Letter to Luxembourg: The Lisbon Treaty-Decision as part of the ongoing "Dialogue" between the Federal Constitutional Court of Germany and the European Court of Justice*

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I. Introduction: The communication between the ECJ and the national judiciaries

The European Union is widely characterized as a "community of law", i.e. a union in which the political input is important but which derives its stability over time from the fact that its law(s) not only bind(s) the member states like any treaty under public international law would do but at the same time entitles the nationals of the member states as against all member states thereby forcing the member states to stick to the political decisions made once they are turned into the form of law. This, and the extensive growth of European law both as regards the substantive areas covered by successive amendments of the founding treaties and the sheer number of norms enacted by the Union leads to a situation in which the central judicial bodies of the Union based in Luxembourg making up the Court of Justice of the European Union (Art. 13, 19 TEU), i.e. the (European) Court of Justice, the General Court (formerly the Court of First Instance) and the specialised courts attached to the General court as provided for in Art. 257 TFEU (formerly 225a TEC), are unable to exclusively decide upon questions of the interpretation of European law. Therefore, the national courts, which are competent to decide the vast majority of cases which are affected by European law, must be regarded as European law courts in a functional sense. They have to interpret and apply European law as part of their ordinary work.

The co-ordination of these two sets of European law courts is effected through the Preliminary Reference Procedure, as provided for in Art. 267 TFEU (formerly Art. 234 TEC, originally Art. 177 TEEC). It allows and in the case of courts of last instance requires the member states' courts to submit questions of interpretation of all European law and of the validity of

* The first part of the title is inspired by a suggestion of Sophie Bings. I would like to thank Prof. R. Streinz (Munich) for comments on a previous draft.

English versions of some decisions of the Federal Constitutional Court are available partly from the FCC itself *(www.bundesverfassungsgericht.de)* (these are marked°), partly from the Institute for Transnational Law of the School of Law of the University of Texas at Austin *(www.utexas.edu/law/academics/centers/transnational/work_new/german/) (these are marked[T]) and in A. G. Oppenheimer, The relationship between European Community law and national law: the cases. 2 Vol. (Cambridge: CUP, 1994/2003) (referred to as Oppenheimer I and II).*

secondary European law to the ECJ enabling the ECJ to control the uniform interpretation (and application) of European law in all the member states. It is generally accepted that this procedure is the cornerstone of the development of European law by the ECJ and the most important means of communication between the ECJ and its national counterparts.

Nevertheless, there are a number of national courts which so far have never submitted any question to the ECJ, sometimes arguing that they will never decide questions of European law or that they cannot be classified as a court within the meaning of Art. 234 TEC (e.g. the Italian Corte Costituzionale[1]) or, while acknowledging a duty to submit such questions, have never classified a question of European law as decisive for their own decision (e.g. the Federal Constitutional Court).

This does not, however, mean that the members of these courts never communicate with their ECJ-brethren. There are at least three ways in which the ECJ and its members and the national courts and their members communicate with each other.

First, there are official visits of the respective courts of each other and other direct encounters of their judges. The ECJ has visited courts in numerous member states as documented in its Annual Reports, inter alia the German federal courts[2] but also UK courts[3] and these Courts have returned those visits[4]. The ECJ is also a founder member of the Association of the Councils of State and Supreme Administrative Jurisdictions in the European Union which grew out of biannual colloquia of the supreme administrative courts of the member states and in which the ECJ joined in 1994 with its first report. In addition, judges of the superior national courts and of the ECJ meet at the FIDE congresses to which the ECJ often contributes a report and at other conferences, not least the conferences organized by the ECJ itself on the occasion of its decennials.[5]

1 Corte Costituzionale, 15 – 29 December 1995, Ordinanza n. 536/95 (judge rapporteur Presidente Ferri); this has changed recently when the Corte Costituzionale, after a former judge at the ECJ, i. e. Giuseppe Tesauro, was appointed to it for the first time, referred a question to the ECJ for the very first time, cf. Ordinanza n. 103 anno 2008 (judge rapporteur Gallo), available on the internet at *www.cortecostituzionale.it/actionPronuncia.do*. Whether the fact that the current Italian judge Tizzano has praised the Corte Costituzionale for finally accepting the superior wisdom of the ECJ (Tizzano, Der italienische Verfassungsgerichtshof (Corte Costituzionale) und der Gerichtshof der Europäischen Union, in: EuGRZ 2010, 1 – 11) will encourage other supreme courts to refer a first case to the ECJ remains to be seen.

2 Federal Constitutional Court in 1970, 1980 and 2.–4. 02. 2006; Federal High Court in 1980; Federal Labour Court on 1. 3. 2005; Federal Tax Court on 30. 5. 2005.

3 HL in 1979 (Lord Bridge).

4 Federal Constitutional Court e.g. in 1991, 1997 and 22. 03. 2004, 21. 10. 2009 (then Vicepresident Voßkuhle); Federal High Court in 2000; HL (Lord Bridge) on 1. – 3. July 1991.

5 At the conference on the eve of the 50th anniversary of the ECJ on 3. 12. 2002 "senior judges of the supreme and constitutional courts of the Member States, of international and European

Secondly, both the judges and Advocates-General of the ECJ and the members of the national courts publish articles on diverse topics of both substantive law and of procedural and institutional questions. Sometimes they even explicitly address the relationship of the ECJ and its national counterparts. A particularly good example is an article by *Peter Wattel*, Advocate General in the Dutch Hoge Raad, in which he complained about the treatment of the highest national courts by the ECJ.[6]

Finally, the courts are able to communicate through their decisions which are taken notice of by the other courts,[7] certainly so in terms of the ECJ and the national courts and to a lesser extent also by the other national courts. What I wish to do in this paper is to exemplify this way of communication in the case of the Federal Constitutional Court vis-à-vis the ECJ.[8]

II. The "dialogue" between the Federal Constitutional Court and the ECJ

The Federal Constitutional Court has played a fairly constructive role in the building of the European legal order from early on. It has repeatedly referred to the jurisprudence of the ECJ both to present the state of the European law as it then stood[9] and as the source of relevant arguments.[10] It has emphasized the competence of the ECJ to decisively interpret European law[11] and accepted to be bound by preliminary proceedings decisions handed down during the proceedings of the case at hand.[12] It has accepted that the lower courts were empowered by European law to examine the compliance of national statutory law with European law and to disapply it in case of conflict[13] thereby accepting a power of the lower courts which they did not have in the

Courts, of other international courts in Europe, Latin America and Africa, and of supreme and constitutional courts in the candidate countries, together with former members of the Court of Justice and the Court of First Instance" took part (ECJ, Annual Report 2002, p. 68).

6 P. J. Wattel: Köbler, Cilfit and Welthgrove: We can't go on meeting like this, in: Common Market Law Review 2004 p. 177–190.

7 This happens sometimes very quickly as may be seen from the decision of the Third Chamber of the Second Senate of the FCC of 28. 10. 2009, 2 BvR 2236/09, *www.bverfg.de/entscheidungen/rk20091028_2bvr223609.html*, para. 37, in which the Chamber refers to a decision of the ECJ which that court had handed down only three weeks earlier.

8 A comparable story vis-à-vis the Italian Corte Costituzionale is told by Tizzano, op. cit.

9 E.g. E 73, 339 (378 – 381) – Solange II (= Oppenheimer I 461 (487–490)); 89, 276 (278); 94, 268 (282, 292); 101, 1 (9, 45); 104, 357 (360); 110, 412 (417 f., 419); K 3, 310 (314).

10 E.g. E 22, 293 (295 f.) – EEC-Regulations[T]; 31, 145 (168 ff.) – Milkpowder[T]; 52, 187 (200) – Perhaps; 76, 1 (106 f.) – Familiennachzug[T]; 85, 191 (209) – Nachtarbeitsverbot[T] (= Oppenheimer I 520 (523)); 97, 35 (43 ff.); 104, 214 (219); 108, 370 (396); 110, 412 (444); 113, 1 (21).

11 E 52, 187 (200) – Perhaps.

12 E 37, 271 (282) – Solange I [= Oppenheimer I, 419/440 (449)]; 52, 187 (201) – Perhaps.

13 E 31, 145 (174–175) – Milkpowder [= Oppenheimer I, 415 (418) – Alfons Lütticke GmbH]; confirmed in E 82, 159 (191) – AFG-Fund (Absatzfonds).

national context where Art. 100 para. 1 BL monopolizes the power to declare statutory norms unconstitutional and invalid with the Federal Constitutional Court. In addition, it supports the ECJ in relation to the duty of the highest courts to refer questions for preliminary rulings to that court under Art. 267 III TFEU by integrating the ECJ into the system of German courts and extending the right to the lawful judge, as guaranteed by Art. 101 para 1, 2nd sentence BL and enforceable through constitutional complaints, to include such preliminary ruling proceedings,[14] even though the test used is limited to the question whether the court has arbitrarily abstained from using the preliminary ruling procedure.[15]

On the other hand, there are two lines of conflict which have not yet been fully resolved even though one line has only limited potential to cause real difficulties. The first line of conflict concerns the basis and the extent of the precedence of European law over national law. The ECJ has constantly held, since the case of Costa v. ENEL,[16] that European law is an autonomous legal system and therefore its validity is independent of the national legal systems over which it takes precedence in cases of conflict. The Federal Constitutional Court, however, has constantly based the validity of European law in Germany on the relevant provisions of the Basic Law[17] and on the Acts of Parliament which consented to the treaties under public international law creating the Communities or Union, thereby insisting on constitutional limits to the precedence of European law over German law. This line of conflict has clustered around the question of the protection of fundamental human rights.

The second line of conflict concerns the relationship of the European Communities or Union and its member states and in particular of the ECJ and the Federal Constitutional Court; it clustered around the question of the competences of the EU and its institutions, more precisely on the question of who will have the final word on questions of competence.

These conflicts feature regularly in the important decisions of the Federal Constitutional Court concerning European integration and there have been a number of reactions by the ECJ which seem to justify the concept of a "dialogue" between the two courts.

14 Explicitly left open in BVerfGE 29, 198 (207) and 31, 145 (169) – Milkpowder; confirmed in E 73, 339 (366 – 369) – Solange II (= Oppenheimer I 461 (477–480)); 75, 223 (233 f., 245 <conscious disregard of ECJ jurisprudence>) – Kloppenburg (= Oppenheimer I 496 (508, 518)); 82, 159 (192, 195 f. <misjudging duty to refer, conscious disregard, incomplete jurisprudence>) – AFG-Fund (Absatzfonds).

15 BVerfGE 82, 159 (194 f.) – AFG-Fund (Absatzfonds); most recently BVerfG [1st senate, 2nd chamber], 30. 8. 2010, 1 BvR 1631/08 para. 48° (successful complaint); and 10. 11. 2010, 1 BvR 2065/10 para. 23 (unsuccessful complaint).

16 Judgement of 15. 07. 1964, Case 6/64, [1964] ECR 585 (593–4).

17 Originally Art. 24 BL, now Art. 23 BL.

a) Precedence and the protection of fundamental rights

Despite expressly accepting the jurisprudence of the ECJ on European law being a separate legal system and rejecting the constitutional complaints against two EEC-regulations as inadmissible, the Federal Constitutional Court emphasized in the final part of its first decision concerning the relationship between European and national law: "No ruling is given here regarding the question of whether the Federal Constitutional Court, within the framework of proceedings properly instituted before it, could examine the compatibility of Community law with the provisions of the Basic Law setting out fundamental rights."[18] Technically, this dictum was obiter, but obviously intended to be taken seriously. One of the judges involved, Judge Ritterspach, in his contribution to the Festschrift for the then President of the Federal Constitutional Court, President Müller, who had also been involved in the Regulations-Case, reprimanded Prof. Ipsen, one of the most eminent European law professors in Germany not only at that time, for trivializing the final part of the decision and insisted that it was for the constitutional courts of the member states to protect the fundamental rights of the citizen against "a 'technocratic' authority the members of which cannot rely on any (immediate) democratic legitimacy".[19]

This focus on the individual rights of the citizens, which in the MILKPOWDER-Decision[20] supported the precedence of European law over German law to safeguard the realization of the subjective rights of the individual as conferred by European law,[21] led the Federal Constitutional Court in the famous SOLANGE I-Decision[22] to establish limits to the precedence of European law over German law. This decision is particularly interesting because the case came from the Administrative Court in Frankfurt, which regarded a provision of European law to breach the right to property as guaranteed by Art. 14 BL and had first submitted a question under the preliminary ruling procedure to the ECJ. The ECJ had not confirmed the assessment of the Administrative Court but ruled that national law of any rank could not form the yardstick against which Community law could be measured without depriving it of its character as Community law and without the legal basis of the Community itself being called into question; that respect for fundamental rights formed an integral part of the general principles of law protected by the ECJ; that the protection of such rights had to be ensured within the framework of the structure and objectives of the Community; and that the provisions in

18 E 22, 293 (298 f.) – EEC-Regulations; translation taken from Oppenheimer I, 410 (414).

19 T. Ritterspach, "Das supranationale Recht und die nationalen Verfassungsgerichte", in: T. Ritterspach / W. Geiger (eds.), Festschrift für Gebhard Müller (1970), 301 (315); my translation.

20 9. 6. 1971, Case 2 BvR 255/69, BVerfGE 31, 145 (= Oppenheimer I, 415).

21 E 31, 145 (174) – Milkpowder (= Oppenheimer I, 415 (418)).

22 29. 5. 1974, Case 2 BvL 52/71, BVerfGE 37, 271 (= Oppenheimer I, 419).

the case at hand were both necessary and appropriate so that no violation of a fundamental right could be found.[23] Therefore the Administrative Court tried its second option to receive a confirmation of its assessment and submitted the case to the Federal Constitutional Court.

The Federal Constitutional Court did not confirm the substantive position of the Administrative Court, either. But, deciding the question left open in the REGULATIONS-Case, it claimed the competence to protect the fundamental rights as enshrined in the Basic Law against European law by declaring it not invalid but only inapplicable by German authorities. In reaching that conclusion the Federal Constitutional Court, with five to three votes, rejected the argument of the ECJ that the Community itself was put in question if there were member states' norms superior to Community law. It emphasized the separation of the European legal system and the national legal systems as two legal spheres and drew an analogy to public international law and other separate legal systems:

"Community law is as little put in question when, exceptionally, Community law is not permitted to prevail over entrenched constitutional law, as international law is put in question by article 25 of the Constitution when it provides that the general rules of international law only take precedence over simple federal law, and as another (foreign) system of law is put in question when it is ousted by the public policy of the Federal Republic of Germany."[24]

At the same time, it strictly delineated the respective competences of the ECJ and the Federal Constitutional Court and recognised a duty to concern themselves in their decisions with the concordance of the two systems of law both of the national court and, the binding of the Treaty not being one-sided, of the ECJ.[25] Therefore, invoking such a conflict could not be regarded in itself as a violation of the Treaty.[26]

Concerning the protection of fundamental rights, the Federal Constitutional Court classified these as part of the entrenched precept of the constitutional law of Germany, and held that the guarantees of the Basic Law should prevail since it found that the standard of protection in the Community was not yet comparable to that in Germany. This was due to the lack of a democratically legitimated parliament in the EEC playing the traditional role of a parliament in a democratic system, and to the lack of a codified catalogue of fundamental rights which allowed for the necessary legal certainty, which was not guaranteed merely by the decisions of the

23 ECJ, 17. 12. 1970, Case 11/70, [1970] ECR 1125, para. 3–4, 12 – Internationale Handelsgesellschaft mbH / Einfuhr- und Vorratsstelle für Getreide und Futtermittel.

24 E 37, 271 (278 f.) – Solange I[T]; translation taken from Oppenheimer I, 419 (446).

25 Ibid.

26 E 37, 271 (279) – Solange I (= Oppenheimer I, 419/440 (446–447)).

ECJ.[27] At the same time, the Federal Constitutional Court accepted that the jurisprudence of the ECJ had been favourable to fundamental rights and was based on well considered reasons[28] and that the whole difficulty arose "exclusively from the Community's continuing integration process, which is still in flux and which will end with the present transitional phase",[29] thereby indicating that the protection of fundamental rights was its primary concern and that the ECJ could expect a harmonious relationship if it fulfilled the Federal Constitutional Court's substantive demands.

The message of the Federal Constitutional Court was, however, substantially weakened by the fact, that the three judges in the minority added a pithy dissenting opinion. In it they rejected the assessment of the majority concerning the level of protection of fundamental rights by referring to the NOLD-Judgment[30] which the ECJ had handed down a fortnight earlier and which was available as a hectograph copy in the Federal Constitutional Court. More importantly, they explicitly accepted the precedence of European law over national constitutional law and criticized the opinion of the majority as leading to unacceptable results and putting itself in conflict with settled case law of the ECJ.[31]

In its Annual Report 1974, the ECJ quoted SOLANGE I extensively, but there is a clear emphasis on the dissenting opinion.[32] This suggests that the Court took a fairly relaxed view of the decision as a result of the dissenting opinion which had fully accepted its own position. Concerning the substance of the conflict, the ECJ has not modified its position. In the judgment SIMMENTHAL II it repeated the claim to precedence of European law over "any conflicting provision of current national law" and the argument based on the imperilling the very foundations of the community.[33] It also added that the recognition of legal effects of conflicting national law "would amount to a corresponding denial of the effectiveness of obligations undertaken unconditionally and irrevocably by Member states pursuant to the Treaty".[34] This remark is not necessary for the decision of the case; it therefore seems plausible to regard it as addressed to the Federal Constitutional Court. Concerning the protection of fundamental rights however, the Federal Constitutional Court was successful in inducing the ECJ to better protect such rights so that

27 E 37, 271 (280) – Solange I (= Oppenheimer I, 419/440 (447–448)).

28 E 37, 271 (280, 289) – Solange I (= Oppenheimer I, 419/440 (448, not included)).

29 E 37, 271 (280 f.) – Solange I (= Oppenheim I, 419/440 (448)).

30 ECJ, 14. 05. 1974, Case 4/73, [1974] ECR 491 – J. Nold, Kohlen- und Baustoffgroßhandlung / Commission of the European Communities.

31 E 37, 271 (298) – Solange I (= Oppenheimer I, 419/440 (459)).

32 The ECJ deals with 5 national decisions on 2.5 pages; the Solange I-Decision occupies 1.5 pages, with the dissenting opinion being quoted for about 1 page.

33 ECJ, 9. 3. 1978, Case 106/77, Simmenthal II, [1978] ECR 629, para. 17, 18.

34 Ibid., para. 18.

in its SOLANGE II-Decision it could certify the ECJ to have achieved a level of protection equivalent to the protection guaranteed by the Basic Law.[35] At the same time it increased the procedural requirements of an admissible challenge to European law in the Federal Constitutional Court to a level which seems hardly surmountable[36] and leaves the Federal Constitutional Court in the role of a substitute with little chance of being brought onto the field.[37] This result is hardly surprising since the conflict does not really pitch the two Courts against each other. Both Courts see it as their task to protect the fundamental rights of the individuals in Europe; the question is more one of fine tuning the results rather than defending one's territory.

b) The EU and its Member States: the last word on the question of competences

The second line of conflict has naturally developed later than the first line, since the question of competences of the EU only gained momentum after the ECJ had been willing to allocate competences to the Communities beyond those expressly provided for in the Treaties[38] and the Member States had sanctioned at least part of this jurisprudence with the extension of Community competences in the Single European Act.[39] This line of conflict is much more dangerous because the ECJ on the one hand and the Federal Constitutional Court and the other national courts on the other hand are structurally pitched against each other, since any gain in competences for the EU is a loss for the otherwise omni-competent member states.

The point of departure of the claim to control the activities of the Communities or Union is essentially the same as in the previous case, i.e. the control of the Act by which Parliament has consented to the founding treaties. As the Federal Constitutional Court explained in its decisions on EUROCONTROL[40] and on the deployment of Pershing missiles in Germany,[41] whenever an international treaty is the basis of a process of integration it is not neces-

35 BVerfGE 73, 339[T] (= Oppenheimer I, 461).

36 BVerfGE 102, 147 (164) – Banana Market Organization° (= Oppenheimer II, 270 (283)).

37 Steiner, Richterliche Grundrechtsverantwortung in Europa, in D. Lorenz and M-E Geis (eds), Staat Kirche Verfassung, Festschrift für Hartmut Maurer (Beck, München 2001), 1005 (1013), footnote 43.

38 E.g. in the field of external competences ECJ, 31. 3. 1971, Case 22/70 – AETR, [1971] ECR 263 (274 para. 15 et seqq.); cf. M. Cremona, External Relations and External Competence: The Emergence of an Integrated Policy, in: P. Craig / G. de Burca (ed.): The Evolution of EU Law (Oxford: OUP, 1999), 137 – 175 (138 et seqq.) on the jurisprudential development; in the field of environmental law ECJ, 18. 3. 1980, Case 91/79 – Commission / Italy (Detergents) [1980] ECR 1099 (1106 para 8), and Case 92/79 – Commission / Italy, [1980], ECR 1115 (1122 para 8).

39 Art. 130r – 130t TEEC (Environmental Politics), Art. 30 SEA (European Political Cooperation).

40 23. 6. 1981, 2 BvR 1107, 1124/77 and 195/79, E 58, 1 (36 f.)

41 18. 12. 1984, BVerfGE 68, 1 (98 f. (sub C.III.2.b.aa))[T].

sary to enact further Acts of Parliament for each step in that process, as long as the original consenting act (and by implication the founding treaty) has determined the future process of integration sufficiently definitely; substantial changes in the process of integration, however, are not covered by the consenting act. Referring to this jurisprudence, the Federal Constitutional Court decided in the KLOPPENBURG-Decree,[42] which was handed down soon after the SOLANGE II-Judgment, that it was "permissible (…) to interpret and amplify existing powers of the Community in the light of and in harmony with the objectives of the Treaty"[43] and that the jurisprudential extension of the binding effects of directives by the ECJ respected the traditional limits of jurisprudential development of the law as developed over centuries of common European legal tradition.[44] But this benevolent result should not disguise the fact that the Federal Constitutional Court insisted on its competence to police the limits of the competence of the ECJ under Art. 234 TEC as regards the limits imposed on it by the German constitution[45] and proceeded on that basis to assess the work of the ECJ.

Nevertheless, there are limits to the transfer of sovereignty to international or supranational organisations by way of consenting to an international treaty by an Act of Parliament, vic. the essentials of the national constitution.[46] It is however only possible to a limited extent to control that question by way of the assessment of the substance of the founding treaty to which Parliament has consented with the Act under review, because the extent of the transfer of competences only becomes clear over time, when the institutions of the Union make use of the competences transferred. Trying to give guidelines on the use of the competences and to determine the outer boundaries of the content of the treaty provisions effecting the transfer of competences tends to be very difficult in advance. The more promising strategy of the national constitutional courts is, therefore, to claim the competence to police these boundaries in the future by determining whether specific decisions of the institutions, including in particular the ECJ, have gone too far. This is what happened in the MAASTRICHT-Judgment[47] of the Federal Constitutional Court, which was rendered without visible dissent. It insisted on its claim to examine "whether legal acts of the European institutions and

42 8. 4. 1987, 2 BvR 687/85, E 75, 223 (= Oppenheimer I, 496).

43 E 75, 223 (242) – Kloppenburg (= Oppenheimer I, 496 (516)).

44 E 75, 223 (243) – Kloppenburg (= Oppenheimer I, 496 (517)).

45 E 75, 223 (235) – Kloppenburg (= Oppenheimer I, 496 (509)).

46 This is certainly not a German particularity, for details cf. R. Streinz, Kompetenzabgrenzung zwischen Europäischer Union und ihren Mitgliedstaaten, in: R. Hofmann / A. Zimmermann (Ed.), Eine Verfassung für Europa (Duncker & Humblot, Berlin 2005), S. 71–103, and the monographic treatment by F. C. Mayer, Kompetenzüberschreitung und Letztentscheidung (Beck, München 2000).

47 12. 10. 1993, 2 BvR 2134, 2159/92, E 89, 155 (= Oppenheimer I, 526)

bodies keep within or exceed the limits of the sovereign rights granted to them"[48] to determine whether these acts are binding on German sovereign territory.[49] It ruled on the content of the Maastricht Treaty, in particular on the competences of the EU, and backed this up by threatening to prohibit German state institutions to apply European legal acts that are the result of a differing interpretation.[50] In this context it admonished the ECJ to reconsider its methods of interpretation, expressly criticizing the reliance on implied powers and the *effet utile* (without however using the opportunity to expressly criticize specific decisions of the ECJ) and contrasting that with the appropriate behaviour "in future (…) when Community institutions and bodies interpret rules conferring competence".[51] Towards the whole of the Community it pointed out: "It is the law approving accession to a community of States which provides democratic legitimation, both of the existence of the community of States itself and of its powers to take majority decisions which bind the Member States. Nevertheless, in accordance with the requirement for mutual regard which flows from the notion of a community, the principle of majority voting has its limit in the constitutional principles and fundamental interests of the Member States."[52] Besides reaffirming its jurisprudence on the precedence of the fundamental rights, this in effect holds the Luxembourg Accords[53] to be required by primary law, thereby contradicting the continuous efforts to extend the areas of majority voting to overcome the danger of crippling stagnation resulting from a veto of the Member States.

The Federal Constitutional Court was heavily criticized for assuming the role of a guardian of the process of integration in general and of the ECJ in particular by authors in favour of ever deeper integration. On the other hand, some complainants felt encouraged to plead the relevant European legal act to be *ultra vires*. These attempts were refuted by decisions of Chambers of three judges, which ruled that the relevant jurisprudence of the ECJ

48 E 89, 155 (188) – Maastricht (= Oppenheimer I, 526 (556)) with reference to E 58, 1 (30) – Eurocontrol I [T] and 75, 223 (235, 242) – Kloppenburg.

49 In distinguishing the validity of the European legal act and its being binding on German sovereign territory the FCC used a device analogous to the distinction of the ECJ between the validity of the national legal act and its non-application in case of conflict as expressed in the Simmenthal II-Decision (9. 3. 1978, Case 106/77 – Amministrazione delle Finanze dello Stato v Simmenthal SpA, [1978] ECR 629 (644 para. 24)).

50 E 89, 155 (210) – Maastricht (= Oppenheimer I, 526 (573)).

51 E 89, 155 (210) – Maastricth; translation taken from Oppenheimer I, 526 (573).

52 E 89, 155 (184) – Maastricht; translation taken from Oppenheimer I, 526 (552).

53 For a detailed discussion of the Luxembourg Accords see Streinz, Die Luxemburger Vereinbarung: rechtliche und politische Aspekte der Abstimmungspraxis im Rat der Europäischen Gemeinschaften seit der Luxemburger Vereinbarung vom 29. Januar 1966 (Florenz, München 1984).