

International and Comparative Law Quarterly

<http://journals.cambridge.org/ILQ>

Additional services for *International and Comparative Law Quarterly*:

Email alerts: [Click here](#)
Subscriptions: [Click here](#)
Commercial reprints: [Click here](#)
Terms of use : [Click here](#)



THE CONTINUING MYTH OF EURO-SCEPTICISM? THE GERMAN FEDERAL CONSTITUTIONAL COURT TWO YEARS AFTER *LISBON*

Beke Zwingmann

International and Comparative Law Quarterly / Volume 61 / Issue 03 / July 2012, pp 665 - 695
DOI: 10.1017/S0020589312000279, Published online: 17 August 2012

Link to this article: http://journals.cambridge.org/abstract_S0020589312000279

How to cite this article:

Beke Zwingmann (2012). THE CONTINUING MYTH OF EURO-SCEPTICISM? THE GERMAN FEDERAL CONSTITUTIONAL COURT TWO YEARS AFTER *LISBON*. International and Comparative Law Quarterly, 61, pp 665-695 doi:10.1017/S0020589312000279

Request Permissions : [Click here](#)

THE CONTINUING MYTH OF EURO-SCEPTICISM? THE
GERMAN FEDERAL CONSTITUTIONAL COURT TWO YEARS
AFTER LISBON

BEKE ZWINGMANN*

Abstract The German Federal Constitutional Court's 2009 decision on the Lisbon Treaty immediately provoked passionate criticisms and revived the Court's image of the Eurosceptic par excellence. However, if one uses the Court's general case law on the interaction between European law and German constitutional law—in particular the *Mangold* follow-up (*Re Honeywell*) and the *EURO bailout* decision—as a background for analysis, a high level of practical support becomes apparent, that is quite the opposite to the all-out war some commentators predicted. It also illustrates how the *Lisbon* principles can be used to exert a positive influence on the European integration process.

I. INTRODUCTION

With its decisions *Solange I*¹ in 1974 and *Maastricht/Brunner*² in 1993, the German Bundesverfassungsgericht (Federal Constitutional Court, hereinafter referred to as Bundesverfassungsgericht or the Court) acquired a reputation for hostility towards the concept of supremacy of European law and the European integration process that lingers to this day. Consequently, when the constitutionality of the ratification of the Lisbon Treaty was challenged, the subsequent judgment³ was one of the most eagerly awaited in recent years. So far, comments range from cautiously appreciative to passionately critical. Using primarily the *Brunner* decision as comparator, a majority of commentators criticized the apparent revival of the obstructive approach and hostile attitude found in the earlier judgment and deplored that the Court

* Lecturer in Law & German/PhD candidate, Cardiff Law School, zwingmannb@cardiff.ac.uk. This article developed from a conference paper presented at the SLS Annual Conference in Keele in 2009. I would like to thank my supervisor, Professor Robert Lee, and the anonymous reviewers for their very helpful comments on the draft. All errors and omissions are my own.

¹ Bundesverfassungsgericht (hereinafter abbreviated as BVerfG) *Solange I*, BVerfGE 37, 271—reported in English as *Internationale Handelsgesellschaft* in [1974] 2 CMLR 540.

² BVerfG *Maastricht*, BVerfGE 89, 155—reported in English as *Brunner v European Union Treaty* in [1994] CMLR 57.

³ BVerfG *Lissabon (Treaty of Lisbon)*, BVerfGE 123, 267. For the official English translation cf <http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html> accessed 8 June 2012.

seemed to have ‘thrown down the gauntlet’⁴ for an ‘all-out’ conflict in particular with the ECJ.⁵ Overall, it was concluded, the Court lacks ‘a serious, principled conviction that the deepening and strengthening of the European integration by treaty reforms complies with the words and the spirit of the German Constitution’.⁶

While comparisons with *Brunner* are of course valid, they tend to overshadow the impact of the Bundesverfassungsgericht’s more general case law on European issues in particular since 2005. When not dealing with amendment treaties, but with the day-to-day application of European law, the Bundesverfassungsgericht provides considerable practical support for its application and enforcement as well as the development of the integration process at national level. Two decisions in particular provided clarification in this respect: the follow-up to *Mangold (Re Honeywell)*⁷ in July 2010 and the *EURO bailout* decision⁸ in September 2011. Given the severe criticisms⁹ following the ECJ’s *Mangold* decision,¹⁰ this case was considered a perfect opportunity for the Bundesverfassungsgericht to show whether it would follow through on the threats perceived in the *Lisbon* decision. However, contrary to the critics’ dire predictions, the Court contented itself with establishing rather strict conditions for a successful *ultra vires* review and with matter-of-factly concluding that, since the ECJ’s decision did not meet those criteria, it was still a ‘binding interpretation of European law’.¹¹ The *EURO bailout* case had a similar outcome: the Court deferred to the political prerogative of the Federal Parliament to assess whether such commitments were fiscally justifiable, rejecting the arguments of the complainants that the Greek bailout and the EURO stabilization package violated the core of the Germany’s fiscal autonomy and thus its constitutional identity.¹²

These cases highlight that the *Lisbon* decision by itself or only in conjunction with *Brunner* provides a context too restricted to take into account

⁴ Dimitrios Doukas, ‘The verdict of the German Federal Constitutional Court on the Lisbon Treaty: not guilty, but don’t do it again!’ (2009) 34 ELR 879.

⁵ Jo Eric Khushal Murkens, ‘Bundesverfassungsgericht (2 BvE 2/08): “We want our identity back”’—The revival of national sovereignty in the German Federal Constitutional Court’s decision on the Lisbon Treaty’ [2010] PL 548.

⁶ Christoph Schönberger, ‘Lisbon in Karlsruhe: Maastricht’s Epigones At Sea’ (2009) 10 German Law Journal 1202.

⁷ BVerfG *Ultra-vires Kontrolle Mangold*, BVerfGE 126, 286—reported in English as *Re Honeywell* in [2011] CMLR 33.

⁸ BVerfG *Griechenland-Hilfe/EURO-Rettungsschirm (Greek aid measures/EURO rescue package)*, case no 2 BvR 987/10, 2 BvR 1099/10 and 2 BvR 1485/10, decision of 07/09/2011 [unreported], <http://www.bundesverfassungsgericht.de/entscheidungen/rs20110907_2bvr098710.html> accessed 8 June 2012, for an English language press release cf: <<http://www.bundesverfassungsgericht.de/pressemitteilungen/bvg11-055en.html>> accessed 8 June 2012.

⁹ For further references of eg Asterios Pliakos, ‘Who is the ultimate arbiter? The battle over judicial supremacy in EU law’ (2011) 36 ELR 113.

¹⁰ ECJ Case C-144/04 *Mangold*, [2005] ECR I-9981.

¹¹ BVerfG *Mangold* (n 7) para 60.

¹² BVerfG *Griechenland-Hilfe/EURO-Rettungsschirm* (n 8) para 133–5.

how the Court's approach differs when dealing with cases about competences already transferred and those about changes yet to be implemented. This article will therefore analyse the *Lisbon* decision within three scenarios to illustrate its practical implications: the day-to-day application of European law by the German Courts (II), the relationship of the German constitutional institutions to each other and to the European institutions in the treaty system post-Lisbon (III) and finally the future evolution of the integration process (IV). This will allow a more realistic picture of the Court's attitude towards European law and European integration to emerge.

II. THE SPECTRE OF HOSTILITY

In *Lisbon*, the Bundesverfassungsgericht unequivocally confirmed the principle established in *Solange II*¹³ that 'the primacy of application of Union law only applies by virtue of, and in the context of, the constitutional empowerment that continues in effect'.¹⁴ This led to strong criticisms that the Court would position itself for an all-out conflict especially with the ECJ, again on the question of the prevalence of European law over the human rights guarantees of the Grundgesetz (the German Federal Constitution).¹⁵ However, considering the scope of the changes introduced by the Lisbon Treaty, the concerns of the complainants in this respect were dealt with rather swiftly. A short reference to well-established case law was all the Court deemed necessary for an issue that, from the judges' point of view, was obviously more than clarified already. Indeed, a closer look at this case law reveals the full extent of the Court's practical support for the enforcement of European law once competences have been transferred to the European Union and are put into action.

A. Judicial Cooperation in Action

Individuals insisted on bringing cases to convince the Bundesverfassungsgericht that it was time to reconsider their 'as long as' caveat established in *Solange II*. The Court finally made it clear in the *Bananas* decision in 2000 that it had no intention to do so—however harsh individual decisions of the ECJ might seem compared to the standards of the Grundgesetz.¹⁶ The judges unanimously held that for a reversal of *Solange II* a referring court needed to provide a detailed evaluation of the level of human rights protection as currently provided by the EC in order to show that it had dropped below the *Solange II* standard *in general*, not just in individual cases.

¹³ BVerfG *Solange II*, BVerfGE 73, 339—reported in English as *Re: Wünsche Handelsgesellschaft* in [1987] 3 CMLR 225.

¹⁴ BVerfG *Lissabon* (n 3) para 240 of the English version.

¹⁵ Doukas (n 4) 880.

¹⁶ BVerfG *Bananenmarktordnung (Bananas)* BVerfGE 102, 147.

In their highly criticized¹⁷ decision on the German *European Arrest Warrant Act*, the Court continued to develop its notion of the duties that fell to the European Union and the national institutions with regard to the protection of individual rights.¹⁸ While two of the dissenting judges showcased eurosceptic¹⁹ and europhile²⁰ alternatives respectively, the majority favoured the more restraint approach visible in *Bananas*. At the same time, it emphasized that the German authorities could not expect the same kind of leniency: the German legislator had a duty to implement European law with the highest consideration possible for the human rights of the individuals concerned.²¹ By making use of the full extent of discretion conferred by the Framework Decision in question, it would have been possible to comply with both the requirements of the Framework Decision and the human rights guarantees of the Grundgesetz, the latter being as binding for the German legislator as the former. Not to have done so constituted a violation of the complainant's rights.²² The majority held the German implementation act to be partly unconstitutional and declared it void in its entirety with immediate effect. A suspension, as suggested by dissenting Judge Lübbe-Wolff,²³ would have been more in line with established precedents for such cases. Thus the majority's decision made it very clear that the German authorities remained accountable to their obligations under the Grundgesetz as far as possible and that the Court would not tolerate circumventions of the Grundgesetz's obligations under the opportune cover of supremacy whenever European law was involved. This approach, incidentally, was endorsed two years later by the ECJ in its own judgment on the validity of this Framework Decision, where the court stated that it was up to the national implementation measures to ensure sufficient human rights protection.²⁴ Moreover, the majority's unusually harsh response stressed that the responsibility to fulfil Germany's

¹⁷ Cf *inter alia* H. Satzger and T. Pohl, 'The German Constitutional Court and the European Arrest Warrant—Cryptic signals from Karlsruhe' (2006) 4 ICJ 686; N. Nohlen, 'Germany: The European Arrest Warrant case' (2008) 6 ICJ 153; J. Vogel, 'Europäischer Haftbefehl und deutsches Verfassungsrecht' [2005] JuristenZeitung 801; J. Masing, 'Vorrang des Europarechts bei umsetzungsgebundenen Rechtsakten' [2006] Neue Juristische Wochenschrift 264.

¹⁸ BVerfG *Europäisches Haftbefehlsgesetz (European Arrest Warrant Act)*, BVerfGE 113, 273.

¹⁹ Judge Broß considered the German implementation act to be void because it went beyond the requirements of the Framework Decision and thus violated the limits for integration established in art 23 GG; BVerfG *Europäisches Haftbefehlsgesetz* (n 18), para 139 and 151 (para 140 and 152 of the English version).

²⁰ To Judge Gerhard the Act was sufficiently open to interpretation so that the concerns of the majority could have easily been met during its application, thus combining the duties under the Grundgesetz with those under European law as emphasized by the ECJ in Case C-105/03 *Pupino*; BVerfG *Europäisches Haftbefehlsgesetz* (n 18), paras 190, 195 and 200 (paras 191, 196 and 201 of the English version).

²¹ BVerfG *Europäisches Haftbefehlsgesetz* (n 18), paras 80 and 83 (paras 81 and 84 of the English version).

²² *ibid* paras 94 and 96 (paras 95 and 97 of the English version).

²³ *ibid* paras 181 and 182 (paras 182 and 183 of the English version).

²⁴ ECJ C-303/05 *European Arrest Warrant*, [2007] ECR I-3633, para 53.

obligations as a Member state was primarily that of the legislative and the executive, and not that of the Bundesverfassungsgericht—a position the Court had already underlined more than a decade before in *Brunner*,²⁵ but which the German Parliament and Government seemed to have conveniently forgotten. As will be seen below, this approach is carried through to the *Lisbon* decision where the Court with even greater emphasis placed the primary ‘integration responsibility’ squarely on the shoulders of the German Parliament and Government.

In 2007, the Bundesverfassungsgericht had the opportunity to develop further the principles outlined above when reviewing a statute creating a greenhouse gas emissions trading system based on EC Directive 2003/87.²⁶ Here the Court distinguished between the mandatory and non-mandatory contents of the Directive and considered provisions of German national law based on the latter to be still subject to the full review under the standards of the Grundgesetz. However, with regard to the mandatory content, the principle of supremacy prevented a constitutional review of the corresponding German provisions.²⁷ Therefore, the German courts had to review such provisions for their compliance with Community human rights and, if necessary, make a preliminary reference to the ECJ to have the validity of the underlying Directive reviewed. Should it prove to be invalid, the ECJ’s decision would then allow the Bundesverfassungsgericht to review the corresponding provisions of German national law as well.²⁸

This decision is a logical step for a court that has accepted the principle of supremacy and its consequences as a reality of life and, following the *Bananas* and *European Arrest Warrant Act* cases, perhaps not even a surprising development. But given its persisting reputation for euro-hostility, it is well worth highlighting that the Bundesverfassungsgericht took this step in such clear terms, considering that it relinquished control over provisions of genuine national law, one of its most important duties. With the number of European directives ever increasing, a considerable amount of German statute law will now no longer be subject to review. Aware of the possible impact, the Bundesverfassungsgericht hastened to emphasize the need to use the preliminary reference procedure to allow the ECJ to fill a potential gap with regard to human rights protection.

This line of reasoning has already been confirmed in a case concerning the German Telecommunications Act that *inter alia* implemented EC Directive 2006/24 on data retention. The complainants applied for interim relief to have the application of the contentious German provisions suspended up to the decision in the main action.²⁹ The Bundesverfassungsgericht dismissed the

²⁵ BVerfG *Maastricht* (n 2), 181–2, 186 and 211.

²⁶ BVerfG *Treibhausgas-Emissionshandel* (*Greenhouse Gas Emissions Trading System*), BVerfGE 118, 79. ²⁷ *ibid* paras 69 and 71.

²⁸ *ibid* para 72.

²⁹ BVerfGE *Data Retention*, BVerfGE 121, 1 (order for interim relief).

application in part. It held that its usually strict standards for interim relief against statutes had to be even stricter when the respective provisions implemented mandatory contents of a Directive because—as the Court did not have the competence to declare EC law invalid—such an injunction would actually give the complainants more than they could achieve in the main action.³⁰ Applying ECJ precedents on interim relief against secondary EC law, the Court held that interim relief against German statutes implementing mandatory contents of a Directive could only be granted if there was a risk to the applicants of particularly serious and irreparable harm that outweighed the severe impairment to the effective operation of EC law.³¹

With this decision, the Court drew the procedural consequences of the principles developed in the cases outlined above: if a substantive review of the provisions in question is not admissible, then it should be very difficult to use the negative consequences of such provisions as an argument to suspend their application to the complainant. Incidentally, the judges do not acknowledge their use of the principle of indirect effect, even though their reasoning clearly reflects the ECJ's case law on interim relief.³² As this decision was issued before *Lisbon*, it will be interesting to see whether the Court's approach in this respect changes in future.

B. Creative Use of National Remedies

Complementing the approach outlined above, the Bundesverfassungsgericht developed principles on enforcing the duties of the German courts under the preliminary reference procedure. While the ECJ has made effective use of Article 267 TFEU, the court still largely depends on the goodwill of the national courts, as there is no direct enforcement mechanism. By using the so-called 'right to the lawful judge' enshrined in the Grundgesetz,³³ the Bundesverfassungsgericht created the means to fill just this gap for the German context.

The right to the lawful judge prohibits the hand-picking of judges for particular cases in order to prevent any inside or outside manipulation of the due process of justice.³⁴ It requires every single German court, including the Bundesverfassungsgericht, to adopt general rules that allow the specific determination of the presiding judge for each case *before* the case reaches the court. He or she then becomes *the* lawful judge, ie the only judge who is allowed to hear the case. In case the respective judge declares an interest or is

³⁰ Incidentally, at that time, the Directive was already under review: ECJ Case C-301/06 *Ireland v Council and EP*, 10/02/2009 (validity confirmed).

³¹ BVerfG *Data Retention* (n 29), para 145.

³² Based on ECJ Case C-465/93 *Atlanta Fruchthandelsgesellschaft*, [1995] ECR I-3761.

³³ Art. 101 (1) 2 GG.

³⁴ Ralf Müller-Terpitz 'Art. 101' in Bruno Schmidt-Bleibtreu, Hans Hofmann, and Axel Hopfau (eds), *Kommentar zum Grundgesetz* (12th edn, Carl Heymanns Verlag 2011) para 5.

otherwise disqualified, an equally predetermined judge has to take over the case. If a party in a particular case is deprived of his or her lawful judge in an arbitrary fashion, the resulting judgment may be challenged before the Bundesverfassungsgericht, which in turn may annul the decision and have the case decided again.³⁵ In *Solange II*, the Bundesverfassungsgericht extended this guarantee to include the ECJ. Given the ECJ's monopoly jurisdiction with regard to the interpretation and validity of EC law and its responsibility to provide human rights protection for individuals, it had become part of the system of legal remedies available in Germany. In order for the right to the lawful judge to remain an effective guarantee, it had to include the ECJ as well. Consequently, a decision not to make a preliminary reference based on arbitrary considerations may constitute a violation of this right and thus allow the resulting judgment to be challenged via constitutional complaint.³⁶

Subsequently, the Bundesverfassungsgericht clarified that it did not intend to use this remedy to establish itself as a 'supreme reference control court'.³⁷ Therefore, decisions would be considered 'arbitrary' only where the duty to refer had been handled in a 'manifestly untenable manner'.³⁸ Referring to the ECJ's jurisprudence on the duties of courts of last instance with regard to preliminary references³⁹ the Bundesverfassungsgericht established that such a manifest violation had to be assumed in particular in three cases: the respective court of last instance had

- 1) misunderstood its duty to refer in principle—this would be the case if the court had realized the relevance of the question for the decision and had had doubts as to the correct answer but did not even consider to refer; or
- 2) had refused to refer (again), while consciously derogating from established ECJ case law—this was for example the case in *Kloppenburg*⁴⁰ where the Bundesverfassungsgericht annulled a decision of the Federal Tax Court, the latter having refused to give direct effect to a European directive deliberately contradicting a decision of the ECJ to that effect following their own reference;⁴¹ or
- 3) in cases without relevant ECJ case law, where the court's judgments had not provided an exhaustive answer to the relevant question or where there was more than a remote possibility of the ECJ developing its case law further—exceeded the acceptable margin of appreciation in an untenable manner; this would especially be the case if the possible interpretations

³⁵ *ibid* (n 33) paras 18–19.

³⁶ BVerfG *Solange II* (n 13), 366–9.

³⁷ BVerfG Case 2 BvR 808/82, [1988] *Neue Juristische Wochenschrift* 1456, 1471; reported in English as *Re patented Feedingsuffs* in [1989] 2 CMLR 902.

³⁸ BVerfG *Absatzfonds (Agricultural Sales Funds)* BVerfGE 82, 159, para 135 (phrase translated by author).

³⁹ Cf especially ECJ Cases 283/81 *CILFIT* [1982] ECR 3415 and 314/85 *Foto-Frost* [1987] ECR 4199.

⁴⁰ BVerfGE 75, 223.

⁴¹ ECJ Case 70/83 *Kloppenburg* [1984] ECR 1075.

of EC law *not* adopted by the court were clearly preferable to the one adopted.⁴²

With this simple mechanism, the Bundesverfassungsgericht had created an easily accessible remedy for individuals that forced the German courts to fully implement the changeover in jurisdiction from the Bundesverfassungsgericht to the ECJ and ensured that this would not be detrimental to the human rights protection of an individual. Since then, a great number of German courts have made preliminary reference requests, so one could argue that this might have worked just a little bit too well for the ECJ's taste.⁴³

In 1995, the Bundesverfassungsgericht expanded on this remedy in the case of *T. Port*.⁴⁴ The German administrative courts had rejected the company's applications for interim relief under the EC regulation establishing the market regime for bananas, arguing that the validity of this EC Regulation had been confirmed by the ECJ,⁴⁵ which left them with no options to grant interim relief to the applicant. The Bundesverfassungsgericht held in favour of Port that irrespective of the question of validity, the EC Regulation was sufficiently open to interpretation regarding cases of hardship.⁴⁶ It followed that the courts should have made a reference to the ECJ to ascertain under which conditions the Regulation would allow such cases to be taken into account and in general under which conditions interim relief against EC law could be granted.⁴⁷ That they had not done so was a violation of the complainant's rights.⁴⁸ This case highlights that the Bundesverfassungsgericht saw the preliminary reference procedure not merely as a procedural step or a convenient opportunity but as an important tool for the German courts to be used creatively to ensure the highest standard of human rights protection possible, while at the same time allowing European law to be implemented effectively. The decision provided an early hint at the strict standards developed subsequently in the *European Arrest Warrant Act* and the *Greenhouse Gas Emissions Trading System* cases.

The Bundesverfassungsgericht refined this line of case law over the years, increasing the burden of proof for both courts and complainants in order to

⁴² BVerfG *Absatzfonds* (n 38) para 137.

⁴³ Cf the statistics on preliminary reference numbers in the ECJ's annual report 2010, 103–4: between 1952 and 2010, the ECJ received 7005 preliminary references. Of this total number, 1802 references came from German courts alone, representing more than 25%. The closest 'runner up' is Italy with 1056 references (about 15%). British courts have referred 505 times (about 7%); <http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-05/ra2010_stat_cour_final_en.pdf> accessed 8 June 2012.

⁴⁴ BVerfG *T. Port*, Case no: 2 BvR 2689/94 and 2 BvR 52/95, [1995] Neue Juristische Wochenschrift 950–1.

⁴⁵ ECJ Case C–280/93 *Germany v Council* [1994] ECR I–4973.

⁴⁶ BVerfG (n 44) 951.

⁴⁷ Following this judgment, the Regional Administrative Court made a preliminary reference to the ECJ to obtain the required guidance: Case C–68/95 *T. Port GmbH & Co. KG* [1996] ECR I–6065.

⁴⁸ Specifically his right to property (art 14 GG) and the right to have access to effective legal remedies (art 19 (4) GG).

ensure admittance of all those cases that it considered important without opening the floodgates to obviously unfounded complaints. It clarified for example that a court that did not acquire adequate knowledge about the relevant European law, substantive law as well as methods of interpretation, typically misunderstood its duty to refer in principle.⁴⁹ Also, a court had to provide detailed reasons for its decision not to make a reference, so that the Bundesverfassungsgericht could conduct a proper review of the efforts the court took in solving the questions of European law raised by the case before it.⁵⁰ At the same time, a court did not exceed the acceptable margin of appreciation simply because the interpretation adopted by the court was not the one favouring the complainants. If the court had based its interpretation of European substantive law on established principles of application and interpretation of European law, there could be no violation of the right to the lawful judge as in that case the procedural decision not to make a reference could not impact on the substantive outcome of the case.⁵¹ For the subsequent complaint this meant that the complainants had to provide sufficient evidence as to why a different interpretation was so obviously preferable to the one adopted by the court.⁵²

In a decision in February 2010, a chamber of the First Senate of the Bundesverfassungsgericht suggested to shift the focus away from the application of European law and to take a more procedural view. The judges argued that the crucial issue was whether the court in question had adhered to the duty on courts of last instance to refer as interpreted by the ECJ.⁵³ They concluded that in the case before them the court had violated that duty as they had not provided sufficient explanation for their decision not to refer despite the fact that the issue under consideration had not been exhaustively answered in the jurisprudence of the ECJ.⁵⁴ However, this approach was rejected a few months later by the Second Senate in the *Mangold* decision mentioned in the introduction.⁵⁵ The judges recalled their refusal to act as a ‘supreme reference control court’ and merely to focus on the formalistic adherence to the duty to refer. They insisted that the criteria established by the ECJ in *CILFIT*⁵⁶ did not oblige the Court to create a remedy for merely procedural violations. Hence,

⁴⁹ BVerfG Case no 1 BvR 1036/99, order of 09/01/2001, para 21. <http://www.bundesverfassungsgericht.de/entscheidungen/rk20010109_1bvr103699.html> accessed 8 June 2012.

⁵⁰ *ibid* para 19.

⁵¹ BVerfG Case no 1 BvR 2722/06, order of 20/02/2008, paras 31 and 48 <http://www.bundesverfassungsgericht.de/entscheidungen/rk20080220_1bvr272206.html> accessed 8 June 2012.

⁵² Cf the examination of the complainant’s arguments in BVerfG (n 49) paras 32–48.

⁵³ BVerfG Case no: 1 BvR 230/09, order of 25/02/2010, para 20. <http://www.bundesverfassungsgericht.de/entscheidungen/rk20100225_1bvr23009.html> accessed 8 June 2012.

⁵⁴ *ibid* para 24.

⁵⁵ BVerfG *Mangold* (n 7). For a more detailed discussion of the decision cf below Part III B ‘Actions of European institutions under review’.

⁵⁶ ECJ Case 283/81 *CILFIT* (n 39).

national courts retained the same margin of discretion for the interpretation of European law as they did for the interpretation of national law, subject of course to their duties to follow established principles of application and interpretation of European law. Therefore, the standard of constitutional review was also the same as it was in purely national contexts, ie the Court reviewed only the potential arbitrariness of the court's decision, not whether the Bundesverfassungsgericht itself might have decided otherwise had it been the trial judge.⁵⁷

This latter approach highlights that the aim in policing the national courts with regard to preliminary references is not to impose yet another procedural burden, but to avoid the outcome that a lack of supervision in the aftermath of *Solange II* and *Bananas* would allow violations of the rights of individuals to go uncorrected by the ECJ. This leads to the Bundesverfassungsgericht judging the 'correctness' of the application and interpretation of European law, which is clearly the ECJ's jurisdiction.⁵⁸ However, it is argued that this approach is still compatible with the ECJ's own approach in the area of state liability in that the failure to refer in itself does not constitute a sufficiently serious breach but has to be seen in context of the application of European law adopted by the court in question.⁵⁹ The decision in C-154/08 *Commission v Spain* is a case in point. The ECJ had held Spain to be in breach of its obligations under European law due to an interpretation adopted by the Spanish Tribunal Supremo. The Spanish Government had argued that they were not able to interfere in favour of European law, since the Spanish constitution guaranteed judicial independence. Relying on the primacy of European law, the ECJ rejected this argument.⁶⁰ Consequently, if the Bundesverfassungsgericht were to decide that a court had not violated the right to the lawful judge due to the interpretation adopted, the complainant in question could always initiate state liability proceedings where the court then could refer to the ECJ and have the previous decisions reviewed, including that of the Bundesverfassungsgericht.

C. A Consistent Policy of Self-Restraint

In conclusion, it is submitted that the case law on the day-to-day application of European law as outlined above does not support the claim that the Bundesverfassungsgericht to this day pursues an unrelentingly hostile course and is set on an all-out conflict with the ECJ. Quite the contrary, it has accepted supremacy, and the subsequent loss of its own powers, as a reality of life. The standard for review established in *Solange II* makes a reversal quite

⁵⁷ BVerfG *Mangold* (n 7) para 89.

⁵⁸ *Inter alia* Dieter Grimm, 'Defending Sovereign Statehood against Transforming the Union into a State' (2009) 5 *EuConst* 357.

⁵⁹ Case C-224/01 *Köbler* [2003] ECR I-10239, para 53-5; Case C-173/03 *Traghetti* [2006] ECR I-5177, para 32.

⁶⁰ Case C-154/08 *Commission v Spain* [2009] ECR I-187, para 125.

improbable.⁶¹ Moreover, the Court ensured that the ECJ could effectively exercise its role as human rights protector by adapting national remedies to prevent the German courts from circumventing their duties in this respect. At the same time, these adaptations provided a remedy for individuals to enforce the courts' obligations with regard to an effective application of European law and to the interpretation of national law in line with European law. Therefore, the practical consequences of the Court's insistence to root supremacy firmly in national law and not autonomously in European law should be negligible.

The controversial 'relationship of co-operation' established by *Brunner* appears to consist in the Bundesverfassungsgericht leaving everything else to the ECJ and focusing on the one issue the ECJ has no jurisdiction to review: the compliance of national laws and of actions of national authorities with the Grundgesetz in those cases where the compliance with European law cannot be faulted. The Court seems determined to use the limited options remaining at its disposal to prevent the competence transfer to the European Union from leading to a gap in the system of remedies available to individuals in Germany. The cases outlined above have proven to be a harsh reminder for the Federal Government, Parliament and the German courts that fulfilling Germany's obligations as a Member State is not an excuse to fail in their obligations under the Grundgesetz.

In the next part, it will be considered how the principle of openness towards European law introduced by the *Lisbon* decision will influence the Court's assessment, and its course of action, when reviewing provisions of German law or the actions of German institutions.

III. THE COMMITMENT TO EUROPEAN INTEGRATION

As seen in the previous part, the case law on the day-to-day application of European law does not support the myth of euro-scepticism on the part of the Bundesverfassungsgericht. Within certain limits, it allows the German courts a considerable margin of appreciation on how best to fulfil their duties with regard to both European law and the Grundgesetz. However, as the *Lisbon* decision shows, the Court is not inclined to allow the German Federal Parliament and Government a similar freedom when *creating* those obligations. It insists that the Grundgesetz's concept of checks and balances be maintained as far as possible by establishing a system of strict supervision of the Federal Government's activities in particular by the Bundestag, the lower house of the Federal Parliament. Moreover, the Court illustrated its apprehensions with regard to the activities of the European institutions and of the German representative in the Council by reaffirming the existing

⁶¹ For a similar assessment cf eg Frank Schorkopf, 'The European Union as an Association of Sovereign States: Karlsruhe's Ruling on the Treaty of Lisbon' (2009) 10 German Law Journal 1230.

ultra vires review power and by introducing the so-called identity review. These controversial claims tend to overshadow the practical support provided elsewhere and led many commentators to call into question or even deny the Bundesverfassungsgericht's commitment to European integration.⁶²

However, as will be seen, the supervisory functions of the Bundestag are not so onerous as to grind the Union's decision-making processes to a halt and the review powers are not likely to develop into a threat, at least not for the European institutions. Also, the developments in the case law since *Lisbon* clearly show the influence of some of its elements that have been underestimated so far: the mandate to integrate and the principle of openness towards European law (*Grundsatz der Europarechtsfreundlichkeit*).

A. The Principle of Openness towards European Law

Given the Court's persisting image as hostile towards European integration, the characterization of the Grundgesetz's stance as a 'mandate to integrate' constitutes perhaps the most surprising part of the *Lisbon* judgment. It would have been easier to simply recall *Brunner* and then to allow the Lisbon Treaty to pass, subject to the previously established provisos. Instead, the Bundesverfassungsgericht stressed that German participation in various forms of peaceful international cooperation and integration was not 'tantamount to submission to alien powers',⁶³ but was in fact a realization of the Grundgesetz's notion of sovereignty.⁶⁴ For the European Union, the Court goes even further and unequivocally asserts the Grundgesetz's commitment to European integration, a commitment that binds all of Germany's constitutional institutions, including the Bundesverfassungsgericht itself:

The constitutional mandate to realise a united Europe (...) means in particular for the German constitutional bodies that it is **not left to their political discretion** whether or not they participate in European integration. The [Grundgesetz] **wants** European integration (...). Therefore (...) the principle of openness towards European law (*Europarechtsfreundlichkeit*) applies.⁶⁵

The characterization of this commitment as a constitutional mandate and as part of a constitutional principle emphasizes the importance that the Bundesverfassungsgericht attaches to the process of European integration and Germany's participation in it.⁶⁶ Such principles represent fundamental value decisions of the Grundgesetz that play a vital role in the interpretation of individual constitutional provisions and in the assessment of the

⁶² *ibid* (n 60) 1238, also Schönberger (n 6).

⁶³ BVerfG *Lissabon* (n 3) para 220 of the English version.

⁶⁴ BVerfG *Lissabon* (n 3) paras 219–26.

⁶⁵ *ibid* para 225 of the English version, emphasis added.

⁶⁶ Daniel Thym, 'In the name of sovereign statehood: a critical introduction to the Lisbon judgment of the German Constitutional Court' (2009) 46 CMLRev 1807.

constitutionality of actions under review,⁶⁷ as can be seen in *Brunner* and *Lisbon* where the Court uses the principle of democracy to great effect. Although, unlike the latter, this new principle of openness is not part of the unalterable core, its status as a constitutional principle means that the Federal Government and Parliament, the German courts, but also the Bundesverfassungsgericht itself, will have to consider it whenever European law is involved. In the *Lisbon* decision, the Court links the principle of openness towards European law to the principle of loyal cooperation and introduces it as a limit to its review powers. However, it does not provide much further information on its scope or how exactly this new principle is going to influence the decision making of the German institutions.⁶⁸ Within the context of the mandate to integrate, it seems to create an overall presumption in favour of the European Union, which could make it a powerful tool for the Federal Government and Parliament as well as the Bundesverfassungsgericht to promote European integration in various ways.

The following sections will examine issues where recent case law has begun to shape the remit of the new principle: the review powers of the Bundesverfassungsgericht and the so-called integration responsibility in particular of the Bundestag.

B. Actions of European Institutions under Review

The Bundesverfassungsgericht's review powers are one of the most controversial issues of its general approach to European law. Since their first appearance in *Brunner*,⁶⁹ they have sparked passionate debates among academics. However, up to the *Lisbon* decision, only two cases were ever brought before the Court where actions of EC institutions were challenged for being *ultra vires*. The first one was a complaint in 1998 against the Council vote that confirmed the introduction of the Euro. The second one was a Constitutional Complaint of the Alcan Company against a judgment of the Federal Administrative Court that had relied on a preliminary ruling decision of the ECJ⁷⁰ to order the repayment of unlawfully paid state aid. The Bundesverfassungsgericht refused to admit either case for decision, summarily rejecting the *ultra vires* argument in both cases since the contested decisions were obviously covered by a competence previously transferred: to the Council in the Treaty of Maastricht regarding the introduction of the Euro and to the ECJ to enforce the Commission's competence in Article 88 EC (Article 108 TFEU).⁷¹ These cases demonstrate an approach similar to *Solange II/Bananas*

⁶⁷ Cf eg Axel Hopfauf 'Einleitung' in Schmidt-Bleibtreu, Hofmann, and Hopfauf, *Kommentar zum Grundgesetz* (n 34) para 88.

⁶⁹ BVerfG *Maastricht* (n 2) 188.

⁷⁰ ECJ Case C-24/95 *Re: Alcan*, [1997] ECR I-1591.

⁷¹ BVerfG *EURO*, Case no: 2 BvR 532/98, 22 June 1998, para 7 <http://www.bundesverfassungsgericht.de/entscheidungen/rk19980622_2bvr053298.html> accessed 8 June

in the area of human rights. The Bundesverfassungsgericht apparently did not intend to allow the *ultra vires* review to be used as an opportune tool to attempt to reverse developments of the integration process merely because they seemed undesirable to the complainants.

At first glance, *Lisbon* seems to reverse this trend and to bring the distrust prevalent in *Brunner* back to the fore: the Court reaffirmed that it considered it its duty to offer remedies against *ultra vires* actions of European institutions and, from now on, also against actions that violated the Grundgesetz's constitutional identity.⁷² However, unlike in *Brunner*, the Court set two conditions: any applicant had to exhaust the remedies available to them on European Union level first and the reviews followed the principle of openness towards European law. Under these narrow conditions, the Bundesverfassungsgericht considered its review powers not to be a violation of the principle of loyal cooperation.⁷³ Most critics considered these conditions mere window dressing, focused on the fact that the Court had reaffirmed its review powers and consequently suspected the Court of intending to escalate its relationship with the ECJ.⁷⁴ It was noted in particular that the Court had broadened the range of actions that could be subjected to review⁷⁵ and seemed prepared to use those powers more actively and very likely in a way that would breach the ECJ's monopoly on the interpretation of the Treaties.⁷⁶ Others were slightly more optimistic, but still cautioned that the Bundesverfassungsgericht's assertion to be the ultimate arbiter of the action's compatibility with the Grundgesetz left the Court only very limited options to exercise those powers in accordance with the European Treaties.⁷⁷

Based on only the *Lisbon* decision some of these criticisms might have been justified, but since the decisions on *Mangold* and the *EURO bailout* most of them have turned out to be misinterpretations of the Court's intentions.

1. *The ultra vires review post-Mangold*

Mangold dealt with a constitutional complaint from an employer against a decision of the Federal Labour Court that had relied on the ECJ's *Mangold* decision to set aside the German law in question. With one judge dissenting, the Bundesverfassungsgericht dismissed the case.⁷⁸ The judges emphasized that according to *Lisbon* the *ultra vires* review was to be conducted subject to

2012; and BVerfG *Alcan* Case no: 2 BvR 1210/98, 17 February, 2000, para 23; <http://www.bundesverfassungsgericht.de/entscheidungen/rk20000217_2bvr121098.html> accessed 8 June 2012.

⁷³ *ibid* para 340.

⁷⁵ Schorkopf (n 60) 1232.

⁷⁶ Jacques Ziller, 'The German Constitutional Court's Friendliness towards European Law—On the Judgment of Bundesverfassungsgericht over the Ratification of the Treaty of Lisbon' (2010) 16 EPL 72.

⁷⁸ BVerfG *Mangold* (n 7).

⁷² BVerfG *Lissabon* (n 3) para 240.

⁷⁴ *Inter alia* Thym (n 65) 1821.

⁷⁷ Schorkopf (n 74).

the principle of openness towards European law and then set out the resulting procedural and substantive conditions.

Since the Bundesverfassungsgericht had to adhere to the decisions of the ECJ as binding interpretation of European law as a matter of principle, the Court had to give the ECJ the opportunity via a preliminary reference to rule on the validity and the interpretation of the contested measure, prior to their own decision in the case.⁷⁹ Deliberately adopting the same phraseology the ECJ uses with regard to state liability, the Court then clarified that a measure could only be declared inapplicable if it was ‘manifestly’ *ultra vires*, ie violated the principle of conferral and thus the existing competence structures in a ‘sufficiently serious’⁸⁰ manner. Such a sufficiently serious violation was

‘contingent on the act of the authority of the European Union being manifestly in breach of competences and the impugned act leading to a structurally significant shift to the detriment of the Member States in the structure of competences.’⁸¹

The Court pointed out that such a shift could not occur simply because the ECJ used its powers—transferred after all by the treaties—to interpret and apply European law, *inter alia* by relying on the common legal traditions of the Member States. Indeed, in the area of human rights, such a jurisprudential method had long been the only possible means to develop the necessary level of protection.⁸² Moreover, the particular position of the ECJ as a supranational court demanded respect for the ECJ’s own methodology and its authority to interpret European law. Hence, interpretations of European law had to be accepted that—while not following the methods of interpretation traditionally used—avoided a structural shift in the manner defined above.⁸³ Dissenting Judge Landau criticized these criteria for excluding the more realistic scenario of a gradual erosion of Member State powers over time that, when combined, caused a manifest violation of the competence structures—as illustrated ‘perfectly’ by the ECJ’s *Mangold* case.⁸⁴

Applying those criteria, the Court concluded that the ECJ had not acted *ultra vires*. As it was for the ECJ to decide whether a particular national measure fell within the area of application of European law, Member States could not remove said measure from the ECJ’s control simply because they used the measure to pursue aims that the European Union had no competence to

⁷⁹ *ibid* para 60. Such an approach had also been suggested directly after *Lisbon* by eg Ziller (n 75) 71; Schorkopf (n 60) 1234.

⁸⁰ BVerfG *Mangold* (n 7) para 61. The official English translation referred to in (n 81) uses at this point the phrase ‘sufficiently qualified’, but the context makes it clear that it should read ‘sufficiently serious’.

⁸¹ BVerfG *Mangold* (n 7) quoted after headnote 1 a) of the English version, <http://www.bundesverfassungsgericht.de/entscheidungen/rs20100706_2bvr266106en.html> accessed 8 June 2012.

⁸² *ibid* para 63.
⁸³ Eg because they were limited to individual cases, and either did not impact on the Human Rights of the individuals involved or allowed for compensation at national level; BVerfG *Mangold* (n 7) paras 66 and 108.

⁸⁴ *ibid* para 108.

regulate. Hence, in this case, the substantive scope of the underlying European legislation was the crucial factor, not the intentions of the German legislator when enacting the national law in question.⁸⁵ Also, the conclusions drawn by the ECJ—that even before the time limit for implementation had passed, national law that conflicted with a directive had to be set aside—merely continued on from the principles developed already in eg *CIA Security*⁸⁶ and *Unilever*.⁸⁷ Even if one were to assume that the ECJ in *Mangold* had gone beyond a methodologically justifiable development of existing primary and secondary European law, this would only constitute a ‘sufficiently serious’ violation if it were to create new competences for the European Union in the process. However, by enacting the secondary law at issue, the European legislators had already created the necessary legal structures that formed the basis of the ECJ’s interpretation.⁸⁸

This decision represents a consistent follow-up to the reasoning of *Lisbon* where the Court indicated *inter alia* that the mandate to integrate required national judicial power to be limited so as not to threaten the integration process and in particular bound national courts to respect the jurisprudence of the ECJ⁸⁹—limitations that are echoed by the conditions set in *Mangold*.⁹⁰ The mandate to integrate and the principle of openness towards European law are clearly meant to be more than mere lip service and are developing a considerable influence over the activities of the German institutions, including the Bundesverfassungsgericht itself.⁹¹

Mangold also links the *Lisbon* decision to the development already seen in the area of human rights. The review powers, claimed as a matter of principle, were not to be used lightly, but with great consideration, deference even, for the role of the ECJ the decisions of which are declared binding unless the very high threshold of a ‘sufficiently serious violation’ can be overcome. Given that the Court already approved the changes to the Union’s competence structure introduced by the Lisbon Treaty, an action that could cause such a ‘structural shift’ is difficult to imagine and thus makes it very unlikely that future actions of European institutions will be considered *ultra vires*.⁹² Indeed, the European institutions, including the ECJ, are left with considerable leeway to develop the integration process in their usual proactive manner. The pointed comment that it was for the ECJ, and not the national legislator, to decide what part of national law would fall within the remit of European law will not go unnoticed

⁸⁵ *ibid* paras 73–4.

⁸⁷ Case C–443/98 [2000] ECR I–7535.

⁸⁹ BVerfG *Lissabon* (n 3) paras 337 and 333 respectively.

⁹⁰ For a similar conclusion of Mehrdad Payandeh, ‘Constitutional review of EU law after Honeywell: contextualizing the relationship between the German Constitutional Court and the EU Court of Justice’ (2011) 48 CMLRev 27.

⁹¹ As predicted by Philipp Kiiver, ‘German Participation in EU Decision-Making after the Lisbon Case: A Comparative View on Domestic Parliamentary Clearance Procedures’ (2009) 10 German Law Journal 1291 and Ziller (n 75) 55.

⁹² As pointed out by dissenting Judge Landau, BVerfG *Mangold* (n 7) para 103.

⁸⁶ Case C–194/94 [1996] ECR I–2201.

⁸⁸ BVerfG *Mangold* (n 7) paras 77–9.

by the German authorities. It should also reassure critics that the Court's perception of the balance of power between the ECJ and itself is far more realistic and pragmatic than they assumed. In this light, it seems reasonable to conclude that the review powers not only could serve to help supervise the activities of the German representative in the Council but might also promote the development of European law in a similar fashion to the use of the preliminary reference procedure.⁹³

While such critics could be tempted to comment cynically that this is merely the Bundesverfassungsgericht shying away from asserting in practice the review powers it so emphatically claims on paper,⁹⁴ there is no denying that the *Mangold* decision answered many questions about the Court's intentions with regard to maintaining a cooperative dialogue with the European institutions. This is so particularly since the Court issued the *Mangold* decision four months after the ECJ handed down its decision in C-518/07 *Commission v Germany*. In that case, the German Government had suggested that for the ECJ to adopt an interpretation contrary to the one they had adopted for the implementation of the European directive in question would essentially constitute an *ultra vires* act.⁹⁵ Predictably, the ECJ was unimpressed by this veiled threat and found Germany in breach of its obligations.⁹⁶ For the Bundesverfassungsgericht to then take such a decided stance in *Mangold* clearly shows that the Court never intended to allow the controversies between the ECJ and itself to become more than a constructive debate about the relationship of European and national law. More importantly, however, it sends a strong signal to the German authorities that the Court will not allow the Federal Government to use the review powers as a convenient threat to hold over the European institutions in order to avoid consequences resulting from the use of the very competences that the German institutions agreed to transfer. Moreover, the Federal Government cannot expect that the Bundesverfassungsgericht will naturally side with its interpretation of a particular act being *ultra vires* or in violation of the Grundgesetz's identity. Again, the initially highlighted distinction in the approach of the Bundesverfassungsgericht comes to the fore: a high level of support once the competences have been exercised, while aiming to maintain a greater influence of the Grundgesetz at an earlier stage.

2. *The EURO bailout and the identity review*

The Court introduced the other limb of the review powers in order to allow the preservation of the specific constitutional identity of the Grundgesetz against actions that appear to violate the limits to integration as set out in the *Lisbon*

⁹³ Kiiver (n 910); Ziller (n 76) 71.

⁹⁴ As done by dissenting Judge Landau, BVerfG *Mangold* (n 7) para 103.

⁹⁵ Case C-518/07 *Commission v Germany*, [2010] ECR I-1885 para 48. Cf for further comments also Pliakos (n 9) 111.

⁹⁶ *Commission v Germany* (n 94) paras 50-1.

decision.⁹⁷ This may concern either procedural or substantive issues, eg that the German representative participated in the Council without prior instruction by the Bundestag (cf. below) or that the action in question infringed the necessary ‘space for the political formation of the economic, cultural and social circumstances of life’.⁹⁸ Due to the European Union’s ‘blindness’ regarding the national constitutional set-up of its Member States, such actions could normally not be considered *ultra vires* as they would be covered by competences actually transferred and thus valid despite the violation of national constitutional limits.⁹⁹ Hence, the Court introduced the identity review as a remedy to address these situations. Unfortunately, the only effective way the Bundesverfassungsgericht saw to achieve this was to threaten the inapplicability of the resulting European act within Germany. However, like the *ultra vires* review, the identity review is subject to two conditions: it will only be available if remedies at Union level fail and it is subject to the principle of openness towards European law.

The 2011 *EURO bailout* decision was the first case where the arguments of the complainants revolved around the identity core of the constitution. However, owing to its particular setting, it is probably not as reliable a guideline as *Mangold* is for the *ultra vires* review. The Court considered admissible only the challenges against the German statutes implementing the decision of the European Council about the financial aid for Greece (‘Greek bailout’) and the decision of the Members of the Eurozone to enhance the stability of the Euro (‘EURO stabilization package’) and only on the grounds of a violation of the identity of the democratic principle. The challenges directly against the acts of the European institutions for being *ultra vires* were considered inadmissible since the complainants were not directly affected by these acts and thus could not challenge them via constitutional complaint. The Court also dismissed the challenges against the acts of participation of the German representative in those bodies, holding that the alleged violation of the integration responsibility of the Federal Parliament was insufficiently substantiated.¹⁰⁰

The Bundesverfassungsgericht reaffirmed that the democratic principle allowed challenges against actions of the Bundestag that eroded its role as an effective representative of the citizens. The judges now extended that to include decisions that could render a present or future parliament not just legally—through transfer of competences—but practically—eg by binding its finances—incapable of fulfilling that role. Consequently, budgetary autonomy was crucial to democratic self-determination and thus part of the constitutional core identity.¹⁰¹ On the other hand, financial commitments were an accepted part of

⁹⁷ BVerfG *Lissabon* (n 3) para 340. For a detailed discussion of the limits cf below Part IV.

⁹⁸ *ibid* para 249.

⁹⁹ *Kiiver* (n 90) 1289–90.

¹⁰⁰ BVerfG *Griechenland-Hilfe/EURO-Rettungsschirm* (n 8) paras 113–18.

¹⁰¹ *ibid* paras 101–2.

Germany's participation in the European integration process. It was up to the Bundestag to evaluate Germany's budgetary capacities and economic strength and to balance these against the likelihood that the guarantees be realized. So long as fundamental fiscal decisions were taken by, or with the consent of, the Bundestag, they would not violate the constitutional core even if they reached substantial proportions.¹⁰² In order to exercise its fiscal responsibility, the Bundestag had to ensure it retained a decisive influence on the decisions taken in these mechanisms, in particular situations even on a case-by-case basis.¹⁰³ At the same time, the Court emphasized that it had to respect the prerogative of the legislator, which prevented it from substituting its own assessment of the risks for that of the elected body and limited its review to evident violations of the limitations outlined above. 'Evident' in this context were decisions that were unjustifiable in light of the amount involved and the potential consequences for budgetary autonomy.¹⁰⁴

Applying these principles, the Bundesverfassungsgericht concluded that the statutes under consideration did not erode the Bundestag's budgetary autonomy to the point that it violated the core of the democratic principle. They did not create an automatic liability and the Bundestag's assessment about the potential impact on the budget was constitutionally acceptable.¹⁰⁵ Conversely, the Court did find parliamentary control insufficient with regard to the statute on the EURO stabilization package as it required the Federal Government merely to *try* to obtain the approval of the Budget Committee. Instead of annulling the statute, however, the judges merely required the statute to be interpreted in line with the constitution, ie as requiring the Committee's prior consent, unless it was an emergency.¹⁰⁶

The scope of this article does not allow for a comprehensive review of this decision; however, a few issues are worth highlighting within the present context. On the one hand, the result is reassuring: the Court retained the exceptional character of the identity review and avoided unnecessary conflict with the ECJ. On the other hand, compared to the indications from the *Lisbon* decision, this case is rather atypical for an identity review. Any conclusions drawn here might therefore not be applicable to future cases.

With regard to the general approach, this case appears consistent with the developments in the area of human rights and *ultra vires* review. The Court limited its review to violations of the core identity rather than police every single transgression. Given the scope of the contributions agreed in the mechanisms under review and the potential impact on the budget, the economy and the lives of the people living in Germany, the Court's consideration for the political stakes involved is remarkable. Even more so, if one recalls that in *Lisbon* the Court had identified fiscal autonomy as a sensitive area, emphasizing that the Bundestag needed to retain 'sufficient political discretion' with regard to the

¹⁰² *ibid* para 124.

¹⁰⁵ *ibid* paras 133–5.

¹⁰³ *ibid* paras 127–8.

¹⁰⁴ *ibid* para 130.

¹⁰⁶ *ibid* para 141.

budget, that a ‘supranationalization to a considerable extent’ would violate the democratic principle.¹⁰⁷ A possible explanation might be that, unlike the situations envisaged in *Lisbon*, this case dealt with activities at European level that took place in the European Council and among the members of the Euro-group. This meant that the more classical intergovernmental mechanisms—decisions were taken under the express proviso of national constitutional compatibility and each Member State had the power to veto further developments—would ensure Germany a decisive influence. The Court could thus rely on these pre-existing options to shape the guidelines for the Bundestag and need not worry that European acts would become valid without Germany’s express approval. In a case from within the more supranational institutional framework this would be different, so the Court might not take such a relaxed stance.

Another interesting point is the use of the principle of openness towards European law. The judges do not refer to it explicitly at that point, but their comment—that even substantial financial commitments were seen as a natural consequence of Germany’s membership in the European Union—can be interpreted as an implicit application causing the standard for review to change for the European context. This could then explain the judges’ reserve in an area they had identified in *Lisbon* as sensitive with regard to further integration efforts.

Where the case becomes atypical for an identity review is that the Court reviewed neither the acts of the European institutions nor the participation of the German representative, not even indirectly. After all, to include such actions—and potentially declare them inapplicable—had been the primary reason for the creation of the remedy; and since the Court did review the German implementation statutes, it would have been possible to at least comment on the underlying European acts as it did eg in the *European Arrest Warrant Act* case. Yet, while both the complainants’ and the Federal Government’s arguments revolved around exactly that point, the judges considered a detailed analysis of the relevant European provisions unnecessary. They merely commented that they saw the current regime of the currency union as presupposing national budgetary autonomy and as aiming to prevent any liability for another Member State’s debts beyond what was agreed in the treaties.¹⁰⁸ The Court relied on procedural constraints to explain this reticence,¹⁰⁹ but this seems unsatisfying since the judges do not clarify under what circumstances or by whom such a challenge should be brought and what their standard for review will be.

Overall, the impact of the case will be difficult to assess. It allows the tentative conclusion that the identity review will not develop into a threat, but it

¹⁰⁷ BVerfG *Lissabon* (n 3) para 256.

¹⁰⁸ BVerfG *Griechenland-Hilfe/ EURO-Rettungsschirm* (n 8) para 129.

¹⁰⁹ *ibid* para 116.

does not establish general guidelines for the German institutions on how to prevent or avoid violations of core identity values.

C. The Integration Responsibilities of the Federal Parliament

Another facet of the Court's attitude towards European integration is illustrated by its approach to the institutions and their activities. While *Brunner* had strongly emphasized the duties of the European institutions with regard to respecting the Member States' rights, the focus in *Lisbon* is far more on the duties 'incumbent upon German constitutional bodies'.¹¹⁰ The Federal Parliament and Government are identified as carrying the primary responsibility which has to be realized in the everyday work of the European institutions (eg while legislating) as well as during a revision of the treaty system.¹¹¹ In order to maintain the political responsibility of the Bundestag as the directly elected representative of the German people, the German representative in the Council could only act with prior instruction by the Bundestag in certain situations, especially regarding any change in primary law.¹¹² Moreover, the vote on this instruction had to be taken as a formal statute requiring the consent of the Bundesrat and in some cases even a two-thirds majority in both Houses.¹¹³ As could be seen in the *EURO bailout* case, this requirement applies also to mechanisms established parallel to the existing treaty system that affect the practical independence of the Bundestag.¹¹⁴

At first glance, these guidelines sounds fairly severe. The mandate to integrate apparently comes at the price of tight internal control to ensure that the Executive does not use its position in the European institutions to circumvent the Grundgesetz's system of checks and balances. This complements the principles developed in the *European Arrest Warrant Act* and *Greenhouse Gas Emissions Trading System* cases regarding accountability especially of the activities of the Federal Parliament. While so far the activities of the Federal Government have of course been subject to parliamentary oversight as of right, the democratic principle now turns this right into a duty, ie reinforces the doctrine of parliamentary reserve for the European context. This forces the parliamentarians to take their role more seriously and not simply rely to on the Bundesverfassungsgericht to enforce their rights vis-à-vis the Federal Government.¹¹⁵

However, before one accuses the Court of excessively restricting the political prerogative of the Government,¹¹⁶ one should consider two things: firstly, that from a practical perspective, this is a sensible precaution to curb the

¹¹⁰ BVerfG *Lissabon* (n 3) para 245 of the English version.

¹¹¹ *ibid* paras 242–5.

¹¹² Eg the use of the bridging clauses, but also *inter alia* the use of art 352 TFEU.

¹¹³ BVerfG *Lissabon* (n 3) paras 319, 320, 327, 328 and 365.

¹¹⁴ BVerfG *Griechenland-Hilfe/EURO-Rettungsschirm* (n 8) para 128.

¹¹⁵ Schönberger (n 6) 1217.

¹¹⁶ Eg Murkens (n 5) 548.

Federal Government's tendency for too much independent action. Also, other Member States operate even more general systems of parliamentary control,¹¹⁷ hence it is unlikely that these requirements will cause unacceptable delays at European level, as could be seen in eg the *EURO bailout* case.¹¹⁸ Secondly, and more importantly, such control mechanisms are not necessarily that effective in practice since in parliamentary democracies like Germany, the government will generally be able to rely on its own majority in parliament to get the required instructions.¹¹⁹ At the same time, experiences from cases of troop deployment—which are subject to a similar parliamentary reserve—will have taught the Federal Government not to underestimate the difficulties to obtain the required majorities, especially in the Bundesrat, or the willingness of Members of both houses of Parliament to challenge the resulting vote before the Bundesverfassungsgericht.¹²⁰ Indeed, the involvement of the Bundesrat might cause considerable problems in this respect, depending on the majority situation in that house. This should lead to a closer cooperation between Federal Parliament and Government; it will require in particular the Federal Government to keep the Bundestag fully informed well ahead of the vote at European level to give it enough time to hold the necessary debate and vote.

But the Bundestag will have to do more than rely on the information provided by the Government in order to protect the core powers as identified by the Court and to use the options introduced by the Lisbon Treaty (eg the so-called early warning system)¹²¹ to their full effect. The *EURO bailout case* is a case in point. The Court allowed the political actors considerable leeway, without responding to the arguments of the complainants that the political pressure exercised by the Federal Government prior to the vote had turned parliamentary participation into mere window dressing,¹²² ie the opposite of what was intended by *Lisbon*. One could argue this shows rather too much appreciation for the political stakes involved. On the other hand, it would have been difficult if not impossible for the Court to define specific guidelines as to what behaviour on the part of the government, or indeed what other political

¹¹⁷ As does eg the UK. For an overview cf *inter alia* Kiiver (n 90).

¹¹⁸ The EURO stabilization package statute was adopted, authenticated and entered into force on 07/05/2010. The applicants filed their constitutional complaints on that same day and the Bundesverfassungsgericht decided on the applications for interim relief mere hours after they had been filed by the applicants, cf the order of 07/05/2010, Case no 2 BvR 987/10 at <http://www.bundesverfassungsgericht.de/entscheidungen/rs20100507_2bvr098710.html> accessed 8 June 2012.

¹¹⁹ Daniel Halberstam and Christoph Möllers, 'The German Constitutional Court says 'Ja zu Deutschland!'' (2009) 10 German Law Journal 1252; Kiiver (n 90) 1293.

¹²⁰ Cf eg BVerfG *AWACS* BVerfGE 121, 135, 153; also BVerfGE 104, 151, 208; BVerfGE 108, 34, 43.

¹²¹ The Lisbon Treaty in its Protocol (no 2) 'On the Application of the Principles of Subsidiarity and Proportionality', [2010] OJ C83/206, introduced rights for national parliaments to object to European bills before the vote in the European Parliament and the Council of Ministers is taken. The aim is to allow national parliaments a greater influence with regard to the adherence to the subsidiarity principle.

¹²² BVerfG *Griechenland-Hilfe/ EURO-Rettungsschirm* (n 8) para 53.

factors, could invalidate a parliamentary vote without interfering with the political prerogative of both Government and Parliament to an unacceptable degree. It will therefore be up to the Members of the Bundestag themselves whether the only consequences of the *Lisbon* requirements will be increased transparency and public scrutiny¹²³ or whether they will manage to achieve a measure of actual control. The amendment of the EURO stabilization package adopted in September 2011 was hailed as move in this direction.¹²⁴ Despite the fact that the Court had let the statute stand, the amendment increased the level of parliamentary participation. As a matter of principle, decisions about stabilization measures now have to be approved by the Bundestag as a whole. The Federal Government can involve the Budget Committee only in specific situations and this decision in turn is subject to review by the Bundestag.¹²⁵

The identity review introduced by *Lisbon* will act as an internal enforcement mechanism, allowing the Bundestag (especially the opposition), and also individuals, to challenge any action taken without prior instruction, thus ensuring that the Federal Government adheres to the strict *Lisbon*-guidelines. Moreover, in the *EURO bailout* case, the judges expanded this to include violations of the integration responsibility as such. At the same time, they confirmed that the review will be subject to the principle of openness towards European law. They held that it requires the German institutions as a matter of national constitutional law to respect and adhere to European law whenever they act within the institutional framework of the European Union.¹²⁶ Consequently, it will not only influence the activities of the German representative in the Council, but also the Bundestag's discretion when providing such instructions. The Federal Government may even be able to challenge the constitutionality of a particular vote before the Bundesverfassungsgericht in order to have it annulled, in case the Bundestag refuses to authorize steps for further integration although they would not threaten Germany's constitutional identity. Used creatively by both Government and Parliament, the procedural mechanisms can be both a threat and an opportunity, the latter especially the earlier in the decision-making process the instructions are requested.

¹²³ Cf also the arguments of Kiiver (n 118) 1295.

¹²⁴ Deutscher Bundestag, 'Breite Mehrheit für Ausweitung des Rettungsfonds' (Press release of 29/09/2011) <http://www.bundestag.de/bundestag/aktuell/35862641_kw39_de_europa.jsp> accessed 8 June 2012. In the debate during the final reading, Volker Kauder (the parliamentary leader of the conservative CDU party) hailed this new regime as a 'paradigm shift' towards a new relationship between the Federal Government and the Bundestag in matters of parliamentary scrutiny. Gregor Gysi (leader of the opposition party 'Die Linke') on the other hand heavily criticized the level of secrecy still involved under the new regime.

¹²⁵ This has already been confirmed in BVerfG *EFSF/ Bundestag's participation rights*, Case no 2 be 8/11, decision of 28/02/2012 [unreported], <http://www.bundesverfassungsgericht.de/entscheidungen/es20120228_2bve000811.html> accessed 8 June 2012. For an English language press release cf <<http://www.bundesverfassungsgericht.de/pressemitteilungen/bvg12-014en.html>> accessed 8 June 2012.

¹²⁶ BVerfG *Griechenland-Hilfe/ EURO-Rettungsschirm* (n 8) para 109.

It has been argued that the requirements outlined above were established to safeguard German sovereignty.¹²⁷ However, as seen above, they would not be very effective in this respect, but then again they were not meant to serve as such. The Court is not concerned that eg the bridging clauses will be used at all but that, when the decision about their use is taken, it is done by the institution that the German people elected for that very purpose, thus ensuring that the democratic principle retains its full effect also during decision making within the European context. Also considering that such requirements mirror the very demands for more participation of national Parliaments at European level that featured highly during the process of drafting the Constitutional Treaty as well as the Lisbon Treaty, it would be difficult to interpret them as mere expressions of euro-hostility.¹²⁸

D. Self-Restraint Carried Further

The cases reviewed above provide essential insights as to the scope and influence of the principle of openness towards European Law. As indicated above, it seems to create a general presumption in favour of the European Union. Without providing a specific definition, the Court used it to derive specific duties for the Federal Government and Parliament and even for itself that in turn have shaped and will continue to shape the relationship between European and national constitutional law. It has acted as substantive and procedural limitation on the review powers. The *EURO bailout* case indicates that it could serve as a justification for the Federal Government and Parliament to agree to further steps of the integration process. Moreover, it seems to turn the principle of loyal cooperation into a principle of national constitutional law.¹²⁹ The parallels are certainly obvious, including the pervasive influence of either. However, how far both will overlap and lead to similar results is still uncertain at this stage. Either way, the principle of openness towards European law could turn into a powerful tool for the promotion of European integration.

The case law also shows how the *Lisbon* principles have reshaped the *Brunner* guidelines with regard to the interaction between the Federal Government and Parliament as well as that between the European and the national level. After the decision in *Mangold*, a successful challenge under the *ultra vires* review seems as unrealistic as a reversal of *Solange II* and the *EURO bailout* decision seems to indicate that the identity review might develop in a similar manner. As in the area of implementation of European law, it will depend on the Federal Government and Parliament how much actual impact either review power will have on their decisions and on decisions of the European institutions. The Court certainly does not intend to use them to

¹²⁷ Claimed eg by Doukas (n 4) 876.

¹²⁸ Cf the conclusions drawn by Murkens (n 5) 550.

¹²⁹ BVerfG *Griechenland-Hilfe/ EURO-Rettungsschirm* (n 8) para 109.

censure activities of the political actors; rather—as the case law before *Lisbon* already indicated—their application appears as a means of last resort and allows the political actors a lot of leeway to implement their chosen course of action. The political centre stage is left to the institutions elected and appointed to take it—a logical consequence of the Court’s notion of democracy as expressed in the *Lisbon* decision.

It now remains to be seen whether a similar conclusion can be drawn with regard to future development of the integration process.

IV. THE FUTURE INTEGRATION PROCESS

While Parts II and III concerned issues that will affect the day-to-day work of the European and German institutions under the current treaty system, this last part will examine issues that affect the interaction of European law and national law at the earliest possible point in time, ie when the Member States plan for the next amendment treaty or for concerted action at European level. This is the area where the Bundesverfassungsgericht seems the least inclined to compromise, ie where it sees the influence of the Grundgesetz at its strongest. This is the main reason the *Lisbon* decision is much more critical than eg *Mangold*. Unlike the latter, the review of an amendment treaty requires the Court to assess not only the new treaty ‘as is’ but also the likely development of the integration process during its implementation, based on past experience in particular with the proactive style of the European institutions.

To the disappointment of many, *Lisbon* clearly reflects the Court’s apprehensions about the potential threats to the system of democratic governance as established by the Grundgesetz. The judges set explicit conditions for further integration and marked particular issues as still needing considerable attention before any further steps could be taken. The general impression was that they had set the threshold so high as to at least hinder if not close off any further efforts at European integration.¹³⁰

It will now be examined whether the mandate to integrate and the principle of openness towards European law might exert their influence also in this area to allow for an interpretation more favourable to future integration than a first impression of the *Lisbon* decision might indicate.

A. The Limits of Competence Transfer

The Court unequivocally reaffirmed, and expanded on, the limits set out in *Brunner*: the core of unalterable values was ‘not amenable to integration’,¹³¹ the principle of democracy in particular was ‘inviolable’,¹³² a transfer of

¹³⁰ *Inter alia* Schönberger (n 6) 1209.

¹³¹ BVerfG *Lissabon* (n 3) para 235 of the English version.

¹³² *ibid* para 216 of the English version.

Kompetenz-Kompetenz was not possible and whatever the extent of the competence transfer, the Member States had to 'retain sufficient space for the political formation of the economic, cultural and social circumstances of life', especially in 'essential areas of democratic formative action' as defined by the Court.¹³³

These limits for future competence transfers sound severe indeed; especially the list of essential state tasks appear at first glance as an absolute limit on any future competence transfers with respect to the listed areas.¹³⁴ However, such a conclusion is borne out neither by the Court's further reasoning in the *Lisbon* decision itself nor by the current state of European law. The Court itself declared that the democratic principle in combination with the principle of openness towards European law did not require that a certain number or specific types of competences had to remain with the Member States. The judges openly acknowledged that the reality of how power is shared between the Member States and the European Union does not follow the traditional concept of a *domaine réservé*.¹³⁵ Moreover, the scope of competences of the EC prior to the Lisbon Treaty already provided the Community with opportunities to legislate in areas the judges listed as essential,¹³⁶ and the European Union post-Lisbon has even more influence.¹³⁷ Indeed, if one considers how much—or rather how little—independent power the Member States actually have left to retain a decisive influence on eg the economic life of their citizens, one is left to wonder how low the Court set the base line, given that the Lisbon Treaty is deemed not to violate it.¹³⁸ Moreover, as both the ECJ and the Bundesverfassungsgericht have stressed, even if a particular piece of national legislation were to be enacted within the exclusive competence of the Member States, it would still come under the influence of European law, should the subject matter overlap.¹³⁹ It is therefore submitted that this enumeration should rather be seen as constituting a list of sensitive areas where future integration efforts should be preceded by considered reflection on the part of the Member States rather than be the object of political

¹³³ *ibid* para 249 of the English version: 'Essential areas of democratic formative action comprise, *inter alia*, citizenship, the civil and the military monopoly on the use of force, revenue and expenditure including external financing and all elements of encroachment that are decisive for the realization of fundamental rights, above all as regards intensive encroachments on fundamental rights such as the deprivation of liberty in the administration of criminal law or the placement in an institution. These important areas also include cultural issues such as the disposition of language, the shaping of circumstances concerning the family and education, the ordering of the freedom of opinion, of the press and of association and the dealing with the profession of faith or ideology.'

¹³⁴ Murkens (n 5) 539; Schorkopf (n 60) 1230.

¹³⁵ BVerfG *Lissabon* (n 3) para 248.

¹³⁶ Eg in the area of social policy, BVerfG *Lissabon* (n 3) para 393.

¹³⁷ Eg in the areas of cooperation in criminal matters and taxes and with regard to the impact of European law on human rights protection in general.

¹³⁸ BVerfG *Lissabon* (n 3) para 351.

¹³⁹ Cf eg BVerfG *Mangold* (n 7) para 73 and ECJ C-555/07 *Kücükdeveci*, [2010] ECR I-365, para 51.

package deals.¹⁴⁰ Consequently, any assessment of whether or not future treaty amendments will leave the Member States ‘sufficient space’ to shape those areas will depend more on the *quality* than the *quantity* of the remaining competences.¹⁴¹

Moreover, the influence of the mandate to integrate and the principle of openness towards European law should not be underestimated even in this area. As already pointed out, in *Lisbon* the Bundesverfassungsgericht stressed that it was ‘not left to the political discretion [of the constitutional institutions] whether or not they participate in European integration’.¹⁴² This could be interpreted as limiting the Federal Government’s prerogative to make a *political* decision about whether or not to remain in the European Union, an option that in other Member States is naturally part of a government’s prerogative.¹⁴³ Based on *Lisbon*, however, it seems that the Federal Government needs to claim that the road the European Union is taking violates the standards set out above, which would then trigger a constitutional duty to withdraw.¹⁴⁴ However, that claim in turn might be subject to review by the Bundesverfassungsgericht, on the application of eg members of the opposition in the Bundestag, which would allow the Court to curb any Euro-hostile attitudes of future Federal Governments or indeed Parliaments. In the case of amendment treaties, the mandate could be seen as creating a presumption in favour of the constitutionality of the planned competence transfer. It will also influence the overall assessment of how the planned transfer correlates with the space the Member States still have left in areas where competences have already been transferred. As the Court has repeatedly stressed, the principle of subsidiarity plays an important role in maintaining the balance of power between the Member States and the European Union as it was intended by the former. Any assessment of how much influence the Member States have retained as a whole to shape the life of their citizens will therefore impact on the question of how many additional competences may be transferred to the European Union.

It has been argued that the politically accountable institutions like the Federal Government or Parliament and not a court, even a constitutional one, should delineate the limits for integration.¹⁴⁵ However, while this might be true for other constitutional systems, this is not the case for the German context, not under the current constitution. From the Court’s perspective, the limits outlined in *Brunner* and *Lisbon* stem from the core constitutional values that the eternity clause¹⁴⁶ reserves to the sovereign decision of the German people alone, ie they are protected from constitutional amendment by precisely those politically

¹⁴⁰ For a similar assessment cf eg Schorkopf (n 60) 1238 or Thym (n 65) 1800.

¹⁴¹ As the Court itself pointed out, BVerfG *Lissabon* (n 3) para 351.

¹⁴² *ibid* para 225.

¹⁴³ As repeatedly stressed by the UK. For further examples cf eg Kiiver, (n 90) 1292ff.

¹⁴⁴ As established by BVerfG *Lissabon* (n 3) para 264.

¹⁴⁵ Schönberger (n 6) 1210.

¹⁴⁶ Art 79 (3) GG.

accountable institutions. Therefore, if the Federal Government and Parliament do not even have the power to make decisions about these values in a purely national context, it follows that they do not have the power to delineate the limits of Germany's commitment to European integration in this respect either.¹⁴⁷ Moreover, given the historical origins of the eternity clause as a safeguard against the subversion or destruction of the constitutional checks and balances from within, it makes sense to use it in the European context as a means to prevent the political actors from assuming power over decisions that—to the Court—are not theirs to make in the first place.¹⁴⁸ It is therefore consistent for the Court to control these limits in the same way as it reviews compliance with the eternity clause in general. Whether or not the *EURO bailout* decision is any indication as to the level of scrutiny applied in this context remains to be seen.

B. The Democratic Deficit as the More Crucial Limit

While the limitations outlined above are not interpreted as setting absolute limits, much of their flexibility will depend on how another controversial issue is resolved by the Member States as well as the European Union: the democratic deficit. Despite the changes introduced over the last two decades and the mechanisms of participatory democracy introduced by the Lisbon Treaty, the *Lisbon* decision made it clear that the Court considered the European Parliament as still lacking in democratic legitimacy and thus unable to fully legitimize action at Union level.¹⁴⁹ In essence, it rejected the adoption of a more flexible approach to the democratic principle simply to accommodate the functionality of the European Union: the Union's *sui generis* nature could not excuse its lack of democratic credentials, especially not if all hopes are pinned solely on the European Parliament.¹⁵⁰ Consequently, future competence transfers will only be possible if the level of democratic legitimization increases correspondingly.¹⁵¹

This reasoning has been criticized as a negative derogation from *Brunner* and as a rigid application of the Court's own constitutional standards to an entity that is still developing its own concept of democratic legitimacy and is now cruelly stifled in those efforts.¹⁵² Moreover, the rejection of the European Parliament in favour of legitimization primarily through national parliaments would only serve to replace one seemingly insufficient mechanism with an ineffective one.¹⁵³ It also seems to leave the European Union in an uncomfortable double bind in that it cannot seem to further its democratization without violating the limits to further integration established by the Court.¹⁵⁴

¹⁴⁷ BVerfG *Lissabon* (n 3) para 218.

¹⁴⁹ BVerfG *Lissabon* (n 3) para 280.

¹⁵¹ BVerfG *Lissabon* (n 3) para 262.

¹⁵² Halberstam and Möllers (n 118) 1248 and 1252; Christian Tomuschat, 'The Ruling of the German Constitutional Court on the Treaty of Lisbon' (2009) 10 German Law Journal 1261.

¹⁵³ Thym (n 65) 1812.

¹⁴⁸ Grimm (n 57) 367.

¹⁵⁰ Succinctly argued by Kiiver (n 91) 1291.

¹⁵⁴ Halberstam and Möllers (n 118) 1251.

These pessimistic interpretations have in turn been criticized for ignoring the generalist nature of the Court's reasoning which allowed room for more positive conclusions. The admittedly clear demotion of the European Parliament to a mere 'representation of the peoples of the Member States'¹⁵⁵—as opposed to that of one European demos—is taken as a 'salutary warning' that the European Parliament alone cannot legitimize the activities of the European Union. Thus, the Member States should not become complacent in their efforts to democratize the structures of the Union as a whole if they want to push for further integration.¹⁵⁶ It was therefore considered to be consistent of the Court to conclude that at the current state of integration the European Union needed the national parliaments to provide the necessary democratic legitimacy in order to compensate for its own lack thereof.¹⁵⁷

These latter interpretations are more consistent with the Court's actual attitude as it has been deduced in this article. In particular, they emphasize the correlation of both the national and the European facets of the integration responsibility of the German constitutional institutions. While the active involvement of the Federal Parliament is constitutionally necessary within the national context, it is crucial at European level to provide the European Union with the level of democratic legitimacy it needs to allow Germany's participation as a member state. Moreover, they highlight why the Court sees the democratic deficit as the greatest obstacle to further integration: in the current political reality, the state is still seen as a necessary structure to provide the 'basis of individual freedom and collective self-determination'¹⁵⁸ of its people, in essence the preservation of their human dignity.¹⁵⁹ The state cannot absolve itself from that duty by transferring power to another entity without making very sure that the people in its care will still be able to exercise that individual and collective freedom through a system of democratic governance.¹⁶⁰ At the same time, there are various courses of action open to the European Union to remedy the deficit without creating the perceived double bind.¹⁶¹

C. The Limits of Self-Restraint

Given the sensitive nature of the issues examined above, it is perhaps not surprising that the Bundesverfassungsgericht's approach in this area shows greater reluctance to have the practicalities of European law overrule the democratic standards of the Grundgesetz. Despite its apparent apprehensions,

¹⁵⁵ BVerfG *Lissabon* (n 3) para 284 of the English version.

¹⁵⁶ Küiver (n 90) 1291; Michael Waibel, 'A good day and salutary warning for the European Union' (2010) 69 CLJ 38.

¹⁵⁷ BVerfG *Lissabon* (n 3) para 224 of the English version.

¹⁵⁹ *ibid* para 211.

¹⁶⁰ For a similar conclusion cf *inter alia* Schorkopf (n 60) 1222.

¹⁶¹ For suggestions cf eg Thym (n 66) 1820.

however, the Court allowed the most fundamental change in the European treaty system to pass, albeit with clear guidelines for the further integration process. This leaves the impression that the Grundgesetz is still fairly flexible and one is left to wonder where exactly the Bundesverfassungsgericht will draw the line, since, it is submitted, the Lisbon Treaty does not seem to be it.

Equally, the mandate to integrate and the principle of openness towards European law showed themselves as a potentially positive influence even in an area where the Court clearly feels apprehensive about further developments. Then again, the Court itself considered the currently existing democratic deficit to be tolerable. In light of the current state of European integration, that conclusion in itself is testament to the Court's commitment to, and support for, the integration process.

Nevertheless, it should not be overlooked that the Court did set one limit where there seems to be no room for flexibility: should the issues around the democratic deficit not be resolved, Germany might ultimately have to withdraw from the European Union as a matter of constitutional necessity.¹⁶²

V. LISBON AS A RELIABLE GUIDE TO THE COURT'S ATTITUDE?

With regard to the question initially raised, the analysis has shown that the *Lisbon* decision in conjunction only with *Brunner* is not a reliable guide to gauging the Court's actual attitude towards European integration. It needs to be interpreted within the context of how German constitutional law as a whole interacts with European law. Separating out the different scenarios of that interaction has highlighted how the various strands of the Court's case law integrate European law within their respective contexts but also how those strands influence each other and thus necessarily shape any analysis of the *Lisbon* decision. The case will still provide the theoretical groundwork for assessments of the future integration process, but the actual limits to European integration will be drawn in more practical decisions like *Mangold* and the *EURO bailout*. In this, it is most interesting to see the pervasive influence the principle of Openness towards European Law has already developed, reaching even into areas that the Court is most anxious to protect. It is the application of this principle, not individual elements of the *Lisbon* decision seen out of context, which will provide reliable guidance for future cases.

The principle's impact is of course directly linked to the Bundesverfassungsgericht's actual attitude towards European integration that is far more positive and supportive than critics claim it to be. While this author does not intend to downplay the Court's apprehensions clearly displayed in the *Lisbon* decision, it is submitted that the Bundesverfassungsgericht is not a threat to European integration. Indeed, to continue to see the Court through a

¹⁶² BVerfG *Lissabon* (n 3) para 264. cf above Part IVA.

'*Brunner-lens*' of euro-scepticism runs the risk of dismissing its apprehensions as mere expressions of that perceived hostility instead of taking them seriously.

However, there is one issue on which the *Lisbon* decision may be considered as reliable guidance: it illustrates the fine line the Bundesverfassungsgericht walks in trying to ensure effective implementation of European law without sacrificing the integrity of the constitution it is duty-bound to protect. These efforts have resulted in some rather uncomfortable consequences for the Federal Government and Parliament and the German courts who sometimes found themselves between a European rock and a hard German place. But, after all, that is the role a constitutional court is supposed to play.