

The Participation of the German Länder in Formulating German EU-policy

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A. Preface

On the 30 June 2009 the German Federal Constitutional Court (*Bundesverfassungsgericht*, FCC) has passed its long-awaited decision¹ on the compatibility of the Act approving the Treaty of Lisbon and the accompanying legislation with the Basic law (*Grundgesetz*).² The FCC's decision according to which the ratification law is compatible with the Basic law was greeted with relief by many German and European policy makers. It has removed another obstacle for the adoption of the Treaty of Lisbon in the European Union (EU), which still has to be ratified by Ireland, Poland and the Czech Republic, though. But also Germany's ratification still depends on the amendment of the accompanying "Act Extending and Strengthening the Rights of the *Bundestag* and the *Bundesrat* in European Union Matters" ("Extending Act")³ which the FCC has declared incompatible with the Basic law insofar as

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1 FCC decision 2 BvE 2/08 of 30 June 2009, paragraphs 1 - 421, a preliminary English translation, is available at: http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html, last accessed on 29 July 2009. See the discussion in: Grosser, *The Federal Constitutional Court's Lisbon Case: Germany's "Sonderweg": An Outsider's Perspective*, 8 THE GERMAN LAW JOURNAL (GLJ) (2009).

2 On 24 April 2008, the German *Bundestag* adopted the Act Approving the Treaty of Lisbon by 515 of 574 votes cast (Minutes of *Bundestag* plenary proceedings – BT-Plenarprot. 16/157, p. 16483 A). On 23 May 2008, the *Bundesrat* approved the Act Approving the Treaty of Lisbon by a two-thirds majority (Minutes of *Bundesrat* plenary proceedings – BR-Plenarprot. 844, p. 136 B). On 8 October 2008, the Federal President signed the Act Approving the Treaty of Lisbon. The Act approving the Treaty of Lisbon (Vertragsgesetz) has been published in the Federal Gazette (*Bundesgesetzblatt*) II on 14 October 2008 (pp. 1038 et seq.) and entered into force the next day (Art. 2.1 of the Act Approving the Treaty of Lisbon).

3 The Act Extending and Strengthening the Rights of the *Bundestag* and the *Bundesrat* in European Union Matters (Extending Act, *Gesetz über die Ausweitung und Stärkung der Rechte des Bundestages und des Bundesrates in Angelegenheiten der Europäischen Union*; see: *Bundestag* document 16/8489), has not yet been signed and published in the *Bundesgesetzblatt* since its content required the amendment of Art. 23 and Art. 45 of the Basic Law. It is to enter into force on the day following its publication in the Federal Gazette, at the earliest, however, on the day following the day on which the Amending Act will have entered into force (Art. 3 of the Extending Act).

the legislature, *Bundestag* and *Bundesrat*, have not been accorded sufficient rights of participation in European law-making and treaty amendment procedures. The FCC has therefore ruled that the Federal Republic of Germany's instrument of ratification of the Treaty of Lisbon may not be deposited as long as the constitutionally required legal elaboration of the parliamentary rights of participation has not entered into force. This puts pressure on German law-makers to amend the accompanying "Extending Act" possibly before the referendum in Ireland and before German elections in autumn 2009.⁴

The amendment of the "Extending Act" touches upon the important question of how Germany's constitutional organs participate in the formulation of EU-policy. While the *Bundestag*, as Germany's Federal Parliament and main legislative organ, has direct parliamentary rights of control with regard to the Federal government which sits at the negotiation table in the Council in Brussels⁵, the role of the *Bundesrat* as the representation of the *Länder* governments in formulating EU-policy is less straight forward and deserves to be given a closer look in order to gain a better understanding about the current debate.

Before the EC accession of Spain with its autonomous regions in 1986, the regionalization of Belgium in 1992, the EU accession of the Federal Republic of Austria in 1995 and the devolution process in the UK in 1998, Germany was the only EU-Member State with a federal structure. The German *Länder* have therefore been the most independent and best organized regional political entities within an EU-Member States eager to influence German EU policy-making and obtaining direct influence at the European level. Their campaigning for more participatory rights in formulating EU-policy and at the same time for preserving their autonomy from encroachments of EU-law-making lead in the 1980ies –

The previous version of the Extending Act of 17 November 2005 under the constitutional treaty was published in: *Bundesgesetzblatt* I Nr. 71 of 25 November 2005.

4 For debate, see: <http://www.spiegel.de/politik/deutschland/0,1518,636324,00.html>, last accessed on 15 September 2009; Möllers, in: <http://www.faz.net/s/Rub117C535CDF414415BB243B181B8B60AE/Doc~E77620A14A6AA46F591B447D40973EF54~ATpl~Ecommon~Scontent.html>; Pinzler, in: 30 DIE ZEIT 6 (16 July 2009) last accessed on 15 September 2009; Rüttgers, in: www.sueddeutsche.de/v5x38X/2967268/Mehr-Macht-fuer-Europa.html, last accessed on 15 September 2009. The first discussion in the *Bundestag* of the amended version of the Extending Act (*Integrationsverantwortungsgesetz*) was scheduled for 26 August 2009 (drafts available under: <http://dip.bundestag.de>, last accessed on 26 August 2009).

5 Both before and after the Treaty of Lisbon, EU treaty law provides that the "Council shall consist of a representative of each Member State at ministerial level, who may commit the government of the Member State in question and cast its vote," (Lisbon Treaty, Art. 16 Sec. 2). "The way in which national Parliaments scrutinise their governments in relation to the activities of the Union is a matter for the particular constitutional organisation and practice of each Member State" (First recital in the Preamble to the protocol on the role of national parliaments in the EU [originally inserted in the Treaty of Amsterdam and largely reproduced under the Treaty of Lisbon]. See: Protocol on the Role of National Parliaments in the European Union [Treaty of Amsterdam], First Recital, 16 December 2004, 2004 O.J. (C 310) 204).

in the course of a general debate on the democratization of the European Institutions – to the introduction of the subsidiarity principle in the Maastricht Treaty in 1992 (article 2 Sec. 2 TEU and article 5 Sec. 2 TEC; Art 3 b of the Treaty of Lisbon). Since then, there has been an ongoing debate on adopting further safeguard mechanisms and procedural guarantees for the implementation of the subsidiarity principle in EU policy making as becomes also evident in "Protocol No. 2 on the Application of the Principles of Subsidiarity and Proportionality" to the Treaty of Lisbon.

The example of German *Länder* participation in EU policy-making can be regarded as an interesting example of how federal states and their entities can take part in integrated frameworks of supra-national cooperation. Meanwhile within the EU other emerging European regional actors such as the Belgian or Spanish regions as well as Scotland, Wales and Northern Ireland are looking to Germany as a model for regional participation in EU-matters.

This article therefore aims at showing how the aspirations of the German *Länder* to play a role on the European stage and contribute to European policy-making have developed until today and how this affects the EU and German EU membership. The focus is on the developments on the national (German) level. Questions, which concern the direct relationship of the *Länder* with the EU institutions such as the principle of subsidiarity, their role in the Committee of the Regions (CoR) or the (indirect) right of the *Länder* to take cases to the European Court of Justice (ECJ), are not subject of this article.

B. German Federalism

In order to create an understanding of the characteristics and peculiarities of present-day German federalism and its institutions, the paper starts with a brief outline of the historical evolution of federalism in Germany. This is then followed by a description of the main features of the initial constitutional framework of German federalism and the factors which have influenced the evolution of the German federal system towards what has been described by analysts as unitary and cooperative federalism. One of these factors has been European integration with the transfer of former federal state and *Länder* powers to the European level.

1. The Historical Development of German Federalism

Federalism has a long tradition in Germany.⁶ The German states have been organized in various federal structures throughout the centuries: until 1806 they were federated loosely

⁶ On the history of German federalism, see: HEINZ LAUFER AND URSULA MÜNCH, DAS FÖDERATIVE SYSTEM DER BUNDESREPUBLIK DEUTSCHLAND (1997), 33-75; ROLAND STURM, FÖDERALISMUS IN DEUTSCHLAND (2001); Umbach, Maiken

in the Holy Roman Empire of German Nations, which was succeeded by a loose confederation of the German speaking principalities, called “*Deutscher Bund*”, following the Congress of Vienna in 1815.⁷ After the Prussian-Danish and the Prussian-Austrian wars the Northern German Federation (*Norddeutscher Bund*) was created with a Constitution which – with minor amendments – later became the Constitution of the German Empire proclaimed in Versailles in 1871 after the Prussian-French war. The “second” German Empire was a monarchical federal state.⁸ Legislation required the assent of the *Bundesrat*, the Federal Council of deputies from the German states. Prussia, which controlled 65 percent of the German territory and held 62 percent of the population, played a dominating role with the Prussian kings ruling the new Empire as German Emperors (*Kaiser*).⁹ The German states nonetheless maintained a great deal of autonomy with power to legislate in many fields.¹⁰ Also most of the administrative powers remained

(Ed.), GERMAN FEDERALISM. PAST, PRESENT, FUTURE (2002); DANIEL ZIBLATT, STRUCTURING THE STATE. THE FORMATION OF ITALY AND GERMANY AND THE PUZZLE OF FEDERALISM (2006), 32-56.

7 The *Deutscher Bund* was a loose association of the sovereign German States with some characteristics of a federal state: the legislative powers were distributed between the regions and the centre, the members established central organs such as the Federal Diet “*Bundestag*” in Frankfurt/M. as a permanent Congress of delegates from the German principalities. A customs union, the “*Zollverein*”, was established between 18 German states in 1833/34, which promoted economic development. The political climate however remained oppressive, since the Confederation concentrated largely on the implementation of measures, which had been agreed in 1819 between the powers of the Saint Alliance in order to quench any revolutionary tendencies in Central Europe. In March 1848 in the course of a popular revolt everywhere in the country a National Assembly was established in Saint Paul’s Church in Frankfurt which worked out a model constitution for a newly united German Empire but eventually failed to establish a lasting administration. This led to the restoration of the old monarchic powers. The *Deutscher Bund* broke apart in 1866 when a war broke out between its two dominating powers, the Austrian Empire and the Kingdom of Prussia. For further details, see: ZIBLATT (note 6), 32-40.

8 The 25 states of the German Empire were the kingdoms (“*Königreiche*”) of Bavaria (“*Bayern*”), Prussia (“*Preußen*”), Saxony (“*Sachsen*”) and Württemberg; the Grand-Duchies (“*Großherzogtümer*”) of Baden, Hessen, Mecklenburg-Schwerin, Mecklenburg-Strelitz, Oldenburg, Saxony-Weimar-Eisenach (“*Sachsen-Weimar-Eisenach*”); the duchies (“*Herzogtümer*”) of Anhalt; Brunswick (“*Braunschweig*”), Saxony-Altenburg (“*Sachsen-Altenburg*”), Saxony-Coburg-Gotha (“*Sachsen-Coburg und Gotha*”), Saxony-Meiningen (“*Sachsen-Meiningen*”), the Principalities (“*Fürstentümer*”) of Lippe, Reuss-Gera (“*Reuß jüngere Linie*”), Reuss-Greiz (“*Reuß ältere Linie*”), Schaumburg-Lippe, Schwarzburg-Rudolstadt, Schwarzburg-Sondershausen, Waldeck-Pyrmont; the “Free Cities” (“*Freie Hansestädte*”): Hamburg, Breme, Lubec and the imperial territory of Alsace-Lorraine (“*Reichsland Elsaß-Lothringen*”). On the history of the German *Länder*, see: DIE DEUTSCHEN LÄNDER. GESCHICHTE, POLITIK, WIRTSCHAFT (Wehling, Hans-Georg ed., 2000).

9 KLAUS VON BEYME, DAS POLITISCHE SYSTEM DER BUNDESREPUBLIK DEUTSCHLAND NACH DER VEREINIGUNG (1993), 331.

10 While speedy economic integration in the second half of the 19th century had already lead to the adoption of a Common Commercial Code (*Handelsgesetzbuch*) in the German Confederation in 1861 and to the establishment of a Common Appeal Court, the *Reichsoberhandelsgericht*, as last instance for commercial law matters, it was only in 1871 that a new Common Penal Code (*Reichsstrafgesetzbuch*) was adopted. In 1877 Common Codes of Civil and Criminal Procedure (*Zivilprozessordnung* and *Strafprozessordnung*) and the Code on the Justice System (*Gerichtsverfassungsgesetz*) were adopted. In order to enable the Empire to replace the numerous Civil Codes, which were still in force in the German states, the constitution was amended in 1873 creating the constitutional basis for the German Civil Code, the *Bürgerliches Gesetzbuch*, which came into force on 1 January 1900.

decentralized until World War I. It was – with some exceptions – only during the war and in the Weimar Republic established in 1919 that a powerful central administration at the level of the “Reich” was established. Under the Weimar Republic, most of the former German principalities continued to exist as 17 *Länder* with their own governments and administrations as well as a Federal Council (*Reichsrat*) which ensured a certain degree of legislative influence on the federal (the *Reich's*) level.

The *Länder* governments and parliaments were eliminated in the course of Hitler's accession to power in 1933/34 in a process which was then referred to as “*Gleichschaltung der Länder*”.¹¹ Despite the plans of the Nazi-administration to completely replace the *Länder* by the regional Nazi-Party administration system of the so-called “*Gaue*”, the *Länder* continued to exist as administrative entities of the Nazi-administration until 1945.¹² In 1945, after the end of the Second World War, at the Potsdam Conference, the Allied Powers (Soviet Union, USA, Britain and France) decided on decentralizing Germany and divided the country into four occupation zones. Already in the following years 1946/47 the occupational administrations started to create new *Länder*.¹³ With the exception of Bavaria, Saxony in the East, and the two city-states of Hamburg and Bremen, these newly created *Länder* had little historical precedent. Their borders were drawn up by the allied military governments. This led to the creation of new entities such as Rhineland-Palatinate;

11 The *Gleichschaltung* of the *Länder*, euphemistically labeled *Neubau des Reiches* (reconstruction of the Reich) was based on a series of laws passed in 1933/34 the *Vorläufiges Gleichsetzungsgesetz* of 31 March 1933 (*Reichsgesetzblatt I*, 1933, p. 153), the *Zweites Gesetz zur Gleichschaltung der Länder mit dem Reich* of the 7 April 1933. The latter became the *Reichsstatthaltergesetz* on the 25 April 1933 (*Reichsgesetzblatt I*, 173), by which permanent *Reichsstatthalter* (Administrators of the Reich) were instated in the *Länder*. The Law on the *Neuaufbau des Reiches* in Spring 1934 (*Reichsgesetzblatt I*, S. 75) finally abolished the *Länder* as political entities. The *Länder* parliaments and the *Reichsrat* were dissolved on the 14 February 1934 (RGBl. I, S. 89). The *Länder* became mere administrative entities of the Reich. See: WALTER BAUM, *DIE REICHSREFORM IM DRITTEN REICH*, in *VIERTELJAHRESHEFTE FÜR ZEITGESCHICHTE* (1955), 52-53.

12 For further details, see: UWE BACHNICK, *DIE VERFASSUNGSREFORMVORSTELLUNGEN IM NATIONALSOZIALISTISCHEN DEUTSCHEN REICH UND IHRE VERWIRKLICHUNG* (1995).

13 The following 16 *Länder* were created in the four occupation zones in 1946/47:

US-Zone: Bavaria, Hessen, Württemberg-Baden, Bremen.

British zone: North-Rhine-Westphalia, Lower Saxony, Schleswig-Holstein, Hamburg;

French zone: Württemberg-Hohenzollern, Rhineland-Palatinate, Baden;

Soviet zone: Saxony, Saxony-Anhalt, Thuringia, Brandenburg, Mecklenburg;

Berlin remained under a special status. In 1952 the states Baden, Württemberg-Baden and Württemberg-Hohenzollern were merged in the *Land* Baden-Württemberg. In 1957 the Saarland became a *Land* of the Federal Republic of Germany, which remained economically linked to France until 1959. On the US occupation policy in Germany, see: Arnold J. Heidenheimer, *Federalism and the Party System: The Case of West Germany*, 52 *AMERICAN POLITICAL SCIENCE REVIEW* 808-828 (1958); RICHARD MERRITT, *DEMOCRACY IMPOSED: U.S. OCCUPATION POLICY AND THE GERMAN PUBLIC* (1995) 1945-1949; LAUFER (note 6) 54-68. On the history of the German *Länder*, WEHLING, (note 8).

Lower Saxony and North Rhine-Westphalia which were established within the boundaries of the allied zones of occupation.¹⁴

In 1948 the Western allied powers instructed the Heads of the *Länder* governments, the Minister Presidents, to convocate an assembly in Herrenchiemsee and to draft a federal constitution, the *Grundgesetz* (Basic Law) which became the constitution of the Federal Republic of Germany (*Bundesrepublik Deutschland*) on 23 May 1949.¹⁵ The (West-) German *Grundgesetz* was conceived as a provisional constitution which was only to remain in force until the reunification of Germany.¹⁶

After the fall of the wall in 1989 the four allied powers and the two German States agreed in 1990 in the so-called 2+4 Treaty¹⁷ on the final situation of Germany and paved the way for the unification of the two German states, which took place on the 3 October 1990.¹⁸

14 BEYME (note 9) 332.

15 The Soviet Union created the German Democratic Republic (*Deutsche Demokratische Republik*, DDR) in its occupational zone on 7 October 1949. Until 1952 also the DDR had been composed of *Länder*, which derived their configuration from pre-1933 antecedents that had been adjusted for the imposition of the Oder-Neisse line and the zonal boundaries towards the west and south. The five *Länder* reconstituted in 1990 were largely identical with the five *Länder* of the 1945 Soviet Zone of Occupation (except for Greater Berlin). In the early years of the DDR, they had constituted the states of a federal system and enjoyed representation in a weak *Länderkammer*, comparable with the *Reichsrat* of the Weimar Republic. The *Länderkammer* played a minor role in the initiation of legislation and survived in obscurity until its abolition in 1958. The *Länder* and their governments were abolished in mid-1952 and replaced by fourteen districts (*Bezirke*), which in the interim sent delegates to the *Länderkammer*. On the developments in East-Germany, see: LAUFER (note 6) 71-75.

16 This is also the reason for its name: a "Basic Law" was not considered a "real" constitution. The old Art. 23 of the Basic Law (in force until reunification in 1990) took account of this situation by stipulating that the Basic Law would only apply to the Western *Länder* and was to be adopted in "other parts of Germany" after their accession (*Dieses Grundgesetz gilt zunächst im Gebiete der Länder Baden, Bayern, Bremen, Groß-Berlin, Hamburg, Hessen, Niedersachsen, Nordrhein-Westfalen, Rheinland-Pfalz, Schleswig-Holstein, Württemberg-Baden und Württemberg-Hohenzollern. In den anderen Teilen Deutschlands ist es nach deren Beitritt in Kraft zu setzen.*) This provision in fact obliged the Federal Republic of Germany to accept "any other parts of Germany" without any conditions if the latter chose to accede. This provision of the Basic Law had been used in 1957 to reintegrate the Saarland into the Federal Republic, and was to serve as a model for German unification in 1990.

17 See: *Vertrag über die abschließende Regelung, in BEZUG AUF DEUTSCHLAND* ["Zwei-plus-Vier-Vertrag"] of 12 September 1990, available at: www.documentArchiv.de/brd/2p4.html, accessed: 12 August 2007.

18 On 18 March 1990, for the first time in 40 years, East Germans were free to elect a new government which was headed by Lothar de Maizière with whom the West German Government under Helmut Kohl agreed on the formation of an Economic, Monetary and social Union which was established on the 1 July 1990. In August 1990 the East German Parliament, the *Volkskammer*, voted for a speedy unification of Germany on the basis of the Basic Law. On the unification process, see: FROM BUNDESREPUBLIK TO DEUTSCHLAND. GERMAN POLITICS AFTER UNIFICATION, (Michael G. Huelshoff, Andrei S. Markovits, and Simon Reich eds., 1993); FEDERALISM, UNIFICATION AND EUROPEAN INTEGRATION (Jeffery, Charlie and Roland Sturm eds., 1993); BEYME (note 9).

Art. 1 of the Unification Treaty of 31 August 1990¹⁹ foresaw that the five newly (re-)created East German *Länder* of Brandenburg, Mecklenburg-Vorpommern, Saxony, Saxony-Anhalt and Thuringia would join the Federal Republic of Germany according to Article 23 forming a new German federal state consisting of 16 *Länder*.²⁰ Like the 25 states of the Wilhelmine Empire or the 17 states of the Weimar Republic, the 16 *Länder* of today's Federal Republic of Germany differ significantly as to their territory, population and their economic and fiscal capacity, which is also reflected by the constitutional framework of German federalism.

II. The Constitutional Framework of German Federalism and its Characteristics

The Federal Republic of Germany was a creation of its *Länder*.²¹ The delegates assembled in the constitutional convention of Herrenchiemsee and in the Parliamentary Council in 1948/49 came from the *Länder* parliaments and governments. They were conscious of Allied requests to prevent the (re-) establishment of a strong central state and government in Germany. The delegates were also faced with the challenge of incorporating into the *Basic Law* the democratic experiences gathered in the Weimar Republic while trying to avoid the weaknesses which led to the speedy dismantlement of the Weimar Constitution in 1933 when Hitler acceded to power.²² Therefore, the *Basic Law* initially envisaged a strong role for the *Länder*, as a horizontal division of power, which is reflected in some of its central provisions:

19 See: *Vertrag zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik über die Herstellung der Einheit Deutschlands (Einigungsvertrag)* (31 August 1990) in: BUNDESGESETZBLATT II 885 (1990), (last version of 1 July 2004, in: *Bundesgesetzblatt I* 718 (2004)).

20 On Art. 23, see: note 11. This "unification via Art. 23" required that the GDR joined the FRG *Land by Land*, and not as a whole. In this form, the East German People's Chamber (Volkskammer) passed the law for the reintroduction of the *Länder* on 22 July 1990, which was to take effect on German Unity Day, 3 October 1990. On this day, the GDR would disappear as an entity. The five new *Länder* would remain and, on the 14 October 1990, elections for their respective diets (*Landtage*) would each in turn establish a parliamentary *Land* government headed by a minister president just as in the West German *Länder*. The new *Landtage* and *Land* cabinets would then send instructed *Land* delegations to the enlarged Bundesrat, each to take their seats and vote en bloc alongside the *Land* delegations of the other German states.

21 This was recently stressed by the political analyst Rudolf Hrbeck in a contribution to a conference where he reminded the audience that Germany was younger than its *Länder* and that it was a creation of the latter (Föderalismus und Europa (2007): Konferenzbericht. Gemeinsame Konferenz der Staatskanzlei Sachsen-Anhalt, Vorsitz der Europaministerkonferenz der Länder, des Europäischen Zentrums für Föderalismusforschung Tübingen und des Instituts für Politikwissenschaft der Otto-von-Guericke Universität Magdeburg, (Magdeburg, 17th /18th of January 2007)).

22 The objectives of the occupation policy of the US are described by HEIDENHEIMER (note 13); MERRITT (note 13). On the discussion about federalization in the constitutional process, see: LAUFER (note 6) 63-68.

- Article 20 Sec. 1²³ stipulates as one of the unamendable²⁴ fundamental institutional principles that the Federal Republic of Germany is a democratic and social *federal* state. The FCC has also inferred from Article 20 the reciprocal obligation for the *Länder* and the federal government to cooperate and treat each other with respect and in a fair and cooperative manner.²⁵
- Article 28 contains a federal guarantee of the *Länder* constitutions and of local self-government.²⁶
- Revisions of the existing division of Germany into *Länder* can be implemented by a federal law, but must be confirmed by referendum (Article 29 Sec. 2).²⁷

23 If not mentioned otherwise, the cited Articles refer to the German Grundgesetz/Basic Law. The English translations used in this text were first published by Inter Nationes, translated by the Federal Ministry of the Interior and reproduced as HTML edition by LAWRENCE SCHÄFER AND GERHARD DANNEMANN, 1999, at: <http://www.iuscomp.org/gla/statutes/GG.htm>, last accessed on 15 September 2009.

24 In the light of the experience of the Gleichschaltung of the *Länder* in 1933/34, Art. 79 Sec. 3 of Basic Law, the so-called “Eternity Clause” (*Ewigkeitsklausel*) stipulates that “Amendments to this Basic Law affecting the division of the Federation into *Länder*, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.”

25 These so-called principles of *Bundestreue* and *bundesfreundliches Verhalten* (loyalty/ allegiance towards the federation) imply that the *Länder* and the Federal state have to co-operate and take each other’s interests into regard (Collection of the decisions of the FCC – *Bundesverfassungsgerichtsentscheidungen* – BVerfGE 1, 315 f; 12, 245 ff; 42, 117 ff; 95, 266). They are obliged to keep each other duly informed, consult with each other and cooperate (BVerfGE 43, 348 f.; 61; 205; 73, 197). See also: LAUFER (note 6) 94. On the role of the FCC in developing the German Constitutional order, see: DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY (1997).

26 See: Art. 28 Sec. 1: “The constitutional order in the *Länder* must conform to the principles of a republican, democratic, and social state governed by the rule of law, within the meaning of this Basic Law. In each *Land*, county, and municipality the people shall be represented by a body chosen in general, direct, free, equal, and secret elections. (...)”. Sec. 3 “The Federation shall guarantee that the constitutional order of the *Länder* conforms to the basic rights and to the provisions of paragraphs (1) and (2) of this Article.” Art 20 and 28 do not guarantee the existence of the 16 *Länder* as such but are seen as a guarantee that Germany has to be composed of at least two *Länder*. This can be inferred from Art. 29, which explicitly provides for the possibility to restructure the territory of the Federal Republic of Germany.

27 See: Art. 29 “[New delimitation of the *Länder*]: (1) The division of the federal territory into *Länder* may be revised to ensure that each *Land* be of a size and capacity to perform its functions effectively. Due regard shall be given in this connection to regional, historical, and cultural ties, economic efficiency, and the requirements of local and regional planning.

(2) Revisions of the existing division into *Länder* shall be effected by a federal law, which must be confirmed by referendum. The affected *Länder* shall be afforded an opportunity to be heard. (...)”

See also: Art. 118 “[New delimitation of *Länder* in the Southwest]:

The division of the territory comprising Baden, Württemberg-Baden and Württemberg-Hohenzollern into *Länder* may be revised, without regard to the provisions of Art. 29, by agreement between the *Länder* concerned. If no agreement is reached, the revision shall be effected by a federal law, which shall provide for an advisory

- Although federal law takes precedence over *Länder*-law (Article 31), the Basic Law confers the general exercise of state-powers and the discharge of state functions (Article 30) upon the *Länder* and even grants the *Länder* (Article 32 Sec. 3) the possibility to conclude treaties with foreign states with the consent of the Federal Government.²⁸
- Only under the exceptional case of a *Land* failing to comply with its obligations under the Basic Law or other federal laws, the Federal Government – with the consent of the *Bundesrat* (!)– may take the necessary steps to compel the *Land* to comply with its duties and shall have the right to issue instructions to all *Länder* and their authorities (Article 37).
- *Länder* have the general power and competence to legislate (Article 70 Sec. 1²⁹) unless the Basic Law explicitly empowers the federal state to do so.³⁰ Although the federal state has managed to expand its law-making competences over the years, the *Länder* exercise legislative and administrative competencies in education (especially at the primary and secondary level), law enforcement, regulation of radio and television and cultural issues. Furthermore, the states retain residual powers to legislate in

referendum.” While the states Baden, Württemberg-Baden and Württemberg-Hohenzollern were merged into the *Land* Baden-Württemberg in 1952, the Brandenburg voters rejected with a clear majority of 62,7 % in a popular referendum the merger plans of the two states of Berlin and Brandenburg on 5 May 1996.

28 See: Art. 30 “[Division of authority between the Federation and the *Länder*]: Except as otherwise provided or permitted by this Basic Law, the exercise of state powers and the discharge of state functions is a matter for the *Länder*.” See also: Art. 31 “[Supremacy of federal law]: Federal law shall take precedence over *Land* law” and Art. 32: [Foreign relations] “(1) Relations with foreign states shall be conducted by the Federation.

(2) Before the conclusion of a treaty affecting the special circumstances of a *Land*, that *Land* shall be consulted in timely fashion.

(3) Insofar as the *Länder* have power to legislate, they may conclude treaties with foreign states with the consent of the Federal Government.” Art. 30 implies that within the German federation, the *Länder* possess their own autonomous statehood and therefore, in constitutional terms, cannot be treated as subordinate or solely administrative entities.

29 See: Art. 70 [Division of legislative powers between the Federation and the *Länder*] (1) The *Länder* shall have the right to legislate insofar as this Basic Law does not confer legislative power on the Federation.

(2) The division of authority between the Federation and the *Länder* shall be governed by the provisions of this Basic Law respecting exclusive and concurrent legislative powers.”

30 The federal government possesses exclusive legislative responsibilities in matters that concern the national security or require policy coordination on a national level. Defense, foreign trade, immigration, citizenship, transportation, communications, currency standards and some other policy areas are exclusive powers of the *Bund* (Federation). In other 33 policy areas – including civil law, refugee and expellee matters, public welfare, *Land* management, consumer protection, public health and the collection of vital statistics (births, deaths, and marriages) – the *Länder* and the federal government share concurrent legislative powers. In a case of conflict though, federal law takes priority (Art. 31).

any area of the concurrent competency where the federal government has not done so.

- The *Länder* governments also exercise a substantial influence with regard to federal law-making through the *Bundesrat*³¹, the representation of the *Länder* governments at the federal level. The *Bundesrat* is composed of 69 members who are not directly elected by *Länder* legislatures or voters but drawn from the *Länder* governments in order to represent the interests of the *Länder* at the national level.³² Each state, depending on its population, is entitled to three to six members with an equivalent number of votes.³³ The *Länder* then have to cast their votes as a bloc which typically reflects the opinion of the *Länder* government. The political composition of the *Bundesrat* at any given time is determined by which parties are governing the *Länder*. Consequently, the party controlling the majority of the *Länder* governments can have a significant effect on legislation passed at the federal level. And because *Land* elections usually take place between *Bundestag* elections, the

31 Art 50: "The *Länder* shall participate through the *Bundesrat* in the legislation and administration of the Federation and in matters concerning the European Union." On the *Bundesrat*, see: 40 JAHRE BUNDESRAT (1989); ALBERT PFITZER, DER BUNDESRAT. MITWIRKUNG DER LÄNDER IM BUND (1987); KONRAD REUTER, PRAXISHANDBUCH BUNDESRAT. VERFASSUNGSRECHTLICHE GRUNDLAGEN, KOMMENTAR ZUR GESCHÄFTSORDNUNG, PRAXIS DES BUNDESRATES (1991), LAUFER (note 6) 108-143. Arthur B. Gunlicks, *German Federalism and Recent Reform Effort*, 6 THE GERMAN LAW JOURNAL 1284, 1284-1296 (see 1284, Footnote 1) stresses, that the "*Bundesrat* is not an 'upper house,' although it is frequently referred to as such by the quality press and even by many Anglo-Saxon experts on Germany. It is, instead, a unique chamber that represents the *Land* governments (cabinets)—not the parliaments—roughly on the basis of population (each *Land* has from three to six votes, which must be cast en bloc). It is not, therefore, a popularly elected body, which German constitutional experts consider to be a prerequisite for a true 'house' of parliament." See MATTHIAS HEGER, DEUTSCHER BUNDESRAT UND SCHWEIZER STÄNDERAT (1990) for a comparison of the *Bundesrat* with the Swiss *Ständerat*.

32 KURT SONTHEIMER, GRUNDZÜGE DES POLITISCHEN SYSTEMS DER NEUEN BUNDESREPUBLIK DEUTSCHLAND (1993) 284-5, has therefore pointed out, that the *Bundesrat* is not really a second legislative body in the process of democratic decision-making, but rather an instrument of executive and bureaucratic influence. He characterizes the control which is exercised by the *Bundesrat* primarily as a control of the federal executive and legislative branches by the executive branches of the *Länder*, since the *Länder* parliaments do not partake at all in the decision-making process of the *Bundesrat* (Sontheimer 1993, p. 291). Clearly, the *Bundesrat* is not a co-equal, second legislative chamber of parliament. It cannot claim the same popular legitimacy as the proportionally composed and directly elected *Bundestag*. The states vote as a bloc; therefore, they view policy from the perspective of the state, rather than national interest. It has therefore sometimes been referred to as a "conclave of states" (Gallagher et al. 1995, p. 139) or a "permanent conference of minister presidents" (RUSSEL J. DALTON, POLITICS IN GERMANY(1993) 58).

33 According to Art. 51 Sec. 2, each *Land* has at least three votes. States with more than two million inhabitants have four votes, those with more than six million people retain five seats and *Länder* with more than seven million inhabitants have six votes. Hega, 2003, p. 12, has pointed out, that this system gives disproportionate weight to the smaller *Länder*. The *Länder* that represent only a third of the population control half of the votes in the *Bundesrat*.

Bundesrat majority can shift during the course of a *Bundestag* legislative period.³⁴

According to the Basic Law, the *Bundesrat* can initiate legislation (Article 76, Sec. 1), and it must approve of all laws directly related to the states' responsibilities such as education, police matters, state and local finance questions, land use and most transportation issues. In addition, any legislation affecting state boundaries, national emergencies and proposed constitutional amendments require *Bundesrat* approval.³⁵ The *Bundesrat* has a two-fold veto power: a "suspensive veto", which it can use against any law, passed by the *Bundestag* and which the latter can in the end override by a simple majority, and an "absolute veto" against certain bills passed by the *Bundestag*, which the latter cannot override. If the *Bundesrat* should put in its "suspensive veto" with a two-thirds majority, then the *Bundestag* needs a two-thirds majority to override the *Bundesrat's* veto as well.

The *Bundesrat* has also become the most important tool of the *Länder* governments for shaping European policy as will be illustrated in the next chapter.

- Although the federal state has far-reaching legislative powers, the *Länder* hold primary responsibility for the policy implementation and administration: Article 83 stipulates that it is generally up to the *Länder* to execute federal laws in their own right, making execution of laws by federal state administrations the exception to the rule as stated in Article 86 and the following.³⁶ The *Länder* therefore enforce "their own" regulations as well as

34 This has led to the *Bundesrat* evolving over the years from a technical chamber which concentrated on administrative aspects of policy making to a more politicized one. While the Christian Democrats (CDU/CSU) were in opposition in the *Bundestag* from 1969 to 1982, the CDU/CSU-led governments formed the majority in the *Bundesrat*. Between 1972 and 1982, the frequency of *Bundesrat* objections to government legislation increased to the point where the leaders of the SPD-FDP government accused it of becoming the "extended arm" of the parliamentary opposition. It was suggested that the CDU/CSU was seeking to obstruct the government's electoral majority by turning its own majority in the *Bundesrat* into a politicized counter government. In 1991 the Social Democrats, after a series of victories in elections, gained control of the *Bundesrat* and insured that *Länder* would have major input into any programs proposed by the government or could block major legislative initiatives, as happened with increasing frequency in the last years of the Kohl government. After the victory of the red-green coalition in 1998 power in the *Bundesrat* shifted again to the opposition.

35 The *Bundesrat* normally schedules only about a dozen plenary sessions in a year. Most of its legislative activity takes place in committees (DALTON (note 33) 336). Bills from the federal government (*Bundesregierung*) shall first be submitted to the *Bundesrat* who is entitled to comment within six weeks (Art. 76, Sec. 2) before being sent to the Parliament (*Bundestag*). If a law is adopted by the *Bundestag*, it has to be submitted to the *Bundesrat* without delay (Art. 77, Sec. 1) with the latter having the possibility to demand that a committee for joint mediation (*Vermittlungsausschuss*), composed of members of the *Bundestag* and of the *Bundesrat*, be convened in order to overcome disagreements on the contents of a bill.

36 See: Art. 87 "[Subjects of direct federal administration]: (1) The foreign service, the federal financial administration, and, in accordance with the provisions of Art. 89, the administration of federal waterways and shipping shall be conducted by federal administrative authorities with their own administrative substructures. A

most of the domestic legislation enacted by the federal government. The *Länder* governments also oversee local government. The administrative strength of the *Länder* (administrative federalism) thus partially counterbalances their legislative limitations.

Despite these constitutional guarantees and the powerful institution of the *Bundesrat* as representation of the *Länder* governments at the federal level, the political influence of the *Länder* and their autonomy as states has decreased steadily since 1949, while the powers of the federal government have increased at the expense of the *Länder*.³⁷ This development has been described by scholars as “unitary federalism.”³⁸ Other analysts have emphasized the interlocking policies, linking the Federation (*Bund*) and the *Länder* (“*Politikverflechtung*”) and the growing “blurriness” of competences and responsibilities between the different levels of government and have coined the concept of “co-operative federalism” in order to describe these trends³⁹.

The trends towards “unitary federalism” and *Politikverflechtung* in Germany have been attributed in particular to the following constitutional developments:

- The changes in the constitutional framework: Between 1949 and 1989 there were 35 amendments to the Basic Law, of which more than 20 had some effect on German federalism, above all in the expansion of powers of the federal government, while there was no case where the *Länder* were given expanded powers.⁴⁰

federal law may establish Federal Border Police authorities and central offices for police information and communications, for the criminal police, and for the compilation of data for purposes of protection of the constitution and of protection against activities within the federal territory which, through the use of force or acts preparatory to the use of force, endanger the external interests of the Federal Republic of Germany.”

37 Hartmut Klatt, *Europapolitik im Föderalistischen System der Bundesrepublik*, in STAATSWISSENSCHAFTEN UND STAATSPRAXIS (1998).

38 The concept of “Unitarian federalism” was first described by: KONRAD HESSE, DER UNITARISCHE BUNDESSTAAT (1962). For a more recent analysis, see: GERHARD LEHMBRUCH, DER UNITARISCHE BUNDESSTAAT IN DEUTSCHLAND (2002).

39 See: LAUFER (note 6), 186-207. The phenomenon of “*Politikverflechtung*” has first been described by: Fritz W. Scharpf et al. *Politikverflechtung. Theorie und Empirie des Kooperativen Föderalismus* in 1 DER BUNDESREPUBLIK (1976) and 2 DER BUNDESREPUBLIK (1977). See also: Rudolf Hrbek, *The effects of EU integration on German federalism*, in RECASTING GERMAN FEDERALISM. THE LEGACIES OF GERMAN UNIFICATION 217-233 (C. Jeffery ed., 1999), who speaks about “*doppelte Politikverflechtung*” taking also into account the dimension of policy-making on the European level.

40 GUNTER M. HEGA, BETWEEN REFORMSTAU AND MODERNISIERUNG: THE REFORM OF GERMAN FEDERALISM SINCE UNIFICATION (2003), Paper to be presented at the Conference on “Europeanization and Integration” EU Center of the University of Oklahoma, Norman, OK, October 24-25, 2003, 1st draft, Oct. 22, 2003, available at: <http://homepages.wmich.edu/~hega/German%20Federalism.pdf>, last accessed on 15 September 2009.

- The introduction of “*Gemeinschaftsaufgaben*” and in particular of the “*Gemeinschaftsfinanzierung*” (joint federal-state competences and joint financing of certain tasks in areas of broad social concern such as improving higher education, developing regional economic structures and improving rural conditions) in 1969 have contributed to a distortion of boundaries between federal and *Länder* competences.⁴¹ In addition to these formal constitutional arrangements, extensive informal or semiformal channels of policy consultation have been established between *Länder* and federal officials. Intergovernmental committees and planning groups coordinate the different interests of federal and *Länder* governments and practice a style of cooperative federalism whereby *Länder* governments can coordinate their activities at regional level or work together with federal officials.
- The federal state has made extensive use of its concurrent competence to legislate under the former Article 72⁴², which provided the basis for wide-reaching federal legislation with the aim of “establishing equal living conditions” (*Einheitlichkeit der Lebensverhältnisse*) throughout the federal

41 See: former Art. 91 a which was modified by constitutional reform in 2006: “(1) In the following areas the Federation shall participate in the discharge of responsibilities of the *Länder*, provided that such responsibilities are important to society as a whole and that federal participation is necessary for the improvement of living conditions (joint tasks):

1. extension and construction of institutions of higher learning, including university clinics;
2. improvement of regional economic structures;
3. improvement of the agrarian structure and of coastal preservation.

(2) Joint tasks shall be defined in detail by a federal law requiring the consent of the Bundesrat. This law shall include general principles governing the performance of such tasks. (...)

(4) In cases to which subparagraphs 1 and 2 of paragraph (1) of this Article apply, the Federation shall finance one half of the expenditure in each *Land*. In cases to which subparagraph 3 of paragraph (1) of this Article applies, the Federation shall finance at least one half of the expenditure, and the proportion shall be the same for all *Länder*. (...)

42 The former Art. 72 on the concurrent legislative power of the Federation stipulated that: “(1) On matters within the concurrent legislative power, the *Länder* shall have power to legislate so long as and to the extent that the Federation has not exercised its legislative power by enacting a law.”

(2) The Federation shall have the right to legislate on these matters if and to the extent that the establishment of equal living conditions throughout the federal territory or the maintenance of legal or economic unity renders federal regulation necessary in the national interest.

(3) A federal law may provide that federal legislation that is no longer necessary within the meaning of paragraph (2) of this Article may be superseded by *Land* law.” Art. 72 was substantially modified in 2006 by Law on constitutional reform, BT-Drs. 16/813 *in der Fassung der Beschlussempfehlung des Rechtsausschusses vom 28. June 2006*, BT-Drs. 16/2010.

territory⁴³ and of its competence for issuing wide-reaching framework-laws ("*Rahmengesetze*") under the former Article 75.⁴⁴

- The accumulation of powers in the centre has been further increased by the centralization of the party system and the alignment of coalition politics at the federal and *Länder* government level.⁴⁵

43 Hartmut Klatt, *Europapolitik im föderalistischen System der Bundesrepublik*, in 1 STAATSWISSENSCHAFTEN UND STAATSPRAXIS 45, 46-47 (1998).

44 See the old Art. 75: "[Areas of federal framework legislation]: (1) Subject to the conditions laid down in Art. 72, the Federation shall have power to enact provisions on the following subjects as a framework for *Land* legislation:

1. the legal relations of persons in the public service of the *Länder*, municipalities, or other corporate bodies under public law, insofar as Art. 74a does not otherwise provide;

1a. general principles respecting higher education;

2. the general legal relations of the press;

3. hunting, nature conservation, and landscape management;

4. land distribution, regional planning, and the management of water resources;

5. matters relating to the registration of residence or domicile and to identity cards;

6. measures to prevent expatriation of German cultural assets. Paragraph (3) of Art. 72 shall apply mutatis mutandis.

(2) Only in exceptional circumstances may framework legislation contain detailed or directly applicable provisions.

(3) When the Federation enacts framework legislation, the *Länder* shall be obliged to adopt the necessary *Land* laws within a reasonable period prescribed by the law."

Art. 75 was among the provisions, which were abolished by constitutional reform in 2006. See: "*Gesetz zur Änderung des Grundgesetzes*" (law on constitutional reform, BT-Drs. 16/813 in der Fassung der *Beschlussempfehlung des Rechtsausschusses vom 28. Juni 2006*, BT-Drs. 16/2010) came into force together with "*Föderalismusreform-Begleitgesetz*" (BT-Drs. 16/814)" for its implementation.

45 Although the German states have lost much autonomy in policy making and many of their functions have been transferred to the national level, this has not weakened the power of the *Bundesrat* whose influence as the representative institution of the German states at the national level has increased. As the locus of policymaking has long shifted from the *Land* level to the national level, so has the impact of the *Länder* shifted from individual influence to their institution of collective representation at the national level, the *Bundesrat*. According to DAVID P. CONRADT, *THE GERMAN POLITY* 192 (1996), this paradoxical development can be explained in particular by party control of the two chambers of parliament, and the divided government of Germany between 1972 and 1982 and since 1991 until 2005 (see note 29). On the centralization of the German party-system, see: Jesse, Eckhard, *Das Deutsche Parteiensystem nach der Vereinigung*, 21 *GERMAN STUDIES REVIEW* 69, 69-82 (1998); GERHARD LEHMBRUCH, *DER UNITARISCHE BUNDESSTAAT IN DEUTSCHLAND: PFANDABHÄNGIGKEIT UND WANDEL* (2002). For a comparative perspective on the phenomenon of Federalism and Party Interaction in West Germany, Switzerland, and Austria, see: Charles D. Hadley, Michael Morass, and Nick Rainer, *Federalism and Party Interaction in West Germany, Switzerland, and Austria*, 19 *PUBLIUS* 81, 81-97(1989).

- German reunification has added five new *Länder* from the former East Germany, which are all much poorer than those of the former West. The policy of bringing public services and living standards in these new *Länder* towards the level enjoyed by Germans in the West still generates a need for huge money transfers, from western *Länder* through the federal government to the eastern *Länder*, which has further increased the role of the federal government.⁴⁶ Apart from this, the sheer number of 16 *Länder* has made coordination and bargaining procedures among the *Länder* themselves and between the *Länder* and the federal government more complicated. The spreading of "joint tasks" and "joint financing" ("*Gemeinschaftsaufgaben* and *Gemeinschaftsfinanzierung*") has further blurred the boundaries between federal and state competences and has weakened the *Länder* as states.⁴⁷
- Another development, which had significant effects on German federalism – and which is in the focus of this article – is European integration. For almost four decades Germany has been the only federal state in the EU. The EU institutions, however, were tailored to a mechanism of unitary states, a fact which has been referred to by critics from the *Länder* side as the "*Länder-blindness* of the European treaties and institutions".⁴⁸ The effects of this "*Länder-blindness*" were two-fold:
 1. The transfer of powers from the Member States to the European level, involved in the case of Germany also powers which according to the initial constitutional arrangement were "*Länder* powers". Some of these powers were transferred from the *Länder* to the European level by virtue of German membership and – as will be explained later – without the formal participation of the *Länder*.⁴⁹

46 According to the political analyst Beyme (See BEYME (note 9), 362), unification has fostered the trend towards centralization in Germany by allocating most fiscal and economic responsibility to the federal government and its agencies and thus gave the federal government a new self-consciousness concerning its steering capacity. See also: Michael Burgess and F. Gress, *The Quest for a Federal Future: German Unity and European Union* in *COMPARATIVE FEDERALISM AND FEDERATION: COMPETING TRADITIONS AND FUTURE DIRECTIONS* (Michael Burgess and A.-G. Gagnon eds., 1993). *FEDERALISM, UNIFICATION AND EUROPEAN INTEGRATION* (Charlie Jeffery and Roland Sturm eds., 1993); C. Jeffery, *The Non-Reform of The German Federal System After Unification*, 18 *WEST EUROPEAN POLITICS* 252-272; *RECASTING GERMAN FEDERALISM. THE LEGACIES OF UNIFICATION* (C. Jeffery ed., 1999).

47 See KLATT (note 43), 47, rightly argues, that the *Länder* kept loosing autonomy, while the *Länder* governments were compensated with more participatory powers in the *Bundesrat*. The strengthening of this "participatory federalism" however has not helped to reinforce the autonomy of the *Länder* "as states" and has in particular lead to further weakening the *Länder* parliaments.

48 LAUFER (note 6), 216.

49 See LAUFER (note 6), 216-7; KLATT (note 43), 48; MICHAEL GALLAGHER, MICHAEL LAVER, AND PETER MAIR, *REPRESENTATIVE GOVERNMENT IN MODERN EUROPE*, 140 (2nd ed., 1995).

In compensation for these transfers of sovereignty, national governments of the Member States dominated the EU decision-making system.⁵⁰ In the case of Germany the power over EU decisions had been exercised solely by the federal government until 1993 with the net effect of weakening the *Länder* and strengthening the federal government.⁵¹ European integration related losses of competence on the *Länder* side occurred in particular in the areas of education (former Article 126, 127 TEC), research (former Article 130 f-p TEC), culture (Article 128 TEC) and broadcasting.⁵²

2. However, *Länder* competences were also affected by secondary Community law based on former Article 100 TEC or the general competency in former Article 235 TEC (now Article 308 TEC), which limited *Länder* discretion in areas such as regional structural policies and economic planning, education and training, technology policy and environmental protection.⁵³

Since the early 1990ies the debate on German federalism has evolved further with the objective of disentangling competences and responsibilities, creating more accountability and transparency and reinforcing *Länder* statehood.⁵⁴ The results of a joint "Federalism Commission" which had been established by the *Bundestag* and the *Bundesrat* in 2003⁵⁵

50 According to Art. 203 TEC the Council consists of "representatives of each member state at ministerial level authorized to commit the government of that member state". Sub-state representatives have the right to sit at the Council table, but only on behalf of national governments.

51 Michael Burgess and F. Gress, *The Quest for a Federal Future: German Unity and European Union in COMPARATIVE FEDERALISM AND FEDERATION: COMPETING TRADITIONS AND FUTURE DIRECTIONS*, 169-76 (Michael Burgess and A.-G. Gagnon eds.) 1993). Tanja Börzel's analysis (See T. A. BÖRZEL, *STATES AND REGIONS IN THE EUROPEAN UNION: INSTITUTIONAL ADAPTATION IN GERMANY AND SPAIN* (2002)), which compares the effects of European integration on the relationships between national and regional government in Spain and Germany and comes to the conclusion that Europeanization has strengthened the co-operation between the German *Länder* and the federal government, refers only to the development after the constitutional amendments of 1992 (law of the 21 December 1992, *Bundesgesetzblatt* 1992, I, p. 2086).

52 LAUFER (note 6), 217; KLATT (note 43), 48.

53 LAUFER (note 6), 217-8.

54 See LAUFER (note 6), 242- 260; Rainer-Olaf Schultze, *Indirekte Entflechtung: Eine Strategie für die Föderalismusreform?*, 31 ZEITSCHRIFT FÜR PARLAMENTSFRAGEN 681-698 (2000).

55 The "federalism commission" under the joint chairmanship of Franz Müntefering and Edmund Stoiber consisted of 16 members each from the *Bundesrat* and the *Bundestag*, in addition to four representatives of the federal government and six representatives of all the *Länder* parliaments. In addition, there were three permanent guest members representing the national peak organizations of local governments, plus 12 experts who were appointed unanimously by the other commission members. The Commission was mandated with:

- developing reform proposals to "modernize" the German federal system,

became the basis for a comprehensive constitutional reform, adopted by the grand CDU/CSU-SPD-coalition government in 2006. The constitutional reform encompassed – among other changes – the abolition of the framework competence of the federal state in Article 75 and the modification of its concurrent legislative competence by widening the scope of *Länder* competences.

Other important issues in the reform debate such as the reform of financial federalism and the restructuring of the federal territory had been deliberately excluded from the mandate of the "Federalism Commission" in 2003. It remained, however, the declared objective of the governing CDU-SPD coalition in Germany to use its current majority in the *Bundestag* and *Bundesrat* to further promote the reform of German federalism and to strengthen in particular the financial independence and accountability of the *Länder*.⁵⁶

These developments have to be borne in mind when looking at the evolution of *Länder* involvement in formulating EU-policy.

A. The Participation of The German *Länder* in Formulating German EU Policy

1. *The Participation of The Länder in Policy-Making at EU Level until the Ratification of The Maastricht Treaty in 1992*

1. Introduction

Until the introduction of the new Article 23 in the Basic Law in December 1992, Article 24⁵⁷ provided the so-called "opening clause", which became the key-instrument for transferring

-
- improving the capacity to act and make decisions of both the federal and *Länder* governments,
 - assigning more clearly defined political responsibilities, and
 - increasing the functional effectiveness and efficiency of the federal system.

The commission examined in particular the division of legislative competences between the federal and *Länder* governments, the responsibilities and rights of the *Länder* in the policy-making process at the federal level, and the financial relations between the federation and the *Länder*. The results of the work of the Commission were taken up by the grand coalition government, which was formed in autumn 2005 and adopted a wide-reaching constitutional reform. For a critical assessment of the reform, see: Arthur B. Gunlicks, *German Federalism and Recent Reform Efforts*, in 6 GERMAN LAW JOURNAL 1284-1296 (2006).

56 See: "Gemeinsam für Deutschland. Koalitionsvertrag von CDU, CSU und SPD", 2005, p. 109: "In einem weiteren Reformschritt in der 16. Wahlperiode sollen die Bund-Länder-Finanzbeziehungen den veränderten Rahmenbedingungen inner- und außerhalb Deutschlands, insbesondere für Wachstums- und Beschäftigungspolitik, angepasst werden. Der Bund bietet den Ländern an, dazu mit Beginn des Jahres 2006 die Voraussetzungen und Lösungswege zu klären, das Grundgesetz so zu ändern, dass die Eigenverantwortung der Gebietskörperschaften und ihre aufgabenadäquate Finanzausstattung gestärkt werden kann." For an earlier perspective on the necessity of reform of financial federalism in Germany, see: GUNLICKS (note 55).

57 Today Art. 24 reads as follows: "(1) The Federation may by a law transfer sovereign powers to international organizations.

sovereign powers – including those of the *Länder* – to the European level of the EEC. In the light of Article 32 of the Basic Law, which stipulates that foreign policy is a matter of the federal state, this meant that the “power of integration” into the new European framework was an exclusive power of the federal government and did not even need the consent of the *Bundesrat* for transferring its – and the powers of the *Länder* – to the newly created supra-national, European institutions.⁵⁸

As the policy competencies of the European institutions expanded, they overlapped considerably with those policy areas which had developed as *Länder* competencies in Germany. These included “exclusive” *Länder* competencies such as education, media policy, environment and regional economic development, and, more significantly, those federal-level competencies exercised by the *Länder* through the *Bundesrat*.⁵⁹ Moreover, *Länder* discretion with regard to implementing federal-level legislation in the domestic policy process was being progressively eroded through federal government transfers of competencies to Brussels and by secondary Community law.⁶⁰

It is therefore not surprising that the *Länder* have always assumed to be in competition with the emerging European institutions and have been very sensitive to perceived encroachments on their competencies by Brussels.⁶¹ Faced with real constraints on their

(1a) Insofar as the *Länder* are competent to exercise state powers and to perform state functions, they may, with the consent of the Federal Government, transfer sovereign powers to cross-border institutions in neighboring regions.

(2) With a view to maintaining peace, the Federation may enter into a system of mutual collective security; in doing so it shall consent to such limitations upon its sovereign powers as will bring about and secure a lasting peace in Europe and among the nations of the world.

(3) For the settlement of disputes between states, the Federation shall accede to agreements providing for general, comprehensive, and compulsory international arbitration.” Para. 1 a was introduced on the 21st of December 1992 (*Bundesgesetzblatt I*, 1992, p. 2086) together with the new Art. 23 on the development of the European Union.

58 Under Art. 24 the *Bundesrat* only had a suspensive veto and no power to definitely stop transfers of powers to the community level (see: Laufer/Münch, p. 220). In order to dissolve resistance from the *Länder* the adoption of the SEA in 1986 and the following amendments were nonetheless always passed with the consent of the *Bundesrat*, KLATT (note 43) 50.

59 Farewell the Third Level? *The German Länder and The European Policy Process*, in: THE REGIONAL DIMENSION OF THE EUROPEAN UNION. TOWARDS A THIRD LEVEL IN EUROPE? 56, 58 (C. Jeffery ed., 1997); LAUFER (note 6) 217-8; HRBEK (note 39), 218-9.

60 JEFFERY (note 59), 58; LAUFER (note 6) 217-8.

61 As early as 1951 when the ratification of the ECSC Act was being debated in the *Bundestag*, one *Länder*-Prime Minister argued that European integration was reducing the *Länder* to nothing more than administrative bodies (Christiansen, 1992, p. 240). North-Rhine Westphalia failed with an initiative in the *Bundesrat* which already foresaw to give the *Bundesrat* powers of directive for the German representative to the ECSC. The federal

sovereign rights and political independence, the *Länder* have battled to redress the balance between their role and those of the federation and the European institutions. Within the domestic arena, the *Länder* argued for recognition of the domestic impact of European policies and, consistent with this, for a *Länder* input into the European policy-making processes.⁶² It was not before the 1990ies, though, that the *Länder* managed to obtain a constitutional entrenchment of their demands in return for *Bundesrat* ratification.

2. Procedure of Forwarding Legal Initiatives (Zuleitungsverfahren)

Until the adoption of the Single European Act (SEA) in 1986, the influence of the *Länder* and their political and legal tools to influence decisions taken at European level remained relatively limited. Article 2 of the Law on the Transposition of the TEC⁶³ contained a mere obligation for the Federal government (*Bundesregierung*) to inform the *Bundesrat* regularly about the developments in the Council.⁶⁴ Although it had been agreed that the federal government was to inform the *Länder* before the adoption of legal acts by the Council that would necessitate amendments to national German law or would have direct legal effect, in practice this “*Zuleitungsverfahren*” (procedure of forwarding legal initiatives) did not really generate active *Länder* participation in and/or influence decisions of the federal government at the European level. This was partly due to the fact that the *Länder* were informed too late of ongoing new initiatives i.e. by receiving only the official finalized documents without being able to influence their contents during the drafting procedure. This implied that *Länder* positions had little chance of being taken into account in the course of negotiations at European level.⁶⁵ On the other hand, the growing number of EC initiatives – which amounted to more than 10.000 p.a. by 1989 – represented a challenge to the *Länder* governments. This led to the establishment of a special EC committee within

government only agreed to inform the *Bundesrat* on developments in the ECSC on the basis of Art. 53 of the Basic Law (LAUFER (note 6), 218-9).

62 JEFFERY (note 59), 59-62.

63 Law on the transposition of the TEC and EURATOM (*Gesetz zu den Verträgen vom 25. März 1957 zur Gründung der Europäischen Wirtschaftsgemeinschaft und der Europäischen Atomgemeinschaft vom 27. Juli 1957*, *Bundesgesetzblatt II*, 1957, p. 753).

64 According to Art. 53 Sec. 2 of the Basic Law the federal government was obliged to inform the *Bundesrat* about how they handle government matters anyways (see: Laufer/Münch, 1997, p. 219). For further details, see also: Gerhard Roller, *Die Mitwirkung der deutschen Länder und der belgischen Regionen an EG-Entscheidungen. Eine rechtsvergleichende Untersuchung am Beispiel der Umweltpolitik*, in: 123 ARCHIV DES ÖFFENTLICHEN RECHTS 21- 59 (1998). In state practice this information obligation has usually been implemented by an exchange of opinions, which was then taken into account in the course of the preparation of the German position for the Council meetings.

65 Roller (ROLLER (note 64), 28), who also points out, that the *Zuleitungsverfahren* was designed to compensate the *Bundesrat* as an organ of the federal state but not the *Länder* as such for loosing competences to the federal and respectively the European level.

the *Bundesrat* which is responsible, until today, for formulating the *Länder* position on EU policies. The EC Committee of the *Bundesrat* examines initiatives launched at European level and forwards them to the *Fachausschüsse* (Specialised Committees). Between 1957 and 1996 the Committee had to deal with 6647 initiatives compared to only approximately 5000 “domestic” initiatives which the *Bundestag* has referred to the *Bundesrat* between 1949 and 1996.⁶⁶

3. Participatory Procedure (*Länderbeteiligungsverfahren*)

The more the European integration process gained pace, the more active became the *Länder* governments in strengthening their influence on the decision-taking process at European (Community) level.⁶⁷ In a political agreement with the federal government in 1968 they succeeded in obtaining concessions with regard to their participation in policy-making at the European level. According to this agreement the federal government was to decide on a case-to-case basis to invite *Länder* representatives to specific committee meetings with the European Commission, if:

- The federal government – due to the constitutional division of competences – would not have any adequate experts of its own;
- Expertise from the *Länder* level was conducive to achieving the optimal results in negotiations;
- The matters in question concerned important interests of the *Länder*.⁶⁸

As the participation of the *Länder* largely depended on the good will of the federal government, discussions between the *Länder* and the federal government on ameliorating *Länder* participation in European policy continued. In 1979 the federal government and the president of the “Standing Conference of Minister Presidents of the *Länder*” (*Ministerpräsidentenkonferenz*) signed a written agreement on the *Länderbeteiligungsverfahren* (procedure of *Länder* participation) according to which the *Länder* were to be given the possibility to formulate their “viewpoints/ joint positions” on all matters which affected exclusive *Länder* competences. The federal government assured the *Länder* that it would only deviate from such *Länder* positions for compelling reasons of European or foreign policy. The *Länder* were to be informed in due course about such reasons. Apart from this, the federal government promised to invite two *Länder* representatives to all important committee meetings of the Council or the Commission if these meetings were to deal with initiatives which would affect matters within the exclusive competences of the *Länder*. The *Länder* “viewpoints/ joint positions” were to be

66 LAUFER (note 6), 222.

67 WOLFGANG WESSELS, DIE ÖFFNUNG DES STAATES. MODELLE UND WIRKLICHKEIT GRENZÜBERSCHREITENDER VERWALTUNGSPRAXIS 1960-1995, 280 (2000).

68 KLATT (note 43), 51.

coordinated through a “joint unit” (“*Gemeinsame Stelle*”) which proved to be too complicated in practice, since it required unanimity among the *Länder* on formulating viewpoints/ joint positions on specific European initiatives. Due to the complexity of this procedure, between 1980 and 1986 there had only been 37 cases in which the *Länder* attempted to formulate a viewpoint/ joint positions and only one case in which the procedure of the *Länderbeteiligungsverfahren* was actually followed till the end.⁶⁹

4. Procedure before the Bundesrat (*Bundesratsverfahren*)

A new quality of *Länder* participation in European policy was achieved with Article 2 of the Law on the Transposition of the SEA⁷⁰, which became the basis for the so-called “*Bundesratsverfahren*” in which *Länder* participation in European policy was organized through the *Bundesrat* at the federal level. According to the provisions of this law and an agreement with the federal government⁷¹, the latter was obliged to inform the *Bundesrat* as timely and comprehensively as possible about all EC-initiatives which could affect *Länder* interests and competences. Before agreeing to acts of the EC, which would affect exclusive *Länder* competences or vital interests of the *Länder*, the federal government had to give the *Bundesrat* the possibility to formulate an opinion within an adequate delay. The federal government then had to take the opinion of the *Bundesrat* into account in the Council negotiations and could only deviate from it, if vital foreign policy or European policy interests were at stake. On request of the *Bundesrat*, the federal government also had to invite *Länder* representatives to the negotiations within the Council or with the European Commission if this was possible according to EC-rules. The opinion of the *Länder* within the *Bundesrat* was adopted by the majority of the *Bundesrats*’ members. In order to accelerate and facilitate the consultation procedure in urgent cases or for confidential matters, a so-called EC-chamber was created in June 1988 which could convene more

69 ROLLER (note 64), 29, has pointed out that the *Länderbeteiligungsverfahren* from a theoretic point of view was better placed to ensure genuine *Länder* participation, than participation through the *Bundesrat* at the federal level, which serves as an additional “filter” to the positions of each single *Land*.

70 See: Law on the Single European Act of 19 February 1986, *Bundesgesetzblatt* 1986 II, 1102.

71 The agreement of 17 December 1987 supplemented the law and contained detailed procedural regulations which reflected the practice of coordination between the federal government and the *Länder* (*Bundesrat*) which had been developed until then. It carried the complicated name: “*Vereinbarung zwischen der Bundesregierung und den Regierungen der Länder über die Unterrichtung und Beteiligung des Bundesrates und der Länder bei Vorlagen im Rahmen der Europäischen Gemeinschaften in Ausführung von Artikel 2 des Gesetzes vom 19. Dezember 1986 zur Einheitlichen Europäischen Akte (EEAG) vom 28. Februar 1986*”. On the practical experience with the procedure, see: Heinz Eirich, *Der Grundsatz der Bundestreue in der politischen Praxis: Das Zusammenwirken von Bund und Ländern in EG-Angelegenheiten*, in: *FÖDERALISMUS IN DER BEWÄHRUNG*, 35 (B. Vogel & H. Oettinger eds., 1992).

frequently than the *Bundesrat* (the latter meets only each three weeks) and in which each *Land* was represented by one representative.⁷²

The new procedure paved the way for a more far-reaching *Länder* participation but did not provide for a conflict-resolution mechanism for cases in which the federal government chose to deviate from the opinion of the *Bundesrat*. This led to a disagreement in the case of EC-directive 89/552/EWG ("Fernsehrichtlinie" or "TV or today Audio-Visual Service-directive") adopted initially by the Council on the 3 October 1989.⁷³ The federal government had agreed to the adoption of the directive despite a negative opinion from the *Bundesrat*, which feared that the directive would affect exclusive competences of the *Länder* in the area of the media. The Federal Constitutional Court (FCC), to whom the *Länder* had appealed, decided on the 22 March 1995 that the federal government had infringed upon the rights of the *Länder* by agreeing to the adoption of the directive.⁷⁴ According to the FCC, the federal government had violated the rights of the *Länder* flowing from Article 70 Sec. 1 in connection with Article 24 sec. 1 by voting in favor of the directive and had not acted in conformity with the principle of federal cooperation and loyalty inherent to the Basic Law ("*Grundsatz des bundesfreundlichen Verhaltens*", Article 20 Sec. 1).⁷⁵ In its decision the FCC stated: "If the European Community claims a law-making competence, it is up to the federal government to represent the rights of the Federal Republic of Germany in dealing with the Community and its organs. If the Basic Law has referred the matter - on which the community claims law-making competences - to the *Länder* legislator, the federal government has to act in dealing with the Community as a trustee of the *Länders'* constitutional rights. The federal government is bound by procedural obligations to the principle of federal cooperation which flows from its responsibility as a trustee of the *Länder* rights."⁷⁶

72 See: LAUFER (note 6), 221. In the constitutional reform in 1992 in the course of the ratification of the TEU (*Bundesgesetzblatt* I, 1992, p. 2086) a new Art. 52 Sec. 3a was introduced, which now provides a constitutional legitimization for the establishment of the EC/EU-chamber of the *Bundesrat*: "For matters concerning the European Union the *Bundesrat* may establish a Chamber for European Affairs whose decisions shall be considered decisions of the *Bundesrat*; paragraph (2) and the second sentence of paragraph (3) of Art. 51 shall apply *mutatis mutandis*." Laufer and Münch (note 6) point out, that the *Bundesrat* makes little use of the EU-Chamber since it has only referred a small number of initiatives to the Chamber. For details on the "*Europakammer*", see: Paras 45 b- 45 k of the standing procedures of the *Bundesrat*. The new standing procedures of the *Bundesrat* which have been adopted on the 8 June and will enter into force on the 12 October 2007 contain the same provisions (see: *Drucksache 310/07 Beschluss*).

73 On the EC directive 89/552/ECC, see: *Europäisches Medienrecht. insbesondere EG-Fernsehrichtlinie und Europarats-Fernsehübereinkommen, in GEGENÜBERSTELLUNG DER EINZELREGELUNGEN* (Heribert Höfling ed., 1991); *EG-MEDIENPOLITIK. FERNSEHEN IN EUROPA ZWISCHEN KULTUR UND KOMMERZ* (Hans J. Kleinsteuber ed., 1990).

74 BVerfGE 92, 203 ff also printed in: *EUROPÄISCHE GRUNDRICHTSZEITUNG* (EuGRZ) 1995, 125-137.

75 See section II.

76 Translation by the author according to quote in: KLATT (note 43), 54.

II. The Introduction of Länder Participation in Article 23 of the Basic Law in The Course of German Reunification and the Ratification of the Maastricht Treaty

1. Introduction

The ratification of the Maastricht Treaty paved the way for a new phase of European integration by proclaiming an “*ever closer Union between the peoples of Europe*”.⁷⁷ Following a series of initiatives launched in the 1980ies, such as the establishment of the Assembly of European Regions (AER) as a lobby organization for the regions in Europe in 1985⁷⁸ and the Community Charter of Regionalization adopted by the European Parliament in November 1988⁷⁹, the Maastricht Treaty also contained important elements which provided for an enhanced role of regional actors at the European stage⁸⁰:

- The modification of Article 146 Sec. 1 TEC (today 203 Sec. 1) enabled representatives of e.g. the German *Länder* (or the Belgian Regions⁸¹) to formally take part in the Council meetings and vote as representatives of their member states.⁸²
- The principle of subsidiarity was introduced in the preamble and in the former Article B of the TEU and Article 3b of the TEC.⁸³

77 Former Art. A of the TEU.

78 For further details, see: www.a-e-r.org (accessed on: 13 August 2007).

79 Community Charter for Regionalization, adopted by the European Parliament on 18 November 1988 (OJ C 326, 19.12.1988, p. 289).

80 On the Maastricht treaty and its consequences, see: George A. Bermann, *Subsidiarity and the European Community*, in: *EUROPE AFTER MAASTRICHT. AMERICAN AND EUROPEAN PERSPECTIVES* (Paul Michael Lützeler ed. 1994).

81 On the regionalization of Belgium and the participation of the Belgian regions in EU-affairs, see: F. Pijnenburg, *Belgium: Federalized EC Lobbying at Home*, in: *NATIONAL PUBLIC AND PRIVATE LOBBYING* (M.P.C.M. van Schendelen ed., 1993) ; A. Alen, and R. Ergec, *FEDERAL BELGIUM AFTER THE FOURTH STATE REFORM OF 1993* (1994); ROLLER (note 64); B. Kerremans, *Determining a European Policy in a Multi-Level Setting: The Case of Specialized Coordination*, 10(1) *BELGIUM, REGIONAL AND FEDERAL STUDIES* 36-61 (2000); B. Kerremans and J. Beyers, *The Belgian Permanent Representation to the European Union: Mailbox, Messenger or Representative?*, in: *THE NATIONAL CO-ORDINATION OF EU POLICY: THE EUROPEAN LEVEL*, 199-210 (H. Kassim, A. Menon, B.G. Peters and V. Wright eds., 2001).

82 This created the necessity for EU-Member States such as Germany or Belgium which have to involve their regional entities to pre-formulate their standpoints as a Member State in an internal coordination procedure prior to the Council meetings. See: *KOMMENTAR ZUM EU-, EG-VERTRAG*, 221(Hans von der Groeben ed., 5th ed., 1997).

83 On subsidiarity in the EU and the situation of regional players, see: CLEMENS STEWING, *SUBSIDIARITÄT UND FÖDERALISMUS IN DER EUROPÄISCHEN UNION* (1992); ANGELIKA KLEFFNER-RIEDEL, *REGIONALAUSSCHUSS UND SUBSIDIARITÄTSPRINZIP: DIE STELLUNG DER DEUTSCHEN BUNDESLÄNDER NACH DEM VERTRAG ÜBER DIE EUROPÄISCHE UNION* (1993); Kees van Kersbergen, and Bertjan Verbeek, *The Politics of Subsidiarity in the European Union*, 32 *JOURNAL OF COMMON MARKET STUDIES* 215-236 (1994); *DIE SUBSIDIARITÄT EUROPAS*. 2ND ED. (Detlef Merten ed., 1994); Andrew

- The Committee of Regions (former Articles 198 a - 198 c TEC) was established in 1994.⁸⁴

This was partly also an achievement of the German *Länder* which were spearheading a campaign for the regions as the "Third Level" of the European polity and had also succeeded in including two *Länder* representatives into the German delegation which participated in the Intergovernmental Conference (IGC) preparing the adoption of the Maastricht Treaty.⁸⁵ The *Länder* successfully lobbied for the inclusion of the principle of subsidiarity in the Maastricht Treaty⁸⁶ but failed to persuade the German federal government to support their request for a modification of Article 146 TEC (old version) in order to allow for the participation of regional representatives in Council meetings. The German federal government rejected these requests as an attempt of the *Länder* to practice "Nebenaußenpolitik" (auxiliary foreign policy). However, the request was also taken up by the Belgian regions, who eventually lobbied successfully for an amendment of Article 146 Sec. 1 TEC (currently: Article 203 Sec. 1 TEC), leaving it to the national legislation of the Member States to define their representation in the Council.⁸⁷ Since it was obvious that the ratification of the Maastricht Treaty necessitated constitutional amendments in Germany⁸⁸, the German *Länder* took advantage of the fact that constitutional amendments had to be passed with a two-thirds majority not only in the *Bundestag* but also in the *Bundesrat* (Article 79 Sec. 2 Basic Law) and requested and

Scott, John Peterson, and David Millar, *Subsidiarity: A 'Europe of the regions' v. the British Constitution?*, 32 JOURNAL OF COMMON MARKET STUDIES 48-67(1994).

84 On the establishment of the Council of Regions, see: KLEFFNER (note 83); LAUFER (note 6), 227-230.

85 LAUFER (note 6), 226.

86 The introduction of the principle of subsidiarity had been proposed by the German delegation in January 1991 based on an earlier initiative of the *Länder*, see: LAUFER (note 6), 230.

87 LAUFER (note 6), 236-7; ROLLER (note 64), 34.

88 The ratification of the Maastricht-treaty followed shortly after German reunification in 1990. Both events were reflected in the Basic Law in a series of constitutional amendments, which had been elaborated by the Joint Constitutional Commission of the *Bundestag* and the *Bundesrat* (*Gemeinsame Verfassungskommission*, GVK) established in December 1991 on the basis of Art. 5 of the Reunification-treaty. Apart from constitutional amendments which had become necessary in order to integrate the new EU-citizenship (in Art. 28, Sec. 1), the creation of the monetary union and the establishment of the European Central Bank (modification of Art. 88), the GVK followed the opinion of many legal scholars and policy-makers, who believed that the existing "opening-clause" of the Basic Law, Art. 24 (s.a.), was insufficient as constitutional basis for creating a political European Union. The GVK therefore suggested a catalogue of constitutional amendments which were eventually adopted on 1 November 1993 after complicated negotiations between the federal government and the *Länder* and the rejection of a constitutional complaint which had been brought against the Maastricht treaty (decision of the FCC of 12 October 1993, in: BVerfGE 89, pp. 155-213). For further details, see: LAUFER (note 6) KLATT, (note 37), 55, stresses the links between German reunification, the ratification of the Maastricht treaty and the constitutional reform process which was triggered by these events: German reunification had only been acceptable to Germany's neighbors on the condition of an ever closer European integration.

obtained a constitutional entrenchment for an enhanced *Länder* participation in formulating EU-policy in return for their approval of the ratification.⁸⁹

2. Article 23 of the Basic Law

The new *Länder* participation rights were laid down in the “European amendments”⁹⁰, in particular in the new Article 23 of the Basic Law⁹¹:

Article 23 [The European Union]

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

(2) The Bundestag and, through the Bundesrat, the Länder shall participate in matters concerning the European Union. The Federal Government shall keep the Bundestag and the Bundesrat informed, comprehensively and at the earliest possible time.

(3) Before participating in legislative acts of the European Union, the Federal Government shall provide the Bundestag with an opportunity to state its position.

89 LAUFER (note 6), 237-8.

90 The ‘European amendments’ (in particular Art. 23 and changes in Art. 24, Art. 50 and the introduction of Art. 52 Sec. 3a on the European Chamber of the Bundesrat) were introduced by the law of 21 December 1992 (*Bundesgesetzblatt* 1992 I, p. 2086). See: JEFFERY (note 59), 61; KOMMERS (note 25), 107-109; HRBEK (note 39), 221-4, 230.

91 On the genesis of the new Art. 23 and its implications for policy-making at the EU-level, see: Rupert Scholz, *Europäische Union und deutscher Bundesstaat*, in *NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT*, 817, 819 (1993); CHRISTIAN SCHEDE, *BUNDESRAT UND EUROPÄISCHE UNION: DIE BETEILIGUNG DES BUNDESRATES NACH DEM NEUEN ARTIKEL 23 DES GRUNDGESETZES* (1994); HANS-PETER DONOTH, *DIE BUNDESLÄNDER IN DER EUROPÄISCHEN UNION: DIE BUNDESSTAATLICHE ORDNUNG IN DER BUNDESREPUBLIK DEUTSCHLAND BEI DER VERWIRKLICHUNG DER EUROPÄISCHEN UNION – EINE ANALYSE UNTER BESONDERER BERÜCKSICHTIGUNG DES NEUGEFASTEN ART. 23 GG* (1996); HENNING KLAUS, *DIE DEUTSCHEN BUNDESLÄNDER UND DIE EUROPÄISCHE UNION, DIE MITWIRKUNG DER LÄNDER AM EU-INTEGRATIONSPROZEß SEIT DEM VERTRAG VON MAASTRICHT* (1996); Ruth Lang, *Die Mitwirkungsrechte des Bundesrates und der Bundestages*, in *ANGELEGENHEITEN DER EUROPÄISCHEN UNION GEMÄß*, p. 2-7 (1997); ROLLER (note 64); RALF MÜLLER-TERPITZ, *DIE BETEILIGUNG DES BUNDESRATES AM WILLENSBILDUNGSPROZEß DER EUROPÄISCHEN UNION: DAS BUNDESRATSVERFAHREN NACH ART. 23 ABS. 2, 4 BIS 7 GG UNTER BESONDERER BERÜCKSICHTIGUNG SEINER VERFAHRENSRECHTLICHEN AUSGESTALTUNG* (1999); ROLAND STURM, *FÖDERALISMUS IN DEUTSCHLAND* (2001) 117-137.

The Federal Government shall take the position of the Bundestag into account during the negotiations. Details shall be regulated by a law.

(4) The Bundesrat shall participate in the decision-making process of the Federation insofar as it would have been competent to do so in a comparable domestic matter, or insofar as the subject falls within the domestic competence of the Länder.

(5) Insofar as, in an area within the exclusive competence of the Federation, interests of the Länder are affected, and in other matters, insofar as the Federation has legislative power, the Federal Government shall take the position of the Bundesrat into account. To the extent that the legislative powers of the Länder, the structure of Land authorities, or Land administrative procedures are primarily affected, the position of the Bundesrat shall be given the greatest possible respect in determining the Federation's position consistent with the responsibility of the Federation for the nation as a whole. In matters that may result in increased expenditures or reduced revenues for the Federation, the consent of the Federal Government shall be required.

(6) When legislative powers exclusive to the Länder are primarily affected, the exercise of the rights belonging to the Federal Republic of Germany as a member state of the European Union shall be delegated to a representative of the Länder designated by the Bundesrat. These rights shall be exercised with the participation and concurrence of the Federal Government; their exercise shall be consistent with the responsibility of the Federation for the nation as a whole.

(7) Details respecting paragraphs (4) through (6) of this Article shall be regulated by a law requiring the consent of the Bundesrat.

Article 23 Sec. 1 emphasizes Germany's commitment to European integration but also conjures a European Union "*committed to democratic, social, and federal principles*" and the principle of subsidiarity. Furthermore, it stipulates that future transfers of sovereign powers by Germany require the consent of the *Bundesrat*. The provision thus defines a level of involvement of the *Länder* in European policy similar to their traditional role in domestic policy. It implicitly guarantees that the federal constitutional order of Germany (and with it, the constitutional sovereignty of the *Länder*) may not be "compromised" by European integration. The ratification/ transposition of amendments of the European treaties or future transfers of sovereignty to the EU therefore require a two-thirds majority in the *Bundesrat* for approval. The establishment of the European Union, as well as changes in its treaty foundations and comparable regulations that amend or supplement the Basic Law, also have to be measured against the so-called "Eternity Clause" in Article 79 Sec 3.⁹² This implies that the federal structure of Germany - as protected explicitly by

92 This has also been stressed by the FCC in its recent decision: 2 BvE 2/08 of 30 June 2009, paragraphs 1 - 421, a preliminary English translation, is available at: http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html, last accessed on 15 September 2009.

Article 79 Sec. 3 - cannot be affected or impaired by future steps towards the European integration.⁹³

Länder are guaranteed involvement “in matters concerning the EU” and participation in these matters through the *Bundesrat* (Article 23 Sec. 2), whose tasks in Article 50 were complemented accordingly.⁹⁴ The provision also stipulates that the *Länder* shall be kept “fully informed” about EU matters. Unlike the earlier provisions of Article 2 Sec. 1 of the Law on the Transposition of the SEA, the information obligation is not any longer limited to those areas in which *Länder* competences are affected.⁹⁵

By stipulating that the *Bundesrat* has to be consulted by the federal government in the formulation of the European policy to the degree to which it would be responsible in domestic matters, Article 23 Sec. 4 ensures that the *Bundesrat* participation is comprehensive.⁹⁶ Its participation rights reach different degrees of intensity depending on the division of responsibilities within the domestic order of the Basic Law. This is specified in Article 23 Sec. 5 and 6 which distinguish between:

- mere “*taking into account*” of the *Bundesrat*’s position in matters which fall within the exclusive competence of the federal government,
- “*paying the greatest possible respect*” to the *Bundesrat*’s position with regard to matters where the *Länder*, the structure of *Land* authorities, or *Land* administrative procedures “*are primarily affected*” and
- “*delegation of the exercise of the rights belonging to the Federal Republic of Germany as a member state*” to a representative of the *Länder* designated by the *Bundesrat* if “*exclusive Länder powers are primarily affected.*”

Article 23 Sec. 6 has been amended in 2006. The provision now lists explicitly school education, culture and broadcasting as matters of exclusive *Länder* competence and stipulates that Germany has to be represented in the Council by a representative named by the *Bundesrat* if these matters are to be on the agenda of Council meetings.⁹⁷

93 German scholars have characterized Art. 23 Sec. 1 as an “*Integrationsöffnungsklausel*” (a clause which opens the German constitutional order for European integration) which is connected with a “*Struktursicherungsklausel*” (a clause which preserves the constitutional structure/order of the Basic Law). For further details, see: LAUFER (note 6), 238; F. Ossenbühl, *Maastricht und das Grundgesetz- eine verfassungsrechtliche Wende?* in: DEUTSCHES VERWALTUNGSBLATT (1993) 629,632.

94 Art. 50: “The *Länder* shall participate through the *Bundesrat* in the legislation and administration of the Federation and in matters concerning the European Union.”

95 ROLLER (note 64), 31.

96 *Id.*

97 The participation of the *Länder* in defining German EU-policy has also been a central topic in the discussions in the run-up to constitutional reform in 2006: while representatives of the federal state have argued that the increasing role of the *Länder* had become a threat to the capability of Germany to act as a player on the European

3. *The Law on the Cooperation between the Federal Government and Länder in Matters Relating to the European Union*

The participatory rights of the *Länder* in EU affairs according to Article 23 have been supplemented in comprehensive detail by the *Law on the Cooperation of the Federation and the Länder in Affairs of the European Union* (12 March 1993) based on Article 23 Sec. 7 (Cooperation Law)⁹⁸ and by a working agreement concluded by the federation and the *Länder* governments on 29 October 1993 (Cooperation Agreement)⁹⁹.

The Cooperation Law confirms the obligation of the federal government to inform the *Bundesrat* and the right of the *Bundesrat* to deliver opinions on the formulation of national negotiating positions for the Coreper (Council of Permanent Representatives) and the Council of Ministers (Para. 2 and 3). It also stipulates that the federal government has to involve representatives of the *Länder* nominated by the *Bundesrat* in meetings aimed at preparing a national negotiation position for EU initiatives which might affect policy areas falling into the competence of the *Länder* (para. 4).

Different degrees of *Bundesrat* participation, enumerated in Article 23 Sec. 5 to Sec. 6, are specified in para. 5. While in the first case – where primarily the legislative competence of the federal state is affected – the opinion of the *Bundesrat* merely has to be “taken into account”, which implies that the federal government has to pay careful consideration to the opinion of the *Bundesrat* but is not legally bound to follow it, the situation is somewhat different if the *Länder*, the structure of *Land* authorities, or *Land* administrative procedures are primarily affected. In these cases Para. 5 Sec. 2 clarifies that the opinion of the *Bundesrat* must be taken into account as the *decisive opinion*. In other words, in such cases the *Bundesrat* basically has the last word in determining the German position within the EU Council of Ministers; it is only bound by the “responsibility of the Federation for the

level (“*Europafähigkeit*”), the *Länder* were arguing in favor of disentanglement of tasks also with regard to interest representation on the European level. These positions have been summarized in the contribution of Rudolf Hrbek to the joint conference “*Föderalismus in Europa*” organized in Magdeburg in 2007 (FÖDERALISMUS IN EUROPA 13 (2007)) who also points out that both positions could not have been reconciled with the character of German federalism which relies on mutual cooperation.

98 “*Gesetz über die Zusammenarbeit von Bund und Ländern in Angelegenheiten der Europäischen Union*” of 12 March 1993 (*Bundesgesetzblatt I*, 1993, p. 313) modified by Art. 2 of the law of 5 September 2006 (*Bundesgesetzblatt I*, 2006, p. 2098). For further details, see: Roller, (note 64), 32–33.

99 See: “*Vereinbarung zwischen der Bundesregierung und den Regierungen der Länder über die Zusammenarbeit in Angelegenheiten der Europäischen Union in Ausführung von § 9 des Gesetzes über die Zusammenarbeit von Bund und Ländern in Angelegenheiten der Europäischen Union*” (“*Agreement between the Federal Government and the Governments of the Länder on Cooperation in Matters relating to the European Union in Implementation of Section 9 of the Act on Cooperation between the Federal Government and Länder in Matters relating to the European Union of the 29 October 1993*”), in: *Bundesanzeiger* of 2 December 1993, p. 10425.

nation" mentioned in Article 23 Sec. 5, 2 of the Basic Law. This responsibility refers to the federal governments' competences in the policy areas of integration, foreign affairs and security (Para 5 Sec. 2, 2).¹⁰⁰

Other than Article 2 Sec. 1 of the Law on the Transposition of the SEA, Para. 5 Sec. 2 of the Cooperation Law also contains a conflict resolution mechanism: if the opinion of the *Bundesrat* should conflict with that of the federal government and if no agreement can be reached, the *Bundesrat*'s opinion is decisive, provided it is based on a decision taken with a two-thirds majority. However this does not cover issues that could lead to increased expenditure or decreased revenue for the Federation. In such cases the Federal Government's consent to the German negotiation position, as defined by the *Bundesrat*, is required.

The Federal government is also obliged to seek consensus with the *Bundesrat* before agreeing to initiatives which are based on Article 308 TEC (former Article 235 TEC), if these initiatives would require the consent of the *Bundesrat* according to domestic law (para. 5 Sec. 3). If consensus cannot be achieved, the federal government may resort to abstention in the Council. This provision aims at preventing future losses of competences for the *Länder* due to the enactment of secondary European legal acts based on Art. 308 TEC.

The Federal government is furthermore obliged to involve *Länder* representatives in meetings with the Commission if issues which primarily affect *Länder* competences are to be discussed (para. 6 Sec. 1). If EU initiatives mainly affect *exclusive Länder* competencies in the areas of education, culture or the media (new Article 23 Sec. 6), the federal government even has to delegate its negotiation mandate in the preparatory working groups of the Commission and the Council and in the Council of Ministers meetings to a *Länder* minister nominated by the *Bundesrat*. This minister would then head the German delegation in the Council and cast its votes (Article 203 Sec. 1 TEC). If EU initiatives affect other *exclusive Länder* competencies than those mentioned above (education, culture and media; Para. 6 Sec. 2, Article 23 Sec. 6), a representative of the *Länder* has to be included in the German delegation during Council meetings. This *Länder* representative then has the right to make declarations during the meetings but does not become head of delegation. The federal government remains in charge of leading the negotiations but has to do so in agreement with the *Länder* representative.

The Cooperation Law also regulates the right of the *Länder* to compel the federal government to appeal to the ECJ, if the *Länder* have been affected adversely by actions or inactions of the European institutions. This right is also limited by the "responsibility of the Federation for the nation."

100 For a discussion, see: ROLLER (note 64), 33.

Furthermore, the abovementioned Law creates a legal basis for the establishment of *Länder* representations in Brussels, an issue which had been controversial prior to 1992. The Cooperation Law does not apply to the policy area of EU Common Foreign and Security Policy (Para 11).

The Cooperation-Agreement, which is based on Para 9 of the Cooperation Law, contains detailed provisions on the briefing of the *Bundesrat* by the federal government, the organization of preparatory consultations for defining the national negotiating position in so far as the *Bundesrat* is involved, the opinion which the *Bundesrat* may present according to Article 23 sec. 5, the inclusion of *Länder* representatives in negotiations with EU bodies, the procedure before the European courts, the cooperation between the Permanent Representative and the *Länder* representative offices and the application of the agreement to areas of intergovernmental and international cooperation and with regard to enlargement and association negotiations.

In the preamble of the Cooperation Agreement, the federal government and the governments of the *Länder* commit themselves “to achieving a united Europe and developing the European Union on the basis of the Founding Treaties of the European Communities (including subsequent law) and of the Treaty on European Union and to fulfilling the resulting obligations in terms of information and action arising from the relationship of mutual allegiance within a federal state.” Their cooperation is to be determined by mutual trust and loyalty. The federal government is to brief the *Bundesrat* comprehensively on an ongoing basis and at the earliest possible moment by writing and verbally through ongoing contacts. The briefing is to cover all projects relating to the European Union which could be of interest to the *Länder*. The agreement specifies which documents of the European Commission, the Council, the European Council and the Coreper (Council of Permanent Representatives) have to be made available to the *Bundesrat* who in return ensures that the relevant documents are to be disclosed only to a restricted group of persons within the relevant highest *Land* authorities. Apart from this, the federal government and the *Länder* commit themselves to grant each other and the *Bundesrat* access to inter-ministerial data bases on projects relating to the European Union. Furthermore the federal government seeks to ensure that EC data bases accessible to Member State-governments are also made accessible to the *Bundesrat* and the governments of the *Länder*.

With regard to preparatory consultations, the agreement stipulates that it is always up to the federal government ministry with overall responsibility for the relevant area to invite the representatives of the *Länder* to consultations in order to agree a national negotiating position on projects by which the *Länder* would be affected. The important assessment of how a project should be classified under the provisions of the cooperation law (Para. 5 Sec. 1 or Sec. 2) is to be based on the specific contents of EU initiatives (projects) and on the existing division of responsibilities at the national (domestic) level. For the purpose of determining the legislative or regulatory focus of an initiative (project), the criterion is the

subject-matter at the centre of the initiative (project) in question or the prime objective of the intended legislative act (regulation/ directive). This should be assessed on a qualitative - not a quantitative - basis.

Based on timely information by the federal government of all initiatives (projects) relevant to the interests of the *Länder*, the *Bundesrat* formulates its positions and shall have the possibility to adjust these positions to the state of negotiations. For this purpose, the federal government has to inform the *Bundesrat*, through ongoing contacts, about any material changes in relation to such initiatives (projects). If the federal government - in the cases of Para 5 Sec. 2 of the Cooperation Law - does not agree with the positions stated by the *Bundesrat*, it shall inform the *Bundesrat* accordingly and invite the designated *Länder* representatives for further consultations as soon as possible in order to achieve a comprehensive agreement. If an agreement cannot be achieved, the *Bundesrat* shall decide as soon as possible whether it wishes to uphold its stated position. In any case the federal government has to keep the *Bundesrat* informed if it chooses to depart from the stated position of the *Bundesrat* and provide the essential reasons for doing so once a project has been concluded.

With regard to the inclusion of *Länder* representatives in negotiations within European Union bodies, the agreement specifies that the *Bundesrat* is entitled to state its position before the national negotiating position is finalized. The federal government commits itself to informing the *Bundesrat* as soon as possible also about the preliminary activities by the Commission, such as formal hearings, consultations and expert discussions. For this purpose, a joint list of those bodies of the Commission and the Council that are concerned with areas and types of legislation which at the national level would primarily affect competences of the *Länder* is drawn up. The federal government commits itself to do its best in each case to enable the inclusion of *Länder* representatives in negotiations in Council or Commission working groups.

With regard to the Council meetings on projects relating primarily to areas in which the *Länder* have exclusive legislative competences, the *Bundesrat* designates, in accordance with Para. 6 Sec. 2, *Länder* ministers to whom the federal government shall then delegate the conduct of negotiations. The *Länder* have to ensure that the Federal Republic of Germany is represented in accordance with Article 203 of the EC Treaty. Only in the event that the representatives of the *Länder* are prevented from attending, a representative of the Federal Government or the Permanent Representative shall assume leadership of the negotiations. The agreement additionally clarifies that representatives of the *Länder* shall be members of the German delegation and shall be able to take part in all relevant discussions.

On the cooperation between the German Permanent Representative and *Länder* representations, which had been difficult before 1992, since the German Foreign Office was afraid of "auxiliary foreign policy" by the *Länder*, the agreement stipulates that the

German Permanent Representative shall, as far as possible and necessary, support the *Länder* representations.

With regard to the application of the agreement to areas of intergovernmental and international cooperation and with regard to enlargement and association negotiations the agreement specifies that the *Bundesrat* is to be involved in negotiations to the extent to which the interest of the *Länder* could be affected. The federal government is to take into account the opinions of the *Bundesrat* by applying Para 5 of the Cooperation Law accordingly. The *Länder* are also entitled to be represented by one observer at ministerial meetings relating to pending intergovernmental conferences (IGC). In cases where exclusive responsibility of the *Länder* is at stake, the latter are entitled to two observers. In the final provisions of the agreement, the federal government and the *Länder* underline that they shall ensure, through appropriate institutional and organizational arrangements, that the Federal Republic of Germany's ability to act effectively and to conduct negotiations at EC level in a flexible manner has to be maintained.

In a protocol supplementing the agreement, which was finalized at a meeting between the Federal Chancellor and the Heads of Government of the *Länder* on 18 December 1997, the representatives of the federal government and the *Länder* also agreed that with regard to the framework decisions under Article 34 (2) b of the TEU (police and justice cooperation), which relate primarily to legislative and administrative responsibilities of the *Länder*, the *Bundesrat*'s opinion is to be taken into account by applying Para 5 of the Cooperation Law accordingly.

III. Other forms of Länder participation in EU-matters

Already from the 1980ies onwards the *Länder* have embarked on a program of European capacity building, setting up an administrative structure capable of managing and maximizing their involvement in European decision-making.¹⁰¹ At present, nearly all of the *Länder* ministries have created internal European policy sections which are supported by "overarching" ministries for European Affairs with overall responsibility for the coordination, development and management of European policy. In 1993 the Conference of European Ministers was established to strengthen the bargaining position of the *Länder* by forging collective agreements amongst themselves prior to the public business formally conducted through the *Bundesrat*. It meets approximately three times a year. These meetings are supplemented by cooperation and preparation at the civil service level. It tends to focus on broader European issues such as the European policy role of the *Länder*. *Land* representatives also use the pre-existing forum of *Land*-level inter-ministerial

101 JEFFERY (note 59), 62, 63,72; HRBEK (note 39), 225-6.

conferences, which meet on a sectoral basis (e.g. finance, justice, etc.) to coordinate *Länder* policy positions and to discuss more policy-specific European issues.¹⁰²

Apart from creating European capacities on the national level, the *Länder* also started to build up direct regional representations to the EU in the late 1980s.¹⁰³ Today, all of the German *Länder* maintain their own information and liaison offices in Brussels.¹⁰⁴ These offices provide direct information to the *Länder* on upcoming European initiatives and projects, allowing the *Länder* to lobby the federal government in good time for their interests to be taken into consideration. Likewise, the *Länder* representations today provide information and regional viewpoints to Commission officials, who would otherwise depend on national governments for their information.¹⁰⁵ The offices have no legal right to act as permanent representatives of their home region: this authority remains with the Permanent Representation of Germany as the EU-Member State.¹⁰⁶

1. Perspective: Protocol No 2 on the Application of the Principles of Subsidiarity and Proportionality of the Treaty of Lisbon

Unlike the initial Constitutional Treaty, which was rejected in the Dutch and French referenda, the Treaty of Lisbon has expressly renounced the constitutional concept "which consisted in repealing all existing treaties and replacing them by a single text called 'Constitution'".¹⁰⁷ However, the Treaty of Lisbon incorporates essential elements of the

102 HRBEK (note 39), 225.

103 M. KEATING, *THE NEW REGIONALISM IN WESTERN EUROPE 169-70*(1998); ROLLER (note 64), 37-8.

104 See, JEFFERY (note 59).

105 KEATING (note 103), 169-70.

106 Given their role, it is not surprising that the information offices have sometimes had a difficult relationship with the federal governments. Federal government fears of regional encroachment into foreign policy have proved particularly contentious. Initially, the German federal government criticized the *Länder* information offices as instruments of 'auxiliary foreign policy' (HRBEK (note 39), 225). However, in the abovementioned 1993 cooperation law and the supplementing cooperation agreement the federation has committed itself explicitly to supporting the *Länder* information offices, particularly through the German Permanent Representation.

107 Council Document 11218/07, Annex, marginal no. 1. The Treaty of Lisbon dissolves the European Union's "three-pillar concept" (Art. 1.3 sentence 1 TEU). The Treaty on European Union retains its name (see: for a consolidated version "TEU Lisbon" OJ 2008 no. C 115/13); the Treaty establishing the European Community is renamed Treaty on the Functioning of the European Union (TFEU) (see for a consolidated version OJ 2008 no. C 115/47). The European Union replaces and succeeds the European Community (Art. 1 Sec. 3 sentence 3 TEU Lisbon), and it attains legal personality (Art. 47 TEU Lisbon). The European Atomic Energy Community is removed from the former umbrella organization of the European Union, and it continues to exist – **outside the** institutional linkage to the EU – as an independent international organization. For discussion, see: Ingolf Pernice, *Der Vertrag von Lissabon - Das Ende des Verfassungsprozesses der EU?*, in: *EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT* (EuZW), 65 (2008).

content of the Constitutional Treaty into the existing treaty system and contains additional provisions that are specifically tailored to individual Member States and may play a decisive role for giving a higher weight to the German *Länder*. This is underlined by an obligation of the European Union to respect, apart from the Member States' national identities, "inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government", the "equality of Member States before the Treaties" and their "essential State functions" in Article 4 Sec. 2 sentences 1 and 2 TEU Lisbon.

Title II of the new version of the TEU – "provisions on democratic principles" – stipulates that the EU shall be founded on representative democracy (Article 10 Sec. 1 TEU Lisbon), complemented by elements of participative, associative and direct democracy, in particular by a citizens' initiative (Article 11 TEU Lisbon).¹⁰⁸ Apart from the European Parliament and the Heads of State or Government, represented in the European Council, and the Member States' members of government represented in the Council, the new treaty underlines also the role of the national Parliaments which are to "contribute actively to the good functioning of the Union" (Article 12 TEU Lisbon).¹⁰⁹ In order to give them a broader role and to better safeguard of their prerogatives, national Parliaments – and in EU-Member States with bicameral systems also chambers thereof (Article 8 of Protocol no. 1 on the Role of National Parliaments in the European Union) – have been granted the "subsidiarity-check", the "subsidiarity-action" and a new role in the amendment procedure of the treaties:

- The subsidiarity-check is based on an early-warning system laid down in Protocol No 2 on the Application of the Principles of Subsidiarity and Proportionality (Subsidiarity Protocol): draft legislative acts of the EU are to be made available to national Parliaments eight weeks before they are placed on the Council's agenda (Article 4 of Protocol No 1 on the Role of National Parliaments in the European Union).¹¹⁰ Subsequently any national Parliament – or any chamber of a national Parliament – may, within this eight-week period, state in a reasoned opinion why it considers that the drafts in question do not comply with the principle of subsidiarity (Article 6 of the Subsidiarity Protocol).¹¹¹ Reasoned opinions establish an obligation for the European Commission to review those drafts which represent a certain proportion of all the votes allocated to the

108 See also for the following explanations the FCC decision on the ratification of the Lisbon treaty: 2 BvE 2/08 of 30 June 2009, paragraphs 1 - 421, a preliminary English translation, is available at: http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html, last accessed on 15 September 2009.

109 *Id.*

110 *Id.*

111 *Id.*

national Parliaments (Article 7 Sec. 2 and 7 Sec. 3 of the Subsidiarity Protocol).¹¹²

If the Commission decides to maintain the proposal, it has to give a reasoned opinion to the European Parliament and/ or the Council as to why it considers the measure to be compatible with subsidiarity.

- The subsidiarity-action (Article 8 of the Subsidiarity Protocol) establishes a further safeguard to ensure the respect of the subsidiarity principle. Any national Parliament – and/or a chamber thereof – may bring an action before the ECJ to have declared an act void according to Article 263 TFEU via their Member States' governments it deems a legislative act incompatible with the principle of subsidiarity.¹¹³
- Moreover, the national Parliaments – and/or a chamber thereof – are entitled to voice their opposition to treaty amendments proposed by the Commission within six months after having been notified of it in the new "bridging procedure", a treaty amendment procedure introduced by the Treaty of Lisbon (Article 48 Sec. 7 (3) TEU Lisbon; Article 81 Sec. 3 (3) TFEU). Opposition by a single national Parliament is sufficient for making the proposed treaty amendment fail.

The initial draft of the "Act Extending and Strengthening the Rights of the Bundestag and the Bundesrat in EU-Matters" (Extending Act)¹¹⁴ which was drafted by the German legislator as part of the national implementation legislation for the Treaty of Lisbon (including the abovementioned Subsidiarity-Protocol) has been declared incompatible with the Basic Law by the FCC. An amended draft was discussed in the *Bundestag* on the 26 August 2009 after an extensive debate among Germany's political parties.¹¹⁵ Although Germany does not have a genuine bicameral system (s.a.), the *Bundesrat* has been designated as a "Chamber of a National Parliament" in the drafts of the Extending Act¹¹⁶

112 *Id.*

113 *Id.* Also the Committee of the Regions may bring actions against legislative acts for the adoption of which it is to be consulted under the new Treaty.

114 *Gesetz über die Ausweitung und Stärkung der Rechte des Bundestages und des Bundesrates in Angelegenheiten der Europäischen Union*, in: 16/8489BUNDESTAGSDRUCKSACHE 7, § 2-4.

115 An amended draft-version of the Extending Act (Integrationsverantwortungsgesetz) is available under: <http://dip.bundestag.de>, last accessed on 15 September 2009 – Bundestagsdrucksache 16/13923 of 21 August 2009.

116 The initial draft of the Extending-Act declared incompatible by the FCC in its sentence was to create the national preconditions for the exercise of the above-mentioned rights of participation that are granted to the *Bundestag* and to the *Bundesrat*:

Art. 1, § 2 Sec. 1 of the Extending Act essentially stipulated that the Federal Government shall submit detailed information on draft legislative acts of the EU to the *Bundestag* and the *Bundesrat* "at the earliest possible date", at the latest, however, two weeks after the beginning of the eight-week period. Art. 1 § 2 Sec. 2 granted the *Bundestag* and the *Bundesrat* powers to regulate in their rules of procedure the adoption of decisions concerning "subsidiarity-checks". Art. 1 § 2 Sec. 3 set out that the President of the *Bundestag* or respectively the President of

and would therefore be able to exercise or contribute to the exercise of the "subsidiarity-check"; submit a "subsidiarity-action" to the ECJ through the federal government or participate in voicing its opposition in the bridging procedure.¹¹⁷ Consequently, the

the *Bundesrat* sends such a decision to the presidents of the European Parliament, the Council and the Commission and informs the Federal Government about it.

Art. 1 § 3 of the Extending Act regulated the procedure of the "subsidiarity action". The *Bundestag* is obliged, in particular pursuant to its section 2 in analogy to Art. 44 Sec. 1 sentence 1 and Art. 93 Sec. 1 no. 2 of the Basic Law, new version, to bring action upon the application of one fourth of its Members; pursuant to Art. 1 § 3 Sec. 3, the *Bundesrat* can regulate in its Rules of Procedure how to bring about the adoption of a decision on a subsidiarity action. Pursuant to paragraph 4, the Federal Government sends the action on behalf of the body that adopted the decision of bringing such action "without delay" to Court of Justice of the European Union.

Art. 1 § 4 Sec. 3 of the Extending Act the interaction of *Bundestag* and *Bundesrat* have been regulated when exercising the right to voice opposition pursuant to Art. 48 Sec. 7 (3) TEU Lisbon taking into account the national allocation of responsibilities:

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

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

In all other cases, the *Bundestag* or the *Bundesrat* may, within four months after notification of the initiative of the European Council, decide to make known their opposition against this initiative. In these cases, opposition to the initiative shall only be made known if such a decision has not been rejected two weeks before the expiry of the time-limit of six months pursuant to Art. 48 Sec. 7 (3) sentence 2 of the Treaty on European Union by the other body. Opposition to an initiative shall also not be made known if one body rejects the other body's decision insofar as it holds the view that there is not a case under number 1 or number 2. If the *Bundestag* adopted its decision on making known its opposition to the initiative by a majority of two thirds, rejection by the *Bundesrat* requires a majority of at least two thirds of its votes. If the *Bundesrat* adopted its decision on making known its opposition to the initiative by a majority of at least two thirds of its votes, rejection by the *Bundestag* shall require a majority of two thirds, at least the majority of the Members of the *Bundestag*.

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

Art. 1 § 6 of the Extending Act determined that details about information according to this Act shall be regulated in the Agreement between the *Bundestag* and the Federal Government Pursuant to § 6 of the Act on the Cooperation of the Federal Government and the German *Bundestag* in European Union Affairs and according to the Agreement between the Federal Government and the *Länder* Pursuant to § 9 of the Act on the Cooperation of the Federation and the *Länder* in European Union Matters (s.a.).

117 Pursuant to Art. 1 no. 1 of the Amending Act of 8 October 2008 (*Bundesgesetzblatt* I of 16 October 2008 (p. 1926), Art. 23 Sec. 1a of the Basic Law, new version, has the following wording: "The *Bundestag* and the *Bundesrat* shall have the right to bring action before the Court of Justice of the European Union on account of a legislative act of the European Union infringing the principle of subsidiarity. The *Bundestag* shall be obliged to do so on the application of one fourth of its Members. An Act requiring the approval of the *Bundesrat* may admit of exceptions to Article 42.2 sentence 1 and Article 52.3 sentence 1 for the exercise of the rights granted to the *Bundestag* and the *Bundesrat* in the Treaties constituting the basis of the European Union."

Bundesrat would be enabled to play a direct role in EU decision-making, rather than "merely" shaping Germany's policy positions in EU matters.

In its decision of the 30 June 2009 regarding the ratification of the Treaty of Lisbon, the FCC has ruled, that the role of *Bundesrat* and *Bundestag* in voicing its/their opposition in the bridging procedure or *passerelle*-procedure¹¹⁸ needs to be enhanced:

"(a) To the extent that the general bridging procedure pursuant to Article 48.7(3) TEU Lisbon and the special bridging clause pursuant to Article 81.3(3) TFEU grant the national parliaments a right to make known their opposition, this is not a sufficient equivalent to the requirement of ratification. It is therefore necessary that the representative of the German government in the European Council or in the Council may only approve the draft Resolution if empowered to do so by the German Bundestag and the Bundesrat within a period yet to be determined, which takes the purpose of Article 48.7(3) TEU Lisbon as an orientation, by a law within the meaning of Article 23.1 sentence 2 of the Basic Law."¹¹⁹

The FCC thus insists on full bicameral ratification for each decision regarding the use of bridging or *passerelle*-clauses which have been designed to give more flexibility for future integration measures without having to resort to the regular ratification procedure for new treaties.¹²⁰ The underlying idea of future treaty amendment by tacit consent to promote integration was rejected by the FCC on the grounds that it would undermine the prerogatives of the national legislature and, essentially, German sovereign statehood.¹²¹

The critique of the FCC is addressed in the current draft of the "Extending act" which does strengthen parliamentary participation but does not impose bicameral parliamentary clearance for all EU-decisions as the CSU, the Christian Social Union had called for in the political debate preceding the new draft.¹²²

118 The most prominent example for a bridging-clause is the so-called *passerelle* (or simplified treaty revision procedure), allowing the European Council unanimously, and with the European Parliament's assent, to introduce qualified majority voting and co-decision in areas where this does not yet apply i.e. when matters of EU-policy on Justice and Home Affairs were "communitarised" by being shifted from the third pillar (intergovernmental cooperation) to the "first pillar" under the Amsterdam Treaty. National parliaments are informed six months in advance and each of them may cast a binding veto, but ordinary positive ratification in all member states is not required.

119 See: 2 BvE 2/08 of 30 June 2009, paragraphs 414, a preliminary English translation, is available at: http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html, last accessed on 15 September 2009.

120 See also: Philipp Kiiver, *German Participation in EU Decision-Making after the Lisbon Case: A Comparative View on Domestic Parliamentary Clearance Procedures*, 10 GERMAN LAW JOURNAL 1287, 1291 (2009).

121 *Id.*

122 See: Point 10 of the 14-Points Plan of the CSU or "*Leitlinien für die Stärkung der Rechte des Bundestages und des Bundesrates in EU-Angelegenheiten*", available at: <http://www.ilse->

The need for full bicameral assent in the case of the use of the flexibility clause may also become more cumbersome for the federal government if the majority in the *Bundesrat* sides with the opposition and would thus be able to compel Germany to veto or to abstain from voting in the Council.¹²³

Regarding *Länder* participation it remains to be seen whether and how the *Bundesrat* will be able to make use of the new rights granted under the Treaty of Lisbon and the Subsidiarity-Protocol.

The "subsidiarity-check" and the "subsidiarity-action" contained in the Subsidiarity-Protocol have been long-standing demands of the German *Länder* representative in the Constitutional Convention which preceded the adoption of the Treaty of Lisbon. The Subsidiarity-Protocol even provides in Article 6 Sentence 2 for a new consultation procedure, whereby *Bundesrat* or *Bundestag* may consult the *Länder* parliaments as regional parliaments. The drafts of the Extending Act have left the details of such a consultation to the *Bundesrat*. Practice will also show whether the 8-week-delay, foreseen by the Protocols No 1 and No 2 to the Treaty of Lisbon, will suffice to conduct a thorough "subsidiarity-check" and make meaningful contributions to EU-policy. However, the new Treaty provisions would compel the Commission, Council and the European Parliament to give enhanced consideration to the principle of subsidiarity not only as regards the EU-Member States but also the regional level. This will certainly contribute in the mid-term to the strengthening of the role of regional entities such as the *Länder*.

2. Conclusion

It has been shown that the *Länder* as sub-state authorities had to battle in order to obtain a mechanism which enables them to participate formally in EU policy-making.

The constitutional entrenchment of their right of participation in Article 23 of the German Basic Law in 1993 represented an important step. Article 23 has to be seen as a constitutional consolidation of a state practice which has already been tried and enacted under the Law on the Ratification of the SEA, rather than a new departure in policy coordination.

The experiences with the *Länder* government's participation in formulating German EU policy are two-fold so far: while the *Länder* governments unsurprisingly view increased participation rights generally in a positive way, critics have warned that *Länder* participation is weakening Germany's position in negotiations at EU-level. They claim that

aigner.de/download/europa_papier_leitlinien_bt_mitwirkungsrechte_europa.pdf, last accessed on 15 September 2009.

123 See: KIVVER (note 120), 1295.

Article 23 has contributed to weakening the federal government in negotiations on the European level and that *Länder* participation has often led to the phenomenon of the “German vote” (abstention of the German delegation in Council votings).¹²⁴

In the absence of any reliable statistic data on how *Länder* participation has actually influenced Germany’s voting behavior in the Council, general experience seems to suggest that the cooperation between the *Länder* governments and the federal government in formulating German EU-policy has so far generally been rather constructive: since 1993 the *Bundesrat* has presented 1868 opinions regarding initiatives/ projects on the European level and has limited itself to take notice of 531 initiatives. In 2006 the *Bundesrat* has presented 140 opinions and has taken notice of 35. There have only been 44 cases since 1993 where the *Bundesrat* has asked for its opinion to be taken into account as the *decisive* opinion because *Länder* competences were primarily affected (Para. 5 Sec. 2 of the Cooperation Law). Representatives of the *Länder* work together with federal government representatives in 294 working groups of the Council and the Commission.¹²⁵ These numbers illustrate that the processes introduced under Article 23 seem to work fairly well, with respect to the internal *Bundesrat* consultation process as well as the direct representation of the *Bundesrat* through the German delegation in the Council of Ministers.¹²⁶ The formalized structures for communication, vertically and horizontally, between the federation and the *Länder* facilitate both institutional and policy learning which may then be consolidated through joint ‘treaties’ between the *Länder*. The *Länder* have also adopted a consensual approach in dealings over European policy with the federal government, with all parties falling back on conventions and routines first formulated after the Single European Act (SEA).

The “subsidiarity check” foreseen by the Protocol on the Application of the Principles of Subsidiarity and Proportionality of the Lisbon Treaty as well as the requirement of full bicameral assent to the use of the flexibility or bridging clauses under the current drafts of the Extension Act may – if the new treaty is actually ratified and depending on national implementation legislation – further contribute to boosting the role of the *Länder* governments through the *Bundesrat* as second chamber of Parliament in shaping EU decision-making.

The procedure which has been developed in order to organize *Länder* participation in European affairs under Article 23 follows the same patterns which have been developed at

124 See, ROLLER (note 64), 41-2.

125 See contribution of Claus-Peter Clostermeyer from the government of Baden-Württemberg in: CLAUS-PETER CLOSTERMEYER, FÖDERALISMUS UND EUROPA, 28 (2007).

126 A *Länder* review of the operation of the cooperation agreement, conducted in February 1997, found the regulations to ‘... have proved themselves without exception and [to] represent a suitable framework for good and trusting cooperation’ (HRBEK (note 39), 222-3).

the domestic level. Like in domestic affairs, also in European affairs executive capacity building at the *Länder* level has far outstripped parliamentary capacity of the *Länder* Parliaments (*Landtage*) in relation to European policy.¹²⁷ This can partly be explained by the fact that Germany has an "executive" model of federalism. In consequence, it is the *Länder* governments and particularly their bureaucracies and not the *Landtage*, which have successfully expanded their influence into European affairs as opportunities have opened since the late 1980s. In comparison, the *Landtage* have been poorly compensated for the erosion of their powers through Europeanization. In some *Länder*, mechanisms have been put in place for the parliaments to receive information from their governments on the development of *Land* European policy, for parliaments to present an opinion on EU matters, and for specialist European committees. However, the capacity of the *Landtage* to influence the formulation of European policy remains underdeveloped and indirect in spite of repeated lobbying by the Conference of the *Landtag* Presidents. It is not expected that the consultation procedure provided for in the new Protocol on the Application of the Principles of Subsidiarity and Proportionality of the Lisbon (Reform) Treaty will have a significant impact on enhancing the role of the *Landtage*. Due to their limited resources, it is questionable whether the *Landtage* will develop the necessary capacities and know-how to substantiate claims of violations of the principle of subsidiarity within the timeframe of eight weeks. Overall, the role of the *Länder* parliaments in determining *Land* European policy remains marginal compared to the role of the *Länder* governments.¹²⁸

The involvement of the *Länder* governments in European policy-making also contributes to deepening of the German domestic problem of "Politikverflechtung" which had earlier been described as characteristic of the German federalism. This leads to reducing democratic accountability on the whole since it becomes more and more difficult for citizens to attribute executive decisions to the *Länder* or to the federal level. The mechanisms of co-operation described above also facilitate informal arrangements and package-deals between the federal government and the *Länder* which remain beyond public and democratic control.

On the European level, the conditions for direct *Länder* involvement – especially through the Committee of the Regions (CoR) – remain beset by structural and practical problems. Membership in the CoR is not self-selecting but is determined by Member State governments – although some Member States have chosen to delegate this authority to the regions/ *Länder* themselves – thereby perpetuating the dominance of central states even in this dedicated regional forum. The difficulty of identifying "regions" among the varied territorial arrangements of the EU member states has opened membership to a very heterogeneous mix of regions and local authorities, whose interests are often

127 See, ROLLER (note 64), 38-40; ROLAND JOHNE, DIE DEUTSCHEN LANDTAGE IM ENTSCHEIDUNGSPROZESS DER EUROPÄISCHEN UNION, PARLAMENTARISCHE MITWIRKUNG IM EUROPÄISCHEN MEHREBENENSYSTEM (2000).

128 HRBEK (note 39), 226.

irreconcilable. As a result, the CoR has difficulty in representing regions as a whole, when in practice they are in competition over many aspects of European politics.

Nonetheless the European arena may in the future be opening up to more independent regional activities. In policy sectors, where EU legal authority is limited, there is already evidence of a role for regional actors in contributing to policy convergence at the European level. The question is, will Europe's regions come to be recognized as independent actors only in areas in which the EU's legal reach remains underdeveloped, or can they carve out a role for themselves also in EU-dominated policy areas. The Protocol on the Application of the Principles of Subsidiarity and Proportionality of the Lisbon Treaty might force the European Institutions to reconsider their perception of the regional actors and the way in which they apply the principle of subsidiarity in European decision-making.

In its ruling of the 30th of June 2009 the FCC has stressed the possibilities which are created by federal or supranational intertwining but has also warned against the limits imposed by the principle of democracy and accountability:

"Inward federalisation and outward supra-nationalization can open up new possibilities of civic participation. An increased cohesion of smaller or larger units and better chances of a peaceful balancing of interests between regions and states grow from them. Federal or supranational intertwining creates possibilities of action which otherwise would encounter practical or territorial limits, and they make the peaceful balancing of interests easier. At the same time, they make it more difficult to create a will of the majority that can be asserted and that directly goes back to the people (Article 20.2 sentence 1 of the Basic Law). The transparency of the assignment of decisions to specific responsible actors decreases, with the result that the citizens can hardly take any tangible contexts of responsibility as an orientation for their vote. The principle of democracy therefore sets content-related limits to the transfer of sovereign powers, limits which do not result already from the inalienability of the constituent power and of state sovereignty."¹²⁹

129 See: 2 BvE 2/08 of 30 June 2009, paragraphs 247, preliminary English translation, is available at: http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html, last accessed on 15 September 2009.