In the Name of Cooperation: The External Relations of the German *Länder* and Their Participation in the EU Decision-Making

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'Foreign relations power' (*auswärtige Gewalt*) in the Federal Republic of Germany strongly centralised by the Lindau Agreement in 1957 – Although the German *Länder* still retain some rights to act at an international level, the Federal Government is the dominant player in the foreign relations of the state – Introduction of *Länder* participation in European Union law-making and policy-making; new opportunities for them to perform a role in external relations – Cooperative character of German federalism confirmed

Introduction

The 1957 Lindau Agreement between the German Federation and the *Länder* marked the transfer of a significant amount of foreign relations power from the *Länder* to the Federation. Thus, the Federal Government assumed the main role in the foreign relations of Germany. In areas within their competence the *Länder* only took a secondary role. Their rights were further impeded by the start of European integration. In his seminal article *Als Bundesstaat in der Gemeinschaft* (1966), Hans-Peter Ipsen instituted the term '*Landesblindheit*' (regional blindness) which refers to the European Communities' disregard of the federal structure of the German State.[1] '*Landesblindheit*' became a popular term in public discourse and is still the starting point of any analysis on the role of sub-state entities in the European Union.

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[1] H.-P. Ipsen, 'Als Bundesstaat in der Gemeinschaft', in E. Von Caemmerer, et al. (eds.), *Probleme des Europäischen Rechts. Festschrift für Walter Hallstein* (Frankfurt am Main, Klostermann 1966) p. 248.

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Over the last two decades the European Union took important steps in recognising the existence and the role of sub-national entities. Since the Maastricht Treaty, regional Ministers can sit in the Council on behalf of a member state.[2] The Treaty instituted the Committee of the Regions as an advisory body to the political institutions and extended the application of the subsidiarity principle to all shared Community powers. Recently the Treaty of Lisbon enhanced the role of the Committee of the Regions and reshaped the principle of subsidiarity in a way which implies stronger consideration for sub-national entities.[3] The new *Protocol on Subsidiarity* introduced the 'early warning' mechanism. This is a tool which pursues the goal of strengthening consideration for the principle of subsidiarity in the legislative process and which may significantly contribute to enhancing respect for the competences of the sub-national entities.

Yet there still remain elements of 'regional blindness'. Key examples are the lack of *locus standi* for the Regions in direct challenges of Union acts and the traditional 'light touch' approach by the Court of Justice where the enforcement of the principle of subsidiarity is concerned. Even the Regional policy of the European Union consists of the allocation of the Structural and Cohesion Funds to the member states or to designated Regional Development Agencies within the member states. These authorities take care of further distribution of the European funding to sub-national administrations. This implies that regional and other sub-state entities cannot directly access funds and benefit from the thrust of the Regional Policy. This proves that the European Union has not yet evolved into a 'Europe of the Regions'.[4]

However, in the last few decades there is evidence to demonstrate that the Union has significantly opened itself up to collaboration with sub-state entities within the member states. This tendency was also confirmed by the Commission's

[2] *See* Art. 16(2) TEU (ex 203 EC). This opportunity for the regional authorities was introduced by the Treaty of Maastricht largely due to Belgian and German pressure. These member states wanted their internal federal framework to be acknowledged at EU level. *See* K. Lenaerts, P. Van Nuffel and R. Bray (eds.), *Constitutional Law of the European Union* (London, Sweet and Maxwell 2005) p. 414.

[3] Art. 5 TFEU (ex 5 EC) expressly recognises the important role of the Regions and of local levels of government. It actually states that 'in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the member states, *either at central or at regional and local level* [emphasis added], but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.' This provision constitutes the legal basis of the subsidiarity principle. In order to comply with subsidiarity, the EU needs to take into account not only the national level, but also the sub-national levels of government within the member states.

[4] C. Jeffery, 'Farewell the Third Level? The German Länder and the European Policy Process', in C. Jeffery (ed.), *The Regional Dimension of the European Union. Towards a Third Level in Europe?* (Lon-

2001 *White Paper on European Governance* and the more recent 2009 Committee of the Regions' *White Paper on Multilevel Governance*.[5]

The treaty-making power in Germany was centralised in 1957 and the autonomy of the *Länder* has been significantly eroded. However this article will demonstrate that the European Union is actually offering the *Länder* the opportunity to play a role in external relations. At the same time European integration is making collaboration between the Federation and the *Länder* ('vertical cooperation'), and among the *Länder* themselves ('horizontal cooperation') increasingly necessary. This largely frustrates the recent attempt made by the 2006 *Föderalismusreform* (the reform of the federal state)[6] to introduce a more competitive type of federalism in Germany.

The shift towards more regional participation and Federation-*Länder* cooperation was further strengthened by the 'Lisbon ruling' issued by the German Federal Constitutional Court on 30 June 2009 and by the laws implementing the Treaty of Lisbon.[7] In this ruling, the Court found the Treaty to be compliant with the *Grundgesetz* (meaning Basic Law, the 1949 constitution of the Federal Republic of Germany, hereinafter GG). It allowed ratification to take place provided that the national legislative bodies (the *Bundestag* and the *Bundesrat*) were given sufficient participation rights in the law-making and treaty amendment procedures of the European Union. For this purpose, four pieces of legislation ('*Begleitgesetze*', laws accompanying the ratification of the Treaty) were passed in September 2009. Following their passage, the instrument of ratification of the Treaty of Lisbon was signed by Federal President Horst Köhler on 25 September 2009.

This paper will examine the external relations of the German *Länder* and their participation in the Union decision-making process from the domestic point of view. The current system of *Länder* participation in Union law-making and policy-making pivots on Article 23 GG (amended by the 2006 *Föderalismusreform*) and on the *Gesetz über die Zusammenarbeit von Bund und Ländern in Angelegenheiten der Europäischen Union* of 12 March 1993 (Act on the Cooperation of the Federation and

don, Frank Cass 1997) p. 56.

[5] Commission of the European Communities, *European Governance: A White Paper*, 25 July 2001, COM(2001) 428 (available at <http://ec.europa.eu/governance/white_paper/en.pdf>, visited on 14 Dec. 2009). Committee of the Regions, *White Paper on Multilevel Governance*, 17-18 June 2009 (available on the web site of the Committee at <http://www.cor.europa.eu>).

[6] *See* the constitutional revision act of the 11 Sept. 2006 (in *Bundesgesetzblatt*, hereinafter *BGBl.*, I, 2006, p. 2098). On the 2006 reform *see* Ch. Starck (ed.), *Föderalismusreform. Einführung* (München, C. H. Beck 2007); R. Hrbek, 'The Reform of German Federalism: Part I', 3 *European Constitutional Law Review* (2007) p. 225; W. Kluth (ed.), *Föderalismusreformgesetz. Einführung und Kommentierung* (Baden-Baden, Nomos 2007); A. Gunlicks, 'German Federalism Reform: Part One', 8 *German Law Journal* (2008) p. 111.

[7] The English text is available at <http://www.bverfg.de/entscheidungen/es20090630_2bve

the *Länder* in Matters Related to the European Union, hereafter referred to as EUZBLG).[8]

Major legislative innovations were introduced in September 2009, in order to align the system with the requirements set in the Lisbon ruling. For the scope of this paper, the most important amongst these is the Law Extending and Strengthening the Rights of the *Bundestag* and the *Bundesrat* in Matters Related to the European Union (*Gesetz über die Ausweitung und Stärkung der Rechte des Bundestages und des Bundesrates in Angelegenheiten der Europäischen Union*). Article 1 contains the Law on the Responsibility of the *Bundestag* and the *Bundesrat* for the European Integration (*Integrationsverantwortungsgesetz*; in acronym, IntVG).[9]

The concentration of treaty-making power in the hands of the Federal Government: The Lindau Agreement

The centralisation of the foreign relations power began in 1871 with the Empire's Constitution and was completed by the 1919 Weimar Constitution. The 1949 *Grundgesetz* continued the centralisation process in a manner essentially analogous to the *Weimarian Reich*. In this respect, Article 32(1) GG states that 'Relations with foreign states shall be conducted by the Federation.' Furthermore, Article 73(1) GG includes 'foreign affairs and defence' among the matters falling within the exclusive competence of the Federation. Finally Article 87(1) GG legitimates the presence, at the federal level, of a Ministry of Foreign Affairs.[10]

There are three theses regarding the allocation of foreign power. According to the first 'centralist' thesis, Article 32(1) GG authorises the Federation to enter into treaties in all fields, including those within the remit of the *Länder*. However the incorporation of these treaties into national law is to be performed in accordance

000208en.html> (visited on 12 Feb. 2010).

[8] Published in *BGBl.*, 1993, I, p. 313. The act was amended in 2006 and 2009.

[9] The Law Extending and Strengthening the Rights of the *Bundestag* and the *Bundesrat* in Matters Related to the EU was published in *BGBl.*, 2009, I, p. 3022. The other pieces of legislation referred to in the text as '*Begleitgesetze*' are: the Law Amending the Act on the Cooperation of the Federal Government and the *Bundestag* in Matters Related to the EU (*Gesetz zur Änderung des Gesetzes über die Zusammenarbeit von Bundesregierung und Deutschem Bundestag in Angelegenheiten der Europäischen Union*; in *BGBl.*, 2009, I, p. 3026); the Law Amending the Act on the Cooperation of the Federation and the *Länder* in Matters Related to the EU (*Gesetz zur Änderung des Gesetzes über die Zusammenarbeit von Bund und Ländern in Angelegenheiten der Europäischen Union*; in *BGBl.*, 2009, I, p. 3031); the Law Implementing the Constitutional Amendments for the Ratification of the Treaty of Lisbon (*Gesetz zur Umsetzung der Grundgesetzänderungen für die Ratifizierung des Vertrags von Lissabon*; in *BGBl.*, 2009, I, p. 3822).

[10] The first subparagraph of Art. 87(1) GG states: 'The foreign service, the federal financial administration, and, in accordance with the provisions of Article 89, the administration of federal waterways and shipping shall be conducted by federal administrative authorities with their own

with the distribution of competences in the GG.[11] Consequently, the Federation is exposed to potential international responsibility if the *Länder* fail to incorporate a treaty correctly and in a timely manner. This thesis was supported by some northern *Länder* (Bremen, Hamburg, Lower Saxony, Schleswig-Holstein) during the negotiations which led to the conclusion of the 1957 Lindau Agreement.

The second thesis is even more centralist and is known as the 'Berlin solution'. In addition to having power in all fields of foreign affairs (including areas within the *Länder*'s exclusive legislative competence), the Federation has the power to issue any legislation necessary for incorporation. This could lead to significant erosion, or potentially the disappearance of the *Länder*'s legislative competences. This thesis was defended by the Federation (with the sole support of the Berlin *Land*) during the negotiations which led to the conclusion of the Lindau Agreement.

The third thesis is called 'federalist'. The Federation has the right to conclude treaties only in fields which are subject to its legislative competence. This thesis was originally upheld by the southern *Länder* (Baden-Württemberg, Hessen, Rhineland-Palatinate, Bavaria, North Rhine-Westphalia) and is based on two considerations. Firstly, the risk of the *Länder*'s failure to incorporate would be avoided, if the Federal Government was entitled to make treaties only in areas within its competence. Secondly, Article 32(3) GG, empowers the *Länder* to conclude treaties with foreign states on matters within their legislative domain.

The 'federalist' thesis is open to objections. Article 32(3) GG states that the *Länder* 'may' conclude treaties with foreign states in matters within their legislative competence. There is no implication that this is an exclusive power.[12] Moreover, the 'federalist' thesis would excessively limit the Federal Government's activities at an international level.[13]

The dispute was solved by the conclusion of the Lindau Agreement. The *Länder* accepted the federal competence to conclude certain categories of treaties. These include: consular treaties, those concerning trade and navigation, the right to take up residence, commercial exchanges and payments to or from foreign countries, as well as treaties regarding the establishment of or joining international organisations.

The Federation can conclude treaties on matters falling under the exclusive competence of the *Länder* (for example agreements regarding cultural matters).

administrative substructures.'

[11] It should be noted that the Federal Republic of Germany is a dualist state, where international rules can operate only after their incorporation within the national system by the national legislature.

[12] J. Ipsen, *Staatsrecht I. Staatsorganisationsrecht*, 18th edn. (München, Luchterhand 2006) p. 283 (Rn. 1088).

But the Federal Government must obtain the consent of the *Länder* before a treaty can become binding at the international level. The consent is given by the Permanent Commission on Treaties (Point 3 Lindau Agreement).

When a treaty affects the vital interests of the *Länder*, the Federation must give them prior notice. The aim is to enable the *Länder* to express their opinions (Point 4 Lindau Agreement). This may be useful as federal laws are often executed at regional level and the Federation can draw upon the technical knowledge of the *Länder*.

But how can a simple agreement between the Federal Government and the *Länder* modify the constitutional competences on the *jus tractati*? This Agreement reflects the typical cooperative nature of German federalism, where the *Länder* very frequently lost their autonomous powers in exchange for participation rights. Arguably infringement of the Agreement is justiciable before the Federal Constitutional Court since it would amount to a breach of the unwritten constitutional principle of federal loyalty (*Bundestreue*).

The right of a single Land to be consulted

A treaty affecting the special circumstances of a *Land* can be concluded by the Federal Government only after consultation with the *Land* concerned.[14] The consensus is that this occurs when a treaty contains obligations regarding territory, constitution, status, economic interests or cultural identity of that *Land*. For example, treaties relating to sea, fishing, or the allocation of the continental shelf can only be concluded after the coastal *Länder* have been consulted.[15] However, the Federal Government is not obliged to uphold the opinion of the *Land*.

The legal consequences of the omission of such consultation are not clear. Arguably this could result in the invalidity of the national legislation approving the treaty. Without invalidity the Federal Government would be granted 'impunity' for non-consultation. This would also be in striking contrast with the Federation's duty to behave loyally towards the *Länder* and with the literal meaning of Article 32(2) GG.[16]

[13] D. Schmalz, *Staatsrecht*, 4th edn. (Baden-Baden, Nomos 2000) p. 298.

[14] Art. 32(2) GG reads: 'Before the conclusion of a treaty affecting the special circumstances of a *Land*, that *Land* shall be consulted in timely fashion.'

[15] I. Pernice, 'Comment to Art. 32 GG', in H. Dreier, *Grundgesetz. Kommentar*, 2nd edn., Vol. II (Tübingen, Mohr Siebeck 2006), p. 771 at p. 787 (Rn. 32).

[16] B. Kempen, 'Comment to Art. 32 GG', in H. von Mangoldt, et al. (eds.), *Das Bonner Grundgesetz*, 5th edn., Vol. II (München, Vahlen 2005), p. 735 at p. 769 (Rn. 79), holds that neither the invalidity

The Bundesrat's role in the making and incorporation of federal treaties

The *Bundesrat* (Federal Council) is a federal chamber where the *Länder* are represented and through which they participate in federal legislation, administration and in matters of the European Union.[17] It allows the *Länder* to collectively play a major role in making and incorporating international treaties signed by the Federal Government.

Treaties governing the Federation's political relations or regulating subjects of federal legislation require approval by a federal statute called '*Vertragsgesetz*'.[18] This statute accomplishes two tasks: it authorises the Federal President to ratify a treaty and it contains provisions incorporating the treaty. This is a necessary condition for the national enforcement of the treaty.[19]

According to the Federal Constitutional Court, treaties regulating the political relations of the Federation are those which 'affect in a substantial and immediate way the existence of a state, its territorial integrity, its independence, as well as the position and the role of the state vis-à-vis other states or the international community.'[20]

The type of statute required for the incorporation of a treaty depends upon the subject. The incorporation statute can be one for which the *Bundesrat* has an absolute veto power (*Zustimmungsgesetz*), or one for which the veto of the *Bundesrat* can be overturned by absolute majority in the *Bundestag* (*Einspruchsgesetz*).[21] The incorporation of treaties regulating the political relations of the Federation always requires an *Einspruchsgesetz*.

The *Grundgesetz* distinguishes the status of treaties ('*Verträge*') from that of executive agreements ('*Verwaltungsabkommen*'). This is a category which includes those international agreements which neither regulate the political relations of the Federation, nor the subjects of federal legislation. Executive agreements are concluded by the Federal Government (*Regierungsabkommen*) or by the competent Federal Minister (*Ressortabkommen*). A federal administrative measure is sufficient for their incorporation. When executive agreements regulate subjects on which the *Bundesrat* has the right to intervene, it is involved in the incorporation process.

of a treaty nor the invalidity of the implementing law derive from this omission.

[17] *See* Arts. 50-53 GG.

[18] Art. 59(2) reads: 'Treaties that regulate the political relations of the Federation or relate to subjects of federal legislation shall require the consent or participation, in the form of a federal law, of the bodies responsible in such a case for the enactment of federal law. In the case of executive agreements the provisions concerning the federal administration shall apply mutatis mutandis.'

[19] *See* K. Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland*, 20th edn. (Heidelberg, C.F. Müller 1999) p. 228 (Rn. 534).

[20] *See* the ruling of the German Federal Constitutional Court in *Entscheidungssammlung des Bundesverfassungsgericht* (from now on *BVerfGE*), Vol. 73, p. 339 at p. 381.

The external relations of the Länder

The *Länder* can conclude treaties with foreign states within the limits established by Article 32(3) GG. These limits concern both subject and procedure: the *Länder* can conclude treaties only on matters within their legislative competence[22] and these treaties require previous consent of the Federal Government. This consent ensures that the *Länder* do not exercise their *jus tractati* in conflict with federal foreign policy. Yet the Government's right of approval is limited by its duty to be loyal to the *Länder*. This implies that it may not abuse its power; for example, consent cannot be denied for reasons which are used as pretexts.[23]

As a treaty concluded by the *Länder* without the Federal Government's consent would certainly not be valid in the domestic legal order, would it be any different on the international level? According to the prevailing view, the *Länder*'s limited international subjectivity is not inherent, but 'conferred by' Article 32(3) GG. This should have a real constituent effect on their capacity to act. Consequently, if a *Land* concludes a treaty without federal consent, this should be considered as being concluded *ultra vires*, in respect of both domestic and international law.[24]

According to Maunz and more recently Kempen, the *Länder*'s international subjectivity is not 'conferred' on them by the *Grundgesetz*, but instead derives from international law.[25] From this premise Kempen infers that a treaty concluded *ultra vires* by the *Länder* would be invalid at the international level. His argument relies on Article 46 of the 1969 Vienna Convention on the Law of the Treaties. The invalidity of a treaty can only be invoked if there is a clear violation of a fundamentally important rule of domestic law on treaty-making powers. Therefore when

[21] The *Bundestag* is the chamber representing the entire electorate.

[22] This means that the *Länder* can conclude treaties: A) on matters within their exclusive competence; B) on matters subject to concurrent legislation (*konkurrierende Gesetzgebung*), provided that: i) the Federation has not yet intervened in that field, or ii) it has re-opened the way to the *Länder*'s legislation under Art. 72 GG, last paragraph, or, even iii) when it is a sector falling within the *Abweichungskompetenz* under Art. 72(3) GG; C) on matters within the Federation's exclusive legislative competence, provided that the Federation has authorized them by statute according to Art. 71 GG; D) in sectors where *Länder* Governments have been authorized by a federal law to issue legislative decrees (*see* Art. 80(1) GG). It is not possible to exclude a priori that a treaty concluded by a *Land* and regulating an issue of regional interest may have a political impact on the Federation. *See* the decision of the Federal Constitutional Court in *BVerfGE*, Vol. 2, p. 347 at p. 379.

[23] *See* Pernice, *supra* n. 15, at p. 793 (Rn. 45); Kempen, *supra* n. 16, at p. 774 (Rn. 90).

[24] H.D. Jarass, 'Comment to Art. 32 GG', in H.D. Jarass and B. Pieroth (eds.), *Grundgesetz für die Bundesrepublik Deutschland*, 9th edn. (München, C. H. Beck 2007), p. 607 at p. 612 (Rn. 13); O. Rojahn, 'Comment to Art. 32 BL', in I. von Münch and Ph. Kunig (eds.), *Grundgesetz-Kommentar*, 5th edn., Vol. II (München, C. H. Beck 2001), p. 463 at p. 489 (Rn. 40); R. Streinz, 'Comment to Art. 32 GG', in M. Sachs (ed.), *Grundgesetz. Kommentar*, 4th edn. (München, C. H. Beck 2007), p. 1059 at p. 1077 (Rn. 63).

[25] T. Maunz, 'Comment to Art. 32 GG', in T. Maunz and G. Dürig (eds.), *Grundgesetz. Kommentar*, Vol. IV (München, C. H. Beck since 1958), p. 1 at p. 25 (Rn. 57); Kempen, *supra* n. 16, at p. 739

a third party concludes a treaty with a *Land*, it is obliged to make sure that the *Land* has all the necessary powers and could not invoke its ignorance of domestic law.[26] In practice it is almost unimaginable that a *Land* would ever sign a treaty without first obtaining the consent from the Federal Government. Moreover Kempen's conclusion is based on the completely unrealistic assumption that third parties must have intimate knowledge of the German constitutional arrangements.

The *Länder* have the power to conclude executive agreements (*Verwaltungsabkommen*),[27] provided that they have the administrative competences which are necessary for implementing them. The Federal Government's consent is always required.

The *Länder*'s 'foreign relations power' is limited to signing international agreements. This precludes them from performing unilateral acts, for example the recognition of foreign states or governments.

Though Article 32(3) only refers to 'foreign states', by implication the *Länder* can conclude treaties and agreements with all international legal subjects. The *Länder*'s agreements with those entities which have no international legal personality (regions or other sub-state entities), lie outside the sphere of application of Article 32(3) GG. Therefore the Federal Government's consent is not required. The same applies to concordats signed by the *Länder* with the Holy See.[28]

Examination of the *Länder*'s international practice during 1949-2004 shows a significantly small number of international treaties and agreements being concluded.[29] They mainly dealt with the following matters: general cooperation, administrative and police cooperation, hunting, fishing, water regulation, hydroelectric power plants and dykes, traffic, construction and maintenance of road

(Rn. 9).

[26] Kempen, *supra* n. 16, at p. 775 (Rn. 91).

[27] *See* the *Kehler Hafen* decision of the Federal Constitutional Court in *BVerfGE*, Vol. 2, p. 347 at p. 369.

[28] This has been recognised in the decision of the Federal Constitutional Court known as '*Konkordatsurteil*', in *BVerfGE*, Vol. 6, p. 309 at p. 362. Zuleeg criticises this position; *see* M. Zuleeg, 'Comment to Art. 32 GG', in E. Denninger, et al. (eds.), *Kommentar zum Grundgesetz für die Bundesrepublik Deutschland*, 3rd edn., Vol. II (Neuwied, Luchterhand 2001), p. 3 (Rn. 8); however he ultimately accepts it since it has given rise to a state practice which has by now become consolidated.

[29] Their number is 144 (it only includes agreements defined as binding by parties, concluded both with international law subjects and with sub-state entities having no international personality). Therefore the average is only 9 agreements per *Land*, even though it should be taken into consideration that this number ranges from 44 agreements by the Rhineland-Palatinate *Land* to no agreements by the Brandenburg and Thuringia *Länder*. Some agreements have been counted more than once, because they have been signed by several *Länder*. The average number of agreements per year is only 2.6. It should be pointed out that the eastern *Länder* have only been playing an active part on the international stage after unification (1990). Data reported here is derived from B. Fassbender, *Der offene Bundesstaat* (Tübingen, Mohr Siebeck 2007) p. 382, who draws on a previous study by U. Beyerlin and Y. Lejeune (eds.), *Sammlung der internationalen Vereinbarungen der Länder der Bundesrepu-*

networks, environmental protection, science, training and culture, health and taxation.[30] The *Länder*'s 'apathy' concerning treaty-making is due to the limited number of subjects within their legislative authority and by the 1957 Lindau Agreement, which conferred wide-ranging treaty-making powers to the Federation.

There are also examples of 'mixed agreements' to which both the Federation and one or more *Länder* are signatories. Worthy of note is the cross-border cooperation agreement of 23 May 1991 between North Rhineland-Westfalia, Lower Saxony, the Federation and the Netherlands. However, the compatibility of such agreements with the *Grundgesetz* is controversial given that there is no explicit constitutional foundation.

The *Länder* perform other activities in the international arena. For example they often meet representatives of foreign governments. This type of activity can have no diplomatic status because diplomatic and consular relations are the Federation's exclusive responsibility. The *Länder* cannot depart from the fundamental guidelines of federal foreign policy. This is to prevent them from developing what is usually referred to as '*Nebenaußenpolitik*', which translates as 'foreign policy on the side'.

The *Länder*'s foreign contacts often generate non-binding acts, e.g., 'common declarations' which do not need to obtain federal consent.[31] This does not mean that these activities are not important. In late 2007 the President of the Bavaria *Land* met the Indian Minister of Finance and they agreed that a day devoted to economic relations between Bavaria and India would take place in Munich. Although this does not constitute a full 'Bavarian foreign policy', it is significant that this *Land* (which is one of the richest regions in the most affluent European country) and India (one of the emergent economic powers) agreed upon prospective business opportunities.

The most important area of external activity for the German *Länder* is the right to establish representation offices in Brussels.[32] They have had offices since the 1980s and their purpose is to enable them to informally participate in the European Union political process. This includes; the establishment of informal contacts with the Union, the gathering and sending of information and lobbying for the interests of the individual *Länder*. These offices have no diplomatic status as this would be incompatible with the Federation's foreign policy monopoly under Article 32(1) GG.

Since 1959 the *Länder* have had a common observer (called *Länderbeobachter*) in Brussels. He or she is appointed by the Conference of *Länder* Ministers for Euro-

blik Deutschland (Berlin, Springer 1994).

[30] Fassbender, *supra* n. 29, at p. 386.

[31] Ibid., at p. 408.

[32] *See* § 8 of the *Gesetz über die Zusammenarbeit von Bund und Ländern in Angelegenheiten der Europäischen Union* (Act on the Cooperation of the Federation and the *Länder* in European Matters, EUZBLG in

pean Affairs (*Europaministerkonferenz*) and works closely with Germany's Permanent Representation in the European Union. The observer may attend meetings of the Union advisory and institutional bodies, but is not allowed to participate in discussions or to vote. The objective is to pass all useful information on to the *Länder*.[33]

The *Länder* are represented at the Union level in the Committee of the Regions. Currently made up of 344 members and 344 alternate members, this body is appointed for a four-year period.[34] The members must either hold a regional or local authority electoral mandate, or be politically accountable to an elected assembly.[35] Overall Germany has been allocated 24 members in the Committee. Each of the 16 *Länder* has the right to one representative.[36] Three representatives are guaranteed for Municipalities and Associations of Municipalities and for the remaining five seats there is a system of rotation amongst the *Länder*.

The transfer of powers to international organisations

The *Grundgesetz* is characterised by a significant openness to international cooperation (*Völkerrechtsfreundlichkeit des Grundgesetzes*). The Preamble contains a forward-thinking reference to the creation of 'a united Europe'. An *ad hoc* constitutional provision (Article 24(1) GG) was inserted in the *Grundgesetz* by the 1949 Parliamentary Council with the aim of making international cooperation possible. This article stipulates that the Federation can transfer '*Hoheitsrechte*' (sovereign powers) to 'international organisations'.[37]

This transfer of 'sovereign powers' goes through two steps: an international treaty concluded by the Federal Government, followed at national level by consent expressed through the two legislative chambers by statute (Article 24(1) GG). The statute performs a two-fold function as a '*Vertragsgesetz*', i.e., a law dealing with treaty ratification and implementation, and as a '*Übertragungsgesetz*', i.e., a law

acronym).

[33] The work of the *Länderbeobachter* is regulated in detail by the Erfurt Agreement of 24 Oct. 1995 between the *Länder* (*Abkommen über den Beobachter der Länder bei der Europäischen Union*). The text of this agreement is available at <http://www.laenderbeobachter.de/> (visited on 13 Nov. 2009).

[34] Art. 305(1) TFEU (ex 263 EC) establishes that the number of members of the Committee shall not exceed 350.

[35] Art. 300(3) TFEU.

[36] *See* § 14(2) of the EUZBLG.

[37] The text of the provision is the following: '*Der Bund kann durch Gesetz Hoheitsrechte auf zwischenstaatliche Einrichtungen übertragen*' ('The Federation may by law transfer sovereign powers to international organisations'). The expression '*Hoheitsrechte*' refers to the exercise of public power in all branches of state activity: legislative, executive, and judicial. The hypotheses provided by the second and third paragraph of Art. 24, concerning the construction of a system of mutual collective security and a system of general, comprehensive and compulsory international arbitration are

dealing with the transfer of powers to international organisations. The transfer will normally take place with the *Bundesrat* only having a suspensive veto which can be overcome with an absolute majority vote by the *Bundestag*.

Article 24(1) GG was applied in the case of NATO and in the original treaties on European integration, but not in the cases of the UN or the Western European Union. In both these situations the transfer of 'sovereign powers' to international organisations was considered absent. Until the 1992 constitutional amendment[38] Article 24(1) GG has represented the basis of the German participation in European integration.

The 1992 constitutional amendment inserted a new paragraph 1a in Article 24 GG, which gave the *Länder* the option to transfer some of their competences (in this case the provision calls them 'sovereign powers') to 'transfrontier institutions'. These are organisations to which both states and sub-state entities can be members. The Federal Government must consent to these agreements.

The transfer of powers to the European Union

Until 1992 the transfer of powers to the Communities was carried out according to Article 24(1) GG. In principle the Federal Government and the *Bundestag* were the 'masters' of any transfer of powers to the Communities. However, delegates of the *Länder* were allowed to participate in the intergovernmental conference leading to the 1992 Treaty of Maastricht.[39] The 1992 constitutional amendment gave the *Bundesrat* the right to consent to decisions on the transfer of powers to the European Union.[40]

German participation in the European integration process (including the transfer of powers to the supranational level) is conditional upon the Union being committed to: democratic, social and federal principles, the 'principle of the state based on the rule of law' ('*Rechtsstaatsprinzip*'), the principle of subsidiarity and a level of protection of fundamental rights substantially equivalent to that provided for by the GG.[41] This commitment is called the '*Strukturs*icherungsklausel' (clause preserving the constitutional structure of the GG). It can be traced back to the case-law of the Federal Constitutional Court initiated by the 22 October 1986 *Solange II* case.[42]

particular cases of transfer of 'sovereign powers' under the first paragraph of the same article.

[38] Constitutional amendment act of 21 Dec. 1992 (in *BGBl.*, 1992, I, p. 2086).

[39] For more details *see* A. Gunlicks, *The* Länder *and German Federalism* (Manchester, Manchester University Press 2003) p. 366.

[40] Art. 23 GG was completely rewritten by the 1992 constitutional amendment. Previously this article listed those *Länder* where the *Grundgesetz* was in force and contained a provision on the reunification of Germany. This norm lost its significance after 1990.

[41] Art. 23(1) GG, first subparagraph.

[42] In that decision, the Court declared that it would not control the conformity of Community

A federal act is required to transfer powers to the Union, this must obtain the consent of the *Bundestag* and the *Bundesrat*.[43] The act is a '*Zustimmungsgesetz*' (*see supra)* which performs a twofold function: that of a '*Vetragsgesetz*', a law dealing with the ratification and incorporation of the treaty, as well as that of an '*Übertragungsgesetz*', a law for the transfer of competences.

Changes in treaty foundations of the Union and comparable regulations that amend or supplement the GG need to be approved by a qualified majority of two-thirds of votes in both the *Bundestag* and the *Bundesrat*.[44] The procedure for such approval must comply with the limits on constitutional revision established by Article 79(3) GG. These are: organisation of the federal state into *Länder*, the principle of *Länder* participation in legislation, human dignity, respect for human rights and fundamental rights, principles of the democratic and social state, popular sovereignty, the principle of constitutional rigidity and that of legality.

The violation of these limits determines the constitutional unlawfulness of the incorporation act. It has been argued that this would also affect the international treaty transferring powers to the Union. Article 46 of the 1969 Vienna Convention on the Law of Treaties stipulates that the invalidity of an international treaty can be invoked by a state when there is a 'manifest violation of a provision of its internal law regarding competence to conclude treaties.'[45]

Rojahn and Streinz argue that all laws transferring powers to the European Union should be approved by a two-thirds majority.[46] They believe that this is because an act that entrusts powers to the Union *ex novo,* or that simply strengthens the powers already transferred, would always end up affecting the GG.

acts with the fundamental rights of the *Grundgesetz* as long as the European Community and in particular the Court of Justice could guarantee a general standard of fundamental rights protection, equivalent to that envisaged by the national *Grundgesetz*. The unabridged text of this historic case can be read in *BVerfGE*, Vol. 73, p. 339 et seq.

[43] *See* Art. 23(1) GG, second subparagraph.

[44] Art. 23(1) GG, third subparagraph. The expression 'comparable regulations' ('*vergleichbare Regelungen*') refers to what the German legal scholarship calls the '*Evolutivklauseln*' ('clauses allowing for evolution') contained in the European Treaties. These clauses authorise integrations of the EU primary law through unanimous Council decisions, followed by the members states' acceptance according to their constitutional laws. The main examples of '*Evolutivklauseln*' prior to the entry into force of the Treaty of Lisbon were Articles 190(4) EC (election of European Parliament), 269(2) EC (system of own resources of the EC), 22 EC (new contents relating to citizenship), 42 EU (provision regulating the transfer of the PJCC under the Community aegis). The issue of the '*Evolutivklauseln*' contained in the Treaties after the amendments of the Treaty of Lisbon has been tackled through the recent IntVG (*see* the next section of this paper).

[45] S. Hobe, 'Comment to Art. 23 GG' (Oct. 2001), in K.H. Friauf and W. Höfling (eds.), *Berliner Kommentar zum Grundgesetz* (Berlin, E. Schmidt Verlag since 2000), p. 1 at p. 35 (Rn. 55).

[46] O. Rojahn, 'Comment to Art. 23 GG', in I. von Münch and Ph. Kunig (eds.), *Grundgesetz-Kommentar*, 5th edn., Vol. II (München, C. H. Beck 2001), p. 121 at p. 153 (Rn. 43) and spec. p. 154-155 (Rn. 47); R. Streinz, 'Comment to Art. 23 GG', in M. Sachs (ed.), *Grundgesetz. Kommentar*, 4th edn.

Conversely other scholars distinguish whether a transfer of powers to the supranational level is of such importance that it requires a two-thirds majority.[47] It is worth noting that the ratification acts dealing with the Treaties of Maastricht, Amsterdam, Nice, the Constitutional Treaty, and, lastly, the Lisbon Treaty, have been passed by two-thirds majority votes in both the *Bundestag* and the *Bundesrat*.

If there is no transfer of 'sovereign powers', there is no requirement for a two-thirds majority. This was the case with Europol and Eurojust[48] and with the European Union enlargement treaties. In addition it is doubtful whether the Common Foreign and Security Policy (owing to its intergovernmental features) implies a real transfer of 'sovereign powers' to the Union.[49]

An expansion of the Union sphere of intervention can be achieved by using the 'flexibility clause' pursuant to Article 352 of the Treaty on the Functioning of the European Union (ex 308 EC). This article states that

> If action by the Union should prove necessary within the framework of the policies defined in the Treaties to attain one of the objectives set out in the Treaties and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures.

The Law on the Responsibility of the *Bundestag* and the *Bundesrat* for European Integration (*Integrationsverantwortungsgesetz*, IntVG) establishes that approval of the proposed measure (as well as abstention), requires the passage of a law in accordance with Article 23(1) GG. Without this law, the German representative in the Council must vote against the adoption of the measure.[50]

Furthermore an extension of the powers of the European Union can take place through the '*Kompetenzerweiterungsklausel*'. The IntVG establishes that the approval of the extension (or abstention) requires a law passed in accordance with Article 23(1) GG. Without this law the German representative in the Council must

(München, C. H. Beck 2007), p. 895 at p. 912 (Rn. 65).

[47] *See* I. Pernice, 'Comment to Art. 23 GG', in H. Dreier, *Grundgesetz. Kommentar*, 2nd edn., Vol. II (Tübingen, Mohr Siebeck 2006), p. 415 at p. 482 (Rn. 90); Hobe, *supra* n. 45, p. 32-33 (Rn. 49); R. Scholz, 'Comment to Art. 23 GG' (Oct. 1996), in T. Maunz and G. Dürig (eds.), *Grundgesetz. Kommentar*, Vol. III (München, C. H. Beck since 1958), p. 1 at p. 100 (Rn. 84); H.D. Jarass, 'Art. 23 GG', in H.D. Jarass and B. Pieroth (eds.), *Grundgesetz für die Bundesrepublik Deutschland*, 9th edn. (München, C. H. Beck 2007), p. 537 at p. 547 (Rn. 23); M. Zuleeg, 'Art. 23 GG', in E. Denninger, et al. (eds.), *Kommentar zum Grundgesetz für die Bundesrepublik Deutschland*, 3rd edn., Vol. II (Neuwied, Luchterhand 2001), p. 1 at p. 44 (Rn. 48).

[48] Europol was established by a convention between the member states of 26 July 1995, while Eurojust was established by a Council decision of 28 Feb. 2002 on the basis of the provisions included in the Nice Treaty.

[49] Pernice, *supra* n. 47, p. 478 (Rn. 82).

vote against the extension. This procedure applies to the following; 'dynamic blanket empowerment' (Article 83(1) TFEU, subparagraph 3), expansion of the European Public Prosecutor's powers (Article 86(4) TFEU) and amendments to the statute of the European Investment Bank (Article 308(3) TFEU).[51]

The role of the *Länder* vis-à-vis simplified amendments of the Treaties

The Lisbon Treaty contains a number of provisions which make it possible to adopt a simplified revision of the Treaties or other adjustments via the 'bridging clauses'. The *Lisbon* ruling clarified that a transfer of sovereign powers from the national level to the European Union could be compliant with the GG only if the democratically representative bodies are involved in the decision. The rationale for all the modifications introduced by the IntVG is to expand the involvement of the *Länder* and of the *Bundestag* in the transfer of powers to the European Union and also to make clear all situations in which the procedure of Article 23(1) GG is required.

The Lisbon Treaty introduced a simplified revision procedure in Article 48(6) of the Treaty on European Union (TEU). According to this procedure, the European Council is entitled to pass, by unanimity, amendments to provisions contained in Part Three of the Treaty on the Functioning of the European Union. This applies to the internal policies and action of the Union. Such 'simplified' amendments can only enter into force after their approval by all the member states and in conformance with their respective constitutional requirements. In Germany the requirement set by the IntVG is a law passed in accordance with Article 23(1) GG.[52]

According to § 3 of the IntVG, Article 23(1) GG shall also apply to other simplified amendments of the treaties. Specifically to a number of measures which can be unanimously adopted by the Council or the European Council and which have an impact on the constitutional law of the European Union. Within this category is the decision of the Council on the accession of the Union to the European Convention on Human Rights and the decision of the European Council to establish a common defence policy.[53] In this last case there are two prerequi-

[50] *See* § 8 IntVG.

[51] *See* § 7 IntVG.

[52] *See* § 2 IntVG.

[53] *See* Art. 218(8) TFEU, subparagraph 2 (sentence 2), and Art. 42(2) TFEU, subparagraph 1 (sentence 2), respectively. § 3 of the IntVG also applies to the passage of: provisions relating to the system of own resources of the EU (Art. 311(3) TFEU); provisions adding further EU citizenship rights or strengthening those already provided (Art. 25(2) TFEU); uniform rules for the election of the European Parliament (Art. 223(1) TFEU, subparagraph 2); provisions conferring on the ECJ

sites: a decision by the *Bundestag* and a statute passed in accordance with Article 23(1) GG.[54] There is no doubt that the decision to establish a common defence policy would have an impact on the GG and would require a qualified majority of two-thirds in both the *Bundestag* and the *Bundesrat*.

The IntVG devotes § 4 to the '*Brückenklauseln*' ('bridging clauses') of Article 48(7) TEU and Article 81(3) TFEU. These provisions allow for changes in the procedure of Union decision-making. Article 48(7) lays down a 'bridging clause' with general application. Its first paragraph allows a shift from unanimity to qualified majority voting in the Council and deprives the member states of their veto power (this is not available for decisions with defence or military implications). Its second paragraph allows a shift from a 'special legislative procedure' to the 'ordinary legislative procedure' (the former co-decision procedure). Article 81(3) TFEU gives the Council the power to unanimously determine (after consulting the European Parliament) aspects of family law with cross border-implications. These may become the subject of acts adopted pursuant to the 'ordinary legislative procedure' (instead of a 'special legislative procedure'). The German approval of the proposed procedural change (as well as their abstention) requires the passage of a law in accordance with Article 23(1) GG. Without this law the German representative in the European Council or in the Council must vote against the procedural change.

The IntVG contains two paragraphs (§ 5 and § 6) which relate to the 'special bridging clauses'. As their scope is sufficiently defined, no law under Article 23(1) GG is necessary for their approval by Germany. These clauses only normally require the sanction (*Beschluss*) by the *Bundestag*. However if the GG requires the consent of the *Bundesrat* to pass a law in a specific area, or it is an area belonging to the legislative competence of the *Länder*, approval by the *Bundesrat* is also necessary.[55]

the jurisdiction on disputes relating to the European intellectual property rights (Art. 262 TFEU).

[54] *See* § 3(3) of the IntVG.

[55] § 5 of the IntVG is devoted to the approval of 'special bridging clauses' in the European Council. In such cases the European Council is entitled to authorise, *by unanimity*, the shift from unanimity to qualified majority voting in the Council. In this way the Council may be allowed to decide by qualified majority in areas of the CFSP other than those listed in Art. 31(2) TEU (cf. Art. 31(3) TEU). Furthermore, it may be allowed to pass the multi-annual financial framework regulation of Art. 312(1) TFEU by qualified majority instead of by unanimity (cf. Art. 312(2) TFEU, subparagraph 2). Instead, § 6 of the IntVG applies to the approval of 'special bridging clauses' in the Council. According to these clauses, the Council can decide, *by unanimity*, to make the 'ordinary legislative procedure' (instead of a 'special procedure') applicable to specific issues in the area of social policy (cf. Art. 153(2) TFEU, subparagraph 4) and in the area of environment (cf. Art. 192(2) TFEU, subparagraph 2). § 6 also applies to the Council decision, taken *by unanimity*, to allow the adoption of measures by qualified majority instead of by unanimity, or by using the 'ordinary legislative procedure' instead of a 'special procedure', in the context of enhanced cooperation (Art.

The participation of the *Länder* in the Union law-making: Indirect participation

It is possible to distinguish between two forms of intervention by the *Länder* in the Union legislative process; their direct and indirect participation. In the first, the *Länder* are present within Union institutions and can influence decisions directly. By contrast, in the second case such entities are entitled to participate in procedures which take place within the member state. These are aimed at determining the position of the national Government within the Council and as such, they contribute only indirectly to the decisions of the latter.

As late as 1992 the GG did not contain any provision on direct or indirect *Länder* participation in the Community law-making phase. The incorporation statute of the Treaties of Rome of 1957 granted a mere right of information to the *Bundesrat* about any development in the Council. From 1979 there has been an agreement in place between the Federation and the *Länder* which created a special cooperation procedure. This had to be put into action where a Community draft act related to a matter falling within the exclusive competence of the *Länder* or touched upon their vital interests. In such cases, the *Länder* had the right to adopt a common position that the Federal Government had to uphold within the Council. The exception to this was the right to depart from the common position on overriding grounds of foreign or European policy.

In 1986 the system of *Länder* participation in European policy was improved by the law transposing the Single European Act (SEA) and by an agreement with the Federal Government. For the first time the new system made the *Bundesrat* the central body of the cooperation between Federation and *Länder* in matters of European policy. The *Bundesrat* was given the right to express its opinion on all Community draft acts affecting exclusive *Länder* competences or vital *Länder*'s interests. The Federal Government had to take the opinion of the *Bundesrat* into account in Council negotiations and could only deviate from it on overriding grounds of foreign or European policy.

This participation system was far from satisfactory. There was no provision on how to overcome a disagreement between the Federal Government and the *Bundesrat* and the standing of the *Länder* in Council negotiations was judged as still too limited. This led to the 1992 constitutional amendment, which is how the *Länder* obtained constitutional recognition and further enhancement of their participation rights. The provisions of Article 23 GG are further specified by the *Gesetz über die Zusammenarbeit von Bund und Ländern in Angelegenheiten der Europäischen Union* of 12 March 1993 (Act on the Cooperation of the Federation and the *Länder* in Matters Related to the European Union, EUZBLG).[56]

333(1) and (2) TFEU).

[56] Published in *BGBl.*, 1993, I, p. 313. The act was later amended in 2006 and 2009. On the

Since the 1992 amendment, the GG allows indirect *Länder* participation in Union law-making and policy-making as a rule and direct participation as an exception. Article 23(2) GG, first subparagraph, states that the *Länder* should cooperate on matters relating to the European Union through the *Bundesrat*. Furthermore Article 23(2) GG, second subparagraph, stipulates that the Federal Government should inform the *Bundesrat* in an exhaustive and timely way about all draft Union acts in which the *Länder* may have an interest.

The *Bundesrat* has to be involved in European Union related decisions in two specific cases. The first is when the agenda of the Council deals with topics on which the *Bundesrat* has the right to intervene. The second is when the matter dealt with by the Council falls within the competence of the *Länder*.[57]

According to Article 23(3) GG, the involvement of the *Bundesrat* (and the *Bundestag*) is consistent with the acknowledgement that the European integration is not merely a question of foreign policy, but is also an important matter of national law and national policy.[58] This explains why the issue of the participation rights of the *Länder* was settled via constitutional rules and was not left to agreements between Federation and *Länder* or to sub-constitutional legislation.

The weight the *Bundesrat* carries varies according to the particular circumstances. One possible scenario is when the interests of the *Länder* are affected by an EU proposal falling within the exclusive competence of the Federation,[59] or in another area in which the Federation has legislative power.[60] In this case, the position of the *Bundesrat* does not have a binding character and must be only taken into account ('*berücksichtigt*') by the Federal Government. Consequently the Federal Government may depart from that position if it considers it appropriate.

When the *Länder*'s legislative powers, the structure of their authorities, or their administrative procedures form the focus (*Schwerpunkt*) of a draft Union act, the position of the *Bundesrat* acquires a quasi-binding (if not a fully binding) value. The GG states that when this occurs, the Federal Government must give the position of the *Bundesrat* 'the greatest possible respect' (*maßgeblich zu berücksichtigen*).[61] It is controversial whether or not this expression means that the position of the *Bundesrat* is binding. Attaching binding character to the position of the *Bundesrat* could have serious shortcomings. The Federal Government would have its hands

historical evolution of the participation rights of the *Länder see* the recent article by M. Suszycka-Jasch and H.-Ch. Jasch, 'The Participation of the German Länder in Formulating German EU-Policy', in 10 *German Law Journal* (2009), p. 1231.

[57] Art. 23(4) GG.

[58] Streinz, *supra* n. 46, at p. 918 (Rn. 91).

[59] Within this framework, we should include the issues listed in Art. 73 GG, the conduct of the relations with foreign States (Art. 32(1) GG), the administration by the *Länder* on behalf of the Federation (Art. 85 GG), as well as the federal administration (Art. 86 GG).

[60] Art. 23(5) GG, first subparagraph.

tied when conducting negotiations at the Union level and could not act with the required flexibility. Therefore it seems preferable to embrace the thesis that the Federal Government would have to do what it could to conform with the views of the *Bundesrat*, except when this proves to be in the best interest of the Federal Republic.[62]

It is worth noting that the debate on the binding or non-binding character of the *Bundesrat*'s positions has a rather academic character. Just 37 out of the total 900 positions adopted by the *Bundesrat* from 1998 to 2003 have been regarded as being due 'the greatest possible respect' (amounting to 4%). In 20 out of these 37 cases the Federal Government initially took a different view to that of the *Bundesrat*, but an agreement was ultimately reached or as opinion suggests, the Government yielded to the *Länder*'s requests.[63] In practice it has always been possible to find political solutions capable of preventing a full clash between the *Bundesrat* and the national government.[64]

No doubts remain about the non-binding character of the *Bundesrat*'s position when increases in expenditures or reduced federal revenues could result from the approval of an EU draft act. In such events the Federal Government has the last say.[65]

Article 23(4) GG does not set any limits on the cooperation of the *Bundesrat* on issues concerning the European Union, but § 11 of the EUZBLG does exclude Common Foreign and Security Policy from that cooperation (with the exceptions now provided for by the IntVG).

A major innovation has been introduced by § 9 of the IntVG. The rights of the *Bundestag* and of the *Bundesrat* are regulated in relation to the 'emergency brake procedure' ('*Notbremsemechanismus*'). This procedure applies where the TFEU entitles the single member state representative in the Council to request that an issue is referred from the Council to the European Council for further discussion be-

[61] Art. 23(5) GG, second subparagraph.

[62] The Federation actually remains responsible for the nation as a whole: Art. 23(5) GG, second subparagraph.

[63] P.M. Huber, 'Die Europatauglichkeit des Art. 23 GG', in D. Merten (ed.), *Die Zukunft des Föderalismus in Deutschland und Europa* (Berlin, Duncker-Humblot 2007), p. 209 at p. 214. The above statistical data is reported in H. Meyer, *Die Föderalismusreform 2006. Konzeption, Kommentar, Kritik* (Berlin, Duncker u. Humblot 2008) p. 368.

[64] A conflict resolution mechanism is provided by § 5(2) of the EUZBLG. It establishes that in the case of an insurmountable disagreement with the Federal Government, the *Bundesrat* can confirm its initial position with a two-thirds majority. The position would become 'decisive' ('*maßgebend*') and in this context is probably intended as synonymous with 'binding'. The conflict resolution mechanism of § 5(2) EUZBLG has found no application so far. There has only been one occasion, involving Directive 96/61/CE of 24 Sept. 1996 on integrated pollution prevention and control, when the conflict was so difficult to overcome that the *Bundesrat* was close to confirming its position by two-thirds majority. On that occasion an agreement was ultimately found.

fore a decision is made. In order to safeguard the rights of the democratically legitimised bodies at national level, § 9 IntVG establishes that in such situations the *Bundestag* can oblige the German representative in the Council to file the request. The *Bundesrat* has the same power when the focus of an EU proposed action falls within an area for which the BL requires the consent of the *Bundesrat* to pass a law, or it falls within an area belonging to the legislative competence of the *Länder*. The 'emergency brake procedure' and as a result, the regime of § 9 IntVG applies to draft legislative acts in the field of social security and to draft directives in the field of the Judicial Cooperation in Criminal Matters.[66]

The direct participation of the *Länder* at Union level

Besides indirect participation of the *Länder*, Article 23(6) GG provides for their direct participation in Union decision-making. Such participation relies on Article 16(2) TEU (ex 203 EC), which allows for the representation of a member state in the Council by a representative, even of a sub-state entity, 'at ministerial level', 'who may commit the government of the Member State in question and cast its vote.'

Article 23(6) GG establishes that when an EU draft act focuses on a matter falling under the exclusive legislative competence of the *Länder* in the areas of school education, culture or broadcasting (radio/TV) then, the exercise of the rights of Germany as a member of the European Union are conferred to a representative of the *Länder* appointed by the *Bundesrat*.[67] However, the *Länder* representative must act 'with the participation of and in coordination with' the Federal Government since, ultimately, the responsibility for the nation as a whole still falls under the duties of the Federation.[68] It should be underlined that this provision is the result of a major amendment introduced by the 2006 constitutional reform of the federal system. Prior to 2006, the direct participation mechanism of the *Länder*

[65] *See* Art. 23(5) GG, final subparagraph, and § 5(2) of the EUZBLG, sixth subparagraph.

[66] *See*, respectively, Art. 48(2) TFEU, first subparagraph, on the one hand, as well as Art. 82(3) TFEU, first subparagraph (first sentence), and Art. 83(3) TFEU, first subparagraph (first sentence), on the other.

[67] Art. 23(6) GG, subparagraph 1. It should be noted that there is no formal rotation system among the *Länder*. The *Länder* have nominated the following representatives in the Council: Minister Ute Erdsiek-Rave (Schleswig-Holstein), in the field of school education, and Minister Wolfgang Heubisch (Bavaria), in the field of culture. In both cases a deputy will be nominated internally, if necessary. In the field of radio/TV, the *Länder* have nominated three representatives: Minister Siegfried Schneider (Bavaria), Prime Minister Kurt Beck (Rhineland-Palatinate), and Prime Minister Peter Harry Carstensen (Schleswig-Holstein); all three are nominated and they will decide internally who will attend the respective meetings in the Council. This system seems to be working well and without tensions amongst the *Länder*.

provided for by Article 23(6) BL, instead of being limited only to the above-mentioned three sectors, embraced all fields of exclusive legislative competence of the *Länder*.

But why did the 2006 constitutional reform decide to restrict the direct *Länder* participation to school education, culture and broadcasting (radio/TV)? It happened because the wide-ranging sphere of application of the previous rule had very often led to disputes opposing the *Bundesrat* and the Federal Government. Such disputes were in relation to whether a matter of exclusive competence of the *Länder* formed the focus of a given act. They were typically extra-judicially settled by granting the representative of the *Länder* the right to issue statements during the Council meetings at which the drafts were discussed.[69] For that reason the direct *Länder* participation has been limited to three 'sensitive' areas, which are traditionally of great importance to the *Länder* from a political point of view. This limitation is also consistent with organisational requirements, since these are sectors that are within the competence of the Council in its 'Education, Young people and Culture' formation. Its tasks include stimulating artistic and literary creativity in the field of media.

Although the sphere of application of their rights of direct participation is theoretically more limited than in the past, the *Länder* have received a benefit. The transfer of the exercise of the rights of Germany as a member state to a representative of the *Länder* is now a compulsory one. Previously this provision took the form of a '*Sollvorschrift*' (literally 'shall-provision') whereby in principle the Federation had to transfer the exercise of Germany's rights to a representative of the *Länder*. The Federation could withhold such rights if this was in the best interest of the German state.[70]

In legal terms a '*Sollvorschrift*' is much stronger than 'should' or 'may'. It rather equalises 'shall, if possible'. Hence the difference between the old and the new version is not substantial. In addition it is hard to imagine which fields could qualify as being 'legislative powers exclusive to the *Länder*' other than those listed in the new Article 23(6) GG. One could argue that the general police power rests exclu-

[68] Art. 23(6) GG, subparagraph 2.

[69] P.-Ch. Müller-Graff, 'Die Europatauglichkeit der grundgesetzlichen Föderalismusreform', in R. Pitschas (ed.), *Wege gelebter Verfassung in Recht und Politik. Festschrift für Rupert Scholz zum 70. Geburtstag* (Berlin, Duncker u. Humblot 2007), p. 705 at p. 717.

[70] The pre-reform text contained the following: '*Wenn im Schwerpunkt ausschließliche Gesetzgebungsbefugnisse der Länder betroffen sind, soll die Wahrnehmung der Rechte ... vomBund auf einen vom Bundesrat benannten Vertreter der Länder übertragen werden*', while the text in force now contains: '*Wenn im Schwerpunkt ausschließliche Gesetzgebungsbefugnisse der Länder ... betroffen sind, wird die Wahrnehmung der Rechte ... vom Bund auf einen vom Bundesrat benannten Vertreter der Länder übertragen.*' The passive present indicative form of the verb '*übertragen*', which has replaced the previous modal verb '*sollen*', emphasises the binding character of the transfer to the *Länder*'s representative of the exercise of the rights pertaining to Germany

sively with the *Länder*. But there are so many special police powers of the Federation that this view would not be convincing. Similar considerations apply to the area of building regulation. Accordingly the trade-off between less discretion on the part of the Federation and an arguably narrower definition of the relevant fields on the part of the *Länder* does indeed exist, but the 'turn-over' is not high.

Limited exceptions to the obligation to transfer powers to the representative of the *Länder* are still expressly provided for by law. First of all, when the German Federal Republic holds the Council presidency, chairing Council meetings will always and in any way be the domain of the Federal Government.[71] Secondly, the *Länder* may exceptionally abstain from direct participation in the Council when the Council's agenda includes 'Part A' items; i.e., draft legislation which has been agreed within the Committee of the Permanent Representatives (COREPER) and which can therefore be put immediately to the vote without the need for preliminary discussion.[72] In such a case, the participation rights of the *Länder* would not be very meaningful, as their representative would be sitting in the Council without being able to influence the content of a draft. This explains why the *Länder* are involved prior to the Council meeting and the German position within the COREPER is agreed at this time.

These exceptions to the direct participation of the *Länder* are justified because they are grounded on the rules and procedures followed by the Union. If exceptions are not rooted in Union law, they must be based on sound foundations since the constitutional rights of the *Länder* are at stake. Clearly it would be unlawful to exclude the *Länder* representative from Council meetings simply for administrative or political convenience.[73]

The representative of the *Länder* has the right to sit in the Council on behalf of Germany and has responsibility for conducting negotiations within Commission and Council advisory bodies.[74] Whilst the representative is called '*Vertreter der Länder*' in Article 23(6) BL, he or she is actually required to represent the whole Federal Republic of Germany at the Union level. Article 16(2) TEU requires the representative to be in office as Minister of a *Land* but does not presuppose membership of the *Bundesrat*.[75] Furthermore he or she must act 'with the participation

as a member state.

[71] *See* § 6(3) of the EUZBLG, first subparagraph. But § 6(3) of the EUZBLG, second subparagraph, specifies that, where the Council deals with draft acts affecting the *Länder*'s exclusive legislative competences with respect to school education, culture or broadcasting, the Federal Government must keep the *Länder*'s representative informed and consider his opinion, even when dealing with the exercise of rights pertaining to it in its role of holding the Council presidency.

[72] *See* § 6(4) of the EUZBLG.

[73] In this direction *see* Rojahn, *supra* n. 46, at p. 169 (Rn. 74) and Streinz, *supra* n. 46, at p. 971 (Rn. 116). On the contrary, the affirmative thesis was upheld by the Federal Government during the preliminary works for the 1992 constitutional amendment.

[74] *See* § 6(2) of the EUZBLG, first subparagraph.

[75] The status of Minister is determined on the basis of each *Land*'s constitutional rules. On this

of and in coordination with' the Federal Government.[76] 'Participation' implies that the representatives of the Federal Government are involved in all meetings and formal external contacts in which the *Länder* representative takes part.[77] 'Co-ordination' is more difficult to construe. Legal scholars generally accept that it means less than a proper 'agreement', but more than simple 'respect for the other's point of view'.[78] It is arguable that the representative of the *Länder* should pay the greatest possible respect to the position of the Federal Government.

When Union draft acts lie outside the 'sensitive' areas mentioned in Article 23(6) BL, but involve a sector falling under the *Länder*'s exclusive legislative competence (police law, building regulation, etc.), the *Länder* will still have the opportunity to make their point of view known within the European Union. The *Bundesrat* then has the power to appoint a *Länder* representative who has the right to release statements in coordination with the Federal Government during the Council sessions.[79] The Federal Government must act in coordination with the *Länder* representative when conducting negotiations within the Commission and Council advisory bodies, as well as at the Council meetings.[80] It important to note that the position taken by the *Bundesrat* 'shall be given the greatest possible respect' by the Federal Government in areas which fall under the *Länder*'s exclusive competence.

If an EU draft act deals with an issue falling outside the *Länder*'s exclusive competence, the Federal Government has to consult with the *Länder* during negotiations within the Commission and the Council advisory bodies.[81] *Länder* spokespersons are entitled to issue statements within these bodies with the consent of the federal representative.[82]

The fulfilment of international and European obligations in the domestic jurisdiction

The implementation of international treaties follows the distribution of competences established by the *Grundgesetz*. When the Federation concludes a treaty dealing with an issue that falls within the exclusive competence of the *Länder*, they have the obligation and the right to implement the treaty within their respective territo-

point *see* Streinz, *supra* n. 46, at p. 923 (Rn. 115).

[76] Art. 23(6) GG, second subparagraph.

[77] Rojahn, *supra* n. 46, at p. 169 (Rn. 75); Streinz, *supra* n. 46, at p. 923 (Rn. 117).

[78] *See* the report made by the *Gemeinsame Verfassungskommission* of the *Bundestag* and by the *Bundesrat* on the constitutional law draft which gave rise to the 1992 constitutional amendment (*Drucksache des Bundestages*, 12/6000, p. 24; 12/3896, p. 20). On this point *see* Scholz, *supra* n. 47, at p. 139-140 (Rn. 138); Streinz, *supra* n. 46, at p. 923 (Rn. 117).

[79] *See* § 6(2) of the EUZBLG, fifth subparagraph.

[80] *See* § 6(2) of the EUZBLG, second subparagraph.

[81] *See* § 6(1) of the EUZBLG, first subparagraph.

ries.[83] Under Article 84 GG implementation by the *Länder* is supervised by the Federal Government (*Bundesaufsicht*). As an *ultima ratio* non-compliance with international obligations could legitimate the exercise of the federal execution (*Bundeszwang*). This would compel the *Land* to comply with its duties (Article 37 GG).[84]

Union measures require implementation and execution at the national level and in compliance with the GG's distribution of competences, these should be dealt with by the Federation or the *Länder*. The failure or inertia of the *Länder* in implementing the EU law would be also an infringement of the principle of federal loyalty. There is no way for the Federation to step in and act instead of the *Land*. The intervention of the federal power would only be possible under Article 37 GG in order to coerce the *Länder* to comply (*Bundeszwang*). So far Article 37 has not been applied; the application of this article would be time consuming and costly in political terms.[85]

Charges deriving from an infringement of Germany's international and European obligations fall on the Federation or the responsible *Land*. Cases of 'mixed' responsibility of both the Federation and the *Länder* may also occur. Under these circumstances costs are allocated in proportion to their individual quota of responsibility.[86]

Concluding remarks

The 1957 Lindau Agreement largely relinquished the *Länder's* treaty-making power to the Federal Government. It reinforced Konrad Hesse's classification of Germany as an '*unitarische Bundestaat*' (unitary federal state).[87] The pattern followed by the Lindau Agreement is a typical one in German federalism and can be summarised by the formula 'less *Länder* autonomous powers for more *Länder* participation rights'. Within the field of legislation the *Länder* have obtained a stronger role for the *Bundesrat* in compensation for the loss of their individual legislative powers.

The European Union has given rise to a new trend of external activities for the *Länder*, projecting a considerable part of their political action beyond the borders

[82] *See* § 6(1) of the EUZBLG, second subparagraph.

[83] This is implied by the principle of federal loyalty. *See BVerfGE*, Vol. 6, p. 309 at p. 361; Vol. 12, p. 205 at p. 254.

[84] Rojahn, *supra* n. 24, at p. 497 (Rn. 55); Streinz, *supra* n. 24, at p. 1071 (Rn. 38). Art. 37(1) GG states: 'If a *Land* fails to comply with its obligations under this Basic Law or other federal laws, the Federal Government, with the consent of the *Bundesrat*, may take the necessary steps to compel the *Land* to comply with its duties.'

[85] *See* Huber, *supra* n. 63, at p. 217.

[86] Art. 104a(6) GG, first subparagraph. An infringement can result from legislative, administrative or judicial acts.

of the Federal Republic. They received significant participation rights in the Union decision-making process (designed to make up for their loss of individual powers), representation in the Committee of the Regions and entitlement to undertake direct relations with the Union institutions.

The trend towards more significant external relations and activities of the *Länder* is likely to be fortified as a consequence of the Treaty of Lisbon. The involvement of national parliaments along with the increased role of the Committee of the Regions provides further opportunities for the *Länder* to have an influence on Union decision-making. The impact for Germany is likely to be enhanced participation for the *Bundesrat* and the *Bundestag*.

The 2006 constitutional amendment endeavoured to re-shape the whole German federal system by instilling elements of 'competitive federalism'. The reform also attempted to unravel the 'political tangle' (*Politikverflechtung*) which traditionally distinguishes the Federation-*Länder* relationship.[88] Notwithstanding this attempt, the European Union is bringing about an ever more 'cooperative' and 'entangled' Federal Republic.[89]

An important consequence of the *Länder* participation in Union law-making has been additional cooperation between the Federation and the *Länder*. It is apparent that the efficient functioning of the system dramatically depends on the good will of the levels of government involved. They must behave in ways inspired by the principle of federal loyalty.[90] This is necessary to avoid reciprocal vetoes and to allow 'understandings' and 'agreements' to take place. The *Lisbon* ruling and the laws accompanying the ratification of the Lisbon Treaty ('*Begleitgesetze*') introduced mechanisms which require a high degree of cooperation.

[87] K. Hesse, *Der unitarische Bundesstaat* (Karlsruhe, C.F. Müller 1962).

[88] F.W. Scharpf, *Politikverflechtung: Theorie und Empirie des kooperativen Foederalismus in der Bundesrepublik. Der unitarische Bundesstaat* (Kronberg, Scriptor 1976).

[89] As early as 1986 Rudolf Hrbek referred to a '*Doppelte Politikverflechtung*', 'double political tangle' of German federalism and European integration. *See* R. Hrbek, 'Doppelte Politikverflechtung: Deutscher Föderalismus und Europäische Integration. Die deutschen Länder im EG-Entscheidungsprozeß', in R. Hrbek and U. Thaysen (eds.), *Die Deutschen Länder und die Europäischen Gemeinschaften* (Baden-Baden, Nomos 1986), p. 17.

[90] *BverfGE*, Vol. 92, p. 203 et seq.