign rights granted, and thus fulfilment of those conditions for parliamentary endorsement of the granting of those rights, would be infringed if Article F(3) of the Treaty on European Union established for the European Union, as a Community of sovereign States, the power to determine its own competence (*Kompetenz-Kompetenz*). Article F(3) of the Treaty on European Union does not, however, empower the Union to obtain, on its own authority, the financial resources and other means of action which it considers necessary for the fulfilment of its purposes. Rather, Article F(3) of the Treaty on European Union merely sets forth the political and programmatic intention of the Member States (forming the Union) to provide the Union with sufficient resources, following the necessary procedures for that purpose in each case. If European institutions were to interpret and apply Article F(3) of the EUT in ways contrary to that Treaty provision, which is incorporated in the German Law Approving the Treaty, such action would not be covered by the Law Approving the Treaty and consequently would not be legally binding within Germany as a Member State. The German organs of State would have to refuse to obey any legal acts based on such an application of Article F(3) of the EUT.

[441] (b) (1) The idea that Article F(3) establishes a power for the Union to determine its competence is contradicted, firstly, by the fact that there is no evidence anywhere in the Union Treaty of an agreed intention of the Contracting Parties to create with the Union an independent subject of rights and obligations entitled to exercise powers of its own. In the Federal Government's view, the Union does not have separate legal personality in relation either to the European Communities or to the Member States, a view also confirmed by Director-General Dewost at the oral hearing.

(b) (2) Nor can it be concluded from the wording of Article F(3) of the Treaty on European Union, according to which the Union shall provide "itself" with means, that the Union has the power to determine its competence. The Union provides "itself" with means in the same way as it sets "itself" objectives in Article B. The Union Treaty does not thereby conceive of "the Union" as an independent subject of rights and obligations, but as a title to denote the Member States acting in common. Those States pre-determine the Union's objectives and means in the Treaty.

(b) (3) An interpretation of Article F(3) of the EUT as conferring the power on the Union to determine its competence would, moreover, be contrary to the systematically expressed intention of the Contracting Parties to establish in the Treaty the principle of limited specific attribution of powers and to circumscribe clearly any individual rules conferring competence. If taken as the basis of a power for the Union to determine its competence, Article F(3) of the EUT would override the whole competence system of the Union Treaty, including the Treaties establishing the European Communities as well as the subsequent Treaties and Acts modifying or supplementing them, and render it largely meaningless. Article M of the EUT, which excludes any implicit amendment of the existing Treaties by the Union Treaty, also contradicts such an interpretation.

(b) (4) To derive from Article F(3) of the EUT a power for the Union to determine its competence would, moreover, be contrary to the deliberate decision of the Member States not to incorporate foreign and security policy and the fields of justice and home affairs in the supranational decision-making structure. If, for example, objectives laid down in the second and fourth tiret of Article B of the EUT could be achieved under the Union's own sovereign powers, by reference to Article F(3) of that Treaty, it would be incomprehensible for Article K.9 of the EUT to make even the simplified transfer of some parts of the fields of justice and home affairs to European Community competence dependent upon prior ratification by the Member States. Accordingly the fifth tiret of Article B of the EUT provides, as regards building on the *acquis communautaire*, for consideration to be given, through the procedure referred to in Article N(2) of that Treaty (i.e. Treaty revision subject to ratification), as to what extent 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 the institutions of the Community.

(b) (5) Finally, Article F(3) of the Treaty on European Union lacks the additional procedural provision which could, conceivably, turn it into a rule conferring competence. All such rules in the Community Treaties always confer a specific decision-making power on a specific institution, and the decision-making procedure, in particular the

participation of other institutions, is always laid down. Furthermore, the majority necessary for adopting the decision is, without exception, specified. An example of that is the provision on the extension of competence contained in Article 235 of the EEC Treaty. Article F(3) of the EUT certainly has no such structure.

Nor can Article F(3) of the EUT be enhanced, as the complainant argues, by recourse to Articles 145 and 148(1) of the ECT in order to add a provision (indispensable to a rule conferring competence) specifying the competent institution and the decision-making procedure. Both those articles apply only within the scope of the ECT. They could therefore be applicable to the other pillars of the Union only if the Treaty expressly so provided. However, the provisions referred to in Article J.11(1) and Article K.8(1) of the EUT specifically do not include Articles 145 and 148(1) of the ECT. Even within the scope of the ECT, those provisions could not upgrade Article F(3) of the EUT to a power for the Union to determine its competence. The second tiret of Article 145 of the ECT does not establish a decision-making power for the Council, but presupposes that any such power is established elsewhere "in accordance with the provisions of this Treaty" (cf. also the second sentence of Article 4(1) of the ECT). Article 148(1) of the ECT provides, as a catch-all rule, for the Council to act by a simple majority when exercising its decision-making powers granted elsewhere, but does not affect the principle of the specific transfer of competence.

(b) (6) Consequently, not only the Federal Government and the *Bundestag*, but also the Member States and the Commission of the European Communities, concur in the legal view that the Union Treaty does not establish any power for the Union to determine its competence (*Kompetenz-Kompetenz*). The Conclusions of the Presidency of the Edinburgh European Council on 11 and 12 December 1992 do not conflict with this view.

In its observations on the complaint of unconstitutionality, the Federal Government stated that Article F(3) of the EUT did not establish a power for the Union to determine competence, but contained only a programmatic declaration of intent. The Minister of State for Foreign Affairs, Mrs Seiler-Albring, addressing the *Bundestag's* Special Committee on European Union (Maastricht Treaty), described that provision as a programme clause which had still to be made concrete through negotiations (cf. Minutes of the 2nd meeting of the Special Committee on 29 October 1992, Prot. 2/15).

In the Recommendation for a Decision and Report of the Special Committee on European Union (Maastricht Treaty), of 1 December 1992 (*BTDucks*. 12/3895), the German *Bundestag* shares that view:

The Committee attached importance to the finding that Article F(3), under which the Union shall provide itself with the means necessary to attain its objectives and carry through its policies, did not establish any power for the Union to determine its competence. The provision in question was a programme clause, not a rule conferring powers. Article F(3) was to be read in conjunction with the final paragraph of Article B, which made the activity of the Union subject to the conditions and the timetable set out in the Treaty and to respect for the principle of subsidiarity (*loc. cit.*, p. 17).

The Federal Government has found, and has so informed the Senate, that its view on the interpretation of Article F(3) of the EU Treaty is shared by the other Member States.

It is also the Commission's view, as explained by Director-General Dewost at the oral hearing, that Article F(3) does not establish any Union competence and certainly no power for the Union to determine its competence.

The Conclusions of the Presidency of the Edinburgh European Council on 11 and 12 December 1992 (Annex 1 to Part A, *BullBRReg*, No 140 of 28 December 1992, p. 1280 *ff.*) do not conflict with that interpretation. It is true that they state, in connection with the principle of subsidiarity, that it shall not call into question the principle set out in Article F(3) of the EUT. However, that [442] declaration is linked with the general statement that the application of the subsidiarity principle shall not affect the long established principles of Community law (principles of limited specific attribution of powers, maintenance of the *acquis communautaire*, primacy of Community law). A power for the Community to determine its competence is certainly not one of those long-established principles. Moreover, in the immediate context of that statement, it is expressly recognized that Community powers would have to be granted by the Treaty in each case, as laid down by the first paragraph of Article 3(b) of the ECT. Likewise, the Guidelines for the application of the principle of subsidiarity, invoking Article 3(b)(1) of the ECT, again emphasise the principle that powers must be conferred by the Treaty. Above all, however, the Heads of State or Government, meeting within the European Council, have confirmed the general view of the Member States that the States themselves will continue to remain the masters of the Treaties and of the further development of those Treaties (*cf. BVerfGE* 75, 223 (242)⁹¹ (Annex 1 to Part B of the Conclusions of the Presidency, *loc. cit.*, p. 1290).

(c) In Article B of the EUT, the Member States have set the European Union objectives and specified that those objectives may be achieved only as provided in the Union Treaty. Moreover, they have described those tasks and powers of the European Communities in

detail and restricted the European institutions and bodies to the exercise of those powers (*cf.* Article E of the EUT as well as the first paragraph of Article 3(b), the second sentence of Article 4(1), Article 4(a) and Article 4(b) of the ECT). Modifications and extensions of those provisions on tasks and powers are subject to the prior formal consent of the Member States, and the scope for developing law on the basis of the existing Treaties is limited (*BVerfGE* 75, 223 (240 *ff.*)).¹⁰⁰ Accordingly, the fifth tiret of Article B of the EUT makes a link between building on the *acquis communautaire* and the procedure for amending the Treaties contained in Article N of the Treaty on European Union. As well as by the formal procedure for amending the Treaties (Article N of the EU Treaty), the Member States' consent can also be declared by a shortened procedure in accordance with specific provisions of the Treaties (*cf.*, in particular, Article K.9 of the EUT and the second paragraph of Article 8(a) as well as the second paragraph of Article 201 of the ECT). However, each such Treaty amendment or extension presupposes its approval by the Member States in accordance with their constitutional requirements. The second sentence of Article 23(1) of the Basic Law requires the adoption of a federal law for any further transfer of sovereign rights. Alterations to the Treaty basis of the Union and comparable legislation, by which the Basic Law is amended or supplemented in its content or whereby such amendments or supplements are made possible, require, in accordance with the third sentence of Article 23(1) and in accordance with Article 79(3) of the Basic Law, the affirmative vote of two-thirds of the members of the *Bundestag*.

(d) By setting out the stages for implementation, the Union Treaty also meets the requirements for endorsement by the *Bundestag*, in so far as it thereby lays down rules for the process leading to European monetary union and its continued existence.

(d) (1) In Title VI, Chapter 2 of the ECT, monetary union is conceived as a community of stability whose primary function is to maintain price stability (Article 3(a) (2) and the first sentence of Article 105(1) of the ECT). Under the second tiret of Article 109(e) (2)(a) of the ECT, each Member State shall, before entering the second stage for achieving economic and monetary union, adopt, if necessary, multiannual programmes intended to ensure the lasting convergence necessary, in particular with regard to price stability and sound public finances. Under Article 109(e) (2)(b), the Council shall assess the progress made with regard to economic and monetary convergence. The criteria for measuring progress made with regard to economic and monetary union are set out clearly and concretely in Article 109(j) (1) of the ECT and more precisely quantified in the

[⁹¹ 93 ILR 439 at 458.]

[¹⁰⁰ 93 ILR 439 at 457.]

Protocol on the Convergence Criteria. Article 6 of that Protocol makes the details of those criteria subject to unanimous adoption by the Council. Fulfilment of those convergence criteria is the precondition for a Member State's entry to the third stage of monetary union.

(d) (2) Even though it is not yet possible at this stage to foresee how monetary union will develop in its various stages in terms of economic consequences, participating Member States and dates, the Law approving the Union Treaty satisfies the requirements for parliamentary endorsement.

(1) The Treaty on European Union is an international agreement on a union of contracting States in the process of continuing development, which is dependent upon the Member States constantly breathing life into the Treaty. Implementation and development of the Treaty have to be sustained by the will of the Contracting Parties. Article N of the EUT therefore provides that any Member State may take the initiative with a view to amending the Treaties, with such amendments entering into force after having been ratified by all the Member States in accordance with their constitutional requirements. In 1996, a review conference will be held, at which the representatives of the Governments of the Member States will examine individual provisions of the Treaty in accordance with the objectives set out in Articles A and B. Those objectives require, *inter alia*, that decisions should be taken as closely as possible to the citizen, that the objectives should be achieved solely as provided for in the Treaty, and that the principle of subsidiarity should be respected. However, even the implementation of the Treaties now in force is dependent on the Member States' willingness to co-operate. Because of the relationship of mutual conditionality between monetary union as provided for in the Treaty, and the prerequisite of progress towards economic union as well, the economic and monetary union envisaged in Article 102(a) *ff.* of the ECT can be achieved only if all the Member States are constantly serious in their willingness to implement it.

In the context of this relationship of conditionality between the Treaty's provisions and the elements of convergence which are prerequisites for them in reality, the date for the beginning of the third stage of economic and monetary union (Article 109(j)(4) of the EUT) must be seen as a target rather than as a legally enforceable deadline. Certainly, under European law, the Member States are under a duty to make serious efforts to meet the date specified in the Treaty. As Director-General Dewost confirmed at the oral hearing, under a well-established Community tradition, the purpose of setting target dates is to give impetus to and accelerate the process of integration rather than to achieve it by the deadline at all costs (*cf.*, for example, Article 8(a) of the EEC Treaty, inserted by the Single European Act, and the relevant Declaration of the Conference of the

Representatives of the Governments of the Member States held on 17 and 28 February 1986).

The *ecsc* Treaty likewise puts the further development of the European Union in the hands of the Member States. Under Article A of the EUT, it is one of the foundations of the Union. However, in accordance with Article 97 of the *ecsc* Treaty, it is due to terminate in 2002, which renders a new arrangement among the Member States necessary.

(2) Moreover, the fact that the European Central Bank is required to pursue, as its primary objective, the maintenance of price stability (Article 3(a)(2) and Article 105(1) [443] of the ECT Treaty) also satisfies a separate constitutional obligation of the Federal Republic of Germany as a Member State of the European Community (Article 88, second sentence of the Basic Law). That constitutional obligation is important in the Community context in so far as the European Community is a community of law in which, under Article 5 of the EEC Treaty, the principle of sincere co-operation applies. That principle not only places the Member States under an obligation vis-à-vis the Community, but also imposes corresponding duties on the Community institutions to co-operate sincerely with the Member States (see Order of the European Court of Justice, 13 July 1990 in Case C-2/88 Imm. [1990] ECR I-3367). In explaining the meaning of that duty of sincerity at the oral hearing, Director-General Dewost stated that the Community institutions would always take seriously Member States' firm indications that their constitutional law was opposed to certain measures, and would endeavour to find a solution which respected the constitutional law of the Member State concerned.

(3) The German *Bundestag*'s concern to reserve the right to make its own assessment regarding the passage to the third stage of economic and monetary union, and thus oppose any watering-down of the stability criteria, may be based, in particular, on Article 6 of the Protocol on the Convergence Criteria. That article reserves to the Council, acting unanimously, the right to lay down the details of the convergence criteria established by the Treaty in a manner which departs from the definitions set out in the Protocol. That means, on the one hand, that the criteria referred to in Article 109(j) (1) of the ECT are not, as such, at the discretion of the Council, particularly as the basic concept of monetary union as a community of stability (sixth recital of the preamble to the Union Treaty; Article 3(a) (2) and (3), Article 109(j)(1) of the ECT) could not otherwise be achieved. On the other hand, it is clear from Article 6 of the Protocol on the Convergence Criteria that the assessment of whether individual Member States fulfill the convergence criteria for the adoption of a single currency, which under Article 109(j) (2) is to be adopted by the Council as the basis for its recommendations, is not allowed to circumvent those

criteria merely by the adoption of a majority decision. Rather, the majority requirement can only mean that, within the remaining scope for assessment, evaluation and prognosis, differences of opinion can be cleared up by a majority vote. This applies where the Council, meeting in the composition of the Heads of State or of Government, is required, under Article 109(j)(3) and (4) of the ECT, to adopt those recommendations as the basis for its majority decisions. Notwithstanding the scope which it has for assessment, evaluation and prognosis, the Council is not allowed by the text of the Treaty to depart from its decision-making basis constituted by the recommendations under Article 109(j)(2) of the ECT, or from the convergence criteria laid down in Article 109(j)(2) of the ECT and more precisely defined in the Protocol on the Convergence Criteria. It has thus been sufficiently ensured that the convergence criteria cannot be "watered down" without German consent, and thus without significant participation by the German *Bundestag*.

(4) In addition, the Protocol on the Transition to the Third Stage of Economic and Monetary Union acknowledges that irrevocable entry to the third stage is dependent on "preparatory work" by the Member States concerned. That preparatory work is itself governed by the national constitutional law of each Member State and may be made subject to parliamentary control (Oppermann, *Der Maastrichter Unionsvertrag—Rechtspolitische Wertung*, in Hrbek (ed.), *Der Vertrag von Maastricht in der wissenschaftlichen Kontroverse*, 1993, p. 103 (116) with reference 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, p. 19 (27)). This is therefore another way in which the German *Bundestag* can put into effect its intention to allow future monetary union to begin only if strict stability criteria are met, at least in the context of Article 23(1) of the Basic Law, the Resolution of 2 December 1992 on economic and monetary union as a community of stability, which is to be applied in a spirit of institutional loyalty, and the letter of 2 April 1993 from the Federal Minister of Finance.

(5) In the final analysis, therefore, by ratifying the Union Treaty, the Federal Republic of Germany is not submitting itself to an unpredictable "automatic" process leading to monetary union, getting out of control as it builds up its own momentum. The Treaty opens the way to a stage-by-stage further integration of the European Community governed by law, which at each further step is dependent, either on conditions being met which can currently be foreseen by Parliament, or else on further consent by the Federal Government, which Parliament will have an opportunity to influence.

(c) Even after entering the third stage, the development of the monetary union will be subject to foreseeable rules and in that respect

qualifies for parliamentary endorsement. The Union Treaty regulates monetary union as a community permanently committed to stability and in particular to maintaining monetary stability. Admittedly, it is impossible to foresee whether the stability of an ECU currency can in fact be safeguarded in the long term on the basis of the arrangements entered into in the Treaty. However, the fear of failure of efforts to achieve stability, which could then lead to further concessions in the field of financial policy by the Member States, is not sufficiently substantial to conclude that the Treaty is imprecise. The Treaty contains long-term guidelines which make the objective of stability the criterion for monetary union, seek to ensure the achievement of that objective through institutional arrangements and even, in the final analysis, do not preclude withdrawal from the Community in the event of failure of the community of stability. Under Article 105(1) of the ECT, the ESCB is primarily required to maintain price stability. The ESCB is endowed, under Article 107 of the ECT, with independence in carrying out its tasks. It is already made clear, in the sixth recital of the preamble to the Union Treaty, that the Member States are resolved to have a stable currency as the basis for establishing an economic and monetary union. Article 2 of the ECT declares the European Community's task to be, *inter alia*, the achievement of non-inflationary growth and a high degree of convergence of economic performance. The introduction and conduct of the single monetary and exchange rate policy provided for in the Treaty are limited, in Article 3(a)(2) of the ECT, to pursuing the maintenance of price stability as their primary objective. Moreover, the EC Treaty contains arrangements whereby the Member States, in their economic policies, must support and promote the stability of the European currency. Article 3(a)(3) of the ECT also sets out the guiding principles for the activities of the Member States, namely stable prices, sound public finances and monetary conditions and a sustainable balance of payments (*cf.* also the second sentence of Article 102(a) of the ECT). The economic policies of the Member States are declared a matter of common concern and are to be co-ordinated and monitored, in terms of their broad guidelines, by means of a Council recommendation (Article 103 of the ECT). [444] Article 104 of the ECT also prohibits the national central banks from granting overdraft or any other type of credit facilities to public authorities or public undertakings of Member States or from purchasing debt instruments directly from them. Other than for purposes of supervision, no privileged access to financial institutions may be established for public authorities or public undertakings of Member States (Article 104(a) of the ECT). Article 104(b) of the ECT excludes any liability for or assumption of commitments of public authorities or public undertakings of any Member State by the Community or another

Member State, so that a Member State cannot simply pass on the consequences of unsound financial policy. Finally, Article 104(c) of the ECT, in conjunction with the Protocol on the Excessive Deficit Procedure, imposes a duty on the Member States to avoid excessive government deficits, and makes them subject for that purpose to monitoring by the Commission. The Council, acting on a recommendation from the Commission, may decide that an excessive deficit exists in a Member State, and intervene to bring about its reduction.

This conception of monetary union as a community of stability is the basis and subject of the German Law approving the Treaty. If the monetary union were unable to build continuously upon the stability existing at the time of entering the third stage, in accordance with the agreed task of stabilisation, it would be departing from the conception embodied in the Treaty.

(f) Finally, the objective connection between monetary union and an economic union likewise does not create any imprecision in the content of the Treaty. Admittedly, there may be logical reasons why monetary union can only be meaningfully implemented as political reality if it is immediately complemented by an economic union which goes beyond co-ordination of the economic policies of the Member States and the Community. However, such a development would require a Treaty amendment procedure in accordance with Article N of the EUT and therefore further parliamentary approval. To that extent, it is uncertain at present whether monetary union will lead to such an economic union or whether lack of willingness on the part of the Member States to see a communityized economic policy with an associated "dominant Community budget" (cf. Seidel, *Zur Verfassung der Europäischen Gemeinschaft nach Maastricht*, *EuR* 1992, p. 125 (134)) will result in future renunciation of monetary union and an amendment of the Treaty to that effect.

Moreover, influential voices point out that a monetary union, particularly between States which are oriented towards an active economic and social policy, can in the end be achieved only together with a political union (encompassing all essential tasks relating to public finance), but not independently or as a mere preliminary step on the way. The President of the Bundesbank, Professor Dr Schlesinger, also made comments to that effect at the oral hearing. This view may also be based on the gradual development of Germany's national unity in the 19th century. Standardisation of the currency did not precede political unification as a nation-State but followed the formation of the North German Confederation and the German Reich of 1871, coming about through the Coinage Law of 9 July 1873 (*RGBl.* p. 233). Admittedly, the *Zollverein* [German Customs Union] had existed for decades before that, and there were also trade treaties and agreements with economic relevance, but no monetary union or

unit of currency (cf. E. R. Huber, *Deutsche Verfassungsgeschichte seit 1789*, volume IV (1969), p. 1053 f.).

However, what this raises is not a constitutional question but a political question. To agree upon and put into effect monetary union without a simultaneous or immediately ensuing political union is a political decision for which the institutions competent to take it must accept political responsibility. If it emerges that the desired monetary union cannot, in reality, be achieved without a (not yet desired) political union, a new political decision will be needed on how to proceed further. Legally, there is room for such a decision because monetary union, as provided for by the present Treaty, is as incapable of automatically entailing a political union as it is of automatically entailing an economic union. Rather, a Treaty amendment is required for that purpose, which cannot come about without a decision by the national organs of State, including the German *Bundestag*. Political responsibility will then have to be taken for such a decision, within the limits of what is constitutionally permissible.

3. The granting of tasks and powers to European institutions under the Union Treaty still leaves the German *Bundestag* with sufficient tasks and powers of substantial political importance. The Treaty also puts a sufficiently reliable limit on the dynamic process of further integration set out in it, a limit which preserves a balance between the structure of governmental decision-making in the European Union of States and the rights of the German *Bundestag* to reserve decisions to itself and to participate in decision-making.

(a) The scope of the *Bundestag*, and therefore of the voters, to exert influence over the exercise of sovereign rights by European institutions has, however, been almost completely withdrawn in so far as the European Central Bank is vested with independence vis-à-vis the European Community and the Member States (Article 107 of the ECT). A major policy area which supports individual freedom through the value of money, and also determines the system of public finances and the policy areas subject to it through the money supply, is to be removed both from the jurisdiction of State organs exercising sovereignty to issue instructions and at the same time, unless there is revision of the Treaty, from legislative control over certain areas of responsibility and means of action. The placing of most monetary policy functions on an independent footing, with an independent central bank exempting sovereign authority in this area from direct State or supranational parliamentary accountability, in order to remove the monetary system from the influence of interest groups and elected political representatives whose interest lies in securing reelection (as already stated in the Government's Draft Law on the Bundesbank, *BTDucks.* 2/2781, p. 24 f.).

This restriction of the democratic legitimation emanating from the voters in the Member States conflicts with the principle of democracy but, as a modification of that principle, provided for in Article 88(2) of the Basic Law, is compatible with Article 79(3) of the Basic Law. The supplementation of Article 88 of the Basic Law, undertaken with European Union in mind, permits a transfer of the *Bundesbank's* powers to a European Central Bank provided that the latter complies with the "strict criteria contained in the Maastricht Treaty and the Statute of the European System of Central Banks as regards the independence of the Central Bank and the priority of monetary stability" (Recommendation for a Decision and Report of the Special Committee on European Union (Maastricht Treaty) of 1 December 1992, *BTDrucks.* 12/3896, p. 21). The intention of the legislator amending the Constitution is thus clearly aimed at creating a constitutional basis for the monetary union provided for in the Union Treaty, yet also at limiting in that eventuality the granting of powers and securing the setting-up of the necessary institutions [445] in the independent manner specified. That modification of the principle of democracy, for the sake of safeguarding the exchange confidence placed in a currency, is justifiable because it takes account of the special characteristic (tried and tested in the German legal order and also proven scientifically) that an independent central bank is more likely to safeguard the value of money, and thus the general economic basis for State budgetary policy and private planning in the exercise of economic civil rights and liberties, than are sovereign institutions. Such institutions are essentially constrained in their scope and means of action by the money supply and the value of money, and dependent on the short-term approval of political forces. To that extent, according monetary policy an independent status within the sovereign competence of an independent European Central Bank, a status which cannot be transferred to other policy areas, satisfies the constitutional requirements according to which the principle of democracy may be modified (*cf. BVerfGE* 30, 1(24); 84 90(121)).

(b) In other respects also, the tasks and powers of the European Union and the Communities belonging to it are, as explained, described in the Treaty, and thus in the German law approving it, in relation to clearly defined situations, so that the far-reaching objectives announced in the Preamble and in Article B of the EUT do not justify the exercise of sovereign rights, but only confirm the political intention to create an ever closer union among the peoples of Europe. The Union Treaty therefore satisfies the requirement, which is concomitant with increasing integration, that the scope of action of European institutions should not only be defined in terms of objectives, but that their resources should be specified in relation to the situation,

and thus that their tasks and powers should be circumscribed in a concrete manner.

The Union Treaty and in particular the EC Treaty follow the principle of limited specific attribution of powers (*cf.* 2(a) above). It is true that, according to this principle, an individual provision which assigns tasks or powers can be interpreted in the light of the objectives of the Treaty. However, the Treaty objective itself is not sufficient in order to establish or extend tasks and powers (H. P. Ipsen, *Europäisches Gemeinschaftsrecht*, 1972, p. 559). Moreover, by making express reference to the requirements of a Treaty amendment (Article N of the EUT) or Treaty extension (Article K.9 of the EUT), the Union Treaty makes clear the dividing line between development of the law within the limits of the Treaties (on the judicial development of law, *cf. BVerfGE* 75, 223 (240 *ff.*))¹⁰¹ and legislation which goes beyond those limits and is not covered by the existing law created by the Treaties. That criterion is incorporated in Article 23(1) of the Basic Law, which requires a law signifying parliamentary approval for alterations to the Treaty basis of the European Union and for the adoption of comparable provisions.

In so far as the Treaties establishing the European Communities grant sovereign rights in relation to certain well-defined situations on the one hand, and lay down rules for amending the Treaties (by a normal as well as by a simplified procedure) on the other, that distinction also has significance for the future application of the specific attributions of powers. Hitherto any dynamic extension of the existing Treaties has been based on a liberal application of Article 235 of the EEC Treaty, along the lines of a "competence to perfect the Treaty", on the idea of the inherent competences of the European Communities ("implied powers") and on an interpretation of the Treaty as implying the fullest possible utilisation of Community powers (*effet utile*) (*cf. Zuleeg*, in von der Groeben/Thiesing/Ehlermann, *EWG Vertrag*, 4th ed. 1991, Article 2 marginal number 3). In future, however, when Community institutions and bodies interpret rules conferring competence, it will have to be borne in mind that the Union Treaty draws a fundamental distinction between the exercise of a sovereign power granted on a limited basis and amendment of the Treaty. Any interpretation of that Treaty must not, therefore, amount in effect to an extension of it. Such an interpretation of rules conferring competence would not give rise to any binding effect for Germany.

(c) The application of this principle of limited specific attribution of powers is then clarified and further limited by the principle of subsidiarity. As far as the European Community is concerned, the

[¹⁰¹ 93 ILR 439 at 457.]

principle of subsidiarity is established in the second paragraph of Article 3(b) of the ECT. It is extended by the reference in the last paragraph of Article B of the EUT to the Union's policies and forms of co-operation which are regulated outside the ECT, and is also restated in Article K.3(2)(b) of the EUT. In addition, limited specific attributions of powers, such as Article 126, Article 127, Article 128, Article 129, Article 129(a), Article 129(b), Article 130 and Article 130(g) of the ECT, restrict Community action to supplementing the policies of the Member States, which in principle should take precedence.

The principle of subsidiarity therefore does not establish any powers for the European Community, but limits the exercise of powers already granted elsewhere (Edinburgh European Council, Conclusions of the Presidency, loc. cit., p. 1281). According to the second paragraph of Article B of the Treaty on European Union, the objectives of the Union can be achieved only as provided in the Treaty and in accordance with the conditions and the timetable set out therein. At the same time, the principle of subsidiarity must also be respected. Accordingly, the first paragraph of Article 3(b) of the ECT states that, as the first pre-condition for European Community action, a power must have been conferred by the Treaty, and the exercise of that power is then made subject, under the second paragraph of Article 3(b), to the principle of subsidiarity.

This means that, if there is power to act under the Treaty, the principle of subsidiarity determines whether and how the European Community may act. If the Community legislator wishes to exercise a legislative power conferred on him, he must first satisfy himself (and also clearly state the reasons for his decision, as required by Article 190 of the ECT) that the objectives of the proposed action cannot be adequately achieved by the Member States at national level. Such a finding must then justify the further conclusion that, in view of the scale or effects of the measure, its objectives can be better achieved at Community level.

This principle of subsidiarity, respect for which is to be monitored by the European Court of Justice, is intended to preserve the national identities of Member States and safeguard their powers (Edinburgh European Council, loc. cit., p. 1280). To what extent the principle of subsidiarity will counteract any erosion of the Member States' powers, and thus any depletion of the tasks and powers of the *Bundestag*, depends both on the case-law of the European Court of Justice, which is bound by the principle of subsidiarity, and decisively on the actions of the Council as the real legislative body of the Community. In that regard, the Federal Government must assert its influence in favour of a strict application of the second paragraph of Article 3(b) of the ECT and thus fulfil the constitutional duty imposed on it by the first

sentence of Article 23(1) of the Basic Law. For its part, the *Bundestag* has the scope, by virtue of its right to participate in the development of national objectives in Germany, established in Article 23(3) of the Basic Law, to exert an impact on Council actions and to influence them in the direction of the principle of subsidiarity. In so doing, the *Bundestag* will also be fulfilling [446] a constitutional duty incumbent upon it under the first sentence of Article 23(1) of the Basic Law. Moreover, the *Bundesrat* can also be expected particularly to espouse the principle of subsidiarity (cf. Goppel, *Die Bedeutung des Subsidiaritätsprinzips*, *EuZW*, 1993, p. 367).

(d) The third fundamental principle of the Community's constitution, that of proportionality, is laid down in the third paragraph of Article 3(b) of the ECT. That principle enshrines, as a basic right, a prohibition upon excessive action. But it may also, in the context of a union of States which specifically is not a homogeneous entity organized in the form of a State, restrict the legislative intensity of Community action for the sake of the obligation under Article F(1) of the EUT. That provision requires the Union to preserve the national identities of Member States and in that way safeguards the tasks and powers of their parliaments against an excessive volume of European legislation. Unlike the principle of subsidiarity, within the narrower meaning of the second paragraph of Article 3(b) of the ECT, the principle of proportionality established in the third paragraph of Article 3(b) of the ECT applies to all Community action, whether based on an "exclusive" or other type of Community competence.

4. In the final analysis, the Union Treaty confers limited powers to act on the institutions and bodies of the three European Communities, the exercise of which is graduated according to the means of action and legislative intensity. The Treaty grants legally definable sovereign rights, has met with parliamentary endorsement and consequently enjoys democratic legitimacy. The process of integration established in the Union Treaty and in the Treaties on the European Communities is derived, not from general objectives, but from specific tasks and powers to act.

D.

The Maastricht Treaty, in particular by extending EC competences and incorporating economic policy, grants to European institutions further substantial tasks and powers which, at the level of the Treaties, have not yet been underpinned by any corresponding enhancement and extension of the democratic foundations. It establishes a new stage of European unification intended, according to the declared will of the Contracting Parties, to enhance further the democratic and efficient functioning of the institutions (fifth recital of the Preamble). According to that recital, democracy and efficiency

are mutually inseparable. Enhancement of the principle of democracy is itself expected to improve the work done in all institutions at Community level. At the same time, in accordance with Article F(1) of the EUT, the Union must respect the national identities of its Member States, whose systems of government are founded on democratic principles. In that respect, the Union preserves and builds on the democratic foundations existing in the Member States.

Any further development of the European Union cannot take place outside that context. The legislator amending the Constitution has taken this into account, in connection with the Union Treaty, by inserting into the Basic Law an Article 23 which expressly refers to the development of a European Union bound by the principles of democracy and the rule of law, by social and federal principles and by the principle of subsidiarity. The crucial point, therefore, from both a Treaty and a constitutional point of view, is that development of the democratic foundations of the Union should keep pace with integration and that, as integration progresses, a living democracy should continue to operate in the Member States.

[Reports: *EuGRZ* 1993, p. 429 (in German); Unofficial translation prepared by the United Kingdom Foreign and Commonwealth Office]

Relationship of international law and municipal law—Treaties —Effect in municipal law—EEC Treaty, 1957—Supremacy of Community law—Conflict between Community legislation and subsequent national law — Whether ordinary courts under automatic duty not to apply conflicting national provision — Principle that full effectiveness of Community law must be ensured—Nature of legal order established by Treaty—Basis for binding nature of Community law — Spanish Constitution, Article 93—Whether Community law endowed with constitutional rank and force

Treaties — Effect in municipal law — EEC Treaty, 1957 — Incorporation of Community law into national legal order—Spanish Constitution, Article 96—“Infra-constitutional” nature of Community law—Constitutional challenge to national legislation on the basis of violation of Community law — Whether

Constitutional challenge on such basis is admissible—Whether conformity with Community legislation constituting yardstick by which to judge constitutionality of national provisions—The law of Spain

ELECTORAL LAW CONSTITUTIONALITY CASE

(Case No 28/91)

Spain, *Constitutional Court*. 14 February 1991

(Leguina Villa, *Presiding Judge*)

SUMMARY: *The facts:*—A constitutional action was brought by the Basque Parliament challenging the constitutionality of Organic Law No 1/87, which modified the Organic Law regulating the General Electoral System so as to prohibit a member of the European Parliament from also being a member of any Spanish parliamentary assembly. The applicants argued that such a rule was incompatible with Article 5 of EEC Council Decision 76/787 concerning Elections to the European Parliament.

Held:—The action was inadmissible.

(1) The binding nature of Community law did not mean that, pursuant to Article 93 of the Constitution (concerning the granting of powers to international organizations), its norms were endowed with constitutional rank and force. Neither did it imply that an occasional violation of Community norms by Spanish legislative provisions necessarily entailed the contravention of Article 93. Although constituting the ultimate foundation for the binding nature of Community law, Article 93 did not provide a basis for an action before the Constitutional Court challenging the constitutionality of a provision of national or regional law which violated Community legislation.

(2) Neither the Treaty of Accession nor secondary Community legislation provided a yardstick by which constitutionality was to be judged, pursuant to Article 96(1) of the Constitution.¹ That provision merely determined that the provisions of international treaties were granted passive force and formed part of the internal legal order. A possible incompatibility between Community law and subsequently enacted regional or national law did not convert into a constitutional matter something which was essentially a conflict between “infra-constitutional” norms. The selection of the appropriate norm, in case of conflict, was a matter to be resolved by the

¹ Article 93 provides: “By means of an organic law, authorization may be granted for the conclusion of treaties by which the exercise of powers derived from the Constitution may be granted to an international organization or institution. It is the responsibility of the *Cortes Generales* or the Government, depending on the circumstances, to guarantee compliance with such treaties and the resolutions emanating from the international or supranational organizations so empowered”.

² Article 96(1) provides: “Validly concluded international treaties, once officially published in Spain, constitute part of the internal (legal) order. Their provisions may only be abolished, modified or suspended in the manner provided for in the treaties themselves or in accordance with general rules of international law”.