Chapter 15

Ultra Vires without End? The German Perspective on the Future of Europe Conference

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Abstract

The paper deals with the German perspective on the FoEC reform process within the framework of the European Union. In this context, an overview is given of the relevant case law of the German Federal Constitutional Court, which is the actual key player in integration policy in the Federal Republic of Germany. The jurisprudence of the Federal Constitutional Court reflects the doctrines developed by German European legal scholarship since the 1950s, which focus on the compatibility of post-national sovereignty with the constraints of integration policy. This article introduces the history of German European legal scholarship. Only from this perspective can the German positions on European budgetary sovereignty, the democratic development of the Union and questions of deeper cooperation in climate protection or pandemic management be illuminated.

Keywords: democracy, depolitization, functional integrative association, Walter Hallstein, Hans Peter Ipsen, Lisbon decision (FCC), Maastricht decision (FCC), neutralization, the political, Solange I decision (FCC), Solange II decision (FCC), special purpose association

I have been asked to present the German perspective on the Future of Europe Conference (FoEC). I can comply with this request only with the one important caveat that there is no specific "German" angle on this issue. The gist of the European integration process is to eliminate the national as the core criteria of political differentiations. Although it is possible to indicate which stakeholders benefit from a measure

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taken in the European context (and which do not), the advantages and disadvantages of European unification must be viewed within a cross-border framework. However, there is a highly developed body of European law scholarship in German-speaking countries, whose various schools have influenced the case law of both the German Federal Constitutional Court (FCC, Bundesverfassungsgericht), based in Karlsruhe, and the Luxembourg-based European Court of Justice (ECJ). Without a look at the extensive German debate on European law, it is impossible to understand the sometimes idiosyncratic positions of German constitutional bodies and government authorities on the current state of integration.[1] This applies not least to the German federal government's reticence regarding the FoEC. In non-German-speaking countries, there are sometimes hair-raising misunderstandings about German European policy, especially about the FCC's position on European law issues. I hope to clarify some of this with my comments. Therefore, the reader may take my contribution as an attempt at damage limitation.

We will see that German legal scholarship does not speak with one voice. A rough distinction can be made between a "Hamburg School" around Hans Peter Ipsen (1907-89) and a "Frankfurt School" around Walter Hallstein (1901-82) and their respective academic successors. These schools are not citation cartels or closed associations. They certainly exhibit a certain internal plurality. What binds the two schools together, however, is the common position of their members on the finality of European unification. The "Frankfurt School" is pro-federalist, its Hamburg antipode anti-federalist, although not nationalist, but rather "sovereigntist". It can be said that the "German" perspective on the FoEC, and on the European integration process in general, is most purely expressed in German European law scholarship and in the jurisprudence of the FCC. With this caveat concerning the focus of my analysis, I will first present the results and the historical context of the FoEC (1.). I will then move on to a more detailed analysis of the most important desiderata following the Conference (2.): (2.1.) further democratisation of the Union; and (2.2.) further steps towards a European fiscal union and a robust Union competence in the field of health policy. We will see that the last two points are closely linked. Finally, I turn to the situation in Germany. The key German player in European policy issues is the FCC. It is therefore appropriate to outline the premises of its case law on European integration, but above all to place them in a political context, outside of which they are not really comprehensible (3.). At the end of my contribution, I shall give a brief conclusion (4.).

1 For this reason, I will largely limit myself below to reproducing and commenting on German-language literature on European law and politics. It goes without saying that I had to make a narrow selection, which is intended to provide further guidance, especially for readers who are not familiar with the German-language literature but who speak or can at least read and understand German. The quotations from German literature and adjudication were translated into English by myself.

1. The Future of Europe Conference: Intention, Results and Political-historical Context

The European Union has been in need of reform for as long as it has existed. The FoEC is one of many contributions to reform that have remained more or less ineffective on their own, but which, taken together, have had a lasting impact on the finality discourse. Nevertheless, former Greek Foreign Minister Evangelos Venizelos posed the provocative question as to why a "simulated conference without a legal basis" was being held.[2] In fact, the conference lacks any legally binding force.

2.1. Why a "Simulated conference without a legal basis"?

The history of the FoEC begins with the European Commission's 2017 White Paper on the "Future of Europe".[3] This describes five future scenarios for the European integration process. One of these scenarios focuses on deepening integration in all policy areas.[4] In his State of the Union address on 13 September 2017, the Commission President responsible for this White Paper, Jean-Claude Juncker, emphasised the need to turn the European Union into a "constitutional state" that protects and strengthens freedom, equality and the single market.[5] In this context, Juncker brought up the creation of the office of a European Minister of Finance and Economy. The European Parliament should be given further powers; the democratic legitimacy of the Parliament should be strengthened by electing some of the Members of Parliament via transnational lists. These ideas were taken up by French President Emmanuel Macron in his Sorbonne speech on 26 September 2017. This speech marked the end of a long period of French reticence on fundamental European policy issues. Macron's statements should also be seen as an attempt to respond to a decade of European financial crisis. As it turned out, the French President's considerations have become even more topical since the start of the Russian-Ukrainian war in February 2022 in light of the European polycrisis[6]. Macron called for a top-to-bottom reform of the European institutions.[7] His European policy ideas focused on a federalisation of the European Union, which he called a "refoundation of Europe":

2 Verfassungsblog, 2024.

3 European Commission, 2017. In addition: Calliess, 2019a, 9 et seq.; Calliess, 2018, 1 et seq.; Calliess, 2019b, 25 et seq.; Hoffmann, 2019, 69 et seq.; Schorkpopf, 2017, 16 et seq.

4 The Member States should share more powers and resources in all policy areas, take decisions jointly (by majority vote) as a matter of principle, leave the floor to the Union – in particular the European Parliament – at international level, and leave the exclusive powers to conclude international trade agreements to the Union.

5 European Commission, 2024.

6 The term "polycrisis" refers to the combination of migration crises, global climate crisis, European security crisis and pandemic. On this from the German literature: Calliess, 2018, 1 et seq.; Ludwigs and Schmahl, 2020.

7 Ouest France, 2017.

a "sovereign, united and democratic Europe".[8] The concepts of peace, prosperity and freedom, which had been at the heart of the previous integration project, had to be more than just technocratic functional modalities of a single European market. The demand for a common strategic defence culture, a common European immigration authority and democratic conventions as an "integral part of the refoundation of Europe" is derived from this. Macron makes it clear that his European policy ideas do not contradict the current level of integration, particularly the level of economic integration. The "common market" still represents the "true spirit" of Europe. Beyond this, however, the values of democracy and the rule of law as well as the single market should be at the heart of the new foundation of Europe. In contrast, the Visegrad states (Hungary, Poland, the Czech Republic and Slovakia) took a sceptical stance.[9] In their joint declaration on the future of the EU of 29 January 2018, they spoke out in favour of securing the level of integration already achieved. The focus of the Visegrad Group was on strengthening European competitiveness and the level of industrialisation, deepening the economic and monetary union, protecting fundamental European freedoms, and securing the common external borders. In these two positions – Macron/Juncker on the one hand, the Visegrad Group on the other – we notice a European policy frontline that also pervades the German European policy debate: the controversy between European federalists on the one hand and pragmatists on the other. On closer inspection, however, it will be seen that the fronts are not as clear-cut as they first appear.

Developments in European policy seemed to prove the Macron-Juncker line right. In another keynote speech on European policy on March 4, 2019, Macron proposed a 'Conference on the Future of Europe'.[10] Macron's impulse was taken up by the future EU Commission President Ursula von der Leyen, whose candidacy and election as Commission President was largely driven by Macron. In her candidate speech to the European Parliament on 26 July 2019, Leyen committed to an "active role" for the Union citizens in shaping the future of Europe.[11] Following on from this and flanked by a Franco-German non-paper[12] , the European Council took up at its meeting on 12/13 December 2019 the impulse of a new European reform convention in the form of a broad-based, online citizens' dialogue. Above all, the idea was to identify integration deficits and to jointly develop solutions broadly sustained by the European public. The European Council issued the conference mandate in January 2020, and the Presidents of the European Commission, the Council and the European Parliament expressed their support for the reform project in a joint Declaration on the Future of Europe on 3 March 2021.[13] The conference opened on Europe Day, 9 May 2021, and the final report was presented to the European public exactly one

8 Speech by President Macron at the Sorbonne. Élysée, 2017.
9 Visegrad Group, 2018.
10 Macron, 2019.
11 European Commission, 2019.
12 Politico, 2019.
13 Coucil of the European Union, 2021.

year later. The report makes a total of 325 individual proposals in nine thematic areas and 49 subcategories.[14] These proposals culminate in the call for a European constitutional convention. Accordingly, the Commission, the Parliament and the Council signed a joint declaration of intent, responding to the integration desiderata identified during the conference.[15] The most important issues identified are: (a) the Union's financial and budgetary system, which should be federalised, particularly through joint borrowing by the EU Member States and the abolition of the unanimity principle in budgetary policy; (b) the establishment of a robust and general EU competence in health policy, particularly to combat epidemics: a consequence of the very heterogeneous political reactions of the EU Member States to the Covid crisis since 2020; (c) the creation of a supranational democracy: as the first reform steps towards this, transnational electoral lists and party mandates are being considered, as well as the further expansion of the European citizenship already introduced by Article 10 of the Treaty on European Union (TEU); (d) the implementation of new instruments of citizen participation in pan-European affairs as well as a new framework for the competences of the Union and the Member States; the latter can, of course, only take place on the basis of a formal treaty revision in accordance with Article 48 TEU.

Minister Venizelos is not so wrong if you look at the immediate results of the conference. This impression may be reinforced with regard to Germany by the lack of interest that German politicians have shown in the results of the conference. The German position is rich in fine-sounding words, but (at least for the time being) makes hardly any substantial concessions in terms of content. This can be seen by comparing the programs of the parties that form the current (March 2024) federal government under Chancellor Olaf Scholz (SPD) with political reality: (a) As the leading governing party, the Social Democrats (SPD) have refrained from making a declaration on the FoEC in their election manifesto for the 2021 Bundestag elections. However, in the coalition agreement for which they are jointly responsible, the working basis of the federal government, there is a demand that the FoEC should lead to a constituent convention with the aim of forming a European federal state. This European federal state should be organized according to the principles of subsidiarity and proportionality and be based on the European Charter of Fundamental Rights.[16] (b) The Green Party (Bündnis 90/Die Grünen) is committed to the further development of the European Union towards a federal European republic with a European constitution.[17] (c) In their program for the 2021 federal elections, the German

14 Kahl and Hüther, 2023.

15 Council of the EU, 2022.

16 Sozialdemokratische Partei Deutschlands/Bündnis 90-Die Grünen/Freie Demokratische Partei, 2021. The coalition agreement of the previous government of Christian Democrats (CDU/CSU) and Social Democrats (SPD) under Chancellor Angela Merkel (CDU) had – despite its titular pro-European commitment – refrained from such a clear commitment (see Christlich-Demokratische Union Deutschlands/Christlich-Soziale Union Deutschlands/Sozialdemokratische Partei Deutschlands, 2018.

17 Bündnis 90-Die Grünen, 2021.

Liberals (FDP) called for the convening of a European constitutional convention after the conclusion of the FoEC.[18]

The post-communist left, which is not part of the Scholz cabinet, also wants a "new constitution for Europe", albeit within the framework of a 'Europe of solidarity'. [19]

The conservative opposition is divided: The Christian Democrats (CDU), currently the largest opposition party, do not want a European federal state, but "more Europe".[20] The CDU's Bavarian sister party CSU did not include a declaration of principles on European policy in its 2021 Bundestag election manifesto. The national-conservative Alternative für Deutschland (AfD) is committed to a 'Europe of fatherlands as a community of sovereign states (...) cooperating in all those areas that can be better shaped together', in reference to Charles de Gaulle.[21]

What Chancellor Scholz said in response to President Macron's keynote speeches on European policy at Charles University in Prague on 29 August 2022 can be regarded as the current German government line.[22] Scholz outlined the vision of a "European sovereignty" that should develop as a result of greater independence of the Union, initially in defence and security policy. He also called for respect for the fundamental European values of human dignity, freedom, democracy, equality, the rule of law and human rights, which to a certain extent outline the core tasks of the Union. Scholz's emphasis on the common European security policy already reflects the new geopolitical situation since Russia's invasion of Ukraine and places a significantly different emphasis on German European policy compared to the final declaration of the FoEC. Climate protection, the fight against the pandemic and a common European budget policy remain important, but the rebuilding of military capacities and the security of transnational supply chains, which are vital for German industry, are moving into the focus of Berlin's future scenarios. However, these observations do not mean that the conference was without effect. Minister Venzelos overlooks the fact that changes in the Union rarely happen through formal treaty amendments and legal acts. The Union's institutions are at least as effective in providing ideas and paving the way for pro-European opinion-forming processes in the Member States. The "united Europe" is a narrative that must be constantly spun if it is to remain credible. This is precisely what the declarations of intent of the EU institutions are all about. First, the public's willingness to accept them is tested, then more concrete projects are proposed, finally these are discussed in more solid forms (e.g. in the context of a citizens' dialogue or a reform convention) and only then, if necessary,

18 Freie Demokratische Partei, 2021.
19 Die Linke, 2021.
20 Christlich-Demokratische Union Deutschlands, 2021.
21 Alternative für Deutschland, 2021. The AfD sees the current Union as a "planned economy superstate" and is therefore considering the withdrawal of the Federal Republic from the Union. It hopes that this will provide the impetus to found a "new European economic community and community of interests".
22 Bundesregierung, 2024.

do they enter into procedures of political understanding between the Union and the member states. Legal acts are only adopted at the very end of this process, but are also often omitted if a consensus can be reached without legalization. The EU institutions have always seen themselves as trustees of the common European interest as well as promoters of societal change and integration. The fact that the FoEC set new standards in this regard can be seen in the Commission President's speech on the state of the Union on 14 September 2022 and the reactions to it.[23]

After all, it is wrong to measure the impact of the FoEC only by its legal consequences, as Mr Venizelos suggests. In truth, the conference marks a similar caesura for European politics – it could be called a "turning point in European politics" – as the polycrisis of 2015 and after did for national and international politics – as it provides a powerful impetus for federalisation and constitutionalisation. This movement can lead to a reshaping of prevailing European political narratives and thus to a shift in political discourse, especially in Germany. The FoEC will have achieved its goal if the politicians acting in its spirit succeed in sensitising the European public to the issues raised and motivating them in line with the conference results. Democratic majorities for the reform agenda will then emerge of their own accord. To what extent this is the case will only be possible to judge conclusively in a few years' time. At present, it seems that the war between Russia and Ukraine, which threatens the whole of Europe, has changed the priorities of the European peoples in a way that was unforeseeable for the initiators of the conference.[24] If a similar colloquium were to be held in 2024, the desire to strengthen collective European security, understood as military security and security of supply, would presumably rank at the top of the list of priorities, whereas this policy area played a very subordinate role in the 2021/22 consultation period. But in this respect, too, hasty diagnoses should be avoided. It is not yet known whether Russian aggression will really unhinge Europe or whether a long conflict on the eastern periphery of the Union that freezes over time will at some point lead back to the old Brussels normality. After all, more than seventy years after embarking on the path of European integration, it is impossible to predict whether this path will be supported by the majority of member states in the long term. The scepticism against a pan-European unification based on economic premises existed from the very beginning, long before the term "Eurosceptic" was coined. It has not diminished. It almost seems that the European peoples understand the unification they initiated less today than they did immediately after the Second

23 European Commission, 2022.

24 The conference was to address the following ten topics: (1) climate change and the environment, (2) health, (3) a stronger economy, social justice and employment, (4) the EU in the world, (5) values and rights, rule of law, security, (6) digital transformation, (7) democracy in Europe, (8) migration, (9) education, culture, youth and sport, (10) other ideas, Archive-It, 2023. The order of the topics certainly indicates a political prioritisation, according to which – following the zeitgeist of the early 2020s – climate protection ranks at the top. No one explicitly considered European military cooperation and the strategic security of the Union, for example the protection of European supply chains.

World War. This observation leads to the major political and historical lines in which the FoEC is to be located.

1.2. Historical lines of the Conference

For all the foresight of its founding fathers, the work of European integration suffers from a fundamental dilemma. It legitimises itself as a peace project, but it does not succeed in neutralising the political. "The political" should not be mixed up with "policy" or "politics". It is understood as the source of unity among individuals and nations, implying the danger of frictions, hostility and war.[25] The political is part of human nature, a basic anthropological constant. People are not inherently unequal. Inequality between people only arises through the definition of their own identity. The identity formation process takes place in every individual as a separation of the self from the you, of the person from their fellow human beings and their environment. In the same way, nations (political communities) define themselves by first formulating criteria for unification (today this is generally done in the context of constitutionalisation), but also by separating themselves from other communities and excluding them. Just as good cannot be conceived without evil, association implies dissociation and the friend implies the foe. The political is opposed to an undifferentiated cosmopolitanism, i.e. the elimination of all differences between citizens and states. What is called the "political" is a process of community-oriented concept formation notwithstanding exclusionary effects. Because of the latter, the political is dangerous.

The European Union is a peace project without war-prevention mechanisms. The peace dividend it promises is a calculation at the expense of third parties. Europe is dependent on the cooperation and goodwill of non-European actors: the USA, Russia and China. Russia has emerged as an aggressor, China is a relentless competitor and the USA is less and less willing to stand up for Europe's security and prosperity. This alone would justify another FoEC. It is all the more remarkable that not a word has been said about the European Union's geostrategic position in 2021, given that the particular sensitivity of European states to disruptions to global trade and the political balance of the major non-European powers is a fundamental constancy that was already evident before the Russia-Ukraine war. So, should the FoEC be dismissed as a "fair weather event"? Is it merely an attempt to avert storms from Europe by ignoring them? Like previous reform plans, the FoEC is primarily aimed at internal coherence. The European Union cannot and will not guarantee the conditions on whose existence it depends.[26] The integration consensus of the member states and

25 Schmitt, 1932. See also: Mehring and Schmitt, 2003.

26 Modification of a famous sentence of Ernst-Wolfgang Böckenförde, related to the constitution: 'The liberal, secularized state lives from preconditions that it cannot guarantee itself' (Böckenförde, 1991, 92 et seq.). What Böckenförde said about the national state's constitution is all the more true for the European Union.

the balance of power within the Union are notoriously fragile. This is not collateral damage of the unification process, but precisely calculated. The FoEC is the latest attempt to answer the question of how the return of the political – meaning: the occurrence of a situation that provokes or even requires decisions based on national interests[27] – can be managed despite all attempts at depoliticisation at European level. On this level, the struggle with the political has a history that goes back to the Maastricht Treaty, whose thirtieth anniversary was celebrated in 2023. With the Maastricht Treaty, the member states of the European Community opted for a deepening and broadening of what had until then been mainly economic integration. The "ever closer union of the peoples of Europe", which had already inspired the Treaties of Rome of 25 March 1957, was supplemented by intergovernmental cooperation in foreign and security policy as well as in domestic and justice policy. Following the demise of the Soviet Union as an organising factor on the European continent, which was also expected to dampen American involvement in the European-Atlantic area, the European states in the West and East became aware of the existential necessity of a European community of values and solidarity. After a European Political Community had failed in the 1950s, mainly due to the conflicting interests of Germany and France, a united Europe was now to be created in the medium term, whose economic and geostrategic weight could be set against the USA, Russia and China. Criticism that the Maastricht Treaty was a resurrection of the idea of a "Greater Europe" under international law, which had emerged particularly in the United Kingdom with an anti-German subtext and had never fallen silent again until Brexit, overlooks

27 The Euro crisis of 2010 onwards is one such example. European policy failed here because it did not know how to prevent a relapse into nationalist stereotypes. The biggest possible disaster for the European Union project would have occurred if the eurozone had actually collapsed. A forced Greek exit from the eurozone would have been the first step in this direction. Portugal, Ireland, Spain and perhaps even Italy and Belgium would have followed them. As a result, a supranational community that was founded for the sake of a common economy would have collapsed due to economic considerations. It is hard to imagine a more cruel irony of history. Any attempt at renewed European unification would probably have been disavowed for decades to come. The debate about whether Greece should remain in the Euro zone has shown that the European Union has long since outgrown the point at which economic indicators are nothing more than that. The fact that it was possible to avert the collapse of the eurozone at the last moment is a baptism of fire for European integration. For the moment, the political has once again been tamed. But the discussion about reforming the European institutions gains its plausibility from the justified concern that thinking in national terms – in the categories of nationalistic demarcations – could gain the upper hand at the next European endurance test.

the fact that Maastricht Europe is a depoliticisation project in the spirit of economic liberalism. [28]

28 The famous constitutional and international law expert Carl Schmitt (1888-1985), one of the key players in the legal establishment in the German Reich during the Nazi era, was the keyword and source of ideas for the Greater Area Theory (Großraumtheorie). Schmitt attempted to give the National Socialist expansionist policy a foundation in international law. He based this on the American Monroe Doctrine. Schmitt did not see the "Greater German Reich" envisioned by the National Socialists as a nation state in the classical sense of constitutional law, but rather as a European area dominated by Germany, consisting of states and territories, some of which were to be sovereign internally and some of which were to be more or less strongly influenced by Germany as protectorates or dependent territories. Schmitt's concept was not limited to the economic control of these territories by Germany, but the core of his considerations was – hence the reference to the Monroe Doctrine – a "prohibition of intervention by powers foreign to the area" (Schmitt, 1941; see also: Dreier, 2001). From the perspective of 1941, the year in which the treatise was first published, Schmitt described the state order that was emerging as a result of the Second World War as a polycentric system of various geostrategically autonomous large areas that were demarcated from one another. The end of the Second World War did not render Schmitt's analysis obsolete, but the subsequent Cold War with its "balance of terror" sharpened it into a theory of global biploarity. After 1945, it was not possible to achieve the One World under the principles of democracy and the rule of law that the United States was striving for. However, the world order structured according to the West-East pattern only lasted a few decades. After 1989/90, the world returned to a multi-polar order. The extent to which European integration, which began at the height of the Cold War, can be seen as an attempt to create an autonomous greater space between the USA and the Soviet Union is controversial. This question cannot be explored in depth in this article. Suffice it to say that the pros and cons of a strategic autonomy of "Greater Europe" was one of the main points of contention between France and (West) Germany and remains so to this day. The unwavering adherence of the Bonn Republic to the Euro-Atlantic security structures against the French will for strategic independence has strained Franco-German relations for thirty years. Hans Peter Ipsen, who will be discussed in detail in this article as the doyen of German European law, took up Schmitt's Greater Germany theory in 1942 and described the internal relations of the German Reich to the territories dependent on it within the "Greater German" area as *Reichsaußenverwaltungsrecht* (Ipsen, 1942, 64 et seq.). This provided an analytical framework for describing the legal relations within the greater area dominated by Germany, which were neither constitutional nor international law. Some German scholars of European law emphasise the parallels between Ipsen's later, very powerful conception of the European Communities and his earlier theory of the Reich's foreign administrative law, although the source situation does not permit clear derivations (see: Kahl and Hüther, 2023, 58 et seq. with further references).

2. Analysis of the Conference results

2.1. Strengthening European democracy

2.1.1. From the lack of a European demos ...

It seems inevitable that reform considerations of the European Union will address "democracy" in some form. No concept in political science is more complex than this one. To simplify, a distinction can be made between "democracy" as a principle of state rule[29] and "democracy" as the guiding principle of republicanism. The former, legitimation-theoretical definition variant is (albeit misleadingly) regarded as a "formal" or even "formalist" theory of democracy, while the latter is mirrored as a "material" or "substantial" theory of democracy. The republicanist interpretation of the principle of democracy is the more common one today. According to this interpretation, "democracy" refers to a certain form of liberal association underlying the republic; "republic" is the official state committed to the moral idea of human dignity[30] . In this sense, for example, the German Basic Law (*Grundgesetz*) of 23 May 1949 (GG) speaks of the "free democratic basic order" (Article 21 paragraphs 2 and 3 GG) as the kind of constitutional order in which the freedom of the individual is derived from human dignity. From this, the consequence of a democratic state structure is inferred. In the context of republican – especially communitarian – theories[31], "democracy" is transformed from a form of government to a form of society. The democratic idea is transferred to institutional contexts outside the state.[32] In the constitutional sense, however, the principle of democracy is understood as the state's legitimising imperative. In all Western state constitutions, reference is made to this power-establishing and power-limiting aspect of democracy, e.g. in Article 20 paragraph 1, and paragraph 2 sentence 1 GG, Article B sections 3 and 4 of the Hungarian Constitution of 25 April 2011. The subject of legitimation of the state is the people; in political science, the term "demos" is often used. "Demos" or "people"

29 See for the classical understanding of democracy: Platon, 555 et seq., 557 et seq., 562 et seq.; Platon, 302 et seq.; Aristoteles, 1279a et seq., 1291b et seq., 1292bet seq., 1294b et seq.; Raymundi and Spiazzi, 1964; Kunzmann, 1958, 75 et seq.; Weinstock, 1971, 74 et seq.; Vorländer, 1964, 128 et seq. The relation between democracy and republicanism was classically conceptualised by: Behler, 1966, 16 et seq. Democracy as a social principle: Forsthoff, 1972, 100 et seq. Important secondary sources: Beyme, 2014; Chevenal, 2015; Fetscher, 1970; Frankel, 1973; Friedrich, 1971, 127 e seq.; Meier, 1970, 7 et seq.; Narr and Naschold, 1971; Palmer, 1953, 203 et seq.; Scharpf, 1970; Talmon, 1961.

30 Arendt, 1958; Isensee and Lirchhof, 1987, 863 et seq.; Isensee and Kirchhof, 2004, 369 et seq. The core of the republic principle, as it is found, for example, in art. 20 para. 1 sentence 1 GG, is the transformation of rule into service through the office. Cf. also: Böckenförde, 1978.

31 Resse-Schäfer, 2019, 365 et seq.

32 Reference texts of the democratization approach: Eschenburg, 1971, 112 et seq.; Hennis, 1973, 26 et seq.

is not understood here as an actual quantity (the "population"), but as a juridical quality – as a subject of attribution under constitutional law. Although constitutional lawyers and political scientists are generally familiar with these different uses of the concept of democracy, they all too often talk past each other. Unfortunately, this also happens in European political discourse. The most prominent example of this mutual misunderstanding is the endless and fruitless debate about the basic democratic structure of the Union. The assertion of a democratic deficit in the Union has become a stereotype thanks to its permanent repetition. An analysis of the wording of the relevant treaty law alone can help. Although the preamble to the TEU and Article 2 TEU determine that the Member States of the Union are committed to "democracy" as a fundamental value of the Union, Article10 paragraph 1 TEU specifies that 'the functioning of the Union shall be founded on representative democracy'. It does not say: 'The Union is a representative democracy'. It is not, because it lacks a *demos*. This does not disprove the binding nature of a democratic way of working, particularly the organisation of decision-making at Union level according to the majority principle. What is meant here, however, is precisely not that the sovereign power of the Union emanates from the *people* (cf. Article 20 paragraph 1, and paragraph 2 sentence 1 GG), but rather that it is derived exclusively from the states (Article 5 paragraph 1 TEU), whose sovereignty the Union must respect and uphold (Article 4 paragraph 2 TEU). Article 10 paragraph 1 TEU does not address democracy as a legitimising principle of state rule, but transfers this principle to the functioning of a non-state organisation, i.e. to a non-state context. "Democracy" is understood here in the sense of republicanism. Compared with legitimation provisions under constitutional law, the content of Article 10 paragraph 1 TEU is, therefore, much more extensive than the wording of this provision suggests at first glance. The wording: 'The functioning of the Union shall be in accordance with representative democracy' not only states that the Union shall in principle take its decisions according to the majority principle and in parliamentary procedures[33], but also that the Union is based on the same *social order* that supports parliamentarism and is presupposed by it. This interpretation of Article 10 paragraph 1 TEU is supported by Article 9 TEU, according to which the Union 'shall, in its common action, respect the principle of equality of its citizens', 'who shall receive equal *attention* from the institutions, bodies, offices and agencies of the Union'. The key concepts of these fundamental organisational norms of Union law are: citizens instead of people, attention instead of legitimacy, functioning instead of decision-making. The vocabulary of Article 9 et seq. TEU does not originate from democratic theory, but from republicanism. The representation terminology of Article 10 paragraph 2 TEU does not change this. Rather, it emphasises that it is not a European demos but the *citizens of the Union*

33 The European Union's legislative procedures are only structured on a semi-parliamentary basis. Even the ordinary legislative procedure provides for equal participation of Parliament and Council, whereas Parliament lacks any legislative initiative. In special legislative procedures, Parliament only has an advisory role in some cases.

that are represented at Union level by the European Parliament. In terms of representation theory, the citizens of the Union are thus on a par with the Member States, which are represented by their governments in the Council in accordance with the same provision. The republican form of the Union is thus a form of equal rights for citizens and states within a larger unit, the purpose of which is precisely – as underlined by Article 10 paragraph 2 TEU – the dissolution of the relationship of subordination that characterizes the relationship of citizens to their state power according to the classical view of state theory. This clearly shows the depoliticization approach on which Union law is based. The "democratic functioning" within the meaning of Article 10 paragraph 1 TEU includes the principles of freedom and the rule of law and, in turn, particularly the protection of fundamental and human rights. Article 10 TEU is thus the consequence of Article 2 TEU, which declares democracy, the rule of law and human rights to be fundamental values of the Union. However, this does not make the Union a democracy in the state-analogous sense. Even in the preamble to the TEU, as in all previous texts, the reference is not to *the European people* but to *the peoples of Europe*, which contradicts any nationalisation approach.[34] It goes without saying that states that are all democratic in themselves can only come together to form a union that is itself based on democratic principles, even if it is not itself a democracy or a state. The democratic policy considerations of the FoEC take this into account. They avoid the demos concept and instead refer to "society", i.e. to a sociological term. The existence of trans-European associations and party structures does not refute this, because political parties and associations are not state institutions. They are self-regulating instruments of the "society", with the help of which democratic decision-making is organised, but not determined.[35] Even if their influence is so great in some states that the impression of a "party state" can arise[36], it is still the individual with the right to vote on whose decision the parliamentary majority is based and it is the people of the state (as the subject of democratic legitimacy) that ultimately creates all government offices. Transnational party structures and a trans-European public emerging in our times may strengthen a common European public sphere transcending the Member States, but they alone do not establish a "European" democracy analogous to the national democracies.

34 Schaefer, 2014, 325 et seq. Monographic treatise on the problem of democracy at European level: Kaufmann, 1997.

35 Paradigmatically, art. 21 para. 1 sentence 1 GG states: 'The parties shall *participate* in the formation of the political will of the people'. They are republican institutions insofar as they enable a pre-selection of persons to be considered for state elective offices. They are, moreover, aids to democratic decision-making, but presuppose a self-organization effort on the part of the citizens that precedes democracy.

36 Leibholz, 1958, 78 et seq.

2.1.2. ... to the neutrilization of the political

This is not a deficit.[37] The debate on democracy conducted with reference to the Union suffers from a transfer of state-theoretical figures to a supranational association. This is inconclusive and obscures the actual finality of the Union, which sees itself as a depoliticization project based on the market and human rights.[38] This is precisely the conflict surrounding the "democratisation" of the Union, which cannot do without a sideways glance at the finality of the Union. This is not about the theoretical question of whether democracy is conceivable without or beyond the state or whether non-state actors can produce a political system analogous to the state. Rather, what is at issue is the acceptance of the depoliticisation approach. Irrespective of the variety of definitions offered to explain the political, the political is defined – empirically speaking – as a factual and substantive contrast between people, which can gain such intensity that the parties can become friends or foes, and thus orient themselves towards a friend-foe scheme.[39] There is no need to be a Schmittian or a follower of Clausewitz to find this formula immediately plausible. The German sociologist Hans Freyer (1887-1969) described the depoliticising effects of capitalism with unsurpassed clarity.[40] Freyer defined capitalism as a system that does not make courses of action dependent on pre-established orders, but is based on a few purposeful – arbitrary, but practically useful – preconditions. This system does not derive its rationality from a particular world view, nor does it involve the person as a whole, but only with regard to those driving forces that are indispensable for the system to function. Thus, a capitalist system can function both in the environment of a liberal democracy and within the framework of an authoritarian political system; the USA on the one hand and China on the other are the most striking examples worldwide. The systemic premises of capitalism are: (1) general freedom of acquisition and contract for individuals and associations; (2) guarantee of individual property, including freedom of disposal over the objects of property; (3) release of the individual interest in acquisition and the forces of production from religious, social or state restrictions. Under these conditions, a "market" emerges as an instrument of basically unlimited economic growth.

37 However, the misunderstanding of a European "democratic deficit" even exists in the German FCC. This is evidenced in particular by recent statements by the former Federal Constitutional Court judge Dieter Grimm (Grimm, 1995, 581 et seq.; Grimm, 2014; Grimm, 2015, 325 et seq. Grimm agrees that the early leading decisions of the ECJ, van Gend and Costa, have begun a "constitutionalisation" of the European Treaties, which is associated with a dwindling democratic power of the Member States.

38 Hayek, 1960.

39 Schmitt, 1932. See also: Böckenförde, 1986, 283 et seq. Schmitt's "Concept of the Political" has electrified German constitutional and political science since its first appearance in essay form in 1927. The German-speaking literature has produced an immense amount of treatises on the political, of which the following give a representative analysis: Maier and Vogel, 1988, 440 et seq.; Brunner, Conze and Koselleck, 1978, 789 et seq.; Sternberger, 1978; Ritter, Gründer and Gabriel, 1989, 72 et seq.

40 Freyer, 1956, 76 et seq. On this: Böckenförde, 2011, 64 et seq.

The all-round political compatibility of capitalism arises because the market is not oriented towards specific goals. Increases in prosperity, productivity or the sparking of the spirit of invention are by-products of economic competition, but not its actual goal. A community of states that integrates itself via a common market can therefore initially leave the question of finality open. Nor does economic supranationality require the abandonment of the state. On the contrary, its regulatory potential is needed to guarantee the individual rights that are essential for the functioning of capitalism and to absorb the social costs and external effects of competition. A state that is compatible with capitalism thus sees itself as a catch-all order for the socially indifferent market. The occasional assertion that the expansion of the market economy is automatically accompanied by the death of the state is simply wrong. However, capitalism tends to extend beyond the economic sphere, and also subjects, for example, the formation of public opinion or the distribution of information to the logic of competition. Furthermore, the market reaches beyond national borders. Karl Marx demonstrated this in the *Communist Manifesto*.[41] The economist Fridrich August von Hayek (1899-1992), one of the pioneers of the ordoliberal Freiburg School after the Second World War, was also close to the vision of essentially apolitical cooperation between Europe's sovereign nation states. The basic idea behind this vision is that collective peacekeeping in Europe cannot be based solely on armed force and mutual deterrence. Wars cost money; military resources cannot be built up without financial resources. In a market economy, state revenues are dependent on national economic performance. This relationship draws the economy into politics. Hayek's idea was to subject national economies to joint administration by a supranational authority, at least in those areas essential to the welfare of the people. This would neutralise the destructive politicising elements of cross-border economic competition – the "economic war" as a precursor form of state war – i.e. remove them from the sphere of influence of the states. This approach can be described as "sectoral and functional integration": "sectoral" because it is limited to a specific, clearly defined policy area; "functional" because it is linked to the objective of joint task fulfilment and the resulting synergy effects. Hayek presented his concept, which he christened "interstate federalism", in exile in Britain as early as 1939.[42] As a first step towards economic "federalisation", Hayek recommended the dismantling of customs barriers and, along with this, the liberalisation of the cross-border movement of people and

41 Marx and Engels, 1848: 'The ancient national industries (…) are being supplanted by new industries, the introduction of which is becoming a matter of life and death for all civilised nations, by industries which no longer process indigenous raw materials, but raw materials belonging to the remotest zones, and whose manufactures are consumed not only in the country itself, but in all parts of the world at the same time. (…) The old local and national self-sufficiency is being replaced by an all-round traffic, an all-round dependence of nations on each other. And as in material production, so also in spiritual production (…)'. This development '(…) pulls all nations into civilisation through the infinitely facilitated communications (…). (…) It forces all nations to adopt the bourgeoisie's mode of production [the liberal market economy, author's note] if they do not want to perish'.

42 Hayek, 1939, 131 et seq. German version: Hayek, 1952, 324 et seq.

capital, i.e. precisely what a few years later constituted the core area of European integration as the "fundamental freedoms" of the European Economic Community (today: Article 28 et seq., Article 39 et seq., Article 45 et seq., Article 49 et seq., Article 56 et seq. TFEU). As a result of the merger, the states would no longer be able to exert any influence on the communitised economic sectors. The supranational community would step into the resulting sovereignty gap. On the one hand, this would protect economic life from state intervention, because at the supranational level, changes to the jointly agreed market organisation would hardly be possible according to the principle of unanimity. But even more important than this is the fact that the executive authority of the Community (in the EU framework this is the European Commission), as the custodian of the Community interest detached from the Member States, no longer controls the economy according to national criteria, but according to the common objectives agreed by all Member States. National egoisms could no longer have an impact on the economic order. The effect of this integration system is depoliticising because cross-border economic conflicts, which can be seen as the main causes of European state wars, are no longer in dispute. To this end, the common authority, as trustee of the Community interest, would have to be granted a monopoly on decisions regarding inter-state trade conflicts. Hayek hoped that his interstate federalism would lead to lasting, resilient peace in Europe. Looking back from the perspective of 2024, the prophetic power of Hayek's design can only be praised. It is ultimately based on Hayek's unarticulated but well-considered insight that the flip side of the political and a possibility that can never be ruled out is war. This justifies the seriousness of the examination of the political, as conducted by the sciences of politics and public law.

2.1.3. The legal shape of the European Union: insights from the Future of Europe Conference

The legal form of the European Union will not be directly changed by the FoEC (see above). However, the call for a European Convention following the conference documents aims at finally overcoming the nation state, understood as the primary civic space, in Europe. Europe's as yet unfinished farewell to the political is to be brought about in the coming years. The collective threat to which all states of the Union are exposed by Russia's aggressive imperialism could create a momentum for the implementation of federalisation ideas that has not been seen in this form since the end of the Second World War. In order to understand what the call for a European convention refers to, it is necessary to return to the problem of the political and, in particular, its relationship to the nation state. Just as at the possible end of the development of the European state, so too at its beginning was the will and the necessity to overcome the political. Medieval European society was pervaded by feuding, i.e. by the logic of feuds and enmities. Since there was no stable, centralised and bureaucratized system of offices with a monopoly on the use of force and jurisdiction – in other words, what is today called the "state" – in Europe at that time, and

since it therefore depended on chance whether well-meaning rulers sought a balance between rule and justice (which often failed), contemporaries were faced with the existential question: How can we effectively prevent people from killing each other in the long term? This is the question of taming the political. The nation state of modern Europe is one such attempt. Its roots go back to the 13th century, when the European peoples began to define themselves no longer as a "church", i.e. as a united Christianity vis-à-vis other religions, especially Islam.[43] With the decline of the Roman church into nepotism, simony and extravagance, Europe discovered the ethnically perceived nation as the new paradigm of political identity. Thus, alongside the church, the modern, centralised nation state emerged, based on a standing army, ongoing taxes and specialised bureaucracy.[44] Not all European states define themselves according to ethnic criteria, but the dominant model of political order of the modern era is the nation united in the state. The "state" can be defined as a unit of will and action of a people that has achieved political consciousness, initially under monarchical and later democratic sovereignty.[45]

The history of the nation state is well known. This form of political order has not only failed to pacify Europe, even in its democratised version, but has led to even more cruel and extensive wars than was ever conceivable under the dynastic feuds over thrones and regalia of the Middle Ages. After 1945, Europe embarked on a radically new path. What was now needed was a model of order that could replace the state. The precedents of church, state and empire could not be relied upon. They had all outlived their usefulness, not to mention the ancient Greek polis and the Roman republic. But what was to take the place of the state? The initiators of the European integration process after the Second World War took advice from leading economists of the interwar period. In addition to the aforementioned Friedrich August von Hayek, these were: Ludwig von Mises (1881–1973)[46], Joseph Schumpeter (1883–1950)[47], and Karl Polanyi (1886–1964)[48], to mention just the most important persons. They all came from the area subject to the Habsburg monarchy until 1918. They were all cosmopolitans and European patriots. They proposed a system of cooperation entirely market-oriented. Thus, they placed the individual, rather than the nation, at the centre of the framework of government institutions. In this system, the state is a function of satisfying individual needs. The sovereign regulatory power must ensure that the market mechanisms do not become dysfunctional. As has been seen above (...), Hayek's draft of an "interstate federation" reads like a blueprint for European cooperation after the Second World War. Ordoliberal market liberalism is

43 Roth, 2011. Ever since the Middle Ages, "Europe" has always been the object and ideological horizon of constitutionalisation efforts. See the treatise on constitutional history by: Thieme, 1997.

44 This development was masterfully traced and sociologically explained by Max Weber (Weber, 2002) From the more recent literature on constitutional history: Reinhard, 1999.

45 Isensee, 1989, 133 et seq.

46 Mises, 2016.

47 Schumpeter, 2020.

48 Polanyi, 1944.

combined with the secular theology of human rights developed in the revolutionary age. In this way, the individual – not the people – becomes the starting point of any higher order, and European nations loose their relevance. However, as Robert Schuman aptly pointed out, these ideas could not be realised in one fell swoop.[49] Initially, the national armaments industries were communitised within the framework of the European Coal and Steel Community in order to pave the way for a European Defence Community and thus force cooperation between Germany and France, who had just been fighting each other as "hereditary enemies". After the EDC failed in August 1954 due to the refusal of the French National Assembly, the Treaties of Rome of 1957 formed within six European states[50] European communities to complement the Coal and Steel Community for the civilian use of atomic energy and the establishment of a single European market: the European Atomic Energy Community (EAEC) and the European Economic Community (EEC). The European Free Trade Association (EFTA) developed alongside the European Communities[51]. Among the Soviet-dominated states of the European "Eastern Bloc", the Council for Mutual Economic Assistance (COMECON) had already been created on 18 January 1949 in response to the American Marshall Fund (opened to non-European states in 1962, dissolved on 28 June 1991). As a result, there were three economic areas in Europe until 1991, although apart from one case – Finland, as an EFTA Member State, had signed a cooperation agreement with COMECON on 16 May 1973 – they did not cooperate with each other. At the level of organised free trade, the political division between the states allied with the Soviet Union or the USA and the "non-aligned" states that emerged after 1945 was reflected quite precisely in the Europe of the

49 European Union, 2024.

50 The founding members of the ECSC, EAC and EEC are: Belgium, (West) Germany, France, Italy, Luxembourg and the Netherlands. In 1973, Denmark, Ireland and the United Kingdom joined; Norway rejected accession after successfully completing accession negotiations. Greece followed in 1981, Spain and Portugal in 1985. In 1995, the European Union was expanded to include Austria, Finland and Sweden, followed in 2004 by Hungary, Poland, the Czech Republic, Slovakia, Slovenia, Malta, Estonia, Latvia, Lithuania and Cyprus. In 2007, Bulgaria and Romania were added to the Union, followed by Croatia's accession in 2013, the last enlargement for the time being. On 1 January 2021, the United Kingdom completed its withdrawal from the Union, which had already been decided in 2016. The Swiss population rejected EU membership in a referendum in 1992. In 2015, Iceland broke off its accession negotiations with the EU, which had started in 2010. Candidate countries (as of March 2024) are: Albania, Bosnia-Herzegovina, Georgia, Moldova, Montenegro, North Macedonia, Serbia and Turkey.

51 EFTA was founded on 4 January 1960 between Austria, Denmark, Norway, Sweden, Switzerland and Portugal. Finland became an associate member in 1961 and a full member in 1986. Iceland joined in 1970, Liechtenstein in 1991. The United Kingdom left EFTA in 1973, Portugal in 1986, Finland, Austria and Sweden in 1995 after their respective accession to the European Communities and the European Union, so that today (March 2024) only Switzerland, Liechtenstein, Norway and Iceland remain. The Agreement on the European Economic Area exists between the EU and the three EFTA states of Liechtenstein, Norway and Iceland, whereby the EFTA states mentioned are included in a deeper European free trade area. Switzerland is excluded.

Cold War.[52] The "common market", today deepened into the European single market, became the centrepiece of European integration and still is. A "common market" knows no nations, only individual players and cooperatively organised groups that act like an individual to the outside world. But it is also not in conflict with the state. The concept of the "market citizen" proposed by Hans Peter Ipsen[53], whose preferences are derived from his natural needs and who is therefore apolitical, is perfectly in line with the logic of European economic integration.[54] The market citizen – like the homo oeconomicus as known in political economy – purports individual likes and dislikes, which may well be altruistic in nature, but which exist alongside and to some extent independently of national affiliations and loyalties. Ipsen understood the concept of the market citizen purely pragmatically, but its extraordinary resonance in German European legal scholarship is due to the utopian associations reflected in it. If we could achieve a state in which the market citizen replaces and consumes the state citizen (the "bourgeois" replacing the "citoyen"[55]), a world freed from national, ethnic and religious hatred would emerge: a world in which there is still affection or aversion, love and hate, good and evil between individuals, but on a purely personal level, not as a divide that separates nations from one another. It would be something like the "end of history". This market system will be complemented by human rights, being in itself unpolitical.[56] They protect the individual as a legal entity isolated from others and self-referential. A government system based on the market and human rights cannot be a centralised law enforcement structure like the nation state of modern times. It is a multipolar negotiating forum in which the relationship between individual interests and the common good must be constantly renegotiated. In contemporary administrative law, this structure is described as a "governance system".[57] It is no coincidence that cybernetic and governance theory approaches, supplemented by deliberative communication theories, have dominated legal and political science theory since the 1970s.[58] In close relation to anarchistic concepts, they describe the abolition of the foe, i.e. an anti-political approach. The Brussels utopia of a well-ordered government through market and human rights,

52 The fact that the original EFTA members Great Britain, Denmark and Norway – as well as Iceland – were not non-aligned, unlike Switzerland, Liechtenstein, Austria, Sweden and Finland, was probably a not insignificant motive for these states to enter into accession negotiations with the European Communities and, in the case of Great Britain and Denmark, to join. Norway and Iceland were left out, so that the economic integration structure during the Cold War was not congruent with the political alliance integration structure – a contradiction that did more harm to EFTA than to the EC.

53 Ipsen and Nicolaysen, 1964, 339 et seq. On the further reception of the term in German European law scholarship: Oppermann, 1988, 87 et seq.; Schönberger, 2005, 1 et seq.

54 Sharp critique: Albert, 2009.

55 Smend, 1968, 309 et seq.

56 The conceptual history of human rights in detail: Stourzh, 1989; Oestreich, 1978.

57 For an overview of the current "interdisplinary" approaches in German legal administrative science see: Schaefer, 2016.

58 Mayntz and Scharpf, 1995.

"eternal peace" as already dreamed of by Immanuel Kant[59], fits in seamlessly with governance cybernetics. In this utopia, there are no insoluble conflicts. The state makes itself superfluous, but not by virtue of a Marxist-Leninist "dictatorship of the proletariat", but by people's understanding that prosperity, freedom and civic participation work better without the state than with it. The state would, certainly, continue to exist in its external form, probably for decades and centuries to come, just as a shadow of the medieval church survived the Middle Ages and is still visible today. But the state would gradually lose its function as the primary power of order and legitimisation. Sooner or later, it could no longer be seen as the primary republican space if the "citizens of the Union" perceived themselves as participants in a common European sphere of prosperity. Transcending states and peoples, the market citizen would develop new, supranational forms of participation. These forms are "democratic", but in a pre-modern and non-state-related republican sense, according to the Roman motto: *quod omnes tangit, ab omnibus approbetur*. In other respects, however, the freedom of the market citizen in the European internal market is an individualistic freedom.[60] The Treaty of Lisbon has set the first milestones in this direction; the FoEC's constitutionalising approach fits perfectly into this context.

2.1.4. The European integration work as a functional integrative association

The constitutional policy demands which followed the FoEC contradict a European law policy narrative that has taken hold in Germany since the 1960s and is associated with Hans Peter Ipsen.[61] Ipsen, one of Germany's earliest scholars of European law and for a long time its pioneer, coined the term *Zweckverband funktioneller Integration* (functional integrative association) in 1964 after many years

59 Vorländer, 1964, 195 et seq.

60 On this differentiation: Isensee and Kirchhof, 2005, 3 et seq.

61 Current European law scholarship has moved away from Ipsen's conceptualisation, but the anti-federal aspect contained in the "associaton of functional integration" continues to drive the German debate. On the state of the discussion: Di Fabio, 2022, 1 et seq.; Fricke, 2021, 561 et seq.; Kube and Schorkopf, 2021, 1650 et seq.; Mayer, 2021, 16 et seq.; Nettesheim, 2020, 181 et seq.; Ruffert, 2020, 1777 et seq.; Schorkopf, 2020, 3085 et seq.; Steinbach, 2022, 1 et seq.

of preliminary considerations[62], inspired by the international law expert Hartwig Bülck.[63] With this term, Ipsen referred both de Gaulle's "Europe des patries" and Coudenhove-Kalergi's "United States of Europe" to the realm of illusions. Ipsen argued that the European Communities (ECSC, EAEC and EEC) were associations for the pursuit of exclusively economic purposes. In Ipsen's opinion, the European Communities can neither be regarded as a federal state nor as an international organisation. A classic-style international organisation does not have the far-reaching legislative powers of the Communities and does not require legal harmonisation at national level. Nor should the Communities be described as state-like entities (federal states) using the terminology of classical state theory. This reservation extends particularly to the principle of democracy. The Communities derive their raison d'être exclusively from their constituent Member States, not from the demos. States require democratic legitimation because they can appropriate their competences themselves within the framework of their political mandate as defined by constitutional law, i.e. they possess the *Kompetenz-Kompetenz* (the competence of being competent). In contrast, the scope of powers of the Communities is precisely defined by the founding treaties (primary law), so that there is no political discretion and decision-making leeway for Community power. The principle of conferral (Article 5 paragraph 1 TEU) therefore replaces the principle of democracy as a prerequisite and condition of all Community action established by the constitutions of the Member States. According to Ipsen, a Community act outside the basis of powers laid down in the treaties must be regarded as an ultra vires act. Community action outside the competences established by the treaties also runs counter to the principle of democracy at the constitutional level, and therefore constitutes a violation of national constitutional law. Ipsen attests that the Communities are apolitical in nature due to their purely economic purpose. However, it cannot be ruled out that, as a result of the deepening economic cooperation between the Member States, a spillover to a political community will

62 Ipsen himself referred to the structure of the European Communities in a contribution to a discussion at the annual conference of German constitutional law teachers in 1959 (Ipsen, 1959, 86 et seq.). Further statements on the subject: Kaiser, 1959, 88 et seq.; Köttgen, 1961; Bülck, 1963.

63 In 1972, Ipsen presented the first monumental presentation of the European Community law in force at the time in German: Ipsen, 1972. The entire work underpins Ipsen's special-purpose association thesis. The genesis of the term was already well advanced at this time. Ipsen had first commented on European integration at the German constitutional law conference in 1959. At that time, the question had been discussed (Erler and Thieme, 1959, 7 et seq., 50 et seq.; cf: Ipsen, 1959, 86 et seq.). Ipsen spoke out vehemently against the transfer of the democratic and constitutional standards valid in the constitutional framework to the European Communities. This did not mean that these principles should not apply to the Communities, but that they should be adapted to the specific characteristics of the Treaty Community. Ipsen first explained what this meant in principle in 1964. Ipsen's conception of the European Communities as "special-purpose associations of functional integration" also dates from this year: Ipsen 1964, 1 et seq.; Ipsen, 1965, 1 et seq.; von Caemmerer, Schlochauer and Steindorff, 1966, 248 et seq.; Ipsen, 1967, 358 et seq.; Ipsen, 1968, 441 et seq.; Ipsen, 1969.

take place at some point.[64] Of course, according to Ipsen's logic, legal recognition of this change in nature presupposes the re-establishment of the Community by means of consenting legal acts by all Member States.

In contrast, the pre-federal character of the ECSC had already been postulated in the Federal Republic of Germany immediately after its foundation in 1951. In addition, European integration in Germany was accompanied from the outset by a romanticising literature that indulged in fantasies of a restoration of the Carolingian-style Roman Catholic West and for this reason alone rejected a unification that remained economic.[65] The diplomat and university lecturer Carl Friedrich Ophüls (1895-1970) was particularly prominent in the federalisation debate. As head of department for general international law at the Federal Ministry of Justice and later as head of department at the Federal Foreign Office, Ophüls accompanied the formation of the Coal and Steel Community from the German side. Ophüls saw in the Community organs analogies to the German federal state organs: the Joint Assembly corresponded to the German Bundestag, the Council of Ministers to the Bundesrat (the representative body of the German states at federal level), the Treaty Court to a supreme constitutional and administrative court; all of this ultimately established a separation of powers similar to that existing in the national framework.[66] Ophüls' thesis is not meant to be descriptive, but prescriptive. It insinuates that a supranational community organised along the lines of a federal state must develop from an international organisation into a federal state, even if – like the ECSC – it does not yet have the corresponding powers at the time of its foundation. Reading between the lines of these statements, one reads that integration aimed at the formation of a federal state is in the interests of the founding states and that no further acts of legitimation derived from the states are therefore required in order to advance the development of the federal state through secondary Community acts or a dynamic jurisdiction of the Treaty Court. The consequence of Ophüls' approach is that the "levers of integration" (*Integrationshebel*, a term coined by Ipsen[67]) necessary for federalisation are already assumed to exist in principle in the ECSC system.

64 Ipsen held on to his view until the end of his academic career in the 1990s. According to Ipsen, even the integration push triggered by the Maastricht Treaty did not create a spill-over effect, i.e. it did not turn the European integration project into a political community, let alone a state. Ipsen was quite critical of the Maastricht judgment of the BVerfG (Ipsen 1994, 1 et seq.), but in this decision the BVerfG went a long way towards Ipsen's conception of European law (BVerfGE 89, 155).

65 For example, the writer Reinhold Schneider, who was very popular in the 1950s: Schneider, 1977, 420 et seq.

66 Ophüls, 1951a, 289 et seq.; Gophüls, 1951b, 381 et seq.; Ophüls, 1951c, 693 et seq.; Ophüls, 1952, 161 et seq. Ophüls' contributions were the first academic statements on the legal character of the Coal and Steel Community in the Federal Republic of Germany and therefore shaped the initial German perspective on the treaty community. Ophüls had also been involved in the planning of a European army on the German side since 1952. Even after Ipsen's unity of purpose theory had gained ground in German European legal scholarship and had become the prevailing opinion, he adhered to his federalisation thesis (Kaiser, 1965, 229 et seq.).

67 Ipsen, 1964, 1 et seq.

It made sense to transfer the federalisation scheme developed by Ophüls for the Coal and Steel Community to the EEC and the EAEC. Walter Hallstein, the first President of the EEC Commission, advocated this with verve. Hallstein coined both the concept of the European Communities as an "unfinished federal state"[68] (*unvollendeter Bundesstaat*) and the concept of a "community under the rule of law" (*Rechtsgemeinschaft*)[69]. But Ipsen considered Ophüls' and Hallstein's doctrines to be indefensible. The will of the treaty states had not been directed towards the establishment of a pan-European federal state. Rather, the intention was to transfer certain sovereign tasks in the area of economic law to a supranational organisation for independent execution. The Community was an economic association, not a state.[70] There is another point: the controversy between federalists and sovereigntists is not an academic gimmick. At its core, the debate revolves around the political shape of the European integration project: its finality. It is very serious. A federal state can only exist on the condition that its Member States are politically homogeneous.[71] States that unite to form a higher political entity must therefore be founded on the same constitutional principles. Otherwise, the federation will fail. The terrible wars surrounding the disintegration of the former Yugoslavia have recently shown us where this can lead, but the military and economic frictions in the post-Soviet space also bear witness to the consequences of a failed federalisation project. Of course, the debates of the 1950s and 1960s were not yet able to refer to this, but they were aware of the American War of Secession and the Swiss Sonderbund War as examples of 19th century wars of federation. The academic protagonists of the Hamburg and Frankfurt schools of European law were well aware of what is equally obvious to us today: the prerequisites for a federal union – political, economic and cultural homogeneity of the Member States – cannot be enforced, but only come about, if at all, in an open process that sometimes takes many decades. Accession procedures by which states with less connectivity join the integration grouping tend to delay the emergence of a sufficient

68 Hallstein, 1969; Hallstein 1979, 341 et seq.

69 Hallstein, 1969. On this: Bogdandy, 2018, 675 et seq.; Calliess, 2014, 63 et seq.; Schorkopf, 2011, 323 et seq.; Voßkuhle, 2022, 33 et seq.; Zuleeg, 1994, 545 et seq;

70 Ipsen, 1969. A border crosser between the two schools of European law was the Frankfurt international law expert Hans-Jürgen Schlochauer (1906-90), who initially defined the ECSC as a "special-purpose association of federal character" (Schlochauer, 1952), but also wrote of a "federal order" (Schlochauer 1951).

71 Heller, 1928, 421 et seq.; Schmitt, 1928, 231 et seq. In the post-war German legal reasoning, homgeinity is substituted by a set of constitutional core values to be accepted by each citizen: Isensee, 1979, 131 et seq. Critical overlook: Grawert, 2012, 189 et seq. The German Basic Law contains an explicit federal homogeneity clause in art. 28 para. 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. In county and municipal elections, persons who possess the citizenship of any Member State of the European Community are also eligible to vote and to be elected in accordance with European Community law. In municipalities a local assembly may take the place of an elected body.' Art. 2, 3 TEU in conjunction with the TEU preamble read as homogeneity provisions under Union law. The procedure under Art. 7 TEU refers to this.

level of homogeneity throughout the Community and postpone federalisation. For this reason, the simultaneous enlargement and deepening of an association of states is impossible. If a forced federation fails, it can end in a humanitarian catastrophe; exceptions, such as the peaceful separation of the Czech Republic and Slovakia, confirm the rule. Hallstein, Ophüls and their fellow campaigners wanted to force a rapid federalisation, according to the accusation of the opposing party, although even among the six founding states of the ECSC at the beginning of the 1950s the essential homogeneity did not exist (and still does not exist today). This could only lead to the failure of the integration project. Actual developments proved this: as early as 1954, the European Political Community and the European Defence Community failed because the French National Assembly said no, which incidentally paved the way for the military integration of the Federal Republic into NATO. Forty years later, the Maastricht Treaty met with fierce resistance in France, Denmark and other EC Member States. The European Constitutional Treaty was also rejected by the French and Dutch in 2005; a referendum in Luxembourg, which was no longer held, would probably also have had a negative outcome. Ipsen's special-purpose association approach, on the other hand, allows for integration alliances of varying density and finality, sometimes referred to as "variable geometry" or "multi-speed Europe".[72] In this respect, different demands are placed on the level of homogeneity of the states. The formation of a common market is already possible between states that are linked by close trade relations, whereas an economic and monetary union requires significantly more intensive economic equality between the participating states. Finally, a political union is based on preconditions that the FCC specified in more detail in its Lisbon decision (see 3. below). With the Copenhagen accession criteria and the Maastricht criteria for economic and monetary union, the Union has formulated homogeneity conditions for accession candidates, which at the same time document a certain level of integration of the Union of Europe. The political shape of contemporary Europe takes very different forms. Not all EU states are members of the Euro zone and the Schengen area; the European Economic Area (EEA), on the other hand, extends beyond the EU and includes economically significant non-EU states such as Norway and Iceland. EU accession candidates and states associated with the EU or the EEA have the opportunity to prove themselves with regard to the homogeneity criteria demanded by the EU and also form strategically important bridges to areas outside the Union.

According to Ipsen's ideas, the concept of "functional integration" fulfilled several functions: Firstly, it was intended to fend off Ophüls' and Hallstein's federal state theory approaches, which aimed at a gradual replacement of the original sovereignty of the Member States by the European Communities. Secondly, the finality of the European integration process was to be kept open, an automatism from a special-purpose association to a federal state was to be denied. Thus, Ipsen's concept

72 In his groundbreaking 1972 textbook on European Community law, Ipsen speaks of communitisation as an "open system" (Ipsen, 1972).

is also prescriptive, not descriptive. The problem, however, was that the descriptive component of the unity-of-purpose theory could not fully capture the reality of European integration as early as the mid-1960s. In the decades that followed, the gap between the legal principles derived from the unity of purpose theory and the actual state of integration grew ever wider. Nevertheless, Ipsen recognised what is still not clear to many of today's constitutional and European law scholars: the Union is a work of depoliticization, which is why the categories of state theory cannot be applied to this phenomenon. In Germany, the terms "neutralisation" and "depoliticization" are primarily associated with Carl Schmitt and his students (above all Ernst Forsthoff), but Ipsen was not a student of Schmitt[73]. The political science basis of Ipsen's theory of unity of purpose is functionalism, as outlined by the Romanian-British political scientist David Mitrany (1888–1975) in his influential work *A Working Peace System* from 1943.[74] Mitrany's account reads in parts almost like a sketch of European unification *avant la lettre*. Supranational communities, as envisaged by Mitrany, are based on the authorization of Member States to exercise sectorally defined sovereign powers, and their performance of tasks is dependent on and limited by the sovereign powers delegated to them, in line with the principle of conferral. The level of legitimacy required by a supranational community flows exclusively from its Member States; the Member States are and remain the primary democratic area. According to Mitrany's concept, autonomous or secondary legitimation, e.g. through a parliamentary assembly or similar attached to the Communities, is not only unnecessary but even harmful because it can blur responsibility structures. Furthermore, in the case of parliamentarisation or democratisation of the supranational community, a contradiction may arise between the democratically mediated interests of the Member States and an independent interest of the community. This could disrupt the integration process. Of course, a ramification process could not be ruled out, as a result of which an originally technocratic community would grow into a political and federal community. But such a finality is not implied ex tunc in the supranational cooperation that Mitrany has in mind.[75] Applied to the European Communities, this would mean that the Communities are initially

73 Ipsen's academic mentor was the Austrian international law expert Rudolf Laun (1882–1975), who taught at Hamburg University.

74 Mitrany, 1943. At the height of the Second World War, Mitrany wanted to point the way to a practically functioning international post-war order. His writing is directed in particular against utopian federalization approaches in the style of Coudenhove-Kalergi. In the context of international law on the concept of a special-purpose association: Bilfinger, 1951; Schlochauer, 1951; Schlochauer, 1955a, 213 et seq.; Schlochauer, 1955b, 40 et seq.

75 Of course, Mitrany's concept did not remain undisputed. His successors, particularly Ernst B. Haas (1924–2003), applied it to the European Communities and, as early as the mid-1960s, spoke of the possibility of a spill-over effect, whereby an originally strictly functional community could become a federal state (Haas, 1968; Haas, 1964.) The difference between the neo-functionalists and Mitrany lies in the assumption that functional communities contain an impulse towards federalisation, which is why a change in the shape of the community could occur without a new foundation. According to Mitrany and Ipsen, this is not possible.

economic-technocratic, not political or democratic in character. Ipsen did not want to rule out a further development of the European Communities into a federal state, but his special-purpose association theory implies that this can only happen on a completely different treaty and constitutional basis. Ipsen's concept is neither nationalistic nor anti-democratic. It does, however, protect the sovereignty of the Member States against the formation of a federal state against their will, an autonomisation of the supranational sovereignty created by them. In addition, the unity of purpose theory emphasises the apolitical nature of the integration process. In any case, it should be emphasised once again, the democratic standard adopted by the nation-state constitutions should not be applied to it.

Unsurprisingly, Ipsen's theory has had no resonance at Community level. On the contrary, the ECJ has made extensive use of the doctrine of implied powers and in this way substantially deepened its powers beyond the wording of the Treaties (see 3. below).[76] However, the fact that part of the German European law doctrine and, as we shall see, above all the German FCC have followed Ipsen's approach has created a tension between the Luxembourg Court's case law and Karlsruhe's constitutional assessment of it. Ipsen did not allow himself to be deterred by the headwind that blew in his face from Luxembourg, but also from the ranks of German European law scholars. Ipsen's convictions (and those of his students) have not been challenged by the fact that the integration process has progressed step by step beyond the functional integration principle as the ECJ's dynamic jurisprudence aimed at consolidating and deepening integration has progressed. Functionalism is, as shown, originally a political science concept and as such descriptive. It can only provide a satisfactory analytical scheme for the political conditions of European integration as long as no integration density has yet emerged that has fundamentally changed the character and form of the functional integrative association. But Ipsen uses the concept prescriptively. He derives legal conclusions from functionalism. The methodological contestability of this approach need not be discussed in the present context. Ipsen and his students are concerned with showing that the European Communities were originally conceived as functional integrative associations, and that a transition (spillover) from a functional association to a political community, i.e. to a federal state, is therefore not permissible without an additional injection of legitimacy by the Member States through a new foundation of the Community under international law, which must also satisfy the constitutional requirements of the Member States. Ipsen simply turns the tables on his critics: for him, the fact that the European Communities and later the European Union have moved further and further away from the original association of purpose without there ever having been a democratically legitimised redefinition of the finality and organisational structure of the Communities by the Member States is a continuing breach of the law.

76 The application of the implied powers doctrine by the ECJ was commented on early on by Gert Nicolaysen, a student of Ipsen: Nicolaysen, 1966, 129 et seq.

Because the debate on supposed democratic deficits at European level does not sufficiently differentiate between legal, political science and economic perspectives and because the claim to depoliticisation behind the economic integration method ("Community method") is generally misjudged, debates on the democratic capacity of the European Union or on the question of where the focus of this Union should lie – with the states, with regions and countries or with a supranational entity sui generis – are so peculiarly confused and unfruitful. A debate on European democracy and finality that follows the templates of the state and state theory simply misses the point. It must be made clear: the Union does not contradict the continued existence of the nation states that support it and yet are not absorbed into it. Nor is it incompatible with democracy and the rule of law. Of course, the Union and all Member States guarantee procedural principles based on the rule of law as well as fundamental and human rights, but in an order based on economic principles, the primacy of the economy over the law applies. The scope of democracy in the process of European integration is illuminated by Angela Merkel's famous words about "market-conforming democracy" and the "lack of alternatives" to European crisis and rescue policy at the limits of the law. They reveal precisely the logic of the European Union. Merkel has recognised this logic much more astutely than her critics, and the FoEC continues the democratic political narrative of the crisis decade of 2012-22.

2.2. Steps towards a European fiscal union and a single European health protection system

2.2.1. Fiscal union

The level of economic unification in the European Union is determined by the Maastricht criteria for economic and monetary union. These are not economic criteria, but *political* criteria formulated and set by the Member States. There has been much debate about their economic meaningfulness, but this discussion completely ignores the fact that it is not economic performance that is of interest, but the level of homogeneity of those Member States that wish to join a new level of integration by joining the Economic and Monetary Union. Because the Maastricht criteria are of a political nature, there is no contradiction in the admission of states that did not fulfil these criteria at the time of accession – e.g. Greece – nor in the temporary dispensation of individual criteria for individual Member States, e.g. for France and Germany in 2003 by the ECOFIN Council. However, the example of Greece, whose economic situation almost caused the Euro zone to collapse, illustrates the political risk of an "incomplete" federation, i.e. a union of states whose individual members do not all meet the necessary homogeneity criteria. This discussion forms the background to the FoEC proposals for the fiscal federalisation of Europe. If this were to take place, it would represent a further step towards federalisation that goes beyond economic and monetary union. Its risks must be weighed very carefully against the presumed benefits. Because even if politicians like to claim that certain integration

steps are irreversible, this is untrue. Nothing is politically irreversible, but the financial, social and humanitarian collateral damage of the reversal can, as we have seen, be devastating.

European fiscal union is desired and promoted by some Member States. It would bring about a common debt of the European Member States promoting a communitisation of budgetary policy. This is another central focus of the FoEC. This aspect is particularly sensitive for Germany. The fiscal policy debate at European level is as skewed as the debate about the Union's supposed democratic deficit. It is based on the respective interests of the Member States and on Union concerns partly opposed to those. It cannot be denied that states have interests, but they refer to the nation. The European Union as an institution of denationalisation does not recognise national concerns (see 2.1. above). Yet, in the market there are only individual and group interests. An analysis of the advantages and disadvantages of certain European policies must therefore start with the market citizens, not with the states. If it is conducted as an etatist debate, the essentials will be obscured. The point of European integration is precisely that it makes no sense to talk about German, Hungarian, Polish etc. interests. Instead, there needs to be a focus on the social groups that benefit or are burdened by Union measures. Economic networks have long since formed below the level of states and across national borders. They have few in common with national interests but affect the welfare of the European people. Thus, the denationalisation of the budgetary system is part of the logic of economic diffusion. The financial resources of a political system reflect exactly the power relations supporting it. The EU budget is currently based on a multitude of direct revenues, of which traditional own resources make up only a small part. The main financial burden is borne by GNI and VAT-based funds. Article 311 paragraph 2 TFEU stipulates that the EU budget should be financed entirely from own resources. Consequently, there is a prohibition on external financing of the Union enshrined in primary law, but no prohibition on borrowing. However, the Union may only borrow in accordance with the principle of conferral (Article 5 paragraphs 1 and 2 TEU), meaning that the Union does not have its own budgetary powers. It is impossible to understand the excitement in Germany and other net contributor states about 'more debt for Europe' without understanding the political preconditions of economic and monetary union, the further development of which is to be driven by a common EU budget. In Germany, it was above all the former President of the German Bundesbank, Hans Tietmeyer (1931-2016), who dominated the German debate on economic and monetary union in the early 1990s due to his influence on political decision-makers.[77] As early as 1992, Tietmeyer pointed out the pitfalls of a European Monetary Union from the perspective of the German Bundesbank. The Deutsche Bundesbank emerged from the Bank deutscher Länder as the German central bank on 1 August 1957. Its main task is to protect monetary stability. To this end, it is organised as a ministry-free authority (similar to an Independent Regulatory Agency), i.e. it operates independently of the government's

77 On the following: Tietmeyer, 1993, 45 et seq.

or parliament's instructions within the scope of its responsibilities; its internal organisation and procedure resembles a court. The core idea behind the Bundesbank's independence is to prevent political influence on monetary policy. In Germany, this design, which was unusual for its time of origin, met with great approval, as the Germans had experienced two hyperinflations in 1922/23 and 1947/48 with catastrophic social consequences; the middle classes were impoverished as a result. For the Federal Republic of Germany, the independence of the European Central Bank, modelled on the German Bundesbank, has been a *conditio sine qua non* of monetary union. However, the European Monetary Union suffers from the asymmetry of monetary, wage and fiscal policy. At the beginning of European economic integration, it was sufficient to protect the mutual convertibility of European currencies. This is why Article 107 of the EEC Treaty referred to exchange rate policy (i.e. the European payments union) merely as a "matter of common interest". With increasing economic interdependence, a monetary union of the states participating in a common market can result in efficiency gains and positive synergy effects. To date, however, neither fiscal nor wage policy has been communitised. In an exchange rate union, the participating states can combat economic imbalances by revaluing or devaluing their currencies within the common monetary system. In a monetary union, this option is no longer available, as none of the participating countries can pursue an independent monetary policy. If the economic homogeneity between the participating countries is too low, the monetary union can be jeopardised by external economic shocks, i.e. disruptions to the overall economic equilibrium, which affect the countries in the monetary union to varying degrees. We can currently see this in the example of the energy crisis, which is caused by the differing dependence of EU Member States on Russian energy supplies and the differing trade policies of these states towards Russia. The European financial crisis of 2010 et seq. was triggered by the differing degrees to which the Euro countries were affected by the US mortgage crisis. Further economic imbalances can arise from differing wage and price levels in the countries of the monetary union. Wage restraint in one country can clash with extensive wage and social policies in another. If there is also a quasi-federal fiscal equalization (a transfer union), as is the case between the German Länder, the costs of the welfare state can be externalised to the partners of the monetary union. The Federal Republic, with its high level of welfare, has always endeavoured to prevent this. Finally, asymmetries of monetary and fiscal policy remain. As the states of the monetary union can no longer pursue an autonomous monetary policy and also have de facto only limited autonomy in the field of wage and social policy, the demand for fiscal policy measures at national level is increasing, particularly for an increase in national debt. Here it is important to prevent the negative interest and exchange rate consequences of a national debt policy from having to be borne by the partner countries as external effects. As Germany, as well as other central and northern European Euro states, are committed to a culture of budgetary discipline, while the southern European states tend to pursue a spending policy, the rules on European fiscal policy in Article 122 et seq. and Article 311 TFEU are of central importance for Germany.

However, even during the conception phase of the monetary union in the 1990s, Germany realised that the Euro Zone states would possibly have to enter into a fiscal union sooner or later. Because this realization has also reached the German federal government and even, as we will see, the FCC, Germany (with the current parliamentary majority) is submitting to a creeping communitisation of fiscal policy.

2.2.2. The Union's responsibility to protect?

With the Council's Next Generation Own Resources Decision of 14 December 2020, the first steps have been taken towards a change in budgetary sovereignty in the Union. This action was prompted by the Covid crisis, which has massively shaken the economies of the European states since 2020. Subsequently, the Union is now being provided with considerable credit-financed budget funds. This explains the close link between the fiscal policy debate and health management, the communitisation of which is also a central demand of the FoEC. To date, the Union has only had marginal powers in the area of health protection. According to Article 168 TFEU, the Union complements, promotes and coordinates the health policies of the Member States. In addition, the Union cooperates with third countries and international organisations in matters of health protection, but there is no original competence of the Union to formulate a binding Union-wide framework agenda for health policy. During the Covid crisis, this led to very different national disease control strategies, which contradicted, and in some cases undermined, each other. Ultimately, however, it is not just about the aspect of effective disease control, but the example of health protection shows that an authority's responsibility for the health of the citizens entrusted to it can lead to a more comprehensive responsibility to protect.[78] This, again, can extend to other areas of public life, e.g. internal and external security. Ultimately, the responsibility to protect – or more precisely: the synallagmatic relationship between protection and obedience – is a key attribute of the state. This view has been common property of European state philosophy since Thomas Hobbes.[79] The recognition of the government's responsibility to protect leads to a reinterpretation of fundamental rights. Above all, the fundamental right to life and physical integrity (Article 2 paragraph 1, Article 3, Article 6 CFR) might be converted into a duty to protect, on the basis of which corresponding powers of

78 The term "responsibility to protect" originates from international humanitarian law (see: Jessup, 1954, 98 et seq.) and can be applied to the fundamental rights of the Union.

79 Hobbes, 1651.

intervention by the Union can be created.[80] This is demonstrated by the development of fundamental rights in Germany. Starting with the abortion legislation in the 1970s, the FCC has interpreted more and more duties to protect into the fundamental rights of the German Basic Law. It has reinterpreted the fundamental rights meant as pre-state rights of freedom of the citizen against the state – rights that the state does not create, but merely recognises, as they are rooted in the dignity of the human being and are therefore unavailable to the state (Article 1, Article 19 paragraph 2, Article 79 paragraph 3 GG) – into state powers, turning individual rights into an objective set of values behind the constitution and supporting it.[81] With this case law,

80 The development of Union competences from "rights to protect" does not need to be subject to a formal amendment of European primary law. The ECJ might follow the example of the German FCC, which reinterpreted the right to life and physical integrity, as guaranteed by Art. 2 para. 2 GG in form of a fundamental right (which means: a subjective right of the individual towards the state prohibiting legal infringement without due legal basis), as a government power, which is the opposite of a fundamental right. As a consequence, a constitutional provision meant as a right can now legitimise infringements of this very right (BVerfGE 39, 1). This adjudication line has been expanded to further fundamental rights provisions of the German constitution. The latest creation of the FCC is an "ecological subsistence level", derived from the constitutional sustainability guarantee (Art. 20a GG), reading: 'Mindful also of its responsibility towards future generations, the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order.' Art. 20a GG is a merely objective constitutional provision, but the FCC finds an individual right in it. Consequently, the judges conclude a government responsibilty to protect this individual right, so that the German legislator has to follow detailed requirements for climate action which are alleged "constitutional" without being suggested by the text of the constitution (BVerfGE 157, 30). This example shows how a court can partly supersede parliamentary legislation by interpretation of fundamental rights, an example of highest interest for an ECJ which understands itself as promotor of integration.

81 BVerfGE 339 1.

the FCC has made itself the true guardian of the political[82], and also the guardian of the legislature. A similar development can occur in the relationship between the Union and its Member States if the Union is assigned a comprehensive responsibility to protect the life and limb of the Union's citizens and if it is then logically concluded that the Union must also be given the necessary budgetary powers and leeway to be able to fulfil its responsibility to protect. The FoEC has set a milestone here, no more and no less, but the topic is now on the European agenda. It has been framed by the Union in a way that emphasises the communitarisation tendency and will be taken up at the next opportunity in order to achieve further steps towards strengthening the Union at the expense of the states. All this still does not turn the Union itself into a state or a sovereign political entity, but it does drive the depoliticisation process further. To date, budget law has been the prerogative of national parliaments; these are the heart chambers of democracy. Nothing is as controversial as the national budget. The parliamentary budget debate is the general debate of the parliamentary session, in which the political becomes most visible in the form of party-political alliances. There is no such political exchange of blows at Union level. The European Parliament, with its transnational, extremely fragile alliances of MEPs, is no substitute for national parliaments, because it is not and cannot be a forum for the exchange of ideas between government and opposition.[83] It should be remembered that even Mitrany's classical functionalism, taken up by Ipsen's Hamburg school of European law, described the role of a supranational consultative assembly (which is what the

82 Collings 2015. The FCC is a "political court". State and constitutional law, the standard of review of the Constitutional Court, is "political law" in the sense that it formulates the conditions, procedures and powers of the state as a political entity – "homogeneity space" – and within this framework also establishes limits to state influence (Böckenförde, 1986). Constitutional jurisdiction itself acts "politically", i.e. with reference to the unity of the state, by interpreting state and constitutional law and thus implementing the homogeneity requirements on which the state is based, the state powers and the democratic decision-making process. Böckenförde puts this in a nutshell: 'Constitutional jurisdiction can therefore not be an area separated from political dissociations and the dangers associated with them in the same way as the judiciary, which is bound to the limits set by political discourse, is'. However, a constitutional court cannot be a "guardian of the constitution"; this term also comes from Carl Schmitt's constitutional theory (Schmitt, 1931). The "guardian of the constitution" must be an actively acting state organ. Its task is to strengthen the resilience of the constitution. A court – even a constitutional court – cannot fulfil this role for the simple reason that its decision-making powers, like those of any court, are strictly tied to the application and the subject matter of the dispute and are subject to more or less strict procedural requirements. Within the scope of its jurisdiction, a constitutional court may provide the political forces with advice and suggestions, but it can never intervene in the political process on its own initiative. The "guardian of the constitution" must be able to do so, because it is the 'guardian of political unity itself' (Böckenförde, 1986). The concept of the "guardian of the constitution" is closely linked to Benjamin Constant's theory of the *pouvoir neutre* as the fourth, moderating power in the three-power state. On this: Doehring, 1964, 201 et seq.

83 The struggle between government and opposition is identified as the core of the political by: Luhmann, 2000.

European Parliament still is) exactly as it is today.[84] There is neither a government of the European Union nor is there an opposition.[85] This is true even in the light of recent developments, which have led to a strengthening of "populist" right or left wing parties opposing the Union or their countries' membership of the Union, being represented in the European Parliament by their own MEPs. "Eurosceptic" attacks are directed towards the relevant national stage on which their promoters seek to make their concerns plausible. In their view, the Strasbourg Parliament is an extended catwalk for a national beauty contest, not a place of politics. But here, they meet a point. The apolitical character of the European Parliament is not a democratic deficit, but (as shown in 2.1. above) a consequence of the depoliticisation approach inscribed in the Union. The Strasbourg Parliament has more the character

84 The controversy surrounding the so-called Spitzenkandidaten system in the run-up to the last European parliamentary elections in 2019 shows that the leading politicians responsible in the Member States are fully aware of this. At that time, the European Parliament attempted to impose top candidates selected according to ideological principles ("conservative" vs "progressive") on the national heads of government meeting in the European Council in order to create a junction between the outcome of the parliamentary elections and the election of the Commission President. This demand was not accepted by the heads of government, in particular Emmanuel Macron. Macron ignored the leadership claim of the lead candidate put forward by the relatively strongest parliamentary group, the EPP, and insisted on the election of a person with government or political leadership experience, which (in Macron's opinion) was not available in the person of this lead candidate. In the end, Ursula von der Leyen, then German Minister of Defence, was nominated for the post of President of the Commission. This impressively demonstrated that, even after almost seventy years of European integration, the place of politics is not to be found at Union level, and certainly not in the European Parliament, but still with the assembled heads of government of the Member States.

85 Older German European legal scholarship has occasionally compared the organizational structure of the European Community/Union with that of the German Confederation of Princes and Cities, which was constituted as the "German Reich" on 24 April 1871 in the Palace of Versailles. For the German Empire of 1871 also consisted of internally sovereign political units whose political leaders had equal rights. The Prussian King, as German Emperor, had by law only a protocolary precedence over the monarchical heads of state and republican heads of city assembled in the Federal Council (similar to the European Council), although Prussia de facto dominated the Reich from the very beginning (on the organisation of the German Reich on the basis of the Reich Constitution of 24 April 1871). Moreover, the comparison of the German Empire with the European Union is wrong in several respects. Although the Reich was not a state either, but a qualified confederation of states, the aim of the Reich was the national integration of the German people, not depoliticisation. Moreover, the German Reich lived from the strength of the dominant great power Prussia; de facto, it was a Prussia enlarged by the southern German states and Alsace-Lorraine to the exclusion of Austria-Hungary. The European Union, on the other hand, is dependent on a genuine balance of power between larger and smaller European states. There must be no permanently dominant power, otherwise the entire integration project will fail. After all, at the time of the formation of the Prussian-German Empire, the economic and legal integration of Germany was already largely complete or – with regard to the standardisation of criminal, procedural and civil law – could be implemented quickly without major resistance. The unification of Germany, which was only completed with the entry into force of the Weimar Constitution on 11 August 1919 and the creation of a German federal state based on it, was based on the already existing national, economic and legal unity of Germany. There can be no question of this in the European context. Here, even after more than seventy years, the economic and legal conditions for unification have only been imperfectly created; there is no national unity in Europe at all and it will probably never come about.

of a consultative assembly and was originally intended as such, a body oriented towards the substance of the matter – and not towards political conflict – which is intended to provide the Union with additional legitimacy not derived from the Member States (Article 10 paragraphs 2 and 3 TEU). It is to be expected that budget sovereignty transferred from the national parliaments to the European Parliament would perfect depoliticisation. Budgetary issues would then no longer be negotiated in terms of political controversy between the government and the opposition, but would be discussed by the Parliament's vast majority in terms of their benefits for the European integration. Some may well see this as progress and relief, as a desirable objectification of public discourse. In any case, however, this step would definitively depotentiate the European states. This development has been described from the outset by German European law scholars in particular, and some would say it has been written about.

2.3. Market versus values – a struggle of perspectives on European integration

2.3.1. The European integration: an application of ordoliberal theory

It is no coincidence that the concepts of German European law have long dominated the perspective on European integration beyond the Federal Republic. While France and Italy were still completely attached to the nation state, the German nation state was divided into East and West after 1945. As a result of the despair of the own nation, intensive reflection on the "post-national constellation" (Jürgen Habermas) began in West Germany immediately after the Second World War. The emerging Bonn Republic became a testing ground for neoliberal political change, which focused on "prosperity for all". The prosperity formula described the German *Wirtschaftswunder*, and it served for the Bonn Republic as the primary means of

integration instead of national symbolism.[86] The Christian-Democratic Union (CDU) of Konrad Adenauer and Ludwig Erhard, victorious in the first Bundestag election in August 1949, ran on this campaign slogan and laid the foundations for a sustained increase in prosperity. As the CDU/CSU have been the parties of *Wirtschaftswunder* (a development which hardly anybody would have thought possible so shortly after the war), they became the dominant political forces in West Germany and have maintained this position even after the German reunification. One important incentive of the gentle revolution in East Germany in November 1989 was the will of the East German people to take their share of the West German consumer paradise. The prescriptions which the economic spin doctors of liberal post-war Europe enacted over West Germany were the same on the European communities level. Therefore, the CDU/CSU parties became the driving force of both *Wirtschaftswunder* and European integration. It surely helped that the European founding fathers next to Konrad Adenauer – Alcide de Gasperi and Robert Schuman – were also Christian Democrats, sharing their political convictions with the German chancellor. With the exception of the Belgian socialist Paul-Henri Spaak, all the founding fathers of the European integration project were Christian Democrats; the Christian Democratic parties in the Netherlands, Luxembourg and France, but above all the Italian Democrazia Cristiana, supported the integration project. However, while the Christian Democratic parties in Italy, France and the Benelux countries are Catholic-oriented, the German CDU/CSU sees itself as non-denominational. In southern Germany and the Rhineland, the Christian Democrats tend to be Catholic, while in the north and east of the country they tend to be Protestant. This is why the CDU and CSU were able to moderate the various northern and eastern enlargements of the European Communities and the European Union, which took away their specifically Catholic character, and remain

86 Like much of what was implemented in West Germany after 1945, the ordoliberal school originated in the final years of the Weimar Republic, when a fundamental reform of the state was being considered, the implementation of which was abruptly interrupted when Hitler came to power on 30 January 1933. The pioneers of the ordoliberal Freiburg School were the economists Walter Eucken and Wilhelm Röpke as well as the civil law expert Franz Böhm. The Freiburg ideas gained enormous political influence through the CDU politician Ludwig Erhard (1897–1977), father of the currency reform (1948) and the economic miracle, Federal Minister of Economics (1949–63) and Federal Chancellor (1963–66). The spiritus rector of German economic policy was Erhard's state secretary, the Cologne professor of economics Alfred Müller-Armack. Under Erhard's chancellorship, the work of European unification temporarily lost momentum. Unlike his predecessor Adenauer, Erhard was a Protestant and an Atlanticist. He took a skeptical view of the Federal Republic's privileged partnership with France and was more politically inclined towards Lyndon B. Johnson than Charles de Gaulle. He regarded the European Communities as economically sensible, but they should not stand in the way of West Germany's close ties with the United States. For Erhard's successors as Chancellor, the Christian Democrat Kurt Georg Kiesinger (1966–69) and the Social Democrat Willy Brandt (1969–74), European unification was not a top priority either, for different reasons. It only picked up speed again when the Social Democrat Helmut Schmidt and the Liberal-Conservative Valéry Giscard d'Estaing became German Chancellor and French President respectively at almost the same time in 1974. The close Franco-German alliance then continued under François Mittérrand and Helmut Kohl from 1982/83. It also led to a revival of European policy impulses.

the German European party. By the mid-1950s, West Germany was the economic engine of the western half of Europe. It has formed the economic centre of gravity of the European Communities from the very beginning. Ordoliberalism, the German version of economic neoliberalism, had triumphed across the board.[87] Their own nation became secondary for the Germans, as did all other European nations. This change of mentality was supported by a decidedly anti-nationalistic policy of the CDU/CSU. A supranational European community based on the market and human rights seemed to the Germans to be a continuation and welcome addition to their own post-national community.[88] They could count on the support of the smaller states of Western Europe, which were in a similar situation to the Bonn Republic. From a global perspective, post-war Germany is probably the most important, if not perhaps the only example worldwide of a successful neoliberal reestablishment of a political system. This was not what the Germans initially wanted. The historical situation forced them to break new ground. The high level of discipline of the German population and their willingness to forego the siphoning off of prosperity gains without regard for further sustainable economic development led the ordoliberal project to success. Elsewhere in the world, similar attempts have failed spectacularly: in the 1970s in Chile, Argentina and the UK (under Margaret Thatcher), in the 1980s in the USA ("Reaganomics") and, perhaps most spectacularly, in the 1990s in Yeltsin-era Russia.[89] Although conservatives criticised the German development as the "end of the state" (Carl Schmitt)[90], as the victory of industrial society over the state (Ernst Forsthoff)[91] or as the mechanisation of the living environment (Helmut Schelsky)[92], all with a resigned undertone, the development was generally welcomed, especially with regard to its extension to the level of the European communities. Michel Foucault's analysis from 1978/79, which discusses the ordoliberal German state model under the heading of "biopolitics", is particularly apt.[93] Ipsen's term *Zweckverband funktioneller Integration* has already been quoted (see 2.1. above); the first President of the European Commission, Walter Hallstein (who came from Adenauer's circle), spoke sybillically of the European treaty community as an *unvollendeter Bundesstaat* (unfinished federal state) and *Rechtsgemeinschaft* (community of law)[94]. Finally, in the 1990s, Giandomenico Majone reduced the approach described here to the denominator of the "regulatory state"[95]; Paul Kirchhof developed the concept of the

87 Overview of ordoliberal theories and schools: Biebricher and Ptak, 2020.
88 Habermas, 1998.
89 Klein, 2007.
90 Schmitt, 1932.
91 Forsthoff, 1971.
92 Schelsky, 1965.
93 Foucault, 1978/79.
94 Hallstein, 1969, 485 et seq.
95 Majone, 1998.

Staatenverbund (association of states)[96], which still characterises the integration constitutional case law of the FCC today (see 3.).

Hallstein should be discussed in more detail at this point, as his theses show that the ordoliberal approach to European integration did not remain uncontested. As a "professional European" (Ipsen's derogatory title[97]), Hallstein took an affirmative stance towards the formation of a federal state at European level. Based on Ophüls' thesis, according to which a supranational integrative association already had the character of a federal state *in statu nascendi*, i.e. in its (pre-)form as an economic association of convenience, Hallstein (like Ophüls) emphasised the analogies between the European Communities and the classical federal state. According to Hallstein, the current state of the Communities in the 1960s was to be seen as a stage, not the final form of European supranationality. The Member States of the Communities would ultimately have to be amalgamated into a federal state, only then would the stable final state of European unification be achieved. Moreover, the economic cooperation of the Western European states only made sense in the finality of the Union project outlined by Hallstein. One may add: in Hallstein's view, persisting with a common European market would eventually cause the impetus for integration to disappear, because the European peoples do not long for a consumer paradise, but for an occidental community of values.[98] Hallstein's statements found considerable resonance in German European law scholarship. Above all, they were able to tie in with the equally popular thesis of the structural homogeneity of the European to the nation-state principle of democracy.[99] The supranational community that democratic states enter into with each other is a reflection of these states themselves. Thus, the democratic as well as the constitutional and power-sharing requirements derived from the national constitutions for state authority would have to apply equally to the Communities and their institutions. In terms of legal policy, this was diametrically opposed to Ipsen's repudiation of a European catalogue of fundamental rights and a parliamentarisation of the Community. Nevertheless, even Hallstein's "Frankfurt School" did not deny that the time had not yet come for the formation of a federal state at European level and that, for the time being, one had to resign oneself, for better or worse, to an "association of functional integration", but only *faute de mieux*. Thus, around 1970, two more or less irreconcilable German schools of European law faced each other: on the one hand, Hallstein's "Frankfurt School", whose legal policy demands suggested activism on the part of both the legislative and the judiciary to achieve rapid progress towards unification at European level, and on the other, Ipsen's "Hamburg School", which on the contrary insisted on the democratic (re-) legitimisation of all further integration steps, which in the long term entailed the necessity of constitutional amendments as a precondition for Germany's participation

96 Kirchhof, 2009, 1009 et seq.
97 Ipsen, 1970.
98 Hallstein, 1969, 93 et seq.; Hallstein, 1979, 103 et seq.
99 In chronological order: Klein, 1952; Kruse, 1954, 112 et seq.; Friauf, 1960, 81.

in substantial deepening of European integration. It is worth noting that this controversy should not be misunderstood as a political dispute. If we look at the state of opinion at the time from a party-political perspective, we see a great deal of unanimity among all of Germany's leading parties with regard to the fundamental desirability of deepening and expanding the European Communities. Politicians were not interested in the how of this deepening, but only in the whether. Furthermore, all the theories associated with the buzzwords mentioned above have one thing in common: they see the European supranational institutions not as a state, but as a particular form of an association of states beyond the political. The "association of states" secures European peace by overcoming national differences. It overcomes national differences by containing and neutralising the political. The market and human rights are the determinants of the idea of freedom on which Union-Europe is founded.

2.3.2. The European Union as a Commonwealth of values ("community of values")

The European Union has been searching for its identity for some time. The preamble to the TEU and Article 2 TEU contain catalogues of values that represent a cross-section of European constitutional culture. The European treaty legislator weaves garlands of words, unsystematically juxtaposing the value provisions within the aforementioned catalogues without any recognisable priorities or patterns of order. The preamble to the TEU mentions the "cultural" alongside the "religious" and "humanist" heritage of Europe, without making it clear how the "religious" and "humanist" heritage are to be reconciled and how the relationship between the two and the "cultural" heritage, of which they are actually an integral part, is to be imagined. The preamble to the European Charter of Fundamental Rights contains the term "spiritual and religious heritage" in the German version, whereas the English version only refers to "spiritual and moral" heritage. This, too, does not make the definition of the common European foundation of values any more meaningful. The European discourse on values often ends in chatter. A certain clarity would have been achieved by including a reference to God in the preamble to a European constitutional treaty. However, all attempts to establish a religious foundation for the European value system have so far failed due to resistance from France, which insists on its secularism.[100] However, this fails to recognise that a constitutional reference to God does not turn rule into a theocracy. Rather, it is understood as a rejection of the omnipotence fantasies of an unleashed *pouvoir constituant* that is accountable to no one. By referring to God, the constitutional legislator acknowledges the transcendental nature – and thus the limitation – of the constitutional law, a gesture of humility. Values can also be founded on secular grounds. In this respect, it makes sense to interpret the fundamental rights of the treaties and the European Charter of Fundamental Rights as elements of an objective system of values. The FCC has taken this approach in order to derive state protection obligations and powers from

100 Isensee, 2015, 6 et seq.; Durand, 2007, 5 et seq.

the subjective rights of the Basic Law (see above). However, it is doubtful whether the path to a community of values does not hinder rather than promote the European integration project. Although top German politicians also like to profess their commitment to common European values, they often mean something completely different: "value" in the economic sense, i.e. goods, capital, labour, the European single market as a whole.

The ordoliberal theory still characterises the German and, as far as as can be seen, the Western European perspective on the European integration process in general. This is probably the root of the rift between some Central Eastern European states (especially Hungary and Poland) and the Western European EU members with Germany at the forefront. The Central and Eastern European states liberated from Soviet rule joined a European Union that they see as an occidental *Wertegemeinschaft* (community of values) and thus as the greatest possible contrast to the Marxist-Leninist "real socialist" empire of the Soviet type. Their euphoria about integration clashes with the cool rationalism of German ordoliberalism, which sees the values of the European Union, as promised in the preamble to the TEU and in Article 2 TEU, as an accessory, not as the essence of European integration. From a legal point of view, there is a dispute as to which provision in the TEU forms the normative foundation of the Union: Article 2 TEU or Article 3 TEU? For Germany and the Western Europeans, the European Union is a single market based on individualistic values; conversely, some Eastern European states probably see it as a community of values with anti-socialist (and only to this extent market-liberal) characteristics. This conflict of interpretation takes on political characteristics, as it has the potential to permanently and sustainably divide Western and Eastern Europeans, but the apolitical character of the Union's institutions is not affected by this. Some critics of the Future of Europe process have criticised the fact that there was no mention of strengthening the concept of subsidiarity (Article 5 paragraph 3 TEU). Furthermore, respect for the sovereignty of the Member States (Article 4 paragraph 2 TEU) was neglected. From the above explanations, it is easy to see that this was not and could not have been the intention of the initiators of the process. Rather, from a "pro-European" perspective, the aim is to achieve a new deepening of the internal market and a centralisation of the protection of fundamental and human rights at Union level.

3. The "German Perspective" on the Future of Europe Conference in Light of the Federal Constitutional Court's Adjudication Lines

3.1. The FCC as a key player in German European policy

As explained at the outset, there is no single German perspective on European integration issues. The point of the integration process is precisely the displacement of national thinking from European policy (see 2.2. above). How the FoEC is judged in Germany depends on the actors being asked about it. From a legal perspective, the key player on the German side can be clearly identified: the Federal Constitutional Court. Since 1967, it has supported the European integration process in part, but has often been very critical and obstructive. The following section provides an overview of the basic principles of Karlsruhe case law on constitutional integration law. First, however, this case law requires a fundamental classification. Since the FCC's notorious Maastricht judgment of 12 October 1993[101], a view has emerged in Germany that sees the FCC as an opponent of the ECJ. Another opinion highlights the FCC as the guardian of German national sovereignty. Both approaches cannot convince. Neither a nationalist nor an anti-integrationist theory can be justified on grounds of the adjudication lines drawn in Karlsruhe, if only because behind the few barriers that the FCC has placed on Germany's participation in the European Union, it has always emphasised and strengthened the Federal Republic's broad powers of participation in integration affairs. Reservations against an unconditioned principle of integration (sometimes falsely referred to as "open constitutional state", *offener Verfassungsstaat*[102]) made from a constitutional point of view may sometimes give the impression that the FCC is in a kind of dispute with the ECJ. This impression is also wrong and it is quite intriguing that law experts in particular have spread it. There can be no competition between Karlsruhe and Luxembourg, if only because the case law of the two courts is subject to different standards of review. The FCC examines only *national law* according to the German Basic Law[103], while the ECJ´s jurisdiction is limited to *Union law*, more precisely: to the control of acts of secondary and tertiary law against the standard of primary law. The only link between the national and the ECJ´s standards of review is the preliminary ruling procedure according to Art. 267 TFEU.[104] Although EU law takes precedence over national law, the former does not override the latter. Conversely, no unilateral reservations can be derived

101 BVerfGE 89, 155.

102 Di Fabio, 2001.

103 More recently, the FCC has in some cases integrated the European Charter of Fundamental Rights into the standard of review of the Basic Law BVerfGE 152, 152; 152, 216.

104 On january 14, 2014, the FCC issued its first order for reference pursuant to Article 267 TFEU (BVerfGE 142, 123). Only with this order did the FCC make it unmistakably clear that it is willing to accept a certain priority of the ECJ in the multi-level system of european legal protection.

from national law in relation to Union law. All of this is basically undisputed and has never been taken into question by the FCC. However, with its case law on the preconditions of European integration derived from constitutional law, the FCC has long assumed the role of an opposition on European issues that has not formed in the German Bundestag, the place of the political in the Federal Republic. European integration has never been seriously controversial in Germany for the reasons mentioned above (see 2.2. and 2.3.). To this day, all the mainstream parties support it. The FCC has thus adopted a political position without exceeding its competences. Karlsruhe limits itself to deriving constitutional standards for the European integration of Germany from the Basic Law, but this type of constitutional jurisprudence has an eminently political subtext.[105] On several occasions, the Karlsruhe court has abandoned the German integration consensus that otherwise prevails and reminded us of the relevance of the state and the nation. With its rulings, it binds the federal government and the federal legislature, which (sometimes only reluctantly) implement the guiding principles from Karlsruhe. The most important consequence of this at present is that the FCC determined in its Lisbon ruling of 30 June 2009 that the level of integration achieved with the Lisbon Reform Treaty is the maximum of supranational subordination that is still compatible with the current Basic Law.[106] The participation of the Federal Republic in further substantial reform steps would require a new constitution. A simple constitutional amendment would no longer be enough. German constitutional law has a provision known as the "eternity clause" in Article 79 paragraph 3 GG, according to which constitutional amendments are materially bound to the principles of human dignity and the major principles of state (i.e. federalism, democracy, rule of law). In the opinion of the FCC, the Federal Republic would forfeit its statehood in the event of further substantial deepening of European integration and become subject to a European federal state, even if this federal state might continue to be called the "European Union". However, the BasicLaw does not permit this. A new constitution would therefore have to be enacted that would authorise the Federal Republic to give up its sovereign statehood in favour of joining a European federal state. Article 146 GG puts such a constitutional replacement within the realm of legal possibility, but politically it is unthinkable. Nobody in Germany is currently thinking of replacing the current Basic Law, which has proven itself for almost eight decades now and was not even structurally changed by the

105 Cum grano salis the FCC's case law on matters of constitutional law relating to European integration can be summed up as follows: *the political meets the non-political*. For decades, the FCC's constitutional jurisprudence on European integration has provided a forum for arguments sceptical of integration that were not heard in the parliamentary decision-making bodies due to a lack of support from the parties represented there. It has thus acted as the de facto mouthpiece of an opposition that was not present in Parliament on fundamental questions of European policy. It has often overshot the mark by failing to sufficiently appreciate the non-political nature of the common European market and its framework institutions. But it is precisely this deliberate disregard of the non-political aspects of European integration that constitutes the political subtext of the FCC's case law.

106 BVerfGE 123, 267.

accession of the East German Länder on 3 October 1990. A political process aimed at recreating the constitution would have unforeseeable consequences and would perhaps paralyse the country for decades.[107] In practice, however, this means that the German government cannot support any substantial reform steps at European level, let alone treaty amendments. The FoEC with its indirect approach, which is not aimed at hard legal consequences or even reforms of primary law, is therefore also a consequence of the restrictions formulated in Karlsruhe on Germany's ability to act on fundamental European policy issues. Germany can currently only talk, not act, in European policy. However, it is not entirely out of the question that Karlsruhe will at some point come to a reassessment of Germany's constitutional leeway. The case law of the FCC to be outlined below, which probably best defines a genuinely German perspective on the integration process, is rich in surprising twists and turns.

3.2. Basic lines of the Karlsruhe integration case law

3.2.1. The general problem: balancing the prevalence of European law with constitutional requirements to protect fundamental rights and state principles

In retrospect, it is surprising that the FCC ignored for years the fundamental change in integration policy that has taken place at the level of the European Communities since 1963/64, forced by the ECJ, and then apparently had difficulties in correctly classifying its constitutional significance. The six signatory states of the Treaty of Rome wanted to create regional international economic law with a joint commission and a treaty court, the ECJ based in Luxembourg. Politically, Walter Hallstein's "unfinished federal state" was perhaps already being considered in the mid-1950s, but this did not emerge in the European treaties of March 1957. It is therefore all the more astonishing that the ECJ created this unfinished federal state virtually overnight with two leading decisions from the early 1960s: van Gend en Loos and Costa/ENEL. The Van Gend and Costa judgments are to the European legal community what the Marbury v Madison case is to the USA: the birth of a self-contained federal legal system. In the Van Gend case, the ECJ rejected the international character of Community law.[108] The European Economic Community constituted a sui generis legal order. From this, the Court deduced the direct effectiveness of Community law in the legal area of the Member States, the possibility of establishing individual rights of market citizens through European law, the possibility of implicitly anchoring subjective rights in European primary law and the obligation of national courts to directly apply Community law. All of this was now also linked to the right of market citizens to bring an action before national courts – dependent upon subjective rights being affected – for the violation of Community

107 As a cautionary tale serves the amendment procedure of the Swiss Federal Constitution which lasted over two decades until 1999.

108 ECLI:EU:C:1963:1 – van Gend.

law by national authorities. In the Costa case, the guiding principles from van Gend were supplemented by the statement that the primacy of Community law over national law implies a prohibition of confusion directed at the Member States, which is why European Community law itself must prevail over national constitutional law (or national law at the highest level).[109] In the early ECJ's adjudication on the status of Community law, there are echoes of both Ipsen's association theory and federalist concepts, in particular the concept of the Rechtsgemeinschaft, which was later prominently advocated by Hallstein. Both approaches can be interpreted in the concept of the "sui generis legal order", the key formula of the van Gend decision, depending on the perspective. On the one hand, the anti-federalists and functionalists could see themselves confirmed in the fact that the character of the Communities as functionally independent, autonomous supranational administrative authorities was approved. On the other hand, the federalists could also be satisfied, as the Luxembourg judges' insistence on the sui generis character of the Communities provided the decisive lever for integration that was needed for the further federal development of Europe. The same can be said of the Costa judgment's postulation of the comprehensive primacy of Community law over national law. Perhaps this also explains why both decisions have met with surprisingly little resonance in German constitutional and international law doctrine. Since all factions felt vindicated in their views, the more recent Luxembourg developments may not have been considered worth mentioning. However, the early ECJ case law did not yet recognise any fundamental rights on the community level, as these were not explicitly provided for in the treaties. In its early case law, the Luxembourg Court of Justice still shows an astonishing restraint in retrospect. Although there is no evidence that the Luxembourg judges were aware of the contemporary European law debate in the Federal Republic of Germany, the ECJ's original position on Community fundamental rights is entirely in line with Mitrany and Ipsen. Ipsen had admitted that the fundamental economic rights of the Basic Law could be affected by sovereign Community measures (see above), but he found that the principles of equal treatment and the prohibition of arbitrariness (Article 36 sentence 2, article 119 paragraph 1 EEC Treaty), which were guaranteed and justiciable at Community level, offered sufficient protection against interference with fundamental rights.[110] In addition, the Communities were strictly bound by the principle of conferral of powers; infringements of powers could also be challenged under Community law on the basis of Article 173 EEC Treaty. However, not all contemporaries saw it that way. From a German perspective, the absence of fundamental rights in Community law subsequently proved to be problematic, as the EEC operated economic administration in a manner relevant to fundamental rights and Community law claimed unconditional priority of application. Thus, it had the greatest possible direct effect within the national legal framework. On the other hand, protection of fundamental rights against Community measures (in particular

109 ECLI:EU:C:1964:66 – Costa.
110 Ipsen, 1964, 1 et seq.

those of the EEC Commission) or against their implementation was initially only possible within the national framework, but could not be guaranteed without interruption due to the primacy of application of Community law and the EEC's independent legal personality ("legal order sui generis"). Article 1 paragraph 3, Article 19 paragraph 4, Article 20 paragraph 3, and Article 94 paragraph 1 no. 4a GG – the most important constitutional provisions for the protection of fundamental rights in German constitutional law – link the jurisdiction of the FCC to measures of German state authority, but according to van Gend and Costa, the European Communities could no longer be regarded as a derived form of German state authority ("sui generis legal order"). According to the German interpretation, this led to a preeminent constitutional relevance of European Community law. Accordingly, there is no legal protection against European primary law, neither before the ECJ nor before national courts. Legal protection against European secondary law (Article 288 TFEU) as well as against acts of execution or implementation by German courts and administrative authorities is conceivable in principle, but according to ECJ case law, it is not compatible with the meaning and purpose of the integration objectives (*effet utile*, Article 4 paragraph 3 TEU). This gives rise to the constitutional problem of balancing the integration objective recognised in German constitutional law (initially Article 24 paragraph 1 GG, today: Article 23 paragraph 1 GG) with the constitutionally required protection of fundamental rights within the scope of application of the Basic Law against sovereign acts attributable to the Federal Republic. Whether and to what extent measures of the European legal community are attributable to the Federal Republic of Germany and therefore trigger a responsibility to protect is the subject of a controversy that has been ongoing since the 1960s to the present day and which has only been clarified by the Karlsruhe case law step by step and not in one fell swoop by a single leading decision.

3.2.2. The early adjudication of the FCC

The FCC took the first step in this direction with its decision of 18 October 1967, concerning EEC regulations.[111] This first supreme court clarification of the complex legal situation was paved by a referral from the Rhineland-Palatinate Fiscal Court to the FCC in accordance with Article 100 paragraph 1 GG.[112] With this legal remedy, known as *Richtervorlage*, lower courts can request a preliminary ruling from the FCC in the event of doubts about the constitutionality of the simple statutory provisions to be applied by them. Ipsen and his fellow campaigners were already contesting the admissibility of the referral, as it addressed the compatibility of the EEC Treaty with the provisions of the Basic Law.[113] The FCC found that the derivation of the exercise of sovereign rights by the EEC with effect for Germany from German

111 BVerfGE 22, 134.
112 Finanzgericht Rheinland-Pfalz, 376 (only guidelines).
113 Contemporary criticism in: Badura, 1966; Fuß, 1964, 577 et seq.; Ipsen, 1965.

constitutional law (then: Article 24 paragraph 1 GG, today: Article 23 paragraph 1 GG) did not justify the attribution of Community acts to German state authority. The FCC thus implicitly recognised the ECJ's sui generis formula. The fact that protection of fundamental rights against Community measures could not be guaranteed in the Federal Republic of Germany at the time also did not establish the FCC's competence to review European acts on German fundamental rights. Although the FCC did not follow Ipsen's opinion regarding the admissibility of the judicial review, the grounds for the decision adhered entirely to Ipsen's special-purpose scheme, which, in terms of legal doctrine, amounts to a strict differentiation of the judicial standards of review: the national courts, above all the FCC, review exclusively national law against the standard of national laws, while the Community courts review Community measures against their own law. Insofar as the Member States apply Community law within the national legal framework, a review against national legal standards is also ruled out.

This decision led the ECJ to adopt a genuine fundamental rights jurisprudence under Community law. In the Stauder case, not coincidentally a case from Germany, the Court held on 12 November 1969 that the fundamental rights of the person are part of the constitutional traditions common to the Member States, which is why they are guaranteed in unwritten form as general principles of Community law.[114] In the International Trading Company case, the ECJ stated in its judgment of 17 December 1970: Since the Communities observe and safeguard fundamental rights as general principles of Community law, there is no room for reservations of fundamental rights and identity on the part of the Member States.[115] In the Nold case, the Court of Justice finally ruled in its judgment of 14 May 1974 that the EEC (and, therefore, also the ECJ) had no power to recognise fundamental rights beyond the constitutional traditions common to the Member States.[116] This was a response to national fears that the ECJ itself could become the guarantor of fundamental rights in competition with the national constitutional courts. Nevertheless, the Court recognised the European Convention on Human Rights as a source of legal knowledge of the common constitutional traditions relevant to Community law. The German debate on European law is likely to have had a particular influence on the International Trading Company case. In 1970, the constitutional law expert and university lecturer Hans Heinrich Rupp argued that the European Communities were, according to the prevailing theory of a special-purpose association, 'rule without a master, the exercise of sovereign rights without a democratic sovereign.'[117] Ipsen, on the other hand, had argued that Community law measures could only be relevant to fundamental rights to a very limited extent, namely only with regard to freedom of

114 ECLI:EU:C:1969:57 – Stauder.

115 ECLI:EU:C:1970:114 – International trading company.

116 ECLI:EU:C:1975:114 – Nold.

117 Rupp, 1970. Rupp thus also set the tone in the debate on the supposed European democracy deficit, a debate which, as we have seen, was misguided. For contemporary criticism of Rupp, see: Martens, 1970, 209 et seq.; Spanner, 1970, 341 et seq.

occupation and freedom to conduct a business (Article 12 GG) and property (Article 14 GG). The FCC was now alarmed. With the famous Solange I decision of 29 May 1974, the court clarified its findings of 1967. Solange I was again based on a concrete review of norms in accordance with Article100 paragraph 1 GG. In the light of the 1967 decision, it was surprising that the FCC considered the referral to be admissible. This was because the subject of the proceedings was again an EEC regulation. Now, however, the FCC considered itself competent under certain conditions, which are summarised in the following formula:

> As long as the Community's integration process has not progressed to such an extent that Community law also contains a formulated (*not implicit*) catalogue of fundamental rights adopted by Parliament and in force that is adequate (*not congruent*) with the Basic Law's catalogue of fundamental rights, after obtaining the consent required in Article 177 TEC (*today: Article 267 TFEU*), the referral of a court of the Federal Republic of Germany to the Federal Constitutional Court in proceedings for the review of legal norms is permissible and required (*obligation to refer*) if the court considers the provision of Community law relevant to its decision to be inapplicable in the interpretation given by the ECJ because and to the extent that it conflicts with one of the fundamental rights of the Basic Law.[118]

In this decision, the FCC was not only guided by the unease of contemporary legal scholars about an independent supranational authority, but also by the conservative criticism of a technicist understanding of the state expressed by the Heidelberg professor of constitutional and administrative law Ernst Forsthoff (1902-74) in his widely received – rather prophetic than analytical – essay "Der Staat der Industriegesellschaft" ("The State of Industrial Society") in 1971.[119] Forsthoff warned against an exclusively technicist approach to the state, which would degrade the state to the function of socially dominant interest groups. Although Forsthoff does not explicitly

118 BVerfGE 37, 271; additives in italics by the author. With regard to the passages of the Solange I formula printed in italics, the following should be noted: (1) Starting with the Stauder case, the ECJ derived a protection of fundamental rights implicit in primary Community law from the constitutional convictions common to the Member States of the Communities. With France's accession to the European Convention on Human Rights (ECHR) in 1974, all EEC Member States at that time were also parties to the ECHR, so that it could serve the ECJ as a source of legal knowledge of the 'common constitutional convictions'. The dogmatics developed by the ECJ at that time is today the basis of Art. 6 sect. 1, 3 TEU, Art. 52 sect. 4, Art. 53 CFR. However, the FCC was not satisfied with Community fundamental rights developed by the courts. (2) The adequacy criterion is based on the level of intergovernmental homogeneity necessary for the participation of the Federal Republic of Germany in the European integration process. No Community fundamental rights corresponding to the Basic Law are required, but they must be comparable to the German standard of protection of fundamental rights.

119 Forsthoff 1971, which is the sum of several relevant preliminary works by the same author on the subject of denationalisation and neutralisation of the political: Forsthoff, 1960, 807 et seq.; Forsthoff, 1968, 401 et seq.; Forsthoff, 1970, 145 et seq. Contemporary criticism in: von Simson, 1972, 51 et seq.

refer to the European Community, its economic integration approach is seen by conservatives as a blueprint for depotentiating the unifying factors inherent in the state. If the state lacks the power to moderate social frictions, this does not mean a taming of the political, but rather the release of the centrifugal forces inherent in society, whereby society becomes an agglomeration of more or less assertive particular associations that are in a state of latent civil war. Forsthoff's thoughts were seconded by the sociologist Helmut Schelsky (1912-84), who coined the term "technical state" in 1961 and understood it to mean an "expertocracy" a rule of experts.[120] Where the experts rule, the demos no longer has anything to decide and courts just certify decisions without technical alternatives, but they can no longer exert any formative influence on them.[121] Although Schelsky's analysis is based on economic science, it can also be understood as a prophecy and the conclusion can be drawn that precautions must be taken at a national, constitutional level against the mechanisation of the state and the "takeover" of an expertocracy. Such ideas and fears are still in the background of the current German debate on the protection of national constitutional autonomy against a migration of fiscal and health policy powers of the state (i.e. from the sovereignty of the democratically legitimised national parliament) to the level of the Union and thus to an executive sphere. In view of these premises, Solange I meets the need for ultimate state control and defence of the state policy monopoly against supranationalisation tendencies.

3.2.3. The rise of constitutional sovereignity

Twelve years later, this case law was corrected in light of the direct elections to the European Parliament that had been introduced in the meantime (first held on 7-10 June 1979) and the progress made in the development of supranational protection of fundamental rights. The basis of these proceedings (and almost all further integration constitutional disputes) was a constitutional complaint (Article 94 paragraph 1 no. 4a GG). With this legal remedy, a holder of a fundamental right can either have the unconstitutionality of judgments of lower courts reviewed before the FCC (after having gone through the relevant legal process in full) or (under strict conditions) directly challenge the unconstitutionality of a statutory provision that burdens him. In both variants, the constitutional complaint does not primarily serve to remedy individual encroachments on fundamental rights; rather, the constitutional complaint is, by its very nature, a procedure for the review of legal norms. With the decision

120 Schelsky, 1965, 449 et seq. Hans Peter Ipsen has made this view of things his own, as can be seen from the following quote: "Where decisions are not made, but recognised, the competence of expertise prevails, not the majority. Community acts of this kind of recognition of what is right are legitimized by reasons, not by majority consensus" (Ipsen, 1969).

121 Much later, the British political scientist Colin Crouch presented similar ideas under the title "Postdemocracy". They are a little reflected copy of the German discussion that had already taken place forty years earlier and of which Crouch took no notice. See: Crouch, 2008. On the postdemocracy discussion in the German legal science: Schaefer, 2016, 437 et seq.

of 22 October 1986 (Solange II), the FCC made a leading decision that is still valid today. The subject matter of the dispute was administrative court decisions relating to EEC law. Once again, the question of the jurisdiction of the FCC in cases relating to European law was raised. It had to be clarified whether the FCC grants protection of fundamental rights against acts of the EEC or their German implementation and enforcement acts. On this occasion, Karlsruhe coined the Solange II formula:

> As long as the European Communities, in particular the case law of the Court of Justice of the Communities, guarantee effective protection of fundamental rights against the sovereign power of the Communities in general (*not necessarily in each individual case*), which is essentially equivalent to the protection of fundamental rights required by the Basic Law as indispensable (*identity control by the standard of proof*), especially since the essence of fundamental rights is generally guaranteed (*not with regard to each individual fundamental right, since there is no complete Community fundamental rights system*), the FCC will no longer exercise its jurisdiction over the applicability of derived Community law (*secondary, not primary law*), which is claimed as a legal basis for the conduct of German courts and authorities within the jurisdiction of the Federal Republic of Germany, and will therefore no longer review this law against the standard of the fundamental rights of the Basic Law.[122]

With the Solange II formula, the FCC comes closer to the idea of a European "community of law" propagated by Walter Hallstein, which still enjoys a certain popularity in German constitutional law today.[123] The reservations expressed in the 1970s against expertocratic reinterpretations of democracy and the transformation of the state into a regime of technical constraints are receding into the background

122 BVerfGE 73, 339; additives in italics by the author. The Solange II formula sets a significantly different emphasis than the Solange I decision: (1) It is no longer required that the European level of protection of fundamental rights must be equivalent to the German level of protection in its entirety, but that there may be greater deviations in individual cases. This is the consequence of the ECJ case law, also recognised in principle by the FCC, according to which European Community law is not derived from national law, but rather the Community forms a legal order sui generis. (2) A constitutional court review of measures of the Communities based on secondary law against the standard of the Basic Law only takes place in the event of a violation of fundamental German constitutional principles that form the basis of identity. The FCC therefore concedes a certain margin of error to the ECJ and Community sovereignty. (3) Although the fundamental rights of the Basic Law are understood to be integral components of the German constitutional identity, they do not enjoy the full breadth of protection guaranteed by the FCC. This reservation was necessary in 1986 simply because of the incompleteness of the protection of fundamental rights at Community level. (4) To clarify, it should be emphasised that the Solange formulas refer only to secondary, not primary, Community law. Primary law is to a certain extent the constitutional law of the European Communities, the interpretation of which is the sole responsibility of the ECJ. Until 2019, the FCC did not dispute the ECJ's monopoly of jurisdiction over primary law (see below).

123 However, subject of discussion is not an unspecific 'legal community', but various interconnected models. See the contributions in: Calliess, 2006; Pernice, 2020. The Freiburg professor Andreas Voßkuhle, President of the FCC 2008-20, has made a particularly valuable contribution to sharpening this concept: Voßkuhle, 2010, 1 et seq.

for the time being. This may have been due not least to a changed perception of the prerogative of West German statehood. On the thirtieth anniversary of the Basic Law, the publicist Dolf Sternberger (1907-89) developed his theory of the transformation of a patriotism related to the nation state into a "constitutional patriotism" (*Verfassungspatriotismus*). The object of patriotic veneration should therefore be the constitution itself and the symbols of German constitutional culture, not the German nation state (which at the time was divided and, in the opinion of many, politically non-existent).[124] Sternberger's doctrine, which quickly became the talk of the town and was taken up by historians and sociologists alike[125], took the edge off the debates about the role of the nation state in the process of European integration. However, this relaxation did not last. The very German discussion of constitutional patriotism (because it arose from the specifics of the political situation in a divided Germany) died down with German reunification and the re-emergence of a unified German nation state on 3 October 1990. Opinions now gained ground again which saw national sovereignty and European integration as polar forces that threatened to tear the nation state apart, regardless of the efforts of Chancellor Helmut Kohl to define German reunification as the supporting pillar of a new European house.

Into this changed debate fell the next landmark decision of the FCC, the Maastricht decision. It occurred on 12 October 1993, when it was disputed whether the Federal Republic of Germany could ratify the Maastricht Reform Treaty in conformity with the constitution. This treaty was associated with substantial reform steps towards a European Political Community, which had failed in the 1950s. The European Community was supplemented by a common foreign and security policy as well as police and judicial cooperation, and European citizenship was introduced. The associated content of the Union was to be supplemented by a Charter of Fundamental Rights. Several constitutional complaints were lodged with the FCC against the ratification of the Maastricht Treaty by the German federal legislature. This in itself was problematic because the admissibility of a constitutional complaint presupposes the possibility of a violation of fundamental rights in the person of the complainant. However, there is no fundamental right to refrain from ratifying an international treaty. Nevertheless, the FCC has used a trick to construct the right to lodge a constitutional complaint from the right to vote (Article 38 paragraph 1 GG) in conjunction with the principle of democracy (Article 20 paragraph 1 and paragraph 2 sentence 1 GG). The right to vote actually only protects the process of democratic legitimization of the state organs by the demos, but the FCC also saw the right to vote as guaranteeing the protection of the democratic substance of the state. Consequently, the right to vote in conjunction with the principle of democracy ensures the substantial decision-making power of parliament, particularly in all political matters, but especially in the area of constitutional law on integration. The citizen could sue for this safeguarding of democratic decision-making substance – as an agent of the

124 Sternberger, 1990.
125 Habermas, 1991; Müller, 2010.

common good, so to speak – before the Constitutional Court. With this case law, the FCC was evidently pursuing the goal of obtaining any decision-making power at all with regard to substantial steps towards European integration. According to the prevailing view at the time, the ratification of an international treaty could only be halted or prevented by a preventive abstract review of norms directed against the parliamentary approval law before the FCC (according to Article 94 pararaph 1 no. 2 GG). However, the abstract review of norms is an instrument to which only state bodies are entitled, not subjects of fundamental rights. In particular, it is an instrument of parliamentary minority protection, as individual parliamentary groups can also use the review of norms against legislative decisions of the majority groups. However, where European policy measures are politically uncontroversial, it is not to be expected that the parliamentary opposition will take constitutional court action. This was precisely the situation in the German Bundestag, as the ratification of the Maastricht Treaty was not disputed between the government and opposition parties. If the FCC had now rejected the constitutional complaints directed against the ratification of the Treaty, there would have been no possibility at all in this specific situation for the courts to deal with fundamental questions of European law. On this basis, the FCC considered the Federal Republic's participation in the European Union created by the Maastricht Treaty to still be constitutional, but insisted on the guarantee of an indispensable constitutional minimum standard for the transfer of sovereign rights, which is now guaranteed by Article 23 paragraph 1 sentence 3 in conjunction with Article 79 paragraph 3 GG. The FCC reserved a residual competence to review European legal acts against the fundamental rights of the Basic Law insofar as the Union acts *ultra vires*, i.e. outside the competences granted to it by the constitution. Since then, this ultra vires reservation has shaped the constitutional debate in Germany on further deepening the European integration process. The regular inadmissibility of constitutional appeals and referrals for judicial review against supranational legal acts before the FCC was confirmed. National transposition provisions based on EU directives are an exception, insofar as EU law has granted the Member States leeway for transposition. This is to be measured against the Basic Law, in particular against fundamental rights. In its decision of 6 July 2010, the FCC specified the ultra vires standard.[126] According to this, the EU institutions have a broad scope for shaping EU law. An ultra vires review is therefore only admissible if a breach of competence by the European institutions is "sufficiently qualified", i.e. a 'structurally significant shift to the detriment of the Member States' can be established. Consequently, structural and permanent shifts in competences to the detriment of the Member States must be demonstrated without sufficient authorization of competences. The procedural prerequisite for establishing an ultra vires act is the prior implementation of a referral procedure pursuant to Article 267 TFEU. With this line of case law, the FCC returns to the "relationship of cooperation" with the ECJ promised in the Maastricht ruling. Accordingly, there can be no departure of

126 BVerfGE 126, 286.

German constitutional case law from EU law without prior consultation with the Luxembourg judges. However, the FCC reserves the right to have the final say on the constitutional conformity of any integration steps. In this context, the FCC also comments on the alleged democratic deficit at Union level. In an almost literal adoption of Mitrany's and Ipsen's theories, it states that, even after Maastricht, the place of democratic decision-making is still at the level of the nation states. This means that the national parliaments are the central legitimising bodies, not the European Parliament, whose upgrading by the Maastricht Treaty is now primarily seen as an accessory to deeper integration. In reality, with regard to the democratic principle of the Basic Law, it would even require particular justification if the European Parliament were to acquire substantially broader powers. In the opinion of the judges in Karlsruhe, the Union is and remains an event of the executive, and this precisely in consideration of the principle of democracy. This position of the FCC was barely understood in the contemporary commentary literature and has often been misunderstood to this day. However, it is absolutely conclusive if one looks at the Union from the perspective of Mitrany's and Ipsen's functionalism theory. Another line of case law established by the Maastricht ruling may be even more significant in the long term: the theory of the European Union as an "association of sovereign states" (*Staatenverbund*), founded by the constitutional judge and Heidelberg law professor Paul Kirchhof (born 1943). This characterization of the Union was intended to indicate that it was supported by its Member States, so that the Union had to respect their Member States' national identities.[127] The Maastricht judgment bears Kirchhof's signature through and through. Just as the concept of an association of sovereign states was intended to keep the finality of the European Union suspended somewhere between a classic-style international organisation (like the United Nations) and a federal state, the FCC's main considerations in the Maastricht case also oscillate between insisting on the protection of German constitutional autonomy and seeking to keep the German constitution open to participation in European integration. It may be noted that the judgment attempts to square the circle: to construct an open constitutional state from a closed system of constitutional principles defined by the nation state. The concept of an association of sovereign states is also regarded by some German constitutional scholars as one of the great mistakes of the FCC. This is because it ultimately fails to capture the logic of the European integration process, which – as this article has shown – is not about denationalisation or the dismantling of constitutional law, but about depoliticisation. The state is still needed, at least for the time being and until further notice, as a guarantor of various depoliticisation and neutralisation processes. It is therefore not surprising that German constitutional law does not really know how to deal with the concept of the association of sovereign states and that the FCC has not developed it any further. The theory of the regulatory state can be seen as a competing interpretation of the association of sovereign states

127 Kirchhof, 1992, 63 et seq. Further conceptual elaboration of Kirchhof's concept of state and union: Kirchhof, 1993, 855 et seq.; Kirchhof, 2012, 299 et seq.

theory, which is closer to the finality of the European Union. It was developed by the Italian political scientist Giandomenico Majone (born 1932).[128] Majone sees the European Union as structurally analogous to the US Independent Regulatory Commissions. In the Federal Republic of Germany, there are non-ministerial authorities which, like their US counterparts, carry out specialised administrative tasks largely outside the direct control of the supreme organs of the state, but within the legal and democratic constraints imposed by constitutional law. A recourse to Majone's regulatory theory would have spared the FCC many highly precarious and controversial determinations on the legal nature of the European Union and the constitutional premises of the European integration process. If the Union and its institutions are seen as Independent Regulatory Agencies, their link to the Member States and their constitutions is self-evident, without the need for a time-consuming and conflict-prone recourse to national constitutional reservations. In addition, definitions of the proximity or distance of the integration project to the state – and thus the tiresome federalisation debate – would be obsolete, as the non-state character of the Union would be clearly recognisable. Finally, the misunderstandings about a supposed democratic deficit of the Union would be dispelled, because it follows from the nature of a regulatory agency that it is a function of the democratically constituted state authority, not independent of it and certainly not an independent democratic subject.

3.2.4. The FCC in search of a constitutional doctrine of integration

A further clarification of the constitutional framework of European integration had already become clear in the Lisbon ruling of the FCC on 30 June 2009.[129] The subject of the proceedings here was the Lisbon Reform Treaty. It adopted the European Charter of Fundamental Rights as part of Union law with the status of primary law. The TEU and the TFEU were fundamentally amended, the European Parliament was again strengthened and the admissibility of majority decisions in the Council was extended. In addition, European citizenship was significantly enhanced and supplemented by instruments for citizen participation in EU affairs. Numerous constitutional complainants also raised fundamental concerns about this, which the FCC rejected in the end, but not without formulating a reservation of national constitutional identity and urging the German legislator to review European policy legislation more closely. Karlsruhe reaffirmed its view that supranational legal acts that are no longer covered by the Act of Consent (ultra vires acts) violate the principle of democracy and the rule of law of the Basic Law as well as the constitutional authorisation for integration under Article 23 paragraph 1 sentence 1 GG. Consequently, the FCC is authoried to carry out an "identity check" pursuant to Article 23 paragraph 3 sentence 3 in conjunction with Article 79 paragraph 3 GG. Even if the interplay of

128 Majone, 1989, 159 et seq.; Majone, 1994, 78 et seq.; Majone, 2011, 31 et seq.
129 BVerfGE 123, 267.

ultra vires and identity review has remained open in detail, this nevertheless means that the FCC has further residual jurisdiction to review substantial reform steps at EU level against the foundations of the guarantee of human dignity in Article 1 paragraph 1 GG and the fundamental principles of the state laid down in Article 20 GG. The Lisbon decision is not a mere continuation of the Maastricht rulings on deepening integration. Rather, the focus of the Lisbon ruling is on the position of the German Bundestag in the integration process. The European Union is characterised by a strong preponderance of the executive (as confirmed in the FCC's Maastricht decision). Not only is the initiating body at Union level, the European Commission, an executive body, but the national governments, which have a decisive influence on European legislation in the Council, are also organs of executive power. From a national perspective, this means that the parliaments of the Member States are in danger of being minoritised by the executive. The more legislative powers are transferred to the EU level, the stronger the position of the Member State governments in relation to their national parliaments and the less able they are to set the priorities of the European policy agenda. In the Lisbon ruling, the FCC criticised what the court saw as the German Bundestag's overly passive stance on integration policy issues. As the German Federal Government determines the European policy guidelines of the Federal Republic and the Federal Government is in turn supported by the parliamentary majority, there is little inclination on the part of Parliament to control the government in this respect. This, however, is the actual task of the Bundestag. For this reason, the FCC derived a specific integration responsibility of the German Bundestag from Article 23 GG. If the Bundestag does not fulfil its integration responsibility, its consent to further European treaties or to their amendment or supplementation may be unconstitutional for this reason alone. The FCC therefore requires the Bundestag not only to accept European policy initiatives of the Federal Government, but to consider them thoroughly and to demonstrate genuine parliamentary decision-making. In the recent past, the FCC has drawn practical consequences from the reservation of identity for extradition requests under the European arrest warrant procedure and for returns under the Dublin Regulation developed in the Lisbon judgment.[130]

The ECJ ruling in the Akerberg Fransson case on 26 February 2013[131] led to major distortions in the German constitutional debate. This case concerned the relationship between the fundamental rights of the European Charter of Fundamental Rights (CFR) and the fundamental rights of the Member States. Article 51 paragraph 1 sentence 1 CFR makes the binding nature of the Charter's fundamental rights for the Member States dependent on implementation. The ECJ has interpreted this provision as broadly as possible and is of the opinion that "implementation" in this sense is any legally relevant action by the Member States within the scope of application of Union law, even if this scope is only marginally affected, as in the reference case.

130 BVerfGE 140, 317; 147, 364; 156, 182.
131 ECLI:EU:C:2013:280.

Due to the sovereignty effects that can result from the supersession of national fundamental rights by European fundamental rights (see 2.2. above)[132], this ECJ case law met with the firm resistance of the FCC. Karlsruhe made it clear that it would not bow to this line of case law and that the ECJ's Akerberg-Fransson ruling would be regarded as an individual case decision (not apt for stare decisis), otherwise it would have to be regarded as an ultra vires act within the meaning of the Maastricht case law.[133] This prompted the ECJ to take a more conciliatory line[134], but the jurisdictional conflict has not been resolved. The FCC's latest volte-face in this matter, the two decisions on the "right to be forgotten" from 6 November 2019, also provide little clarity.[135] In these decisions, the FCC abandoned the separation theory it had previously advocated. According to this theory developed in relation to Article 51 paragraph 1 sentence 1 CFR in conjunction with Article 4 paragraph 3, Article 6 paragraphs 1 and 3 TEU and Article 1 paragraph 3 GG, either the fundamental rights provisions of the Basic Law or the fundamental rights of Union primary law

132 From a state perspective, fundamental rights, understood as claims for injunctive relief, performance and participation by holders of fundamental rights against the state, compete with the state's legislative and administrative powers. As far as the scope of application of a fundamental right extends, the holder of the fundamental right can therefore mobilise state power in his or her own interests. From the state's perspective, fundamental rights are therefore negative competence provisions. This is the reason for their relevance to sovereignty. Even at the domestic level, fundamental rights upset the separation of powers between the legislature and the executive because they can directly force the executive to refrain from certain measures or to provide state services against the will of the parliamentary legislature in accordance with the constitution. This power of fundamental rights to break through the parliamentary legislature is the consequence of their constitutionally direct guarantee, which trumps the simple parliamentary law. But the relationship between the legislature and the executive can also be changed by fundamental rights. Insofar as fundamental rights also bind the legislative power of the state, as in Germany through Art. 1 para. 3 GG, they can be mobilised against the legislature, so that its responsibility to protect can also force it to encroach on the administrative order of competences. A recent example is the "fundamental right to self-determined dying" recognised by the FCC (BVerfGE 153, 182), the recognition of which is now forcing the German legislature to realign the law on euthanasia with far-reaching consequences for the executive. The sovereignty effect of fundamental rights is magnified when it is no longer the nation state, within the framework of its constitution, but a supranational organization that positions fundamental rights against the nation states. This can lead to national legislation being put under pressure and restricted in its sovereign legislative scope not only by the executive-oriented structure of the European political process, but also by the ECJ as a supranational fundamental rights court. This context explains why, in addition to the United Kingdom, Poland and the Czech Republic also expressed unilateral reservations against the unconditional validity of the European Charter of Fundamental Rights during the Lisbon ratification process. Last but not least, the ECJ's excessive power to interpret fundamental rights depotentiates the national constitutional courts. A similar process can be observed in Germany with regard to the relationship between the Federal Constitutional Court and the constitutional courts of the federal states. Although these continue to exist, they must largely defer to the case law of the FCC. The FCC's sharp reaction to the ECJ's Akerberg Fransson decision can also be explained by fears that Karlsruhe could find itself in a similarly subordinate position to Luxembourg as the German state constitutional courts are in relation to the FCC.

133 BVerfGE 133, 277.

134 ECLI:EU:C:2014:126; ECLI:EU:C:2014:2055.

135 BVerfGE 152, 152; 152, 216.

are the exclusive judicial standard of review. According to this theory, only the Basic Law is applicable when implementing Union law in conjunction with national discretionary or regulatory leeway, and only the CFR is applicable when implementation is fully determined by Union law. According to new case law, the FCC differentiates the question of precedence according to whether Union law is fully or partially harmonised with national law. If there is full harmonisation, the Union's fundamental rights are "as a rule" exclusively applicable. The exception arises from the constitutional residual reservations that the court developed in the Maastricht and Lisbon proceedings. What is new is that the FCC itself now applies the CFR as a standard of review and control. This had previously been rejected, as the Basic Law itself (Article 1 paragraph 3, Article 94 paragraph 1, Article 100 paragraph 1) exclusively defines national constitutional law as the FCC's standard of review and scrutiny. Insofar as only partial harmonization is required under EU law, the FCC upholds the primacy of the fundamental rights of the Basic Law, but the CFR fundamental rights form the constitutionally binding minimum fundamental rights standard. The latter guiding principle has been referred to as the "reverse" Solange formula. Consequently, constitutional complaints and referrals to the FCC by judges are now admissible even in the area of law that is fully harmonised under EU law; the referral procedure pursuant to Article 267 TFEU is included in the constitutional complaint procedure. What was initially celebrated with a certain euphoria as the burial of the hatchet between Karlsruhe and Luxembourg in the initial surprise at this turnaround in case law, which hardly any expert saw coming, turns out on closer inspection to be a line of case law with great potential for conflict. In the medium term, the interpretation of the CFR may diverge between the ECJ and the FCC. The question then arises anew as to whose interpretation takes precedence. So far, the FCC has not answered this question. In the meantime, the ECJ has indicated on another occasion that it is serious about its role as the constitutional court of the European constitutional courts, a role it has adapted since Akerberg Fransson.

With the judgment in the Associação Sindical dos Juízes Portugeses case of 27 February 2018[136], the Luxembourg judges have taken the path towards full harmonisation of the rule of law standards in the Union. Maybe this decision defines the ECJ's Marbury moment, notwithstanding it has been hardly perceived as such. Pursuant to the second sentence of the first subparagraph of Article 19 paragraph 1 TEU, the Court of Justice shall ensure that the law is observed in the interpretation and application of the Treaties. The second subparagraph of Article 19 paragraph 1 TEU (in conjunction with Article 47 CFR) also stipulates that the Member States shall provide the legal remedies necessary to ensure effective judicial protection in the areas covered by Union law. The ECJ states that the second sentence of the first subparagraph of Article 19 paragraph 1 TEU extends to the entire scope of Union law. Due to Article 2 TEU, this includes the rule of law. According to the second subparagraph of Article 19 paragraph 1 TEU, the national courts, in cooperation with

136 ECLI:EU:C:2018:117

the ECJ (here Luxembourg has adopted the Karlsruhe formula), fulfil the task of upholding the rule of law in the EU. Furthermore, Article 4 paragraph 3 TEU obliges the Member States to provide effective legal protection and to establish appropriate legal remedies. In conjunction with the second sentence of the first subparagraph of Article 19 paragraph 1 TEU, this principle is a central component of the system of legal protection required under EU law. The guarantee of judicial independence at Member State level is indispensable for this. It is therefore the task of the ECJ to review and guarantee this. With this judgment, the ECJ can therefore both criticise what it considers to be inadequate national procedural law (and thus, at least indirectly, examine national law against the standard of Article 19 TEU) and also decide whether judicial independence is sufficiently guaranteed at national level. This can go as far as the ECJ ordering a Member State to maintain a national constitutional court or to refrain from reforming the constitutional jurisdiction, which in the opinion of the ECJ could impair judicial independence. The fact that this decision was not really about Portugal, but actually about Poland, needs no further explanation. Ultimately, however, any Member State whose state organs – in particular the national parliaments and constitutional courts – in the opinion of the ECJ fail to recognise the common European value standards can be targeted by the procedure under Article 7 TEU. The FCC's decisions from 6 November 2019 can also be read as a reaction to this new initiative from Luxembourg. This time, however, Karlsruhe does not remain in fruitless protest, but accepts the challenge and elevates itself to 'guardian of the Charter of Fundamental Rights'.

The last word has by no means been spoken on this matter. In its ruling of 5 May 2020, the FCC made in its PSPP ruling an *ultra vires* finding for the first time in its history.[137] At the time, it concerned the policy of the European Central Bank. ECB President Mario Draghi had promised unlimited crisis response funds at the height of the Euro financial crisis. As a result, the ECB bought up government bonds of distressed euro states on the secondary markets on a large scale. The FCC saw this as a circumvention of the prohibition of mutual assumption of liability between the euro states (Article 311 TFEU in conjunction with Articles 122 and 125 TFEU). However, the ECJ, to which the FCC had appealed, had no objections to this policy under EU law.[138] Thus, the FCC found that both certain ECB measures and the ECJ case law confirming them were no longer covered by the constitutional authorisation for integration and were therefore *ultra vires*. The Federal Republic of Germany was no longer allowed to participate in this. The details are not of interest in the context of this article. Apart from the fact that this ruling by the FCC caused great perplexity in both German politics and bureaucracy because its implementation remained completely unclear, the European Commission reacted by initiating infringement proceedings against the Federal Republic in accordance with Article 258 TFEU. This could have led to a veritable escalation of the crisis between Germany and the European Union,

137 BVerfGE 154, 17. On this: Mayer, 2020, 733 et seq.
138 ECLI:EU:C:2018:1000

as the ECJ was now called upon to act as judge in its own cause. Its (expected) criticism of the FCC's decision would have been contested from the outset. Neither the Commission nor the Federal Government wanted to let it get that far. A settlement was reached to end the infringement proceedings in return for the Federal Government's promise that the FCC would no longer issue ultra vires decisions in future.[139] This is remarkable in many respects and raises questions about the judicial independence recently emphasised by the ECJ. In any case, according to the latest case law, the FCC appears to be adhering to this agreement. After all, the breakthrough on joint borrowing by the EU Member States as part of a Union reconstruction program gave rise to further-reaching constitutional concerns. In a remarkably inconsistent final decision, the FCC has meandered around the discussion of an ultra vires act.[140] The subject of the proceedings was the Ratification Act passed by the German Bundestag, which was intended to bring the EU's own resources decision of 14 December 2020 into force for the Federal Republic. The FCC stated that joint borrowing by the EU Member States was not fundamentally excluded by Article 311 paragraph 2 TFEU, according to which the Union's budget 'shall be financed wholly from its own resources, without prejudice to other revenue'. However, the principle of conferral (Article 5 paragraph 1 sentence 1, section 2 TEU) must also be upheld in this respect. The principle of conferral is complied with if the authorisation to borrow is provided for in the own resources decision itself, the funds are used exclusively for the purpose of a specific authorisation granted to the Union, the borrowing is limited in time and amount and the sum of these other funds does not exceed the amount of own resources. The reasons for the ruling reveal serious concerns in this regard. On the one hand, it is questionable whether the requirements of Article 122 TFEU are met, and on the other hand, there are doubts as to whether the "other resources" created by joint borrowing do not exceed the Union's own resources, which is prohibited by Article 311 paragraph 2 TFEU. Here, Karlsruhe is satisfied with the existence of "different valuation possibilities". Finally, the bail-out prohibition pursuant to Article 125 paragraph 1 TFEU was again critically considered, but here too the court gave the all-clear. As the court explains, joint borrowing serves to relieve economically distressed Member States from the "market logic". Although the Federal Republic could be obliged to make substantial additional payments to the Union, which were not foreseeable at the time of ratification, in order to compensate for shortfalls in the EU budget, this obligation to assume liability was only of a provisional nature and could thus be regarded as constitutional. After all this, no violation of the German constitutional identity could be identified. This decision by the Senate majority can be seen as an effort to square the circle: a face-saving retreat from jurisdictional positions emphasizing sovereignty and identity, which had previously been built up for decades and even accelerated in 2020. The special opinion published on this decision reads as a kind of attempt to save the court's honour. Judge Müller explained

139 European Commision, 2024.
140 ECLI:DE:BVerfG:2022:rs20221206.2bvr054721.

that the Senate majority's decision leaves almost all relevant questions of EU law unanswered, refuses to enter into a dialogue with the European constitutional courts, accepts a violation of the responsibility to integrate and hints at a withdrawal from substantive ultra vires review. In a rhetorical mantra that is very unusual for German case law, Müller sums up his criticism: 'Closing the curtain and leaving all questions open does not seem to me to be a suitable maxim for the effective protection of the (...) right to democracy (...).'[141]

My brief outline of the FCC's case law history on integration constitutional issues has shown that the FCC is finding it increasingly difficult to develop a clear and uniform line on the core constitutional issues of European integration. This could be left to one side if, as explained at the beginning, the FCC were not the key German player in European policy issues. Thus, the confusion in Karlsruhe is affecting the entire Berlin Republic. The German government knows perhaps less today than it did thirty years ago whether its fundamental European policy initiatives will meet with rejection or applause from Karlsruhe. The only thing it can be sure of is that the FCC will deal with each of these initiatives in one way or another, thanks to the expanded power of constitutional appeal since the Maastricht ruling. The parliamentary legislator's hands are also tied because the red lines of integration that a parliamentary design of the "open constitutional state" must not cross are diffuse; thus, they are ultimately not "lines", but overlapping zones somewhere in the fog of vagueness. Contemporary German constitutional and European law scholarship is of little help here, as it too is divided. Of course, this cannot be blamed on academia; in a way, it is its job to be divided. Time has passed over both Ipsen's concept of a special-purpose association and the naive federalisation theory of the early years. Today, however, there are still two schools of thought in German European law, which, following Wolfgang Kahl, can be described as the "union of values" and the "theory of political cooperation".[142] The former theory sees the finality of the European integration project as being founded from the outset on common European values[143]; this was already true at the time when European integration was still translated as the "common market". The entry into force of the CFR and the defensive (i.e. reinforced by Article 7 TEU) value regime (Articles. 2, 7 and 49 TEU) were central to the development of the European Union into a union of values. The fundamental rights are understood as 'crystallisation points of a European value system'[144]; the Member States form a European "value network". The weakness of this theory is, of course, that nobody understands what this is supposed to be. The only thing that seems clear is that the European "union of values" is not a federal state in the sense of the previously called-for United States of Europe, but an association of sovereign states,

141 ECLI:DE:BVerfG:2022:rs20221206.2bvr054721

142 Kahl and Hüther, 2022, 113 et seq.

143 Blumenwitz, Gornig and Murswiek, 2005; Joas and Mandry, 2005, 541 et seq.; Volkmann, 2017, 57 et seq.; Voßkuhle, 2021, 108 et seq.

144 Calliess, 2004.

between which, however, there is a higher degree of homogeneity than is usual in international organisations. This qualified homogeneity is founded on common "values". To put it bluntly, the theory of a European union of values aims to create a union without a state. However, the ECJ draws, if not legal arguments, then certainly political legitimation from the various value theories to act as the guardian of this European community of values. The above-mentioned decision on the Portuguese financial judges shows this very clearly. The opposing position also criticises the vagueness of the concept of values with regard to the European Union. Not least the political upheavals within the Union – on the occasion of the Euro crisis, the debate about the rule of law in Poland and Hungary or, more recently, the attitude towards Russia or the Middle East conflict – show that there is no common, politically resilient foundation of values for the Union. Some scholars criticise the unrealistic nature of unifying European value postulates.[145] Instead, Union Europe should resemble a network of different associations, which communitise certain policy areas with different objectives and at different speeds, whereby the balance between supranational and national tasks can be shaped differently depending on the relevant policy area. In this context, the unfortunate metaphor of Europe's "variable geometry" is sometimes used. The concrete design of the integration mode should be based on the (presumed) acceptance of the Union's citizens.[146] Article 7 TEU is now increasingly becoming the focus of the German debate on European law. According to the constitutional law expert Martin Nettesheim, this provision should not be understood as a legal basis for preventive measures against unruly member states, but rather as a safeguard clause. Only 'those conditions (...) which the Member States have jointly formulated as a prerequisite and condition for membership of the EU' are to be safeguarded.[147] In general, there are warnings against an "overstretching" of European integration.[148]

The German position on further reform steps, as announced by the FoEC, has become even more unclear as a result of the latest volte-face in Karlsruhe, and the scope for German European policy has become even more uncertain. For it is doubtful whether the FCC will uphold the ultra vires review. Rhetorically, the ultra vires proviso may continue to be important, but its practical significance is likely to tend towards zero if the line of case law established here is continued. A similar development has been seen with regard to the Solange reservation from 1974, which

145 Kielmansegg, 2015.

146 Huber, 2019, 215 et seq.

147 Nettesheim, 2019, 91 et seq. Nettesheim adds that a community of values cannot be understood statically. Values are under discussion everywhere. Values can only be generalised at the cost of understanding values, and this requires a contentious process between the Member States. From this, one can further conclude that a definition of the European Union as a community of values – perhaps contrary to the intentions of its proponents – institutionalises the dispute within the Union instead of having a pacifying effect. In any case, according to Nettesheim, the intrinsic laws of a pan-European discourse on values could not be captured by a decision under Article 7 TEU.

148 Klein, 2014, 165 et seq.; Winkler, 2006, 36 et seq.

was de facto buried in 1986 (see above). The ruling on the EU Reconstruction Fund could stand in a similar relationship to the Solange I and Solange II rulings to the Maastricht ruling, although (in contrast to the Solange II ruling) no explicit distancing was made.

4. Conclusion

From all this, a very brief summary of the German position on the Future of Europe process can be drawn. From the perspective of March 2024, it is clear that the judges in Karlsruhe are endeavoring to give German European policy more leeway. This applies particularly to steps towards the mutualisation of European sovereign debt, which is increasingly turning out to be a question of the weal and woe of the European Union. On the one hand, Germany should maintain its sovereignty in this process, but on the other hand it should not be condemned to the role of the eternal brakeman. The fear in Berlin and Karlsruhe is that if Germany were to take on this role, it would leave France, Italy and Spain with the leading role in the Union. At the same time, this would reinforce the Union's focus on economic and financial issues. The fact that negotiations on strengthening democracy in the European Union were also held as part of the FoEC seems almost like a diversionary tactic. One is tempted to hurl the Bill Clinton quote from the 1992 US presidential election campaign at the supporters of a more democratic faction: 'It's the economy, stupid!' This could deepen the contrast between the Western European and Eastern European Member States. The Eastern Europeans, especially Poland and Hungary, have gone to sleep with the Christian-Western community of values in mind and woken up in a single European market. This is perhaps the reason for the disillusionment with the European integration project that can be heard in Budapest, Warsaw, Bratislava and among the candidate countries of the Western Balkans. The Future of Europe Conference has moved beyond this.

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