

## States Without a Market? Comments on the German Constitutional Court's Maastricht-Judgement and a Plea for Interdisciplinary Discourses

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### Keywords

Maastricht-judgement, supranationalism, regulatory politics, social regulation, European polity formation, governance, institutionalisation, institutions, legitimacy, political science, law

### Abstract

As the title of this lecture indicates, it builds upon the author's previous analysis of the European Communities' market building efforts (C. Joerges, *The Market Without the State? The "Economic Constitution" of the European Community and the Rebirth of Regulatory Politics*, European Integration online Papers, Vol. 1, No. 19 (<http://eiop.or.at/eiop/texte/1997-019a.htm>)).

The analytical approach chosen includes a "comparative analysis" of legal and political science theories of European integration. It is asserted, that the schisms between legal and political sciences inhibit an adequate understanding of the European Polity. Lawyers risk to overlook important institutional innovations; political scientists are urged to address the "constitutionalist" dimension of the European law. The theoretical argument is then substantiated by an analysis of the German Constitutional Court's decision on the Maastricht Treaty. Without even mentioning the normative visions of Germany's neo-liberal tradition, the Constitutional Court has, while pretending to defend the nation state, in fact endorsed the idea of a purely economic constitution of the European Community. The paper argues that the Europeanization process is de facto and de jure depending upon a constitutional vision which is to overcome the separation between "political" nation states and an "unpolitical" European governance structure.

### Kurzfassung

Der Beitrag setzt, wie auch sein Titel indiziert, Analysen fort, die der Autor unter dem Titel *Markt ohne Staat? Die Wirtschaftsverfassung der Gemeinschaft und die regulative Politik* (in: R. Wildenmann (ed.), *Staatswerdung Europas? Optionen einer europäischen Union*, Baden-Baden: Nomos 1991, 225-268; auf Englisch: C. Joerges, *The Market Without the State? The "Economic Constitution" of the European Community and the Rebirth of Regulatory Politics*, European Integration online Papers, Vol. 1, Nr. 19 (<http://eiop.or.at/eiop/texte/1997-019a.htm>)) vorgelegt hat.

Analytischer Ausgangspunkt ist ein Vergleich zwischen rechts- und politikwissenschaftlichen Integrationstheorien. Die Schismen zwischen beiden Disziplinen, so wird geltend gemacht, erschweren eine adäquate Behandlung der Integrationsproblematik. Juristen erschweren sie die Wahrnehmung institutioneller Innovationen; Politikwissenschaftler pflegen die praktische Bedeutung normativ-rechtlicher Diskurse zu unterschätzen. Diese Analyse wird an Hand einer Auseinandersetzung mit dem Urteil des Bundesverfassungsgerichts zum Vertrag von Maastricht substantiiert. Ohne die Perspektiven der deutschen Ordnungstheorie zu artikulieren, hat das Bundesverfassungsgericht die Idee einer supranationalen Wirtschaftsverfassung der Sache nach gestützt und den Nationalstaat, den es zu bewahren verspricht, in Wahrheit ökonomisch (und sozial) entmachtet. Demgegenüber kommt es darauf an, eine die Spaltung zwischen dem 'politischen' Nationalstaat und der unpolitischen Gemeinschaft überwindende Perspektive für die Verfassung Europas zu gewinnen.

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### Preliminary

Are we witnessing the emergence of 'a market without a state?' was one of the questions posed in an analysis of the dynamic evolution of the integration process since the launching of the internal market programme in the mid-1980s. Not really: the completion of the internal market is bound to lead to a *renaissance* of regulatory policies, to a reregulation of the economy at European level; at the same time it restructures the economic law and threatens the survival of social institutions. Precisely because of these effects, we have to take economic integration seriously -- and reflect on its 'constitutional' importance. The present paper pursues this same issue from another perspective. Are we faced with the revival of the nation-state defending its constitutional achievements against the intrusions of a non-democratic supranational regime? This turning around of my previous question is motivated by the judgement of the German Constitutional Court on the Treaty on European Union(1). As one may expect, the new question will not affect my normative answer.

This answer, however, will remain provisional. It could be more adequately called a long-term research agenda. One important element of this agenda is a methodological concern. It is a plea for interdisciplinary discourses on the perception of European integration between lawyers and political scientists. This is not to suggest that political science has the answers at hand to problems which lawyers are not (yet) able to resolve. On the contrary, my argument is to be understood as a rigorous

defence of the 'juridification' of Europe and a plea to political scientists to 'take the law seriously'. On the other hand, we lawyers should pay special attention to the recent efforts of political scientists to overcome both neo-functionalist and intergovernmentalist research traditions and to reconceptualize Europe as a denationalized non-hierarchical governance structure, and thus an attractive alternative to supranational and national systems(2).

This theoretical background agenda will be introduced in the first part of this paper. But it will then remain in the background. The second part will address the controversy between the supranationalism of the European Court of Justice and the German Constitutional Court's (*BVerfG*) national constitutionalism. 'The state without a market' is an implication of the reasoning of that judgement, which will be examined in the third part -- only to urge once more for the type of research agenda called for in this introduction.

## **I. Taking the Law Seriously: Cleavages and Linkages Between Legal Research and Political Science**

'Integration through Law' was the title of a transatlantic project launched in the early 1980s by Mauro Cappelletti, Monica Seccombe and Joseph Weiler at the European University Institute in Florence (Cappelletti, M., M. Seccombe and J.H.H. Weiler 1986). The formation processes of the American federation and the European Community were to be compared and the experiences of both systems in developing legal frameworks and techniques were to be evaluated. For Europe, the title was of programmatic significance, albeit allowing for different readings of its meaning.

Firstly, the formula 'integration through law' may be understood functionally: a statement regarding a particular strategy of integration policy and its strength. Social scientists might regard this interpretation as provocative, in so far as it appears to demonstrate a naive or uncompromising understanding of law. The formula does not exhibit any of the contingencies of law-making and of the effectiveness of legal systems in presenting law as an autonomous world governed exclusively by legal doctrines and techniques of interpretation.

A second understanding proves to be more interesting. Here the formula 'integration through law' refers to the special contribution that law has made in the construction of the European Community. In this view, the quality of Community law as a 'constitutional charter' of the participating states differs from international legal orders: it is different to international law, which is based on agreements between sovereign states and/or generally recognized legal principles; it is different to public international law, which leaves the unilateral definition and defence of public or governmental interests to each individual state jurisdiction; and it is different to private international law, which -- at least theoretically -- regularly applies foreign laws but bases such legal implants on domestic sources and, in principle, limits them to private law. This particular role of Community law may be reconstructed, in the language of political science, as a statement about the specific density of juridification at European level which needs to be distinguished from the contingencies of consensual cooperation among sovereign states on the one hand, and international organizations or regimes on the other.

Such parallelisms between legal conceptualizations and reconstructions informed by political science lead -- as far as recognition of the particular role of law in European integration is concerned -- to a number of questions relating to a third interpretation of the 'integration through law' formula: How -- and within which limits -- can legal science justify the validity of a supranational European legal

order? How can the development of supranational law be explained? Under which conditions can compliance with the law be expected and its effectiveness be ensured? We will explore these questions more fully below. They will require concrete analyses of the dynamic developments of integration policy and European law. The argument may at the outset be presented in an abstract form: the validity claims of European Law cannot be justified legalistically; they depend on its 'normative quality'. A further demand follows from this statement: political science ought to recognize these 'normative properties' of law and integrate this normative dimension into its conceptualizations of European integration.

Consequently, the present treatment of the role of law in the process of integration, addressed to both social scientists and to lawyers, has to take account of the diversity of legal approaches. At the same time, it must consider the theoretical spectrum on offer in the field of political science. A systematic analysis would thus have to reconstruct the competing approaches of either discipline, and would then be able to make certain structural affinities visible: between an understanding of the Community based on classical international law (cf. Bülck 1959) and a 'realist' international relations analysis which views the Community as intergovernmental cooperation; between the legal category of the Community as an 'association of functional integration' (*Zweckverband funktionaler Integration*); Ipsen 1972, 176 *et seq*) and neofunctionalism and regime theories (Gehring 1994); between neoliberal conceptualizations of the Community as a supranational economic 'constitutional' order (*Wirtschaftsverfassung*)(3) and neoclassical economic theory (cf. Streit and Mussler 1995); as well as institutional and social choice approaches.

Such structural affinities between legal approaches and political science theories do not remove the differences between the disciplines. But they require political scientists seeking an improved understanding of the role of law to take the theoretical foundations of legal concepts into account. Equally, lawyers studying the 'reality' of integration are called upon to consider the theoretical context of political science analyses.

It is certainly impossible to offer here a complete picture of the cross-cutting links between the disciplines. By way of an alternative, the development of a single substantial position may be traced: the initial thesis that the normative quality of Community law is one of the conditions of its effectiveness. With regard to the study of law, this thesis concerns with the rational foundations of a legal system which commands neither the sanctions of a state-like sovereign nor the legitimacy of the democratic constitutional state. In terms of method, this implies that law must not be satisfied with a purely formal and positivist treatment of its object of study.

As for political science, there is a distinction between scientific explanation and the recognition that reflectivist theories linking the effectiveness of rules to their normative and moral content are better able to understand the role of law in European integration (cf. Hurrell 1993; Schaber 1994). The Community's 'legitimacy problem' is an abbreviated (but less precise) description of this interface between law and social science. In this respect, one might ask (cf. Habermas 1987): Is the legality of European law institutionalized in such a way as to rationally convey the validity of its claims? And, leading on from this question (cf. Franck 1990; Weiler 1991, 2466 *et seq*): Will European law manage to guarantee its own acceptance and compliance in the long run?

These questions might seem abstract and theoretical, yet they are of considerable practical significance. Indeed, in the present contribution the practical aspects constitute the dominant part of the analysis, even though they can only be treated in an impressionistic manner. Two areas are exemplary for this purpose.

On the one hand is the debate about the nature of the legal reconstruction of the Community system. This complex deals with the particularities of European law *vis-à-vis* national legal systems and international law. This constitutional aspect of European law has received renewed attention since

the Maastricht judgement of the German Constitutional Court. Yet its significance is independent of the hopes and fears regarding this particular judgement. It concerns core constitutional problems of the European project which in any case belong high up on the academic and political agenda. On the other hand, there is the problematic of designing a socially acceptable 'constitution' of the European economy. This second complex is concerned with the form and the consequences of the economic emphasis of the European project.

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These two aspects -- constitutional law and economic law -- are closely related. Even though economic law is principally 'regulatory' rather than 'constitutional', the aims and the substance of economic law are always tied up with the definition of the functions of the constitutional state (cf. Häberle 1993). Indeed, the precise form assumed by the market economy is itself one of the core constitutional questions for a legal system. This is why the transfer of economic regulation to the European arena has indeed turned out to be a significant constitutional problem: the institutionalizing of a European market order does not simply bear upon states' capacity for political action, but ultimately also on the states' own legal identity.

The two topics are presented as legal issues. However, the following analysis will not lose sight of the theoretical claims raised above. Its objective is to demonstrate that the parties to legal controversies should search for a 'convincing' law for the European polity. It is also to confirm the thesis that political scientists should take that normative search seriously, and contribute to it.

## II. The Constitutional Significance of the Supremacy of European Law

At the outset of every legal innovation we observe the creation of a concept. Here the term 'Community Law', denoting European law's special place *vis-à-vis* both national and international law, has been commonly used for quite some time. Yet approaching this term's complex meaning remains a long-term effort. The doyen of German Community law declared as late as 1994 that the creation of this term ought to be understood as nothing more than a provisional characterization of the gestalt of the Community. The use of this type of definition, he continued, is always appropriate when and as long as there is not yet a legal definition of abstract measures, but where at the same time an illustrative, precise and empirically reasonable description of a phenomenon is possible if it corresponds to its objectives (Ipsen 1994, 7, cf. Ipsen 1983, 79 *et seq*).

Such reservations should not be surprising to political scientists. International relations theory, not unlike the disciplines of international and European law, is constantly trying to identify and conceptually adapt to transformations of its subject-matter. More radical still -- indeed at the risk of self-eradication -- integration theory has reacted to changing conditions in the process of 'uniting Europe' in its early advances, the crises of the 1960s, the new dynamism of the 1980s, as well as current uncertainties (for a recent resume cf. Welz and Engel 1993). Legal science, by contrast, has apparently achieved greater conceptual stability. The conceptualization of the 'Community system' as a supranational legal order, which assigned the term Community law its dominant interpretation, became accepted during the early 1980s just as the EC was in a state of crisis. And it was only with the October 1993 judgement of the German Constitutional Court on the Maastricht Treaty that this legal *acquis communautaire* seemed to be seriously questioned. How can this continuity of juridical conceptualization be interpreted and explained? What is the significance of recent legal disputes about the juridical characterization of the Community system? The reconstruction below intends to show that juridical conceptualizations are not simply a problem for legal science; by contrast, useful

and rewarding opportunities for interdisciplinary thinking can be found in the openness and interdependence of legal categories.

## 1. The EC System as a Supranational Legal Order

The interpretation of the EC system as a supranational legal community which is above all a product of the jurisprudence of the European Court of Justice has found -- in the legal system and beyond -- such widespread support that it can well be regarded as the dominant orthodoxy of Community law. The fascinating story of the gradual construction of this legal architecture need not be retold here.(4) Through the doctrine of 'direct effect' and the recognition of subjective rights, the Court has 'integrated' societal actors into the promotion of the Community's legal system while at the same time ensuring the collaboration of national courts; the doctrine of the supremacy of Community law could then be introduced as a logically imperative implication of 'direct effect'(5); 'direct effect' and supremacy lead on to the principle that Community law has the effect of pre-empting Member States from taking legislative action, if and when a policy area has become occupied by the Community; demanding that Community law have equal relevance in all Member States is to say that the ECJ must have the final competence to rule on the limits of its application(6). Jurisdiction concerning the 'functional' Community competences -- based on the objectives of the Treaty -- as well as the 'implied powers' doctrine carried on from this judgement.

Inevitably, the application of these principles did and does pose difficult problems, from which respective controversies of interpretation follow. But as long as these doctrines are accepted in principle and as long as the ECJ remains able to take conclusive decisions in cases of conflict, we are dealing with a supranational order that is fundamentally different from choice-of-law rules and international law. Precisely because of this difference, one may assign to the structuralization of the Community legal system, as has been endorsed by the ECJ, the status of a 'constitutional charter' (Stein 1981; Weiler 1991, 2413; Pernice 1993, 449). The ECJ could not, for its landmark decisions, muster the support of the European nations; frequently it did not even meet with the consensus of their governmental representatives (Stein 1981, 25). Equally, the Court was unable to rely on force or on the kind of sanctions that a supranationally institutionalized power centre might possess. Instead, support came from the Court's Advocates General, from the Commission and, after some resistance, from the national courts (Beutler *et al.* 1993, 98; Weiler 1993). But even basic changes in law-making procedure, such as the move to majority vote for measures related to the Single Market programme -- with its strengthening of the European Parliament -- have not fundamentally affected the legal basis of supranationalism. All that followed was a modification of individual elements of the system and the use of greater caution in its further expansion. Consequently, the ECJ protected the European Parliament's participatory rights in the legislative process(7). The transposition of secondary Community law was supported through the requirement of conformity in the interpretation of directives and through the promotion of individual rights to compensation *vis-à-vis* a Member State in case of non-implementation of directives. In contrast, a 'horizontal' direct effect of non-implementation has been refused(8).

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All ECJ statements on the quality and the content of Community law have been based on strictly juridical operations. Nowhere do we find explications of methodological premises or theoretical deliberations as to the legitimacy of Europe's 'constitutional charter'. How stable can such a constitution that presents itself as a purely legal product of law be?

## 2. The EC System as an Association of States (*Staatenverbund*)

There are sound reasons for the Court's choice of a strictly juridical line of argumentation. Certainly, the distance between legal terminology and political arenas has facilitated consensus-building on the European level as well as the integration of domestic legal actors into the Community system. But the significance of the law which has thus developed has an impact which reverberates beyond its own internal structures. Its meaning must be communicated to non-participants and ought to remain explicable in such a way that it can stand up to questioning from many affected quarters. There have been numerous indications of such a crisis of acceptance since the signing of the Single European Act in 1987 and the subsequent rapid expansion of European law. Yet it was to be the German Constitutional Court (*BVerfG*) that would forcefully articulate this widely discernable scepticism. The determination with which the *BVerfG* revoked basic elements of the *acquis communautaire* forces the orthodoxy of European law to explain and justify itself. On the other hand, whether the *BVerfG*'s type of criticism can have constructive results is a different question.

### a) 'Requalifications'

The German Court's statements on the gestalt of the European Union and Community are legally conspicuous warning signals. The normally commonly used term 'Community' was avoided by the Court. Instead the Union is declared to be an "association of democratic states" which, to be precise, is not a state-like entity<sup>(9)</sup>. The topos 'state association' was recommended by the rapporteur of the 2nd senate of the Court, Paul Kirchhof, to denote an organizational form between confederation and loss of statehood of the Member States. The *BVerfG* explicitly refrained from presenting this new form as a final legal description (Kirchhof 1992, 859). But it did not hesitate to operationalize the meaning of its terminology in various respects.

(1) Supremacy: A key test of the 'association' terminology is its 'application' to the relationship between European and national law. In the previously dominant understanding, this relationship is described by the term 'supremacy'. Which bears a substantive and an institutional dimension. Substantively, the primacy of European *vis-à-vis* national law is at stake, but by the same token the question remains as to what extent European law -- precisely because of its quality of law -- restricts the freedom of political action of the Member States and grants individual citizens subjective and enforceable rights. From an institutional point of view, supremacy describes the direct effects of European primary and secondary law. Last but not least, supremacy implies the ECJ's competence to rule on jurisdictional conflicts between the Union and the Member States.

In its Maastricht judgement, the *BVerfG* departed in each of these dimensions from the conventionally dominant understanding. The most revealing passage is found in the context of the Court's statement on majority decisions, which the Court accepts in principle as a functional necessity of integration. But here the Court adds: "Yet the majority principle is limited -- through the requirement for mutual respect -- by the constitutional principles and fundamental interests of the Member States."<sup>(10)</sup> With the requirement of mutual respect, the Court elaborates on its own understanding of the term 'community of law'<sup>(11)</sup>, and thus limits the validity of European law through national law. The reference to "fundamental interests of the Member States" goes beyond the Member States' positive right of unilateral action recognized by European law, for instance, in Article 100a (4) of the EC Treaty. Thus the Court questions the juridification of the relations between Community and Member States. Decisions as to which interests are of 'fundamental interest' for Germany can and should apparently only be determined by Germany itself.

These substantial limitations of the supremacy of European law led to restrictions on the institutional role of the ECJ as well as on the binding nature of European rules for national authorities. This has been frequently noted in comments on the judgement (Tomuschat 1993, 492): The *BVerfG* does not view itself as a lower tier in a European judicial hierarchy, but prefers to define its link to the ECJ as a 'cooperative relationship'. In particular, this wording refers to the Court's mandatory protection of human rights under the Basic Law<sup>(12)</sup>. Equally, the Court reserves for itself a specific, not



transferable right to adjudicate on the assignment of competences. Should the Community misjudge its power to extend its competences unilaterally when, in fact, a Treaty revision is called for, then this process will not have a binding effect for Germany(13).

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The *BVerfG's* refusal to recognize the ECJ's right to delimit the competences of the Community touches on a precarious element in the architecture of European law (cf. Weiler 1991, 2403-2483). The difficulty of appreciating these limits is contained in the rules governing the transfer of competences themselves. On the one hand, these are described substantially and are therefore explicable as a transfer of enumerated powers(14). On the other hand, in Article 100 EEC Treaty the powers of legal harmonization are simply described 'functionally', by way of the goal of "creating a functioning Common Market". Beyond this, Article 235 simply states that, if Community action is required in an area not envisaged by the Treaty, the Council may decide unanimously on a proposal from the Commission after consulting the European Parliament on suitable measures. Until 1987, the willingness of the ECJ to accept law-making powers that were justified merely through reference to their objective -- and thus to defend Community activity in the fields of environmental and consumer protection -- was supported by the agreement of all Member States. However, with the introduction of qualified majority voting (Article 100a) for the measures required for the realization of the Single Market and the extension of the majority rule in the Maastricht Treaty, this barrier against unwanted enlargement of Community competences has fallen. The introduction of the principle of subsidiarity in Article 3b does not offer any clear direction in this respect since the relevant criteria for deciding which level is 'better' able to perform a given function -- cannot be defined by legal concepts (Dehousse 1994, 107).

With each transfer of competence to the European level, the nation-state's capacity for political action erodes further. But this surrender of competences also reflects an increased capacity to act where unilateral 'national' action has lost his feasibility. The dispute about the limits of EC competences is the legal expression of this balancing act. The *BVerfG's* reservations about a purely functional orientation in this process of extension of competences is as understandable as the scepticism about the subsidiarity principle. The *BVerfG* searches for a way out of this by trying to rehabilitate the sovereignty of the nation-state. The German ratification law is to maintain and limit the transfer of sovereign rights, and it is the right and duty of the *BVerfG* to supervise the observance of this law and therefore control integration policy(15).

## b) Legitimation

Reservations about the supremacy principle and the transfer of competences delineate the theorem of the 'association of states'. But they only become comprehensible in the context in which they are situated in the *BVerfG's* reasoning. This context constitutes the 'trans-disciplinary' core of the judgement. Three points of reference can be distinguished:

(1) *Democracy*. The *BVerfG* found an entry-point for a substantial examination of the Maastricht Treaty through its reading of Basic Law Article 38, which it interprets as guaranteeing "the subjective right to participate in the election of the German parliament and thereby to cooperate in the legitimation of state power by the people at a federal level, and to influence the implementation thereof"(16). This interpretation of electoral rights as a "claim to the existence of a democratically constituted statehood" (Ipsen 1994, 2) is easily transformed into conservation of the form of the nation-state. From this, one may draw protective rights against the recognition and implementation of 'foreign' not domestically legitimated sovereign acts. But how is this conception reconcilable with the openness to integration as provided for by Article 24 Basic Law? Yet the subject-matter of this

law also requires precise definition. Is the capacity of constitutional states to provide for social responsibility in the economy a democratic right? Are there protective rights against the social consequences stemming from foreign sovereign acts?

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(2) *Integration*. Even before the Maastricht Treaty, the reliance on the 'integration lever' (Ipsen 1972, 58) of Article 24 Basic Law to transfer sovereign rights had been the cause of some concern (Schilling 1990). What barriers to integration do the principles and rules of Article 79 (3) -- declared as irrevocable -- pose to integration? The *BVerfG's* statement on the collision between the openness as well as the limits to integration contained in German constitutional law derives from its understanding of the principle of democracy. This principle requires that the execution of sovereign rights must derive from "the people of the State" ("*Staatsvolk*")(17). This did not exclude membership in a "community of states authorized to issue sovereign acts", but it did mean that the authority of the Community remained limited and that the body representing the German *Staatsvolk* was left with "sufficient powers of substantial political weight"(18). "If the peoples of the individual States (as is true at present) convey democratic legitimation via their national parliaments, then limits are imposed, by the principle of democracy, on the extension of the EC's functions and powers. State power in each of the states emanates from the people of that State. The States require sufficient areas of significant responsibility of their own, areas in which the *Staatsvolk* concerned may develop and express itself within a process of forming political will which it legitimizes and controls".(19)

The 'association of states' theorem is thus to be understood as a normatively framed analysis which demonstrates and limits the evolutionary possibilities of the European political system. With this limitation, the *BVerfG* wants to balance the principle of democracy with the integrative openness of the Basic Law. The balancing condition is not written in stone, yet it is conceived in such a way that it must act as an impediment to growth. This is due to the linkage of political democracy to the organizational form of nation-states.

(3) '*Staatsvolk*': *Herder v. Kant*(20). Yet the pertinent statements of the *BVerfG* are difficult to decode as the judgement indeed contain passages that are open to further development of the EC's political system. The link between democracy and the nation-state, on the other hand, is constructed in such a way that a democratic supranationality becomes inconceivable. Both constructions relate to the 'materialization' of the principle of democracy, which names its pre-legal prerequisites and at the same time treats them as inalienable legal principles(21). Democratic legitimation of state power is constituted through the provision of political discourses ("an ongoing free interaction of social forces, interests and ideas")(22). The EC system does not fulfil this requirement. But at least it is still conceivable that at some stage, once the process of creating a 'European public opinion' has advanced the political objectives of the European institutions will not have to be conveyed within the nations. The *BVerfG* creates a genuine legal barrier only by defining the democracy principle as 'popular democracy' (Bryde 1994), and thereby assigning it a meaning that is principally not transferable to the European construction. The peoples of the states should "develop and express" what concerns them, "on a relatively homogeneous basis -- spiritually, socially and politically"(23). Hermann Heller, to whom the Court refers here, had in his time demanded a "certain degree of social homogeneity" as precondition for the self-assertion of the Weimar Republic's parliamentary system(24). The *BVerfG's* appeal to homogeneity is not prompted by a crisis comparable to that of the Weimar Republic, and thus inspires different connotations. The capacity of the European nation-states for economic and social problem-solving is more fundamentally eroded -- and their commitment to peace within the Community incomparably stronger -- than was conceivable in Heller's time. The rules of the Treaty, most notably the anti-national its prohibition of Article 6 and the anti-protectionist stipulation of Article 30, have had an impact on both aspects of this process (cf.

Weiler 1994a). To be sure, the *BVerfG* has not failed to note that universalistic legal principles and the Europeanization of external trade policy have and should limit state sovereignty. The problem with its theorem of the association of 'relatively homogeneous' states remains that it conceives the constitutional state only retrospectively and only as a nation-state that cannot be integrated with legal instruments. As with all guiding principles of EC law, this theorem presents an amalgamation of empirical observations, abstract theoretical concepts and normative premises linking law and politics. The thesis that the European construction -- now and in the foreseeable future -- comprises an association of peoples organized in states is a legal-conceptual reconstruction which limits the expansion of supranational competences and constitutes a constitutional requirement to defend national legal traditions by unilaterally defining national interests.

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We will have to explore in greater depth one important dimension of the controversy, namely the constitutional importance of economic integration. At present, however, one interim conclusion should be noted. The legal dispute between the EJC and the *BVerfG* concerns the deep structures of European law and German constitutional law. The 'association of states' concept, which the *BVerfG* uses in order to give legal form to the European project, is of one-sided origin and direction in that it measures the Federal Republic's capacity to integrate simply in terms of its own constitutional provisions and its essential national interests. This view is in conflict with the supranational nature of the ECJ's 'community of law', which does not discriminate among constitutional states. Supranational and national law each have their own legitimacy: How is the law to mediate between them? Any search for a response to this question should start by reflecting upon the weaknesses of the competing positions. The *BVerfG*'s anchoring of the demos in the ethnos has the consequence of foreclosing the law against the potential benefits of European integration. The ECJ's supranationalism fails to satisfactorily explain the constraints that European law imposes on the political autonomy of constitutional states. The common weakness of both conceptions seems to be their incapability of coping with the dynamics of the integration process: on the one hand, this process erodes the competences of constitutional states and, on the other hand, it has not yet generated a European polity (cf. the observations of Schwarze 1994). The focus on economic integration in the next section proceeds from the assumption that the debate on the future European polity will have to shift its attention to the constitutional dimension of the Europeanization of national economies if it is to provide 'convincing' answers to the dynamics of the integration process and the concern for the preservation of democratic structures.

### III. Europeanization of Economic Law

The 1957 EEC Treaty initiated the process of European integration by opening up the borders between states. In this context, the project of economic integration and the realization of a 'Common Market' certainly constituted a political programme. Yet its repercussions on the domestic conditions and the political sovereignty of the European nation-states remained undefined. Meanwhile, the ambivalent results of the eroding economic management potential of nation-states are becoming politically apparent and occupy central space in the discussion, both in the political science and legal fields, on the European constitution. This, if nothing else, requires an analysis of the role of law in the process of European integration to examine at the significance, in particular, of economic law. Yet again thematical limitations and a structuring of the argument are necessary from the outset. The following initial discussion of the *BVerfG*'s statements on the constitutional value of economic integration should complete the critique of the judgement (*infra 1*). This section will also serve as an alternative introduction to the search for a common starting-point for a political science analysis of European regulatory policy-making and a legal analysis of the Europeanization of economic law (*infra 2* and *3*).

## 1. The European Economy and the National State

In the constitutional critique of the Maastricht Treaty, it was repeatedly asserted that the Federal Republic would lose its quality as a State and become part of a European federation. This thesis was based not only on the loss of national monetary sovereignty, but also on the transfer of further regulatory competences to the EC (cf. Murswieck 1993, 187; Steindorff 1992, 13). The plaintiffs' arguments regarding the effects that the loss of economic regulatory powers must have on the constitutional state's ability to shape living conditions for its citizens did not impress the *BVerfG*. Its response was simple: European state-building does not occur if and because those European competences, which have actually been transferred to the Community, are primarily and only of economic significance.

Much more thorough was the *BVerfG* in its treatment of the agreements on monetary union. According to the overall conception of its argument, the *BVerfG* also had to examine also in this respect whether the projected European monetary system was in line with the German Constitution. Yet the Basic Law did not explicitly determine German monetary policy. Article 88 merely envisaged the creation of a central bank, the independence of which was later guaranteed in the Federal Bank Law of 1957. Since then the constitutional debate has concerned the transfer of a discretion to a politically independent institution (cf. Ladeur 1993). The *BVerfG* sums up the discussion only very briefly: the "modification of the democracy principle", with which monetary policy is being protected against short-term interests and pressures, has been proven to be successful and seems "acceptable"(25).

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The Bundesbank's 'external relations' were reorganized by the new Article 88 (2), inserted into the Federal Bank Law by the Law of 21 December 1992. It stipulates that the Bundesbank's tasks may be transferred to a European Central Bank that is "independent and which serves the primary objective of price stability". Tensions between supranational and domestic law result firstly from the fact that the institutionalization of monetary policy is more insulated against democratically legitimized decision processes in the Treaty on the EMS than it is in the Basic Law. This increase in the autonomy of monetary policy-making is not addressed by the *BVerfG*. Any independent European monetary policy also lacks the backing that develops with decades of social and scientific consensus -- the 'pre-legal preconditions', therefore, which formed the basis in the Federal Republic for the institutional independence of the Bundesbank and the orientation of its monetary policy. In contrast to its approach to the democratic deficit, the Court refrained from specifying the conditions for the workability of monetary union. Instead, it declared the relationship between monetary and economic union contingent and politically determinable(26). Precisely in this way politics has indirectly become involved: the federal parliament has the right to examine, before entering the third stage of monetary union, the fulfilment of the Treaty criteria on price stability and convergence -- and exercise of the Bundestag's right to supervision is bound to the agreed-upon objectives(27). Furthermore, if monetary union "could not develop continuously in line with the agreed stability mandate", then the Treaty conception assumed by the German ratification law would be abandoned(28).

Economic integration as a non-state and unpolitical process and monetary union as a project condemned to succeed and only legitimized by success -- this argumentation is, at the least, in need of further interpretation: Did the court agree with the ordo- and neo-liberal theory of the economic constitution, which always conceptualized supranational economic law as being independent of and unaffected by politics? (cf. Behrens 1994; Mestmäcker 1994) Does the *BVerfG* confirm the view of

the Community as an 'association of functional integration' which remains limited to questions of 'technical realization' and is therefore sufficiently legitimated through expertise? (Ipsen 1972, 176 and *idem* 1993) Does the Court's treatment of economic integration as 'low politics' relate to the respective views in functional integration theories? Or does it confirm political science diagnoses which state that the EC system conserves the nation-state precisely by the way in which it takes away its capacity for socio-economic decision-making? (Streeck, W. 1995a, 1995b)

## 2. Economic Law and Market Integration

All of these questions were not raised by the *BVerfG*. Yet confronting them is unavoidable if the Court's assertions are to be judged and the difficulties of the law in the process of integration are to be understood. The *BVerfG*'s careless treatment of the transfer of competences of economic regulation is -- in view of the regulatory density and functions of domestic economic law -- difficult to comprehend. Even if one, by way of a functional delimitation of 'economic' law, simply looked at those matters intended to institutionalize markets and provide for their functioning, there would be no end in sight. Apart from private economic legislation -- corporation law, property law, competition law and merger regulation -- general private law, on the one hand, and the law of public economic administration, on the other, would have to be considered. In addition, one would also need to examine at the whole of product safety regulation which covers the marketing of any product and thus both constitutes and regulates markets. Finally, in responding to the question of what else concerns 'the economy', one encounters labour and social law, environmental law and safety at work regulation.

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Thus, more than marginal matters are at stake when the European Union assumes 'competences and tasks' in the construction of an economic community. By contrast, we are faced with a project with highly complex regulatory techniques and extremely charged normative politics. Adapting economic law to the requirements of market integration therefore comes up against a complex web of active rules and common practices. That is why integration policy can only proceed selectively -- and it must have a two-sided effect: the Europeanization of economic regulation with the objective of integration is, from the perspective of domestic legal orders, an intervention with disintegrative consequences (Everson 1993; Joerges 1994a, 32-34). The more integration proceeds through market-constitutive regulation, the more these repercussions will become apparent. Market integration does affect the constitutional state more fundamentally than appears from the *BVerfG*'s judgement. The *BVerfG*'s reasoning presupposes either a purely formal understanding of sovereignty which ousts all the modern regulatory functions of the welfare state or, what amounts to the same result, a legally binding commitment of supranationalism to the concept of a minimal state(29).

## 3. Regulatory Patterns of Europeanized Economic Regulation

For a long time the Community only very cautiously advanced the construction of a Common Market. Comparing the rules and decision procedures of the EEC Treaty to the substance and the law-making procedures in national economic law, this seems all but surprising. Certainly the EEC Treaty was meant to guarantee the four basic freedoms: the mobility of goods, services, capital and labour. But even though the ECJ deduced applicable civil rights and legal rules from these stipulations, European law hardly interfered with the networks of economic regulation. The Treaty's guarantee of the freedom of trade in goods was limited by all the objectives named in Article 36. Those who wanted to exercise the freedom of services were obliged to respect professional regulations and other rules concerning the quality of their performance. The title on the mobility of capital did in any case respect the sensibilities of monetary policy; this freedom was not 'directly

applicable'.<sup>(30)</sup> Institutional limitations played their part. The Community could, within the limits of its enumerated competences, pass directives in accordance with Article 100 or it could act on the basis of Article 235: the unanimity principle meant that each Member State remained in a position to defend its regulatory system or its economic interests using the veto. European competition policy continued a piecemeal existence, even though its rules were directly applicable and were implemented by the Commission itself -- *vis-à-vis* protectionist national regulatory patterns it proved to be helpless.

### a) Single Market Programme

This might explain why the continuous growth of European economic regulation was carefully documented, but -- apart from the *ordo-* or neoliberal legal theory -- was rarely seen as a constitutionally relevant process. Only as it became possible in the 1980s to overcome the blockages of the integration process and to initiate a conceptually renewed internal market programme did the perception of 'Europe' change. The internal market initiative was presented as a project to enhance the competitiveness of the European economy through an efficiency-oriented deregulation strategy. The legislative core of this strategy was the retreat from the 'traditional' policy of harmonization. In principle, the doctrine of mutual recognition of essential regulation was supposed to make the passing of detailed ('positive') Community regulations unnecessary. Essential regulatory objectives were to be brought into the form of easier to agree upon general principles; the further concretizations of such essential requirements were to be removed from the European political system and their implementation transferred to the Commission, who would cooperate with non-governmental organizations and rely on the European committee system. The move to -- qualified -- majority voting for all measures relating to the internal market (Article 100a) was the most visible institutional innovation.

This transformation of the EC system not only stimulated political practice, but also caused commotions in the legal and social sciences. The move to majority voting affected precisely that legal-political balance between legal supranationalism and intermediation of national interests that Joseph Weiler had identified as the hidden stability condition of the EC system (Weiler 1981, 267 and 1991, 2423). Did supranational law -- as did Münchhausen in the swamp -- pull itself away from its ties to the nation-state? In fact the new legislative policy turned out to be the 'implementation' of a principle that the ECJ had previously developed from primary Community law. A German barrier to the marketing of French liquor had been declared incompatible with the principle of the free movement of goods in the *Cassis-de-Dijon* judgement. The Federal Government's argument in that case that the higher alcohol content required by German law was to protect German citizens against alcoholism was refuted. This judgement was convincing. But it is also true that the ECJ had quite cautiously formulated the principle of mutual recognition and its competence regarding the control of national legislation. It remained for the Commission to read into the ECJ decision a new guiding principle of harmonization policy and to expand on this in the White Paper on the internal market<sup>(31)</sup>. Yet this did not suffice either. The internal market initiative received its binding legal form only in the 1987 Single European Act that was negotiated by the national governments themselves.

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Did this herald the end of 'integration through law'? Is the broad acceptance of the internal market initiative due to a programmatic orientation that followed an efficiency and deregulation rhetoric which steered clear of controversial redistributive and other social welfare policy objectives? (Majone 1995) Did the design of a new programme and the negotiating skills of the Commission President bring together European business interests, thus utilizing an ultimately neofunctional logic

(Sandtholtz and Zysman 1989). Or should the change in the integration process be attributed to the interests and power of the three most important Member States? (Moravcsik 1991) Political science analyses of the conditions and consequences of the internal market programme always -- at least implicitly -- also contain judgements about the functions of law. It would certainly be rewarding to trace in more detail these perceptions (and misperceptions). In this context, the thesis must suffice that, particularly in the implementation process of the internal market programme, the law has maintained its role as an independent and resistant factor. Evidence for this thesis is found in the results -- equally surprising for both -- critics and supporters of the internal market programme of its implementation. Internal market policies have not removed the 'juridification' of the Western European economies. They have created a large number of arrangements which demonstrate notable patterns: a tendency towards high-level regulation; the development of new forms of cooperation; a renaissance of regulatory functions for the nation-state(32).

(1) Market integration and legislative activism. In each case in which Community law addresses the institutional framework and the legal fine-tuning of markets, this takes place in an extraordinary manner. The most striking examples are to be found in product regulations which aim at consumer and health protection, but which also involve some concerns of labour and environmental protection. In this context Article 100a (3) EC Treaty and the right 'to go it alone' given to those Member States willing to regulate(33) entail that an opening of markets can only be achieved at the price of modernizing and improving the quality of respective regulation (Joerges 1994b). But it also becomes clear in the economic regulation of the markets for goods and services that a single market requires the establishment of measures of legal protection, such as a partial harmonization of supervisory rights and arrangements for the coordination of practice of national supervisory authorities (Reich 1992, 869). The harmonization of private law demonstrates that European law cumulates and improves protective measures found in domestic legal systems whenever the functioning of markets actually demands genuine legal harmonization (Joerges and Brüggemeier 1993, 252). Such legislative policy cannot identify itself as simply functional. It remains tied to the legal systems of the Member States and must respect the standards of justice which have won recognition in them.

(2) Supremacy of European law and horizontal cooperation. Since the EC does not itself wield the resources to generate standards and since it also lacks the administrative competence to enforce legally binding decisions in the Member States, it must seek to counterbalance these deficits. It is for this reason that the Commission cooperates with European standardization organizations in the definition of product safety regulation and supports the coordination of national certification authorities. Furthermore, the Community operates through a dense network of committees with the participation of administrative experts from the Member States as well as independent scientists and representatives of economic and social interest organizations. This opening is supported by moves towards a procedural juridification which is based on demands for transparency, promotes the consideration of scientific knowledge, gives in to claims for participation and extends the possibilities for judicial protection(34). The dependence of the Community on national administration therefore demands some form of horizontal coordination. The intensity of judicial control over administrative acts and over the European 'fourth branch of government' will increase. In this way the practical weakness of 'comitology' becomes its (potentially) normative strength: without the law cooperative solutions to regulatory tasks will not be successfully mastered, and with the law they can only succeed in the long term if they develop a legal constitution corresponding to the conflict potential of regulatory politics.

The dependence of the Community on the harmonization of private economic law through directives is even stronger. Following their adoption and transposition into domestic law directives are primarily a matter for national courts. Through the procedures of Article 177, the ECJ comes to deal with Community legislation only after national courts have been involved. It would undermine its own effectiveness if, in its interpretations of the meaning and content of Community, it was to go beyond the social ties of private and economic law -- ties which national courts have established

within their legal systems (Joerges and Brüggemeier 1993, 281; Joerges 1995).

(3) Market integration and regulatory autonomy of the Member States. The validity claims of so-called secondary Community law -- its primacy and its preemptive effect -- are not only limited by primary law which gives Member States the right to 'go it alone', but are typically also circumscribed in the directives themselves and, finally, are only applied cautiously by the ECJ (Furrer 1994, 43, 165). Neither does the ECJ use its supervisory powers under primary law simply with a view to enforcing deregulatory programmes or to moving towards a European neo-liberal economic constitution.

It is true that ECJ jurisdiction on Article 30 EC Treaty in the follow-up to the *Cassis-de-Dijon* case evaluated national regulation according to its compatibility with the functional requirements of a market economy(35). But it is also true that convincing regulatory interests motivated by consumer, social or environmental protection were addressed very cautiously (Wils 1993) and that the ECJ has shown particular reserve when addressing issues that concern the national *ordre public*, i.e. subjects that open up the debate over political-ethical traditions (Phelan 1992). In the latter two groups of cases, the ECJ has now initiated an explicit withdrawal of its supervisory claims and has, at the same time, formalized this self-correction: only product regulation is now to fall under the *Cassis* terms of reference, while all 'modalities of purchase' may be regulated by Member States independently(36).

In addition to Article 30 EC Treaty, the ECJ has used Articles 85 and 5 EC Treaty to gain access to state measures endorsing anti-competitive practices(37). More precisely, the German *Monopolkommission* has sought to read into that jurisprudence a move towards a general control of state measures(38). Yet, once again in 1993, the ECJ refused the request for a substantial examination of regulatory arrangements between state authorities and the "economic circles concerned". Instead, a kind of European 'act of state' doctrine was announced: EC law merely checks whether Member States take formal responsibility for such regulatory techniques; it does not examine their regulatory rationale(39).

This renewed self-restraint should not be interpreted as the renunciation of regulatory competence (Reich 1994), nor can it be explained simply as the result of the Court's workload. The Court always had to react to the tension between the validity claims of Community law geared towards the realization of trade liberalization on the one hand, and the regulatory interests of the Member States on the other hand. The latest judgements respond negatively that these questions may not be decided according to a higher regulatory rationality of Community; they may be understood as imposing demands for justifications at either level, the European as well as the national, and may thus be interpreted as a search for compatibility (cf. Joerges 1994a).

## **b) Rationalization Processes**

All of these developments have also been observed, explained and interpreted by social scientists. This is true, first of all, for the legislative activism of the Community and its emphasis on market-related economic law and product-related regulation. This is indeed a process of 'market-building' (Streeck 1995b) and the stringent level of regulation, particularly of products -- which also concerns safety at work via machine-safety -- corresponds to the conditions and configurations of interests in the politics of market-building (Scharpf 1994).

The move to horizontal forms of cooperation in the production and implementation of European standards can be equally well explained. In the related growth of a comitology directed by the



bureaucracy and supported by experts, Bach (1993, 227) has identified -- very much in line with Ipsen (1993) -- the emergence of a new type of regime to which he attributes a technical-bureaucratic character removed from the domestic context. More open to the legitimacy problems of this regulatory practice is Majone's (1994a, 23) perspective of a European 'fourth branch of government'. Majone (1993a, 156 and *idem* 1993b) attributes to the whole range of Community activities in social regulation a role of politics that compensates market failure and deficits of 'soft' international cooperation. But he pleads not only for respective restrictions, but also for institutional innovations which can ensure some form of political accountability of this 'fourth branch of government' (1994b).

Wishful thinking? Are lawyers merely observing differently or is what they see in fact marginal? It depends whether European legislation is really exposed to demands for justification which cannot be dissolved by functional arguments. It depends on how European comitology reacts to its legitimacy problems. And it depends not the least on whether European and national courts are indeed willing to pass the survival of normative ties of the economy on to the processes of regulatory competition or whether they search for legal principles ensuring the coexistence of supranational linkages with national regulatory interests.

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Yet, even if all this proves to be possible, the integration process will still have disintegrative implications. Developing a European equivalent of the degree of legal commitment in the economy which constitutional states have achieved presupposes a transformation process which would replace national legal traditions by European principles and rules. The development of European basic rights together with the detection of common European constitutional principles (Häberle 1991) and common private law traditions are necessary but not sufficient elements for this project. The Europeanization of economic law is driven by the impetus for legal change coming from the logic of market integration. It cannot be content with the codification of legal norms which are in any case common tradition, but must orient European law towards the functioning of the Common Market. In this sense market integration has to push forward a 'rationalization' of economic and private law (Joerges 1994b, 1995). But this does not exclude the emergence of procedural as well as substantial criteria of justice. Yet rationalized law must also remain able to recognize its limits of legitimacy. It has to differentiate between universal criteria of justice and political-ethical questions. It has to recognize, above all, limitations of its effectiveness: given the uneven conditions of economic development among the European economies and the resultant differing national preferences in the fields of labour, social or environmental law, it cannot respond constructively with the creation of a European system of fiscal equalization in order to compensate for the raising of regulatory standards (on the related economic reasoning Sinn 1994); it cannot simply release the more developed economies from the drive towards 'social dumping', nor prepare the ground for the formation of transnational coalitions of homogeneous social interest groups (Streck 1995a). Yet the financial costs following the opening up of borders and the need to devise communitarian regulatory strategies are not, *per se*, unjust.

## Conclusion

Analysis of the *BVerfG's* Maastricht judgement has demonstrated that the judicial controversy over the qualification of the EC system as either a legal Community or a mere 'association of states' is essentially about the compatibility of the European supranational legal constitution with democracy constituted in the nation-state. Yet it was only discussion of economic integration that brought to light the difficulties of a coexistence of these two legal orders. The resort to supranational sovereign rights according to the convincing dictum of the *BVerfG* requires specific legitimation, a type of

legitimation which cannot be found through the legal operations on which the ECJ has built its architecture of supranationalism. European economic integration directly affects individuals and social actors all over Europe. By granting these actors European rights, the Court itself has paved the way for the emergence of a European civil society. By transforming its institutional structures into new forms of governance, the legal system has responded to the need for a juridification of the European economy. In the German Constitutional Court's neglect of the implications of economic integration, it sees but a helpless retraction from these challenges. These challenges are not yet adequately understood. They should concern lawyers and political scientists alike. Legal science will need to listen to economic and political science analyses and rationality concepts when it comes to the search for institutional solutions which safeguard the achievements of national constitutional states, secures the taming of the nation-state through supranational law and, finally, also provides for the social acceptability of economic integration. But political science ought also to be interested in the possibilities of the law to pre-structure intergovernmental bargaining and to tie the conflicts over economic and social consequences of market integration to principles and rules.

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**Note** that due to technical reasons this bibliography also includes literature which is only referred to by the author's related paper, *The Market without the State? 'The Economic Constitution' of the European Community and the Rebirth of Regulatory Politics*, European Integration online Papers Vol.1, no. 19, <http://eiop.or.at/eiop/texte/1997-019a.htm>. The same bibliography is, however, also attached to the latter paper.

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## Endnotes

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(1) Bundesverfassungsgericht, Judgement of 12 Oct. 1993, 2 BvR 2134/92 and 2 BvR 2159/92 (1994) 89 *Entscheidungen des Bundesverfassungsgerichts* 155-213; English translation in [1994] CMLR 1.

(2) Recent contributions to this kind of analysis include Scharpf 1994 and 1995; Grande 1995; Hix 1994; Jachtenfuchs 1995; Zürn 1995.

(3) Cf. Behrens 1994; Mestmäcker 1994; Petersmann 1994.

(4) Case 26/62 *Van Gend en Loos* [1963] ECR 1.

(5) Case 6/64 *Costa v Enel* [1986] ECR 593.

(6) Case 72/70 ERTA [1971] ECR 263.

(7) Case C-70/88 *Parliament v Council* [1990] ECR I-2041; case C-65/90 *Parliament v Council* [1992] ECR I-4625, also case 138/79 *Roquette Frères* [1980] ECR 3333.

(8) Case C 91/92 *Dori* [1994] 5 *Europäische Zeitschrift für Wirtschaftsrecht* 498.

(9) Bundesverfassungsgericht, Judgement of 12 Oct. 1993, 2 BvR 2134/92 and 2 BvR 2159/92 (1994) 89 *Entscheidungen des Bundesverfassungsgerichts* 155-213 at paras. C 1, C II 1a, C II 2 b1 and C II 3 d.

(10) Para. C II a.

(11) Para. C II 2 b d2(2).

(12) Cf. 7 and para. B 2 b.

(13) Para. C II 3 b; cf. Zuleeg 1994, 3.

(14) Article 3 and 4 EEC Treaty, confirmed through Article E EU Treaty, Article 3b I 4 EC Treaty.

(15) Para. C I 2 a and 3.

(16) Para. B 1 a.

(17) Para. C I 2 before a.

(18) Para. C II 3.

(19) Para. C I 2 b b2.

(20) On the following cf. the analysis of Weiler 1995. 'Herder v. Kant' is a more benevolent title than

'ethnos v demos' but it addresses the same problematic; my additional concerns with the *BVerfG's* judgement relate to its treatment of economic integration (cf. infra III).

(21) Para. CI 2 b b1.

(22) Para. C I 2 b b1.

(23) Para. C I 2 b b2.

(24) Heller 1928, 427; an interpretation in Böckenförde 1987, 348 and Bryde 1994, 311.

(25) Para. C II 3 a.

(26) Para. C II 2 f.

(27) Para. C II 2 d d2 (3).

(28) Para. C II 2 e.

(29) *Wissenschaftlicher Beirat beim Bundesministerium* (1994), 11 *et seq.*

(30) Case 203/80 *Casati* [1981] ECR 2595.

(31) Cf. the Commission of the EC, 'Communication on the implications of the ECJ judgment of 20 February 1979 in case 120/78 (*Cassis-de- Dijon*)', OJ 1980 C 256, 2 and the Commission's White Paper to the European Council on "Completion of the Internal Market", COM (85) 310 final of 14 June 1985; Alter and Meunier-Aitsahalia, 1994, 555.

(32) Cf. more extensively in Joerges 1991a, 234 and *idem* 1994, 41-51.

(33) Article 100a para. 4, Article 118. para.3, Article 130t EC Treaty.

(34) Cf. case C-212/91 *Angelopharm* [1994] 5 *Europäische Zeitschrift für Wirtschaftsrecht* 213, more generally European Parliament, Bericht des Institutionellen Ausschusses über die Transparenz in der Gemeinschaft of 21 March 1994, PE 207.463/final.

(35) Cf. case C-362/88 *GB-INNO-BM* [1988] ECR I-667 and case C-126/91 *Yves Rocher* [1993] ECR 3187.

(36) Cases 267 and 268/91 *Keck and Mithouard* [1993] *Europäische Zeitschrift für Wirtschaftsrecht* 770, latest also cases C-69 and 258/ 93 *Punto Casa* [1994] 5 *Europäische Zeitschrift für Wirtschaftsrecht* 434.

(37) Particularly case 136/86 *BNIC v Aubert* [1987] ECR 4789 and case 276/86 *Van Eycke* [1989] ECR I-4789.

(38) Monopolkommission 1990, 401.

(39) Cf. case C-185/91 *Bundesanstalt für den Güterverkehr v. Reiff* [1993] 4 *Europäische Zeitschrift für Wirtschaftsrecht* 769 and as a recent example cases C-401 and 402/92 *t'Heukske* [1994] 5 *Europäische Zeitschrift für Wirtschaftsrecht* 435.

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