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GERMAN FEDERALISM

AND

EUROPEAN INTEGRATION

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FOREWORD

Since 1949, German democracy has rested on an original federal structure that has its roots in the long development of the German State and its modern embodiment in the very particular context of the immediate post-war period.

This structure has evolved over time, in response not only to a centralising trend which is typical of most federal States but also to the very specific issues raised by the European integration process and the emergence of a supranational decision-making level.

We felt these developments were worth reviewing, both to shed light on the particular approach to the European Union of its most populated and economically powerful Member State and to contribute to the debate on the European integration process itself. Concepts such as basic law, concurrent powers among the various organisational levels and cooperative federalism based on permanent compromise are all avenues worth exploring in a Europe which will still be seeking its institutional balance for some time yet.

I would like to take this opportunity to thank Jutta Hergenhan, who has been a researcher with *Notre Europe* for over a year, for undertaking this study and providing us with such a clear and thorough report.

Jacques DELORS

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I. INTRODUCTION

Alongside Germany, the European Union (EU) is now having to confront the principle of federalism. Like any federal State, Germany has during its somewhat unusual history – which for a long period was mainly that of its States – developed its own variant of federalism. National sovereignty is shared between the federal State (*Bund*) and the federated States or *Länder*. While its particular constitutional framework means that the German State must constantly seek to reconcile federal interests with those of the *Länder* in the everyday running of the democracy, it has also given rise to a significant and widespread debate on the transfer of sovereign rights to Community level.

German federalism is fighting two battles. Faced with the centralising tendencies of the German political system, it is seeking to preserve the division of powers between the *Länder* and the federal State provided for in the Basic Law (*Grundgesetz* or GG). And in response to increased decision-making at European level, it is attempting to guide the process of European integration in a direction which respects the various levels of power within the German federal system, and the subsidiarity principle in general. In what ways does the pooling of powers within the European Union pose a specific problem to Germany as opposed to the other Member States?

Most political activity in Germany takes place at federal level. The vast majority of laws are passed by federal political representatives; the major taxes are paid to the federal authorities, and most political parties draw up their platforms at federal level. For most German nationals, federal, local and European politics are more important than the politics of their particular *Land*. At the same time, the minister-presidents of the *Länder* are first-rank politicians, and the election of a *Land*'s parliament attracts the attention of the whole country. While elections in the *Länder* have no direct influence on the composition of the federal government, they nevertheless affect the balance of power within the *Bundesrat* and thus have a bearing on federal politics. In other words, although the political autonomy of each *Land* is very limited, a *Land* nevertheless has a significant influence on federal politics. How can we explain this paradox, which is the main distinguishing feature of German "cooperative federalism"?

Germany's Basic Law provides for a clear distribution of powers between the federal State and the *Länder*. It assigns the exercise of State powers and the fulfilment of State tasks to the *Länder*, save where otherwise provided or permitted. Notwithstanding this constitutional precedence awarded to the *Länder*, the Federal Republic of Germany (FRG) has, since its inception 50 years ago, undergone a considerable concentration of decision-making powers and political exchange at federal level, based on the extensive list of "concurrent" powers and the framework legislation system provided for in the Basic Law. The powers of the *Länder* have thus been steadily reduced. They are now essentially in the areas of education, cultural matters, broadcasting, internal security and regional development.

Involving various amendments to the Basic Law, the transfer of powers from the *Länder* to federal level was counterbalanced by a stepwise process of institutional adjustments. This has resulted in the current system of decision-making being shared between the chamber of deputies, or *Bundestag*, and the chamber of the *Länder*, or *Bundesrat*. The latter is composed of representatives from the governments of the *Länder*. With the initial model of a strict division of powers having been largely replaced by this model of joint decision-making at

federal level, the FRG has become a "cooperative federal State" (*kooperativer Bundesstaat*) presenting an obvious trend towards centralisation and bureaucratisation. This centralisation has been compounded by a tendency towards "deparliamentisation", i.e. loss of power on the part of the *Länder* parliaments. Parallels can easily be drawn with the current process of European integration, where the national parliaments are afraid of gradually losing their effective decision-making power and of becoming mere local implementers of decisions taken at European level.

Within the European Union, the *Länder* are the only "strong regions" with legislative powers. Like the *Länder* in Austria, moreover, the German *Länder* are States with democratic constitutions. They have legislative, executive and judicial powers and are much more than subordinate administrative units. Having the status of States, they are endowed with their own powers and a politically autonomous territory. As a consequence, the transfer of national powers to Community level affects their spheres of competence and curbs their sovereignty alongside that of the federal State. This transfer of powers effected by the federal government was initially accepted by the *Länder* because the Basic Law gives the federal State the right to transfer sovereign rights to international institutions and stipulates that it is the federal State which is responsible for foreign relations. To the extent, however, that the Community primary and derived law form a body of legislation which increasingly impinges on the internal affairs of the Member States – and thus in Germany on the powers of the *Länder* – the latter have come to oppose the erosion of their rights and powers, and demanded to participate in Community decision-making which affects their spheres of competence.

"*Landesblindheit*", or blindness to the status and role of the German *Länder* in the process of European integration (Hans-Peter Ipsen, 1966), has prompted strong reactions from the *Länder* since the Single European Act was negotiated in the mid-1980s. Various political measures, including a major amendment to the Basic Law[1], have been introduced so as to ensure their participation in decision-making at Community level. Having seen a large part of their powers transferred to the federal level, the *Länder* have since then been seeking to prevent the erosion of their remaining powers as federated States. Whether by refusing European Commission interference in their regional development policy, as happened in Saxony, or preserving the special status of public-sector credit establishments (which come under their supervision) during the last intergovernmental conference, the *Länder* have demonstrated that they are vigilant and united when it comes to defending the limited number of powers they have left. During the successive amendments to the European Treaties, the *Länder* have intervened on every occasion to avoid new transfers of their powers to Community level. The most recent demonstration was given when the *Länder* subjected the Kohl government to an unprecedented degree of supervision during the latest review of the Treaties.

What might be perceived as exacerbated regionalism is actually a crucial and complex democratic issue. Also, what may appear to be a defensive attitude towards European integration has, over time, led to very constructive proposals for a European architecture involving a clear division of powers and decision-making close to the people, in accordance with the principle of subsidiarity. The fact is that German federalism is inseparable from the principle of subsidiarity, which the first federal constitution of 1871 already referred to. This

[1] The new Article 23 (the "*Europa-Artikel*") explicitly governs participation of the *Länder* in Germany's European policy.

principle also underpins the current Basic Law, which gives the municipalities (*Gemeinden*) the right to regulate local affairs under their own responsibility (*kommunale Selbstverwaltung).* The application of the subsidiarity principle within the German institutional framework is particularly interesting since the European Union has itself incorporated it into its Treaties.

At a time when some of the European Union's spheres of competence are being developed along federal lines, the German experience is becoming an important subject of study for the future architects of the European democratic system. There are two reasons for this. Firstly, on account of its economic weight and geopolitical position, Germany is a key player in the European integration process. Understanding the country's institutional difficulties makes it easier to predict how much room for manoeuvre it has in this crucial phase. But studying the German model is useful mainly because of the similarities in institutional arrangements between Germany as a federal State and the European Union as an "unidentified political object" which is often seen as an embryonic European federation. The German *Länder* have themselves often spoken of German federalism as a model for the European Union. If so, what lessons does it hold for the future structure of the European Union?

II. FOUNDATIONS AND DEVELOPMENT OF GERMAN FEDERALISM

II.1. The background to German federalism

The political unification of Germany

There is a long tradition of federalism in Germany. Its origins are to be found in the multitude of independent States which emerged throughout history on the current German territory. Leaving aside the National Socialist dictatorship and the one-party GDR, Germany has always thrived on the diversity of its constituent parts, which have never been mere provinces. Even the Holy Roman Empire featured a very pronounced polycentrism, which has always undermined the central power. After the Peace of Westphalia, in 1648, the 350 German States (monarchies, principalities and free cities) enjoyed considerable autonomy *vis-à-vis* their emperor. With the Napoleonic wars and the disappearance of the Holy Roman Empire in 1806, the autonomous German territories regrouped into 39 States that were formally sovereign, most of them monarchies. The Holy Roman Empire thus left in its wake a patchwork of autonomous territories of very unequal size and nature, and without any unifying political framework.

Alongside these sovereign German States, however, emerged a national unity movement. This was based on two forces. On the one side were movements for democracy and fundamental freedoms, supported by young German intellectuals championing the ideals of the French revolution. They yearned for a German republic based on a democratic constitution guaranteeing human and citizens' rights. On the other side were representatives of trade and industry, and the Prussian elite who advocated institutional links between the German States for essentially economic and military reasons. The structure the German territory was to take, and political control over it, thus became the key issue in the first part of the 19th century.

Initially associated within the Confederation of the Rhine (*Rheinbund*) under the protection of Napoleon I, the German States began concluding a series of increasingly close alliances, starting with the German Confederation (*Deutscher Bund)*. The latter was established during the Congress of Vienna, in 1814/1815, under the presidency of the Austrian emperor. Its role was to guarantee the external and internal security of Germany, and the independence and territorial integrity of the German States. By signing the Act of Confederation (*Bundesakte)*, each State undertook to defend all of Germany and any other member against any external aggression. These countries could thus concentrate their energy on the challenges of modernity facing States at the time: promoting internal development and establishing an effective administration and a well-organised educational system. On account of Austria's reluctance, the German Confederation failed to adopt a constitution, as Prussia would have liked. It did, however, establish a permanent assembly, or *Bundestag*, at Frankfurt am Main, composed of plenipotentiaries from the constituent States. This assembly can be regarded as the forerunner of the current chamber of the *Länder*, the *Bundesrat*. It was based on the traditional plenipotentiaries' assembly under the Holy Roman Empire (*Immerwährender Reichstag*), which sat in Ratisbon from 1663 onwards.

At the time, modernisation took place without the citizens' participation and therefore did not satisfy the aspirations of a society undergoing rapid change and industrialisation. The German Confederation itself did not allow political participation on the part of the people, although the constituent States were drafting constitutions and guaranteeing democratic rights for their

citizens. This situation led to the revolutionary events of March 1848, culminating in the meeting of a freely elected parliament in the Paulskirche in Frankfurt. This national assembly (*Nationalversammlung*) drew up the constitution for a new German empire, that it envisaged as a federal State based on two democratically elected chambers. The King of Prussia was to become the German emperor and head of this federal State. The revolution and the Paulskirche democratic movement collapsed, and the constitution never came into force. German unification was forged over twenty years later, under Prussia's political and military guidance.

In 1862, Bismarck, a politician not noted for his liberal tendencies, was appointed chancellor[2] of the King of Prussia, Wilhelm I. His aim was to achieve German unity by force and to the benefit of Prussia, without seeking support from the people. At the time, Prussia was a highly organised and powerful State, benefiting from the industrial growth of the Ruhr. After the defeat of Austria in the Austro-Prussian War of 1866, the path was clear for a confederation of German States led by Prussia. In 1867, all the German States north of the Main joined Prussia to form the first federal German State: the North German Confederation (*Norddeutscher Bund*). This united 21 States, and Bismarck became its chancellor. In order to bring the southern German monarchies (Baden, Württemberg and Bavaria) – which already had a greater parliamentary tradition than the other German States – into this confederation, it was necessary to have another war. So as to curb the strong sense of local identity within the Catholic monarchies of southern Germany, and particularly within Louis II's Bavaria, Bismarck deliberately provoked France to arouse German patriotic fervour. The victory of the German States over France enabled the German Empire (*Deutsches Reich*) to be proclaimed in the Hall of Mirrors of the palace of Versailles on 18 January 1871. The German States, which until then had been independent and sovereign in terms of international law, explicitly lost their sovereignty, and became member States of the Reich.

The German Empire, with its population of 41 million, adopted a constitution which drew on the version drawn up in Frankfurt, in 1848/1849, and on that of the North German Confederation. It established a system of government midway between a federation and a confederation. Its federalism was based on integration (or agglomeration)[3], aimed at strengthening German unity around Prussia. Prussia accounted at the time for 65% of the *Reich*'s land area and 62% of its population[4], while the *Reich* was a hereditary constitutional monarchy, composed of 25 federated States[5]. Except for the three Hanseatic cities and Alsace-Lorraine (which had a distinct status), all the States remained monarchies. Heading the *Reich* was the King of Prussia, Wilhelm I, who at that point became the German emperor. He was backed up by a federal council, the *Bundesrat,* and a parliament, the *Reichstag*[6]. Each *Land* retained its own parliamentary assembly, the *Landtag.*

[2] In the German political system, the function of chancellor corresponds to that of a prime minister.

[3] "In order to confer more unity where there was too much diversity, as opposed to federalism by dissociation (or by segregation) which is designed, on the contrary, to bring more diversity where there was too much unity", according to Jean-Louis Clergerie.

[4] The Prussian dominance was so overwhelming that many people considered the new Empire as a "Greater Prussia".

[5] In order of size in the *Bundesrat*: Prussia, Bavaria, Saxony, Württemberg, Baden, Hesse, Brunswick, Mecklenburg-Schwerin, Saxony-Meiningen, Saxe-Coburg-Gotha, Anhalt, Schwarzburg-Rudolfstadt, Schwarzburg-Sondershausen, Waldeck, Saxony-Altenburg, Saxony-Weimar, Mecklenburg-Strelitz, Oldenburg, the two Reuss States, Lippe, Lübeck, Bremen, Hamburg and Schaumburg-Lippe.

[6] The *Bundesrat*, which was composed of 58 plenipotentiaries (including 17 from Prussia) appointed by the heads of State, represented the *Länder*. The *Reichstag* symbolised the German nation. It comprised 397 deputies

Powers were distributed according to function (legislative and administrative) rather than area of responsibility; the German *Reich* of 1871 drew up the laws but it was the member States which applied them. The *Reich* did not have its own civil service, except for the Foreign Affairs Department and the Imperial Post. Other functions were fulfilled by the *Länder*. The policy on distribution of powers at the time was that the federal authorities would restrict themselves to international relations, diplomacy, entering into treaties, laws relating to the army and navy, trade, customs, postal and telegraph services and judicial affairs. Bavaria had a special status, retaining in particular its military autonomy in peacetime. In all other fields, each *Land* remained independent, particularly with regard to teaching, religions and tax matters. The *Reich* nevertheless increasingly expanded its bureaucracy, notably as a result of Chancellor Bismarck's creation of the social security system from 1884 onwards. The *Reich* also increased its powers in the judicial field by creating a federal civil and criminal appeal court, in Leipzig, in 1877.

The Weimar constitution of 19 August 1919 ushered in a system halfway between a federal and a unitary State. It established a democratic and parliamentary republic, with a president elected – for the first time – by the people. The parliament comprised a *Reichstag*, representing the nation and with members elected by universal suffrage, and a *Reichsrat*, representing the *Länder*. Without explicitly referring to subsidiarity, this constitution nevertheless distinguished between two types of powers: those that were the exclusive preserve of the federal State, and the "concurrent" powers, which enabled the *Länder* to legislate so long as and to the extent that the *Reichstag* did not itself act. As regards public administration, the constitution of the Weimar Republic gave the *Reich* the right to create federal departments by an ordinary law, and strengthened its rights to supervise and intervene in the *Länder*'s administration while, overall, leaving them with the executive functions of the *Reich.* The central government made use of its new powers in 1919 to establish an efficient tax and finance department at *Reich* level, replacing those of the *Länder*. It set up a taxation system which largely abolished the tax resources available to the *Länder* and municipalities. In return, the *Länder* were entitled to fixed quotas from the federal taxes, which they had to share with the municipalities. They had, however, become financially dependent on the *Reich*.

Following Hitler's arrival at the German Chancellery on 30 January 1933 and the establishment of the National Socialist regime, the federal structure established for the German Empire in 1871 was abolished. All powers were very quickly transferred to the Chancellery, and Germany became a unitary and centralised State. By means of an "Enabling Act" (*Ermächtigungsgesetz)* adopted on 23 March 1933, Hitler freed himself of all constitutional obligations and parliamentary supervision[7]. The "alignment" laws (*Gleichschaltungsgesetze*) of 31 March and 7 April 1933 brought the *Länder* into line with the *Reich*. The *Länder* parliaments were restructured to ensure a National Socialist majority, and "governors of the Empire" (*Reichsstatthalter*) were appointed to oversee the application of the political guidelines set by the chancellor. Lastly, all the sovereign rights of the *Länder* were transferred to the *Reich* by the law of 30 January 1934. The independence of the *Länder* and autonomy of the municipalities were thus completely abolished until 1946.

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elected by universal suffrage (one deputy for 100 000 people), initially for three years and then, from 1884 onwards, for five years.

[7] As a result of this law, the *Reichstag* lost its purpose. The bill was passed thanks to the support of right-wing parties for the NSDAP. As the Communist Party was already banned, only the social-democrats voted against.

After the war, wary of the possibility of a "greater Germany" reemerging, the allies promoted the restoration of a State with strong regions acting as a counterweight to the federal State. The *Länder* were therefore reestablished as of 1946, to provide the beginnings of administrative support for the allies and end the post-war chaos. The Federal Republic of Germany itself was not established until May 1949. The new map of the *Länder* no longer showed Prussia, and the fundamental imbalance of Germany's federal system came to an end. At the instigation of the Americans, the military governors of the three western zones gave the *Länder* a privileged role. Virtually all the powers that Hitler had transferred to the Reich were returned to the minister-presidents appointed during the summer of 1945 and to the body bringing them together, the Council of the *Länder*. The Americans also insisted that the *Länder* should rapidly develop into communities endowed with parliamentary and democratic constitutions. By the end of 1946, constitutions drawn up by constituent assemblies had been promulgated and approved by referendum in Bavaria, Hesse and Baden-Württemberg. This head start of several years on the federal institutions explains in part why the *Länder* and their representatives have such a major role in the German political system. The members of the various parliamentary assemblies of the *Länder*, meeting in the Parliamentary Council (*Parlamentarischer Rat*) also drew up the new Basic Law for the western part of Germany. The Parliamentary Council's constitutional work was prepared by a committee of experts created by the minister-presidents in August 1948 at Herrenchiemsee (Bavaria). The Basic Law of the FRG was adopted by the Parliamentary Council on 8 May 1949, approved by the military governors of the three victorious powers, ratified by the parliaments of the *Länder*[8] on 12 May, and formally promulgated on 23 May 1949 in Bonn. It was called the *Grundgesetz* (basic law) rather than *Verfassung* (constitution) because it was intended to serve as an interim basic law for the mutilated country which the FRG then was, as long as the division of Germany made it impossible to adopt a constitution for a unified German State.

After the fall of Communist rule in the former GDR, the *Länder* of Brandenburg, Mecklenburg-Western Pomerania, Saxony, Saxony-Anhalt and Thuringia were recreated. East Berlin became part of the *Land* of Berlin. As a result of the GDR joining the FRG, pursuant to Article 23 GG (old text), the GDR ceased to exist as a State on 3 October 1990. Nevertheless, no new constitution was adopted for the unified Germany, in spite of the considerable preparatory work undertaken by the "joint constitutional commission" (*Gemeinsame Verfassungskommission*) set up for this purpose.

Economic and monetary unification of Germany

In Germany, the country's political unification went hand in hand with economic and monetary unification. The German Confederation abolished all restrictions on the movement of citizens of its member States in 1815. However, innumerable customs barriers and very diverse monetary systems and weights and measures remained, over which the 35 principalities and four free cities forming the territory of Germany had sovereign control. In a context of accelerating industrialisation and technical progress, this fragmentation was hindering the growth of trade and industry. While the largest neighbouring European countries sought to keep foreign goods out of their markets by applying protectionist measures, the German States' foreign relations were, on the contrary, characterised by free trade. In order to facilitate the free movement of goods among the German States as well, the leaders of the

[8] The only exception was Bavaria, which did not ratify the new constitution as its CSU majority considered it too centralist.

liberal bourgeoisie –whose interests were in trade, industrial production and private finance – called for economic and political union of the German States and proclaimed the idea of national unity.

Economic union took a first step forwards when Prussia's internal tariff barriers were abolished in 1818. After various intermediate customs agreements, the German Customs Union (*deutscher Zollverein*) was created on 1 January 1834. While excluding Austria, it brought together 26 German States, including the States of southern Germany[9], under the guidance of Prussia, and abolished the internal customs barriers between them. The *Zollverein* also contributed to monetary union by promoting the standardisation of coin minting across the various States. The coins circulating at the time were of very diverse origins: not only the various German States, but also the United Kingdom, Denmark, France and Russia. These foreign currencies were used in international trade, and had the additional advantage of an intrinsic gold or silver value very close to their nominal value. The diversity of German coins was in sharp contrast with the unified monetary situation of the other trading powers. Not only were the weights and names of coins different, but so was the standard on which they were based: the *Thaler* in the north German States, including Prussia, and the *Gulden* in the southern States, including Austria. These standards were linked to silver by a monetary unit, which was expressed as an equivalent number of marks of fine silver (just as the dollar was to be defined as a number of ounces of fine gold in the 20th century). The silver standard prevailed in Germany, except in Bremen where overseas connections had led to gold being chosen. Gold coins were also used, but mainly for transactions between traders and as a reserve currency. Comparison between coins, even with the same name, was complicated by the difference in metal purity[10].

In 1838, the monetary agreement of Dresden was negotiated within the framework of the *Zollverein*. This created a simplified monetary system by establishing a fixed exchange rate between the *Zollverein*'s two monetary areas. The Dresden agreement reduced the number of currencies legally in circulation to three, and imposed the silver standard. Each State could choose between the *Thaler* (subdivided into *Groschen*) and the *Gulden* (subdivided into *Kreuzer*) as its monetary unit and could mint its coins provided it respected the common metallic definition, specified in terms of marks of fine silver. The States were, however, obliged to withdraw the many depreciated coins from circulation and replace them, at their own expense, by coins of the full metallic value. To promote the idea of a unified monetary system and facilitate trade between the *Thaler* and *Gulden* zones, the States agreed to mint one coin in common, bearing the inscription *Vereinsmünze* ("Union coin"). This coin never played its intended role, as its value was too high for everyday transactions. The Prussian *Thaler* quickly became the everyday all-purpose coin and was adopted as common currency, even in Austria, following the conclusion of the Monetary Treaty of Vienna in 1857. Austria had been trying to become a member of the *Zollverein* since 1848, proposing the introduction of the gold standard in Germany in order to tie German trade to world trade. It was not to join the *Zollverein* until it had given up this demand, which ran counter to Prussia's interest in maintaining the dominance of its *Thaler* silver standard. Austria was not part of that monetary union for long, and its defeat in the war with Prussia forced it to withdraw from the Treaty of Vienna in June 1867.

[9] The trading city-States in northern Germany (Bremen, Hamburg and Lübeck) and Schleswig-Holstein did not initially take part.
[10] Schor, Armand-Denis, *La monnaie unique*, Paris, PUF, 1997.

Political unification was what eventually enabled monetary powers to be transferred to federal level. When the *Reich* was established, at the beginning of 1871, minting had not yet been unified in Germany; there were 31 private issuing banks operating in accordance with the laws of the various States. These laws differed considerably in their provisions for legal reserves and other requirements. At that point, the business community demanded that minting be standardised and the *Mark* introduced as the basic monetary unit, divided into *Pfennige* in line with the decimal system. It also pleaded for the application of the gold standard, mainly to link the *Mark* to the British pound, the currency of international trade. This request was granted when the *Reich*'s first monetary law, in December 1871, authorised the minting of *Reich* gold coins of 10 *Mark* and 20 *Mark*, with a specified weight and subdivided into *Pfennige*, and forbade the minting of silver coins. The gold standard thus replaced the silver standard and took over all the associated functions. The legal precondition for monetary and banking reform had been met by the provisions of the constitution of the North German Confederation of 26 July 1867 and the *Reich* constitution of 16 April 1871. These stipulated that the regulation of currency minting and of weights and measures, the enacting of principles governing the issue of paper money – both guaranteed and not guaranteed – and the regulation of banking matters in general fell within the supervisory and legislative scope of the Confederation and then the *Reich*. On this constitutional basis, a law instituting a uniform gold currency for the *Reich* as a whole came into force in December 1871. The monetary system was finally consolidated by the law of 9 July 1873 on currency minting. This contained a provision requiring the withdrawal, from the beginning of 1876, of paper money issued by the governments of the various States, and henceforth authorising only banknotes denominated in *Mark*. In order to establish a powerful federal central bank and to strengthen the federal powers, the Prussian Bank, which had issued paper banknotes under State supervision since 1847, became the Imperial Bank, or *Reichsbank*, on 1 January 1876. It gradually took on all the duties of a central bank.

At the end of the Second World War, the German central banking system collapsed and was replaced in the western areas by a banking system based on the *Länder*, which used the branch offices of the former *Reichsbank* as their central banks[11]. This was in line with the Potsdam agreements, which advocated decentralisation of the German economy. When the new federal central bank – the forerunner of the *Bundesbank*, called the *Bank deutscher Länder* – was established, its organisational structure was also influenced by the principle of decentralisation: the bank belonged to the central banks of the *Länder*, whose capital was held by the *Länder* governments. The *Bundesbank* was not established until 1957.

[11] The system was inspired by the Federal Reserve System of the United States.

II.2. Principles of the federal constitution

The *Grundgesetz* builds on the German democratic and liberal achievements of the 19th century, while also drawing the lessons from the weaknesses in the Weimar Constitution and the experience of National Socialist dictatorship. It is based on the rule of law, parliamentary democracy and social and federal principles. Article 20 stipulates that "the Federal Republic of Germany is a democratic and social federal State." The federal structure remains inviolable as a central principle for organising the State and – just like the basic rights enumerated in Articles 1-20 – cannot be amended under any circumstances, even by a majority in parliament[12]. The main feature of Germany's federal system is the double separation of powers: horizontally between the legislature, executive and judiciary and vertically between the federal State, *Länder* and municipalities.

Each *Land* has institutions characteristic of a true State (parliament, government, civil service, judicial institutions, audit office, etc.). The parliamentary assembly of each *Land* elects its own government. Its head is called the "minister-president" except in the city-States, where the head of government and the mayor are the same person, called the "governing mayor" (*Regierender Bürgermeister*) in Berlin, the "first mayor" (*Erster Bürgermeister)* in Hamburg and the "president of the Senat" (Senatspräsident) in Bremen. Members of the *Länder* governments are called "ministers" and "ministers of State" or, in the case of the city-States, "senators". No federal official is entitled to intervene in the affairs of the *Länder*. Each *Land* has autonomous courts, including a constitutional court.

Division of powers between the federal State and the Länder

According to the Basic Law, the legislative power belongs to the *Länder* wherever it is not explicitly assigned to the federal State[13]. Under Article 30, "except as otherwise provided or permitted by this Basic Law, the exercise of State powers and the discharge of State functions is a matter for the Länder". At first glance, it therefore seems that the *Länder* hold the main legislative powers in the German State. In practice, however, the federal authorities have an effective priority in legislative matters, while the *Länder* take precedence in the administrative field. The federal State has exclusive legislative competence in certain fields and either "concurrent" or "framework" (*Rahmengesetzgebung*) powers in others.

In all areas where the federal State has exclusive legislative competence, the *Länder* have the power to legislate only if a federal law explicitly allows them to. These areas of exclusive law-making powers include in particular foreign affairs, defence, freedom of movement for goods and persons, nationality, foreign exchange, credit and currency, customs, railways, post and telecommunications, and cooperation between the federal State and *Länder* in criminal police matters[14]. In practice, the federal State has only very rarely authorised the *Länder* to legislate in these fields.

In the fields where there is concurrent legislative competence, the *Länder* can legislate so long as and to the extent that the federal State has not used its own law-making powers. The fields concerned cover most traditional legislative areas (civil and criminal law; court organisation

[12] The absolute protection of fundamental rights and the federal structure via the "perpetuity clause" – Article 79 (3) GG – was incorporated into the Basic Law in reaction to the experience of National Socialism.
[13] Articles 30 and 70 (1) GG.
[14] Articles 71 and 73 GG.

and procedure) and areas where modern States play a role (commercial law, nuclear law, labour law, land law, law on aliens, environmental policy, shipping and road transport, waste disposal and control of air and noise pollution) [15]. In these fields, the principle *Bundesrecht bricht Landesrecht* of Article 31 applies. This provides that "federal law shall take precedence over *Land* law"; in other words, the laws of the *Länder* in a specific field cease to apply in the event of the federal State legislating in that field. The federal State has made use of its right to legislate in most of the fields listed in the enumeration of "concurrent" powers, and the *Länder* now have virtually no powers of their own left in these areas.

Lastly, the federal State can pass laws as a framework for *Land* legislation relating to the organisation of higher education, the film industry, the press, protection of nature and the countryside, regional development and town and country planning, and water resource management[16]. In these fields, the federal State draws up the legislative framework and the *Länder* must detail the federal provisions by means of the necessary laws, within a period which is itself set by the federal law.

The federal State and the *Länder* also carry out "joint tasks" (*Gemeinschaftsaufgaben*), incorporated into the Basic Law in 1969. These relate to the construction of higher-education establishments, research, improvement of regional economic structures, agricultural structures and coastal preservation, with arrangements for joint decision-making and financing[17].

The areas which are the exclusive preserve of the *Länder* are not listed in the Basic Law. They are limited to cultural matters (broadcasting), education, police and local affairs. In the fields where they have exclusive competence, the *Länder* often cooperate with each other without involving the federal authorities. They can also conclude bilateral cooperation treaties.

The prevailing role of the federal State in legislating is matched by the *Länder*'s predominance in implementing the laws. Under the separation of tasks in Germany's federal system, the *Länder* are responsible for administration[18]. The federal administrative system distinguishes between four cases: 1. direct administration by the federal State, for matters within its spheres of competence; 2. administration by the *Länder* for local matters; 3. administration of federal matters by delegation to the *Länder*; 4. administration of federal matters by the *Länder* in their own right (*eigene Angelegenheit*). Unlike delegated administration, where the federal State retains extensive supervisory powers, federal administration by the *Länder* in their own right is, in principle, subject only to monitoring of legality. Here, however, the Basic Law allows an ordinary law, submitted to the *Bundesrat* for approval, to limit the scope of the *Länder* in the regulation of administrative organisation and procedures, and to grant the federal government the power to issue specific instructions in order to ensure that federal laws are implemented. Subject to the consent of the *Bundesrat*, the government can decree general administrative rules[19]. Since 1949, for instance, civil service institutions have been controlled mainly by the *Länder*, but they have been fairly closely monitored by the federal authorities. This has resulted in close cooperation between the administrative services of the federal State and those of the *Länder*[20].

[15] Articles 74 and 74a GG.
[16] Articles 75 GG.
[17] Articles 91a GG.
[18] This also applies to European affairs.
[19] Articles 50 and 83-87 GG.
[20] See Gosselin, Serge, "Evolution du fédéralisme allemand depuis 1949. Tendances récentes et rôles du Bundesrat dans l'Allemagne unifiée", *Allemagne d'aujourd'hui*, No. 116, April-June 1991.

The *Länder* are subdivided into counties (*Kreise*) and municipalities (*Gemeinden*), whose self-government is a fundamental principle and a specific historical feature of German federalism. Municipal self-government (*kommunale Selbstverwaltung*) is a tradition deeply rooted in Germany, as an expression of civic liberty. Its origins lie in the privileges granted to the free cities in the Middle Ages, when civic rights freed their inhabitants from serfdom. In the modern era, municipal self-government stems primarily from the reforms introduced by Reichsfreiherr vom und zum Stein, and in particular the Prussian local government code of 1808. The Basic Law is based on this tradition and expressly guarantees the self-government of towns, counties and municipalities, as do the constitutions of all the *Länder*. The Basic Law provides that the *Länder* must guarantee the municipalities the right to regulate all local affairs under their own responsibility, within the framework of the laws in force[21]. This includes local public transport, local road construction, the supply of gas, water and electricity, housing development and town planning, construction and maintenance of primary and secondary schools, theatres, museums and hospitals, sporting facilities and public baths, and youth services and adult training. For historical reasons, municipal government systems and democratic representation vary considerably from one *Land* to another. Federalism and municipal self-government thus provide for a degree of administrative flexibility and enable specific local and regional features and identities to be preserved.

The shift in power from the *Länder* to the federal State has gradually intensified since 1949. The situation in the immediate post-war period, the arrival of millions of refugees and displaced persons and the sheer extent of the destruction seemed to make it necessary for the federal State to assume responsibility not only for foreign, defence and monetary policy but also for social and economic policy, transport policy – including postal services, railways, road construction, shipping and air traffic –, and, at a later stage, environmental policy. The list of areas for which the Basic Law has assigned the right to legislate to the federal State[22] has been considerably expanded through numerous amendments to the constitution, in particular in the 1950s and 1960s. The broader scope of Article 72 (2) GG – which grants the federal State the right to legislate "if and to the extent that the establishment of equal living conditions throughout the federal territory or the maintenance of legal or economic unity renders federal regulation necessary in the national interest" has led to a considerable expansion of the powers of the federal State, at the expense of the *Länder*. In addition, the federal State has to date made use of its framework laws with such regulatory fervour that there no longer remains much scope, even in this area, for legislation by the *Länder*. The *Länder* have been able to compensate in part for this reduction in their legislative powers by securing the right to participate in federal law-making through the *Bundesrat*. This development has therefore affected the *Länder* governments to a lesser degree than the *Länder* parliaments (since the former benefit from the federal State's increased power through the *Bundesrat*). The rulings of the Constitutional Court (*Bundesverfassungsgericht*) in Karlsruhe have, on account of its neutrality in disputes between the federal State and the *Länder*, contributed to the trend towards centralisation and uniformity[23]. The result has been a strong concentration of powers (legislative, administrative and judicial) in the hands of the federal State.

[21] Articles 28 GG.

[22] Article 73 (list of areas for which the federal State has exclusive legislative competence), Article 74 (list of areas for which the federal State has "concurrent" legislative competence), and Article 75 (list of areas governed by the federal State's framework laws).

[23] See Papier, Hans-Jürgen (Vice-President of the Constitutional Court) "Der unitarische Bundesstaat", *Frankfurter Allgemeine Zeitung*, 5 November 1998.

Federalism in taxation and financial equalisation

The Basic Law stipulates that the federal State and the *Länder* are "autonomous and independent of one another in the management of their respective budgets"[24]. Tax legislation is subject both to the exclusive power of the federal State (for customs duties and tax monopolies) and to a great extent to "concurrent" legislative powers. The *Bundesrat*'s consent is required for taxes from which the *Länder* or municipalities also benefit[25]. Apart from some insignificant exceptions, the *Länder* and municipalities cannot levy taxes.

With regard to tax revenues, the great financial reform of 1969 established a joint system providing for both common and separate taxes for the federal State and the *Länder*. Since then, the federal State and the *Länder* have shared the "main taxes" (income, corporation and turnover taxes), which account for about two-thirds of total tax receipts. The Basic Law provides that the federal State and *Länder* shall share equally the revenue from income and corporation taxes. The shares of the federal State and the *Länder* in the turnover tax (VAT) are, however, determined in the light of changes in their revenue and expenditure, and thus remain a continuous source of conflict. The apportionment was changed a number of times in favour of the *Länder*, and currently stands at 50.5% for the federal State and 49.5% for the *Länder*. Apart from these shared taxes, the federal State, *Länder* and municipalities each have a monopoly over certain less significant taxes[26]. The municipalities are granted a share of the joint taxes, which is set by a federal law. In addition to their revenue from direct taxes and local taxes, there are receipts from the equalisation fund managed within each *Land* and on which the *Land* can legislate. The topic of the financial apportionment of the municipalities is, moreover, the subject of ongoing debate, because the municipalities – and first and foremost the towns –, which are facing growing social problems, have not, for some years, had the resources necessary to fulfil their responsibilities. They are, in particular, responsible for social security payments, which are a considerable expenditure heading in times of high unemployment. Out of total tax receipts, a little over 50% is apportioned to the federal State, with the *Länder* receiving about 33% and the municipalities about 16%.

Alongside the sharing of joint tax revenue between the federal State and the *Länder* (vertical equalisation), the German federal tax system includes a mechanism for horizontal financial equalisation between the *Länder* (*Länderfinanzausgleich*). There is, in addition, a second vertical redistribution mechanism whereby the *Länder* receive supplementary allocations from the federal government. The aim is to use transfers to maintain a financial balance between the *Länder*, which have varying tax revenues but must all carry out the same tasks and provide the same services for their citizens. The greater part of these transfers is, in theory, horizontal, that is between the *Länder*. This system, which is highly complex but effective and egalitarian, results in a substantial equalisation of *per capita* tax revenue. It currently ensures that the *Länder* with low tax revenues receive payments from the financially better-off *Länder*, bringing their financial resources up to 95% of the average level for all *Länder*. The second, vertical, equalisation mechanism supplements the horizontal redistribution. It enables the disadvantaged *Länder* to reach 99.5% of the average level. Under the system, the federal State also provides resources to certain *Länder* according to their needs if their financial situation is particularly difficult, as in the case of Bremen and the Saar. In addition to these, the main

[24] Article 109 I GG.
[25] Article 105 GG.
[26] Article 106 GG.

beneficiaries of these transfers are currently the new *Länder* in the east, and Berlin (which is preparing to take on the functions of federal capital). Since unification, the vertical payments from the federal State to the *Länder* have come to exceed the horizontal transfers between the *Länder* (40 billion DM, as against 13.5 billion DM, in 1998).

Financial equalisation, both horizontal and vertical, is governed by a federal law requiring the consent of the *Bundesrat*[27], and this has often led to alliances between the federal State and the financially weak *Länder*. The stronger *Länder*, finding themselves in a minority, have already challenged the current financial equalisation system before the Constitutional Court on a number of occasions.

While the federal financial arrangements have always been a source of conflict in Germany, unification has further increased the problems. It has created an unprecedented level of regional imbalance. The arrival of five *Länder* which are economically much weaker than the others has placed a considerable extra burden on the western *Länder*. In 1998, the total financial equalisation flows amounted to 60.1 billion DM, of which 50.5 billion DM (i.e. 84%) was paid to the new *Länder* in the east. The newcomers were incorporated into the financial equalisation system in 1995, with the result that some western *Länder* which had hitherto been beneficiaries of the equalisation arrangements found that they had become contributors. This situation has revived the debate on a reform of the current federal system.

[27] Article 107 GG.

II.3. German "cooperative" federalism

The division of powers in the German federal State features a high degree of institutional, political and financial interpenetration which requires close cooperation between the federal State and the *Länder*. Over the last fifty years, the German federal system has generated an entanglement of powers which is becoming increasingly difficult to unravel. Even in areas that are the explicit preserve of the *Länder*, such as education, cooperation between the *Länder* governments has been strengthened and considerable harmonisation achieved. The bodies involved in this cooperation among *Länder*, that is outside the federal authorities, are the conference of minister-presidents and the conferences of ministers responsible for specific areas, in particular the conference of European Union affairs ministers and the conference of culture and education ministers (*Kulturministerkonferenz*). The latter, a major "standing conference", is a purely intergovernmental body which adopts decisions on a unanimous vote. It has brought about a considerable harmonisation of school curricula, diplomas and, more gradually, university examinations. The *Länder* have also concluded several cooperation agreements with the federal State, which often govern the implementation of federal laws by the *Länder*.

Consultation among the *Länder* gradually developed into coordination between the federal State and the *Länder* on economic policy and regional planning. This resulted in the introduction of "joint tasks" into the Basic Law in 1969. Since the early 1970s, German federalism has taken on a more cooperative character given the impractical nature of a strict separation of powers and the interdependence of issues.

The Bundesrat, cornerstone of the cooperative model

The basic relationship between the federal State and the *Länder* under the cooperative system is as follows: the German *Länder* implement the federal laws and in return contribute to shaping federal legislation. A specific institution, which already existed at the time of the empire, carries out this role: the *Bundesrat*, the chamber of the *Länder*. As a federal body, the *Bundesrat* contributes to expressing the will of the federal State. It has no say in tasks which are the exclusive preserve of the *Länder*. It therefore plays no coordinating role regarding the problems and issues about which the Länder wish to consult each other and harmonise their points of view. That is the task of the conference of minister-presidents and the conferences of ministers.

The *Länder* take part in law-making through a complex process in which the government and the *Bundestag*, in principle, initiate a bill and the *Bundesrat* then makes a substantial contribution to shaping it. Federal laws must be adopted by both chambers. In the event of a dispute, a mediation committee (*Vermittlungsausschuss*), composed of 32 members (16 from each chamber), tries to work out a compromise. Where no agreement can be reached, the final decision depends on the nature of the bill. If the bill touches on the *Länder*'s interests, the *Bundesrat's* consent is required. These "consent bills" (*Zustimmungsgesetze)* may enter into force only with the assent of the *Bundesrat*. If it definitively rejects a consent bill, the draft must be abandoned. In other cases, the *Bundestag* can overrule the *Bundesrat*'s opposition with same majority rule (absolute or two-thirds) the latter applied to oppose the bill.

Under the Basic Law, the consent of the *Bundesrat* is required for three types of law.

1. Laws amending the Basic Law. A two-thirds majority is required within the *Bundesrat*.
2. Laws affecting the *Länder*'s tax revenue. In particular legislation on taxes whose revenue is shared by the *Länder* and municipalities: tax on salaries, income tax, value added tax, and motor vehicle tax.
3. Laws which undermine the administrative autonomy of the *Länder*. This category of laws is particularly important because a law need only contain one provision of this type for the whole text to require the consent of the *Bundesrat*. This is the case, for instance, when certain provisions relating to competence, forms, time limits, administrative taxes or notification procedures are imposed on *Länder* authorities by a federal bill. The consent of the *Bundesrat* is required even if the substance of the law does not actually affect "*Länder* interests", for example in the case of international treaties or defence issues.

Nowadays approximately 60% of all laws require the *Bundesrat's* consent, thus generating a unique form of permanent political cooperation and balance of powers. The federal government, elected by a majority in the *Bundestag*, must often face an opposition majority in the *Bundesrat*. Regional elections, whose dates are chosen freely by the *Länder*, do not generally coincide with federal elections. The federal government can thus find itself confronted with an opposition majority in the *Bundesrat* if opposition parties win regional elections in one or more *Länder*. This situation requires dialogue between the majority and opposition parties, and between the federal State and the *Länder*. Each *Land* has its own representation in the federal capital for this purpose and meetings never cease. This system, similar to the French "cohabitation" but on a more permanent basis, operates quite smoothly thanks to, *inter alia*, the mediation committee (*Vermittlungsausschuss*). The committee convenes when necessary to help the two chambers reach agreement and has a high success rate.

In contrast to the United States, where the second chamber, the Senate, comprises two directly elected senators per State, the *Bundesrat* consists of representatives of the *Länder* governments and each *Land* must speak with one voice. Since German unification, there are 16 *Länder*[28] who have between three and six votes in the *Bundesrat* each, depending on their population[29]. Ministers with specific portfolios sit on the *Bundesrat*'s committees (legal affairs ministers on the Committee on Legal Affairs, European Union affairs ministers in the Committee on European Union Affairs, etc.). They may be – and usually are – represented by a senior official from the ministry in question. The fact that the *Länder* participate in policy-making at federal level via *Länder* governments rather than through their parliaments has generated an "executive federalism" in which the *Länder* parliaments play a relatively marginal role, since they have real influence only over matters that are the exclusive competence of the *Länder*.

In this distinctive power-sharing system, the *Länder* minister-presidents counterbalance the chancellor, and the *Länder*, which often have common interests irrespective of their political

[28] Ten *Länder* in the west: Baden-Württemberg, Bavaria, Bremen, Hamburg, Hessen, Lower Saxony, Nordrhein-Westfalen, Rheinland-Pfalz, Saarland and Schleswig-Holstein, and six in the east: Berlin, Brandenburg, Mecklenburg-Western Pomerania, Saxony, Saxony-Anhalt and Thuringia.

[29] Each *Land* has at least three votes. *Länder* with over two million inhabitants have four, those with over six million inhabitants have five votes and those with over seven million inhabitants have six. The absolute majority required for decisions taken in the *Bundesrat* is set at 35 votes, out of a total of 69.

majorities, counterbalance the federal State. Thus, all forms of "cohabitation" imaginable have arisen between the two chambers since 1949. The *Bundesrat* has often been united, beyond traditional political cleavages, in its opposition to the federal government and the *Bundestag* majority to defend *Länder* interests *vis-à-vis* the federal State. Solidarity between *Länder* has suffered since unification as the new *Länder* are heavily dependent on financial assistance from the former *Länder* and the federal State.

For the German *Länder*, the unification of Germany was an opportunity to demand that their autonomy in relation to the federal State be restored. The most recent constitutional changes in October 1994[30] and the ruling of the Federal Constitutional Court of 15 October 1997[31] were designed to rebalance powers between the federal State and the *Länder*. Since then, the number of consent bills has further increased. This contributed to a legislative deadlock in Germany during the final years of Helmut Kohl's CDU/CSU-FDP government because the *Länder*, the majority of which were governed by the SPD and the Greens, used this majority in the *Bundesrat* to withhold consent on several crucial bills, relating to the reform of the social security and tax systems, put forward by the federal government. The Schröder government is currently in the same situation; any government action is heavily dependent on the cooperation of the Christian Democrat and Liberal opposition which holds the majority in the *Bundesrat*.

Refederalisation or "competitive federalism"?

The German model is characterised by a constant search for consensus, without which it would be politically and institutionally impossible to pass legislation. The cooperative system confers strong cohesion, political balance and great stability on the federal State as the State, the *Länder* and the municipalities must work closely together in the legislative, administrative and financial spheres. However, the model, at this particular stage in its development, presents several problems which undermine its efficiency and democratic nature.

1. It has a centralising effect, which substantially limits the autonomy of the *Länder* and thus runs counter to the principle of subsidiarity.
2. It is a complex system, which lacks transparency and gives considerable power to the various administrative and negotiation bodies (the formal and informal coordination committees which work out legislative compromises and the mediation committee) to the detriment of elected authorities.
3. It encourages compromise and moderate options; this often results in a woolly consensus which no longer clearly shows where the majority and opposition actually stand.
4. The system is unclear to ordinary citizens, making parties and political ministers less accountable to the electorate.
5. The system of multiple powers and checks and balances is conducive to institutional deadlock, preventing adoption of the necessary decisions and reforms and ultimately resulting in *status quo*.
6. Cooperative federalism is expensive: maintaining 16 small States with their own officials and representation costs is quite costly, particularly since there are many sub-entities within the *Länder*.

[30] Concerning Articles 72, 75, 93 (1) and (2), and 125 (2) of the Basic Law.
[31] This judgement reestablishes the importance of the charter of basic rights and the constitutional courts in the *Länder*.

In general, it can be said that German federalism remains rather opaque to the majority of citizens for the above reasons. It is very difficult to know where responsibilities lie amid the interwoven spheres of competence, which encourage each layer of government to claim credit for a successful bill and deny responsibility in the event of failure. An oft-used argument in favour of federalism is that it encourages good practice by allowing the federated States to compare ideas and experiment innovative solutions. This has not been the case in Germany.

The problems mentioned above have prompted debate within the academic and political spheres on "refederalising" the Federal Republic. Numerous proposals for reform have been put forward, which are all designed to clarify responsibilities and separate tasks and resources but vary in terms of scope and purpose. They include the following in particular:

1. Redefinition and strict separation of tasks between the federal State and the *Länder*, taking due account of responsibilities transferred to European level.
2. Reduction in the number of federal bills requiring the consent of the *Bundesrat* to make it easier to pass legislation at federal level.
3. Clarification of tax provisions and apportionment of some types of tax entirely to the federal State (indirect taxation such as VAT for instance) or to the *Länder* (direct taxation such as income and corporation taxes for example), accompanied by a reduction in the joint expenditure by the federal State and the *Länder* (in the fields of higher education, town planning and housing).
4. Reform of the financial constitution to reduce financial transfers between the *Länder*.
5. Reorganisation of the federal landscape (merges of *Länder*) to create a "level playing field" among the *Länder*.

All of these ideas for reform touch on the issue of national solidarity to some extent. The scale of financial transfers since German unification has rekindled debate on the need for such a comprehensive financial equalisation system between the *Länder*. Most of them are now deemed to have too few inhabitants and not enough financial resources to fulfil their role as a federal State. Paradoxically, *Länder* such as Bavaria and Hessen, formerly net beneficiaries, are now among the most vocal opponents to the system which enabled them to reach their present high level of technical and economic development[32].

The issue is to determine just how much competition between *Länder* German federalism can tolerate. The most daring proposals for reform tend towards the American model, where responsibilities and tax revenues are strictly separated. Each *Land* would be responsible for its own policy-making and have its own resources, and this competition would highlight the best policies. For "competitive federalism" to work, however, the *Länder* would need to be more or less equal in surface area, population and economic strength to ensure comparable starting conditions. But the restructuring required to reduce the number of *Länder* would probably not be accepted by the German population[33]. Such a change in the principle of territorial solidarity would run counter to the historical foundation and the spirit of the constitution of the Federal Republic of Germany.

[32] For example, Bavaria was among the *Länder* receiving equalisation payments for 37 years.

[33] Under the Basic Law, new delimitation of the *Länder* is possible only by means of a referendum (Article 29 GG). A proposal to join the two *Länder* of Berlin and Brandenburg in 1996 was unsuccessful because the population of Brandenburg failed to endorse it, although the governments and the administrations of the two *Länder* had already negotiated and prepared the measure and all the experts had strongly recommended this union.

Currently, several *Länder* governed by the CDU and the CSU, including some of the richest (Bavaria, Baden-Württemberg and Hessen in the West, Saxony and Thuringia in the East) are pleading for a reform of the financial equalisation system. They no longer want to help finance *Länder* whose budgetary policies are, in their view, not rigorous enough. On 29 and 30 July 1998, Baden-Württemberg and Bavaria (later joined by Hessen) lodged a formal complaint with the Federal Constitutional Court regarding the present equalisation system. For many years now, the Bavarian minister-president, Edmund Stoiber, has been calling for in-depth reform of German cooperative federalism and the replacement of the cooperative model with a competitive model. He opposes the current trend toward uniformity and advocates a clear division of powers giving the *Länder* exclusive responsibility for economic, agricultural and urban development and for the building of council housing and universities. He also wants greater tax autonomy and a limit on transfers from prosperous *Länder* to be set at 50% of above-average tax revenue. Today, some *Länder* redistribute up to 80% of the proportion of their tax revenue above the average for all the *Länder*. The finance ministers of those *Länder* which benefit from financial equalisation condemn this "net contributor" attitude and cite the Basic Law, which stipulates that "the financial requirements of the Federation and of the *Länder* shall be coordinated in such a way as to establish a fair balance, avoid excessive burdens on taxpayers, and ensure uniformity of living standards throughout the federal territory"[34]. Yet the most populated *Land*, Wolfgang Clement's Nordrhein-Westfalen, supports Bavaria's policy of regional affirmation. And Gerhard Schröder had done the same while he was minister-president of Lower Saxony. In a recent ruling on 11 November 1999, the Federal Constitutional Court in Karlsruhe demanded profound reform of the financial equalisation system before 2005. But the need for reform also appears to be accepted at political level: a joint committee, set up following an agreement between Chancellor Schröder and the 16 *Länder* minister-presidents, is drawing up proposals for a new financial constitution.

[34] Article 106 (3) 2. Also on this subject: the statements of the senator (at ministerial level) for finances from Berlin, Annette Fugmann-Heesing (*Frankfurter Allgemeine Zeitung*, 11 August 1998); of the finance minister for Rheinland-Pfalz, Gernot Mittler (*Süddeutsche Zeitung*, 10 August 1999); of the finance minister for Bavaria, Kurt Faltlhauser, (*Süddeutsche Zeitung*, 20 August 1999); of Wilfried Herz ("Ansporn statt Alimente", *Die Zeit* No. 36, 27 August 1998) and of an SPD deputy in the *Bundestag*, Joachim Poss ("Wer mit wem und gegen wen im Föderalismus?", *Frankfurter Rundschau*, 18 December 1998).

III. GERMAN FEDERALISM AND EUROPEAN INTEGRATION

III.1. The effects of European integration on the German federal structure

The transfer of powers to European level

Until the mid-1980s, the federal government had exclusive responsibility for German participation in European integration. This derived from Article 24 (1) GG, which gives the federal State the right to transfer powers to supranational institutions, and Article 32, which gives the federal State exclusive responsibility for foreign affairs. Since European integration was considered an international issue, the *Länder* were not included in the negotiation of the treaties establishing the European Communities, nor in decision-making at European level. They were unable to prevent their own spheres of competence being transferred to European level.

As the European Communities developed an increasingly large body of law prevailing over national legislation (both of the federal State and of the *Länder*), European affairs became to a large extent a matter of internal rather than foreign policy. Consequently, the *Länder* asked to be able to contribute to these policy areas, which could no longer be regarded as the exclusive responsibility of the federal State. It was with the advent of the Single European Act in 1987 that European integration started to pose a real problem for the German *Länder*. Decisions taken at European level increasingly impinged on the *Länder*'s spheres of competence, such as broadcasting, vocational training, health, research and technology, the environment, structural policy and regional development.

Above all, the *Länder* came up against the decision-making procedures in the Communities' areas of competence: the federal government, within the main decision-making body, the Council of Ministers, thus took part in decisions on issues that not only had an impact on the *Länder* but were in some cases, under German law, their exclusive responsibility. While the federal government would never have been able to take or contribute to any decisions in these areas at national level, it could under Community law. The *Länder*, which, as we have seen, had already had to surrender many of their responsibilities on account of the enthusiastic use of concurrent powers by the federal State, did not accept this further restriction of their spheres of competence.

From the outset, the *Länder* tried, without much success, to exert an influence on European affairs at national level, in particular with respect to shaping Germany's positions within the Council of Ministers. The texts ratifying the Treaty of Rome provide that the federal government must keep the *Länder* informed of European developments at regular intervals. This gave the *Bundesrat* an opportunity to take a stance on initiatives originating from the Communities but offered no guarantee that the government would take its opinions on board in discussions and negotiations within Community bodies. At all events, the European Communities' activities remained relatively limited until the 1970s and had few implications for the *Länder*. This situation changed in the mid-1970s, when the establishment of the European Regional Development Fund (ERDF) marked the beginning of a European regional policy. The *Länder* subsequently found themselves increasingly affected by Community policies and endeavoured to increase their opportunities for involvement. They adopted the same strategy as they had used earlier against the federal State to stop their powers being eroded at national level: since they could no longer prevent the transfer of powers, they

demanded to have at least the right to take part in decision-making. Thus, the German "political entanglement" (Fritz W. Scharpf, 1976) was extended to include European affairs and thus became a "double political entanglement" (Rudolf Hrbek, 1986).

The *Länder* took advantage of the law ratifying the Single European Act in 1986, which required the consent of the *Bundesrat*, to extend and, above all, establish a legal basis for their participation in decision-making at national level. They thus obtained increased rights to be informed by the federal government while securing participation in decision-making to a varying extent depending on whether their powers and interests were totally, partially or not at all affected by the measures proposed by the European Communities. The former participation procedure, called *Länderbeteilungsverfahren*[35], was replaced by a mechanism called the *Bundesratsverfahren*: the government accepted the obligation to consult the *Bundesrat* and take its opinion into account in negotiations, before approving Community decisions. Where the decision taken runs counter to this opinion, the government is required to inform the *Bundesrat* and explain its reasons. The law also made provision for representatives of the *Länder* "to participate in negotiations within the consultative bodies of the European Commission and the Council of Ministers", while the federal government remained responsible for leading the negotiations. With this in mind, the role of "*Länder* observer" (*Länderbeobachter*), created in 1958 to benefit all the *Länder*, was reinforced in 1989 and 1996. The observer is responsible for keeping the *Bundesrat* informed about Community initiatives and is entitled to take part in the meetings of the Council and Permanent Representatives Committee (Coreper), and of the federal government when it is preparing Community meetings. The *Länder* have welcomed this new participation procedure but are nevertheless still seeking to strengthen their role at national level.

At the same time, the *Länder* tried to be more active at Community level by "bypassing" the federal government, and established various direct contacts with Community institutions and officials. They justified these steps to the federal government, which regarded their direct intervention as a parallel foreign policy (*Nebenaussenpolitik*), by indicating that European affairs were in fact becoming a "European internal affairs policy". Between 1985 and 1987, the *Länder* each opened information offices to collect and pass on information on European affairs to their respective governments. The new *Länder* followed suit in the early 1990s.

The constitutional adjustments required to ratify the Maastricht Treaty then provided the *Länder* with an opportunity to finally push through a constitutional reform confirming their sovereign rights and ensuring their participation in EU affairs. Since the Maastricht Treaty broadened the European Union's scope to include culture and education[36] and strengthened its responsibility in environmental matters and regional structural policy, the *Länder*'s exclusive powers were directly affected. It would have been unacceptable for the federal State to transfer those powers to the European Union by means of a simple law (not requiring the consent of the *Bundesrat*) based on Article 24 (1) GG, which governs the transfer of sovereign powers to conventional international organisations. The *Länder* threatened to reject the ratification of the

[35] This form of participation of the *Länder* in European affairs was introduced in 1979 by Chancellor Helmut Schmidt and the chairman of the conference of minister-presidents at that time, Johannes Rau. The government committed itself to respecting the *Länder*'s opinions on European issues that would affect their interests. However, this step did not solve the problem of decisions taken by the federal government in the European institutions which went against the position of the *Länder*. The government was not required to justify its decisions.

[36] Articles 127 and 128 (now Articles 150 and 151) TEC.

treaty within the *Bundesrat* unless their involvement in law-making in these areas was expressly provided for in the Basic Law. They argued that European affairs were no longer part of Member States' foreign policy, but part of the EU's internal policy, which they had a right to be involved in just as they are involved in German internal policy.

Länder involvement in decision-making on European issues

Drawn up in 1992, the new Article 23 GG, known as the *Europa-Artikel*[37], reaffirms the FRG's commitment to European integration, provided it is based on a series of fundamental principles: democracy, the rule of law, social and federal principles, subsidiarity and a level of protection of basic rights comparable to that afforded by the Basic Law. [38] To this end, the federal State may transfer sovereign powers by a law with the consent of the *Bundesrat* or a majority of two-thirds in the two chambers if amendments to the Basic Law are necessary. The article also reaffirms Germany's federal structure.

For the *Länder*, Article 23 GG and the federal law that further details it[39] provide for greater involvement in European affairs via the *Bundesrat*. It also allows representatives of the *Länder* to take part in formal meetings of European bodies. The *Länder* have a right to prompt and comprehensive information on all negotiations in Brussels[40]. Where the interests of the *Länder* are involved, the federal government must allow the *Bundesrat* to take a stance sufficiently in advance for its position to be taken into account in the EU negotiations under way. If the measure proposed by the European Union affects an area within the federal State's sphere of competence, the federal government must give due consideration to the vote in the *Bundesrat*. If, on the other hand, the measure under discussion concerns an area within the sphere of competence of the *Länder*, the federal government must consider the vote as binding. In the event of contradictory opinions, both parties must first try to reach an agreement. If this fails and if the *Bundesrat* confirms its position with a two-third majority, the federal government must respect its decision. However, the federal government does have the last word in all cases where a decision would result in increased expenditure or a reduction in revenue for the federal State.

The Basic Law also provides for the possibility of the *Länder* representing Germany within the Council of Ministers[41]. However, it does not clarify to what extent a representative of the *Bundesrat* could – within his negotiation mandate – accept compromises that differ from the common position.

At first, the new participation rights gave rise to a number of practical problems because the *Länder* had to agree a common approach with the federal government beforehand, within very tight deadlines. The *Bundesrat* therefore had to adapt to the pace of the European institutions. As a general rule, it is the *Bundesrat*'s Committee on European Union Affairs which prepares

[37] This article replaces the former Article 23, which became obsolete after the GDR joined the FRG.
[38] This protection of basic rights was declared *conditio sine qua non* by a ruling of the Constitutional Court on the compliance of the Maastricht Treaty with the German constitution.
[39] *Gesetz über die Zusammenarbeit von Bund und Ländern in Angelegenheiten der EU* (EUZBLG) of 12 March 1993.
[40] Before, the *Bundesrat* only had a right to information which affected the interests of the *Länder*.
[41] Article 23 (6) GG: "When legislative powers exclusive to the *Länder* are primarily affected, the exercise of the rights belonging to the Federal Republic of Germany as a Member State of the European Union shall be delegated to a representative of the *Länder* designated by the Bundesrat."

decisions relating to European issues. However, the *Bundesrat* has also established a "European chamber" (*Europakammer*), for exceptional cases where decisions on European issues must be taken faster than parliamentary sessions will allow. This body can be convened outside *Bundesrat* parliamentary sessions and take decisions which have the same value as those taken by the *Bundesrat* in plenary. One member, usually the representative to the federal State (often the minister for federal and European affairs) from each *Land*'s government is delegated to the chamber with the same number of votes as in the plenary session. In practice, the *Europakammer* is very rarely convened. It primarily illustrates the importance the *Bundesrat* attaches to efficient participation in European affairs.

In order to guarantee the *Länder's* participation in negotiations within European Union bodies, the *Bundesrat* has appointed representatives of the *Länder* (currently approximately 400) to take part, on a case by case basis, in the German delegations responsible for negotiations in various Council and Commission working groups. The effectiveness of their participation depends, in each specific case, on their personal and technical qualifications for the particular issue in question. While the participation of representatives of the *Länder* in negotiations has never been a problem, these representatives has never been entrusted with leading a negotiation. Under the agreement between the federal State and the *Länder* in this respect, a precondition would be that the issue must come mainly within the legislative sphere of competence of the *Länder*. The Treaty on European Union, however, allows Germany to be represented in the Council by the *Länder* since it provides that "the Council shall consist of a representative of each Member State at ministerial level, authorised to commit the government of that Member State"[42]. Nevertheless, during the German presidency of the Council of the European Union in the first six months of 1999, the Council meetings were chaired by federal ministers, even in the fields of culture and the audiovisual sector, education and research, and justice and home affairs.

The *Länder* have also strengthened cooperation between their governments in order to be able to act as effectively as possible on European issues. In October 1992, a new form of cooperation was established specifically for EU affairs: the Conference of Ministers for European Affairs. This body enables exchanges of information and coordinates positions concerning the role of the *Länder* in specific aspects of European policy or issues relating to the reform of the Treaties. On the other hand, specific issues are dealt with separately by the relevant conference of ministers. The conference of ministers plays an important role mainly in areas which are the exclusive responsibility of the *Länder* since it, rather than the *Bundesrat*, is responsible for identifying the common political approach taken by the *Länder*.

In practice, the *Länder* still clash quite often with the federal government over issues of responsibility regarding EU initiatives that fall within their sphere of competence. This has been the case for the SOCRATES programme, an exchange and education programme covering schools, universities and vocational training, the RAPHAEL action programme for the protection of the cultural heritage, the White Paper on Education and Training, the directive on waste treatment, and the Europol convention.
To date, *Länder* parliaments (the *Landtage*) have played only a very secondary role in European affairs compared with the executive bodies. The Conference of *Länder* Parliaments, however, has called for their participation in decision-making regarding European policy

[42] Article 146 (now Article 203) TEC was amended to this end, in Maastricht, at the request of the Belgian and German governments.

areas. In particular, the conference is asking to be informed and to be able to influence the shaping of positions defended by each of the governments before the *Bundesrat*. In some *Länder*, the *Landtag* is now kept informed on a regular basis and takes a stand on issues that relate to the European Union and concern the *Land*. Some of them have also set up specialised committees on European affairs (Saarland, for instance). Nevertheless, the role of the *Landtage* remains marginal.

On the whole, it is fair to say that the *Länder* have not lost out from European integration. They have managed to remain influential at federal level. However, the new ways of involving them have made decision-making procedures slower and more cumbersome. Decision-making at European level is already relatively complex and opaque. In Germany itself, this is compounded by the lack of clarity regarding the role of the many parties involved in European affairs. There is a risk that procedures might take precedence over policy. And the risk has been heightened of a double political deadlock between the *Länder* and the federal State on the one hand, and the federal State and the European Union on the other[43].

Alongside the national mechanisms, the German *Länder* have also gained the opportunity to contribute to Community affairs directly at European level. To involve local and regional bodies in the European integration process, the Maastricht Treaty created the Committee of the Regions, a consultative body[44]. It is consulted by the Council, the Parliament or the Commission in certain cases and can also issue own-initiative opinions if regional interests are involved. Germany has 24 seats on the Committee of the Regions. Three are held by federal associations of cities, municipalities and districts[45], and the remainder are divided between the *Länder* with more or less one seat for each *Land*. At the request of the German government, pushed by the *Länder*, the Committee of the Regions was given a broader mandate at the Amsterdam summit in June 1997. Not only was it provided with its own administrative services, but the European Commission is now obliged to consult it on any measure concerning the environment, the Trans-European networks (infrastructure such as transport, telecommunication and energy), structural policy, economic and social cohesion, public health, employment, culture, social policy, youth, education and vocational training[46]. The Committee of the Regions is above all viewed as a mouthpiece for regions with legislative powers, such as the autonomous Spanish regions, the German and Austrian *Länder*, and the Belgian regions and communities, without other regions and local authorities necessarily feeling implicated in this role. Some *Länder*, in particular Bavaria, would like to increase the influence of this body further still. Some proposals go as far as to make it a third chamber within a future constitutional framework.

[43] See Hrbek, Rudolf, "Les effets pour le fédéralisme de l'intégration dans l'Union européenne", *Documents*, January-March 1998.
[44] Article 198 a-c (now Article 263-265) TEC.
[45] *Deutscher Städte- und Gemeindenbund*, *Deutscher Landkreistag* and the *Deutscher Städtetag.*
[46] Now Articles 129, 137, 148-152, 156, 159, 161, 162 and 175 TEC.

III.2. European integration and German federalism

The Länder: slowing down European integration?

Since 1990, the *Länder* have been calling for the European Union to apply four federal principles to ensure that their status and participation in European integration is properly taken into account in the long term[47]:

- enshrining the principle of subsidiarity in the European treaties
- opening Council of Minister meetings to representatives of the *Länder* and the regions
- creating a Council of the Regions
- giving *Länder* and regions the right to bring an action before the Court of Justice of the European Communities.

The first three demands were broadly met further to the last two amendments to the European Treaties, notably as a result of strong pressure from the *Länder*. They exercised considerable pressure on the federal government during the negotiations on the Treaty of Amsterdam, which they participated in as part of the German delegation with two *Bundesrat* representatives (the Bavarian State minister, Kurt Faltlhauser, and the secretary of State from Rheinland-Pfalz, Karl-Heinz Klär)[48]. They were able to introduce their main proposals into the Treaties using the new Article 23 GG and a number of *Bundesrat* position statements on EU reform. Chancellor Kohl, whose scope for negotiation and compromise had been considerably reduced as a result of the *Länder* defending their interests, was forced to back down from many positions previously defended by the federal government. A substantial extension of majority voting was thus blocked by a German veto, although the other Member States would have accepted abandoning the unanimity rule in some areas, such as the policies on culture and immigration. Chancellor Kohl, traditionally one of the driving forces behind European integration, was forced to slow the process because of the *Länder*. The outcome for the latter, however, was positive. They obtained:

- a protocol on subsidiarity and corresponding declaration which stipulates that the administrative implementation of Community law is the responsibility of the Member States
- autonomy for the Committee of the Regions in establishing its rules of procedure and in its administration
- a protocol on the financing of public broadcasting in Member States, acknowledging the general interest nature of the service
- a declaration confirming that "the Community's existing competition rules allow services of general economic interest provided by public credit institutions existing in Germany [which come under the supervision of the *Länder*] and the facilities granted to them to compensate for the costs connected with such services to be taken into account in full"

Nevertheless, it cannot be said that the *Länder* defended their own interests only. The resolutions passed by the *Bundesrat* and *Länder* minister-presidents on the subject of EU

[47] These were laid out in the "Munich principles" by the minister-presidents of the old and new *Länder*, as well as representatives of the *Bundesrat*.

[48] The *Bundesrat* was represented at the Maastricht intergovernmental conference by the finance ministers from Hamburg and Bavaria. However, this involvement of the *Länder* was badly accepted, especially by the Dutch presidency.

reform reflect a much broader view of European integration. They call for institutional reform to:

- deepen European integration
- fully close the European Union's democratic deficit
- ensure the smooth running of the institutions and the capacity for action of an enlarged Union
- clearly identify the European Union's spheres of competence in relation to the Member States
- provide a clear definition of the principle of subsidiarity

Neither should it be forgotten that it was the *Bundesrat* which successfully asked the federal government to accept the principle of EU competence in the field of employment. And since, in Germany, the decisions taken in Brussels are applied by the *Länder* and municipal authorities, it should come as no surprise that they called for EU procedures and measures to be more open, more intelligible and closer to the people. With this in mind, the *Länder* are supporting the drafting of a European Charter of Basic Rights to give EU citizenship a formal foundation.

The principle of subsidiarity was incorporated in the Treaties to stop new powers being tacitly acquired through the use of very general legal bases, such as Articles 100 and 235 (now Articles 95 and 308) TEC. The *Länder* always opposed the application of Article 235 of the EC treaty[49], fearing that the European Union would use it to give itself new powers without incorporating them into the Treaties, i.e. that it "would give itself the power to give itself new powers". To clarify this division of powers, the *Länder* have long stressed the need to establish a clear list of spheres of competence for the European Union and its Member States. In practical terms, they propose:

- to lay down more precisely the conditions governing the adjustment of the legal and administrative standards of Member States as part of the completion of the single market (Article 100a, now Article 95 TEC)
- to specify the European Union's areas of exclusive competence with a view to clarifying the principle of subsidiarity (Article 3b, now Article 5 TEC)

To ensure that the EU institutions respect the principle of subsidiarity, the *Länder* are calling for regions with legislative powers and the Committee of the Regions to have the right to bring an action before the Court of Justice in Luxembourg. The German government ignored these demands during the intergovernmental conference, retaining the exclusive power to represent Germany before the Court of Justice. Currently, the *Länder* can, via the *Bundesrat*, ask the federal government to bring an action before the Court of Justice under Article 173 (now Article 230) TEC. They also have the right to institute proceedings directly as a legal person, under the fourth subparagraph of the same article. The fact that they are demanding the right to bring an action before the Court of Justice independently from the federal government indicates that what they really want is to obtain the same status as a Member State.

[49] Article 235 TEC (now Article 308): "If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures."

It can be said that, despite the ceaseless complaints from the Bavarian minister-president regarding the European Commission's violations of the principle of subsidiarity[50], the procedures governing the participation of the *Länder* in European affairs are now well established and operate smoothly at national and European level[51]. Fresh controversy, however, can be expected in the areas of justice and home affairs, which have in part integrated into the Community framework further to the Treaty of Amsterdam. As regards police cooperation, in particular, a switch to majority voting will certainly not be accepted without precise procedures being defined to ensure that the *Länder* retain their full powers. On 12 May 1999 at Potsdam, with a view to the next intergovernmental conference, *Länder* minister-presidents renewed their calls for a clear division of powers between the European Union and Member States, the right to bring an action before the Court of Justice, and participation rights for the Committee of the Regions. [52]

The federal outlook after Maastricht and Amsterdam

Today, Germany has a double federal structure as a result of its division into federal State and *Länder* and as a Member State of the European Union[53]. This three-tiered framework faces two challenges. On the one hand, the federal structure must absorb the political, economic, social and cultural repercussions of German unification. On the other, a role must be defined for Germany within a European Union which now has powers in most national policy areas and whose Member States often take decisions by a majority vote. The time has come to reform, from the inside, a federal system that has become cumbersome and highly centralised, and contribute to developing a democratic system at European level that will avoid the German pitfalls.

The German State is working to this end within the scope offered and the constraints imposed by its Basic Law. From the outset, this law has been open to European integration. One of the lessons learnt from the national, even nationalist, isolation of Germany in the past was to provide for the constitutional possibility of acceding to international institutions. The preamble of the Basic Law declares that "...inspired by the determination to promote world peace as an equal partner in a united Europe, the German people, in the exercise of their constituent power, have adopted this Basic Law." In Articles 23 and 24, Germany has given itself the means to join supranational – in particular European – organisations. Since the new Article 23 was introduced into the Basic Law in 1992, establishing a united Europe and the development of the European Union are among the explicit aims of the German State… provided that, as we have already mentioned, the European Union demonstrates its commitment to federal principles and the principle of subsidiarity.

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[50] See also the list of 65 cases of violation of the subsidiarity principle sent by Edmund Stoiber to Chancellor Helmut Kohl in 1998, and Edmund Stoiber's article "Braucht Europa eine Verfassung?", *Die Welt*, 26 January 1999.

[51] For an initial assessment of cooperation between the federal State and the *Länder* under Article 23 GG, see the speech made by Gerd Wartenberg, secretary of State responsible for EU affairs for the *Land* of Berlin, 15 June 1998, to the *Forum Constitutionis Europae* of the Institute for European Constitutional Law at Humboldt University Berlin (www.rewi.hu-berlin.de/WHI).

[52] See also the conclusions of the 22nd conference of *Länder* European affairs ministers on 21 April 1999 in Bonn.

[53] See Nass, Klaus Otto "Verpönt und vergöttert. Der Föderalismus wird zu einem Strukturprinzip der Europäischen Union", *Frankfurter Allgemeine Zeitung*, 30 December 1997.

The latter is enshrined in the Treaty of Amsterdam by Article 5, a protocol and an annexed declaration, but it is not yet defined in law. Despite the issuing of some explanatory and insistent documents such as the opinion of the Committee of the Regions of 11 March 1999, "Developing a genuine culture of subsidiarity", drafted by Mr Delebarre and Mr Stoiber, there is no doubt that this principle cannot be put into practice unless powers are clearly divided between the European Union, the Member States and – possibly – local and regional authorities. The step has also been called for by the Council of European Municipalities and Regions (CEMR), who suggest "drawing up a list of the powers which belong exclusively to the Union and the Member States, it being understood by default that the other powers are either mixed or joint powers of the Union, the States and local and regional authorities or the exclusive powers of the latter"[54]. The Union of German Cities, meanwhile, wants to see the right to self-government for municipalities incorporated into the European treaties. It should be borne in mind that the German federal structure – with its list of spheres of competence, vertical division of powers and financial constitution – is, in effect, based on the principle of subsidiarity even if this principle is not expressly mentioned in the Basic Law. The opposite is true of the European Union: it is making liberal use of the word "subsidiarity" in its founding texts, without the principle genuinely being applied in its organisational structure.

In Germany, the ratification of the Maastricht Treaty sparked a broad debate on the limits of German involvement in European integration. Compliance of the treaty with the constitution was challenged before the Constitutional Court (*Bundesverfassungsgericht*) in Karlsruhe. In its judgement, drawn up by the judge-rapporteur Paul Kirchhof[55], the Court ruled that the transfer of powers, including monetary sovereignty, to the European Union was compatible with the Basic Law. At the same time, however, the court laid down its limits. It thus provided an answer to the following question: by exercising more and more of its powers at European level, is there a risk that the German State as it is could one day be dissolved and simply become part of another State, the European Union? According to the Court's decision, the European Union is not yet a State and cannot become one, because there is no homogenous European people or European public opinion[56]. For the Court, the European Union is no longer a federation of States (*Staatenbund*), and not yet a federal State (*Bundesstaat*). However, the Court considered it an intermediary structure: a "grouping of States", referred to as a *Staatenverbund*, which acts, in the first instance, through the governments of its Members States. Under this interpretation, the rights conferred to the European Parliament are an additional source of democratic legitimation, but the primary legitimation rests with national parliaments and governments. The Court stipulates that within this framework the *Bundestag* must always retain substantial powers. European integration must not go so far as to strip it of its role. Furthermore, the Constitutional Court reserved the right to assess the compliance of European decisions with the Basic Law if EU institutions went beyond the powers laid down in the treaties or if basic rights were not sufficiently respected. This provision puts the Constitutional Court in competition with the Court of Justice in Luxembourg. It can even be said that, with its 1993 ruling, the Constitutional Court gave itself a right to vet European integration in the future. This power should not be underestimated, for the Court is well respected and has considerable power in Germany.

[54] Declaration adopted by the Executive Bureau of the CEMR on 1 October 1998 in Vienna under the presidency of Valéry Giscard d'Estaing.
[55] BVerfG, vol. 89, p. 155
[56] See also the recent interview with Paul Kirchhof on the 50th anniversary of the Basic Law in the *Rheinischer Merkur*, 7 May 1999.

Indeed, the position of the Constitutional Court is opposed by a number of political figures and constitutional experts, who believe that the Basic Law must now be interpreted in the light of the "European constitution", as it has gradually developed over the last 50 years. This line of argument is based on the principle that in the present age of globalisation, the traditional sovereign nation State no longer exists and a State's constitution must be viewed in the context of the State's commitments at international level. From this point of view, a State is made up of various levels, among which power is shared. Some of the sovereign rights of the State's people are transferred to supranational institutions in certain substantial areas. The powers in other areas are exercised at the level of the State, which can be either unitary or federal (*multilevel constitutionalism*, Ingolf Pernice, 1998). This outlook seems better suited to the current stage of European integration than the traditional approach based on defence of national sovereignty.

IV. CONCLUSIONS

We have seen that the German federal system was originally conceived as a way of separating powers between the *Länder* and the federal State, with an important element of concurrent powers. The federal State very quickly exercised its legislative prerogatives in the area of concurrent powers, which resulted in legislative centralisation at federal level. This trend gained further momentum from 1969, when joint tasks with mixed financing provisions and the current system of financial apportionment were introduced into the Basic Law. The majority of legislative measures are now decided and financed jointly by the federal State and the *Länder*. This has resulted in a marked (and desired) alignment of living conditions within Germany and reduced the economic and legal disparities between *Länder*. Increasing coordination by the *Länder* in their areas of exclusive competence has contributed to this process. Some analyses take this even further: the concept of "unitary federal State" (Konrad Hesse) was first coined in 1962, and there has even been talk of a "unitary State in disguise" (Heidrun Abromeit) since 1992.

In order to counterbalance the dominance of the federal State in legislative matters, the *Länder* strengthened their coordination and the defence of their common interests within the *Bundesrat*. They also used their executive and administrative powers as regards the implementation of laws to influence the content of federal legislation. A form of cooperative federalism has thus developed over the last 50 years, in which policy-making rests on steady cooperation between the federal State and the *Länder* rather than a strict division of tasks, implementation and financing. The *Länder* conceded part of their autonomy in exchange for greater participation in federal matters. The result is a huge entanglement between the various political levels of the German federal State.

This system not only restricts the federal State's power to act (on account of its dependence on the *Länder*, represented by the *Bundesrat*), it also limits the *Länder*'s scope to experiment with individual solutions to their specific problems. Overall, this opaque and highly complex system makes efficient democratic supervision almost impossible. The decision-making mechanisms at federal level are difficult for citizens to understand, thus leaving political power in the hands of experts – who are mainly lawyers. As for political parties, this system obliges them to seek compromises, which are of a more technical than political nature. On the other hand, it could be said that the division of powers between the federal State and the *Länder*, the creative tension between several decision-making centres and levels and the separation of federal and regional mandates are factors which make the German system more democratic and prevent the concentration of power in the hands of a small number of people. However, many experts agree that there are too many checks and balances in the federal system to allow effective government and clear political choices.

Since European affairs have become more significant at national level, the *Länder* have asked to participate in decisions taken in Brussels. The system of *Länder* involvement in European affairs, established by Article 23 GG, has created a double political entanglement. In areas where the European treaties confer a particular power to the European Union, three political levels now take part in adopting and implementing legal acts: the European Union, the federal State and the *Länder*. In practice, this complicates the work of each of the three. The European Union must deal with a German government which is highly influenced by the *Länder*. These can, in certain cases, play a decisive role in establishing the German position. As for the German government, it has often had very reduced room for manoeuvre in

negotiations within the Council because it cannot stray too far from the position set by the *Bundesrat*. And the *Länder* frequently have difficulties implementing decisions taken in Brussels and explaining them to the citizens. Quite obviously, this state of affairs does little to help ordinary citizens – and often also politicians – understand EU affairs. On the contrary, it leaves room for controversy and shirking of responsibility on the part of political decision-makers**.**

While the German system and the current European system are difficult enough to understand in themselves, the entanglement of the two complicates matters even further. Nevertheless, in formal terms, the present situation respects the constitutional status of the *Länder* and ensures their participation in decision-making in areas where their powers are affected. In this context, the question arises as to the status and purpose of the Committee of the Regions in terms of democratic and institutional consistency. Its consultative role can admittedly be justified, since the underlying rationale is the same as for the two sides of industry within the Economic and Social Committee. And in some EU Member States, the regions have a very significant constitutional status. These regions might well, therefore, demand greater powers for the Committee of the Regions. However, it can be argued that, in the case of Germany, the *Länder* have already secured their participation in decision-making via the *Bundesrat*.

Apart from issues concerning the role of the regions, the German federal model is now compelling the European Union to address a number of fundamental problems which will affect more or less directly every system of government at several levels, and therefore also the institutional and procedural system of the European Union:

1. A clear division of powers and genuine autonomy for the federated States (i.e. the *Länder* in Germany) has proved to be virtually impossible in a federal structure that aims to harmonise economic and social conditions on its territory. Is the predominance of the federal level the precondition for economic and social unity or can other solutions be found?
2. The degree of potential centralisation of a federal system depends on how broadly the concurrent powers are defined. In the case of the European Union, is it in its interests to incorporate lists of exclusive and concurrent spheres of competence into its treaties?
3. In Germany, the areas that are the exclusive preserve of the Länder are not listed in the Basic Law. Hence the complexity of the procedures and decision-making mechanisms described above. This has prompted some commentators to suggest that exclusive powers for the Member States should be identified in the European treaties. However, experience has shown that a strict division of powers can be damaging in systems featuring several highly interdependent levels, where practically all areas of State action require at least minimum regulation at the highest level. Instead, should we not look in the direction of clearer decision-making and cooperation mechanisms between levels?
4. In Germany, subsidiarity was the guiding principle of the architects of the Basic Law, who translated it into articles in the constitution: self-government for the municipalities, powers for the *Länder* in all areas not regulated by the federal State, and lists of spheres of competence. In Europe, the principle of subsidiarity has been incorporated into the founding treaties for areas which are not the exclusive competence of the European Union (and which are not actually detailed), but its implementation is not sufficiently clear and its practical content still remains vague. It is therefore imperative to further clarify the concept of subsidiarity and its implementation in the European Union.

5. Cooperative federalism (as opposed to federalism with separate powers) tends to exclude the parliaments of the federated States (and therefore the legislative power), since it is the governments of these federated States (the executive power) which sit in the second chamber and thus determine their policy within the federal system. In the light of the experience of these last 20 years, can we speak of "executive federalism" to describe the decision-making process in the European Union?

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The German experience therefore cautions against overly complex institutional mechanisms, which tend to give a technocratic bias to democracy. Conversely, however, it also shows that the federal structure has made it possible to reconcile national unity with the historical diversity of the regions and municipalities in the political and cultural spheres. Like any federal system, Germany is constantly evolving and undergoes cycles governed by the antinomy between the centre and the periphery and the opposition between centralising and decentralising forces. At all events, as regards the institutional challenges of European integration, there can be no doubt that the German system has demonstrated its flexibility in responding to the need to change.

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VI. ANNEXES

Extracts from the Basic Law (GG)[57]:

1. Article 23 and 24 GG on the European Union and international institutions

Article 23 [The European Union]

(1) With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social, and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law. To this end the Federation may transfer sovereign powers by a law with the consent of the Bundesrat. The establishment of the European Union, as well as changes in its treaty foundations and comparable regulations that amend or supplement this Basic Law, or make such amendments or supplements possible, shall be subject to paragraphs (2) and (3) of Article 79.

(2) The Bundestag and, through the Bundesrat, the Länder shall participate in matters concerning the European Union. The Federal Government shall keep the Bundestag and the Bundesrat informed, comprehensively and at the earliest possible time.

(3) Before participating in legislative acts of the European Union, the Federal Government shall provide the Bundestag with an opportunity to state its position. The Federal Government shall take the position of the Bundestag into account during the negotiations. Details shall be regulated by the law.

(4) The Bundesrat shall participate in the decision-making process of the Federation insofar as it would have been competent to do so in a comparable domestic matter, or insofar as the subject falls within the domestic competence of the Länder.

(5) Insofar as, in an area within the exclusive competence of the Federation, interests of the Länder are affected, and in other matters, insofar as the Federation has legislative power, the Federal Government shall take the position of the Bundesrat into account. To the extent that the legislative powers of the Länder, the structure of Land authorities, or Land administrative procedures are primarily affected, the position of the Bundesrat shall be given the greatest possible respect in determining the Federation's position consistent with the responsibility of the Federation for the nation as a whole. In matters that may result in increased expenditures or reduced revenues for the Federation, the consent of the Federal Government shall be required.

(6) When legislative powers exclusive to the Länder are primarily affected, the exercise of the rights belonging to the Federal Republic of Germany as a Member State of the European Union shall be delegated to a representative of the Länder designated by the Bundesrat. These rights shall be exercised with the participation and concurrence of the Federal Government; their exercise shall be consistent with the responsibility of the Federation for the nation as a whole.

(7) Details respecting paragraphs (4) through (6) of this Article shall be regulated by a law requiring the consent of the Bundesrat.

[57] Nomos homepage: http://www.bundesrecht.de/grundgesetz/

Article 24 [International organisations]

(1) The Federation may by a law transfer sovereign powers to international organisations.

(1a) Insofar as the Länder are competent to exercise State powers and to perform State functions, they may, with the consent of the Federal Government, transfer sovereign powers to transfrontier institutions in neighbouring regions.

(2) With a view to maintaining peace, the Federation may enter into a system of mutual collective security; in doing so it shall consent to such limitations upon its sovereign powers as will bring about and secure a lasting peace in Europe and among the nations of the world.

(3) For the settlement of disputes between States, the Federation shall accede to agreements providing for general, comprehensive, and compulsory international arbitration.

2. Articles 70-75 GG on the division of legislative powers between the federal State and the Länder

Article 70 [Division of legislative powers between the Federation and the Länder]

(1) The Länder shall have the right to legislate insofar as this Basic Law does not confer legislative power on the Federation.

(2) The division of authority between the Federation and the Länder shall be governed by the provisions of this Basic Law respecting exclusive and concurrent legislative powers.

Article 71 [Exclusive legislative power of the Federation: definition]

On matters within the exclusive legislative power of the Federation, the Länder shall have power to legislate only when and to the extent that they are expressly authorised to do so by a federal law.

Article 72 [Concurrent legislative power of the Federation: definition]

(1) On matters within the concurrent legislative power, the Länder shall have power to legislate so long as and to the extent that the Federation has not exercised its legislative power by enacting a law.

(2) The Federation shall have the right to legislate on these matters if and to the extent that the establishment of equal living conditions throughout the federal territory or the maintenance of legal or economic unity renders federal regulation necessary in the national interest.

(3) A federal law may provide that federal legislation that is no longer necessary within the meaning of paragraph (2) of this Article may be superseded by Land law.

Article 73 [Subjects of exclusive legislative power]

The Federation shall have exclusive power to legislate with respect to:
1. foreign affairs and defence, including protection of the civilian population;
2. citizenship in the Federation;
3. freedom of movement, passports, immigration, emigration, and extradition;
4. currency, money, and coinage, weights and measures, and the determination of standards of time;
5. the unity of the customs and trading area, treaties respecting commerce and navigation, the free movement of goods, and the exchange of goods and payments with foreign countries, including customs and border protection;
6. air transport;
7. postal and telecommunication services;
8. the legal relations of persons employed by the Federation and by federal corporations under public law;
9. industrial property rights, copyrights, and publishing;
10. cooperation between the Federation and the Länder concerning
    a) criminal police work,
    b) protection of the free democratic basic order, existence, and security of the Federation or of a Land (protection of the constitution), and
    protection against activities within the federal territory which, by the use of force or preparations for the use of force, endanger the external interests of the Federal Republic of Germany;
11. statistics for federal purposes.

Article 74 [Subjects of concurrent legislation]

(1) Concurrent legislative powers shall extend to the following subjects:
1. civil law, criminal law, and corrections, court organisation and procedure, the legal profession, notaries, and the provision of legal advice;
2. registration of births, deaths, and marriages;
3. the law of association and assembly;
4. the law relating to residence and establishment of aliens;
the law relating to weapons and explosives;
5. (repealed in 1994)
6. matters concerning refugees and expellees;
7. public welfare;
8. (repealed in 1994)
9. war damage and reparations;
10. benefits for persons disabled by war and for dependants of deceased war victims as well as assistance to former prisoners of war;
10a. war graves and graves of other victims of war or despotism;
11. the law relating to economic affairs (mining, industry, energy, crafts, trades, commerce, banking, stock exchanges, and private insurance);
11a. the production and utilisation of nuclear energy for peaceful purposes, the construction and operation of facilities serving such purposes, protection against hazards arising from the release of nuclear energy or from ionising radiation, and the disposal of radioactive substances;
12. labour law, including the organisation of enterprises, occupational safety and health, and employment agencies, as well as social security, including unemployment insurance;
13. the regulation of educational and training grants and the promotion of research;
14. the law regarding expropriation, to the extent relevant to matters enumerated in Articles 73 and 74;
15. the transfer of land, natural resources, and means of production to public ownership or other forms of public enterprise;
16. prevention of the abuse of economic power;
17. the promotion of agricultural production and forestry, ensuring the adequacy of the food supply, the importation and exportation of agricultural and forestry products, deep-sea and coastal fishing, and preservation of the coasts;
18. real estate transactions, land law (except for laws respecting development fees), and matters concerning agricultural leases, as well as housing, settlement, and homestead matters;
19. measures to combat dangerous and communicable human and animal diseases, admission to the medical profession and to ancillary professions or occupations, as well as trade in medicines, drugs, narcotics, and poisons;
19a. the economic viability of hospitals and the regulation of hospital charges;
20. protective measures in connection with the marketing of food, drink, and tobacco, essential commodities, feedstuffs, agricultural and forest seeds and seedlings, and protection of plants against diseases and pests, as well as the protection of animals;
21. maritime and coastal shipping, as well as navigational aids, inland navigation, meteorological services, sea routes, and inland waterways used for general traffic;
22. road traffic, motor transport, construction and maintenance of long-distance highways, as well as the collection of tolls for the use of public highways by vehicles and the allocation of the revenue;
23. non-federal railways, except mountain railways;
24. waste disposal, air pollution control, and noise abatement;
25. State liability;
26. human artificial insemination, analysis and modification of genetic information, as well as the regulation of organ and tissue transplantation.

(2) Laws adopted pursuant to clause 25 of paragraph (1) of this Article shall require the consent of the Bundesrat.

Article 74a [Concurrent legislative power of the Federation: remuneration, pensions, and related benefits of members of the public service]

(1) Concurrent legislative power shall also extend to the remuneration, pensions, and related benefits of members of the public service who stand in a relationship of service and loyalty defined by public law, insofar as the Federation does not have exclusive legislative power pursuant to clause 8 of Article 73.

(2) Federal laws enacted pursuant to paragraph (1) of this Article shall require the consent of the Bundesrat.

(3) Federal laws enacted pursuant to clause 8 of Article 73 shall likewise require the consent of the Bundesrat, insofar as they contemplate standards for the structure or computation of remuneration, pensions, and related benefits including the classification of positions, or minimum or maximum rates, that differ from those provided for in federal laws enacted pursuant to paragraph (1) of this Article.

(4) Paragraphs (1) and (2) of this Article shall apply mutatis mutandis to the remuneration, pensions, and related benefits of judges of the Länder. Paragraph (3) of this Article shall apply mutatis mutandis to laws enacted pursuant to paragraph (1) of Article 98.

Article 75 [Areas of federal framework legislation]

(1) Subject to the conditions laid down in Article 72, the Federation shall have power to enact provisions on the following subjects as a framework for Land legislation:
1. the legal relations of persons in the public service of the Länder, municipalities, or other corporate bodies under public law, insofar as Article 74a does not otherwise provide;
1a. general principles respecting higher education;
2. the general legal relations of the press;
3. hunting, nature conservation, and landscape management;
4. land distribution, regional planning, and the management of water resources;
5. matters relating to the registration of residence or domicile and to identity cards;
6. measures to prevent expatriation of German cultural assets.
Paragraph (3) of Article 72 shall apply mutatis mutandis.

(2) Only in exceptional circumstances may framework legislation contain detailed or directly applicable provisions.

(3) When the Federation enacts framework legislation, the Länder shall be obliged to adopt the necessary Land laws within a reasonable period prescribed by the law.

3. Article 91a and b GG on the joint tasks

Article 91a [Participation of the Federation pursuant to federal legislation]

(1) In the following areas the Federation shall participate in the discharge of responsibilities of the Länder, provided that such responsibilities are important to society as a whole and that federal participation is necessary for the improvement of living conditions (joint tasks):
1. extension and construction of institutions of higher learning, including university clinics;
2. improvement of regional economic structures;
3. improvement of the agrarian structure and of coastal preservation.

(2) Joint tasks shall be defined in detail by a federal law requiring the consent of the Bundesrat. This law shall include general principles governing the performance of such tasks.

(3) The law referred to in paragraph (2) of this Article shall provide for the procedure and institutions required for joint overall planning. The inclusion of a project in the overall plan shall require the consent of the Land in whose territory it is to be carried out.

(4) In cases to which subparagraphs 1 and 2 of paragraph (1) of this Article apply, the Federation shall finance one half of the expenditure in each Land. In cases to which subparagraph 3 of paragraph (1) of this Article applies, the Federation shall finance at least one half of the expenditure, and the proportion shall be the same for all Länder. Details shall be regulated by the law. The provision of funds shall be subject to appropriation in the budgets of the Federation and the Länder.

(5) Upon request the Federal Government and the Bundesrat shall be informed about the execution of joint tasks.

Article 91b [Cooperation between the Federation and the Länder pursuant to agreements]

Pursuant to agreements, the Federation and the Länder may cooperate in educational planning and in the promotion of research institutions and research projects of supraregional importance. The apportionment of costs shall be regulated by the relevant agreement.

4. Articles 106 and 107 GG on the apportionment of tax revenue and financial equalisation

Article 106 [Apportionment of tax revenue]

(1) The yield of fiscal monopolies and the revenue from the following taxes shall accrue to the Federation:
1. customs duties;
2. taxes on consumption insofar as they do not accrue to the Länder pursuant to paragraph (2), or jointly to the Federation and the Länder in accordance with paragraph (3), or to municipalities in accordance with paragraph (6) of this Article;
3. the highway freight tax;
4. the taxes on capital transactions, insurance, and bills of exchange;
5. nonrecurring levies on property and equalisation of burdens levies;
6. income and corporation surtaxes;
7. levies imposed within the framework of the European Communities.

(2) Revenue from the following taxes shall accrue to the Länder:
1. the property tax;
2. the inheritance tax;
3. the motor vehicle tax;
4. such taxes on transactions as do not accrue to the Federation pursuant to paragraph (1) or jointly to the Federation and the Länder pursuant to paragraph (3) of this Article;
5. the beer tax;
6. the tax on gambling establishments.

(3) Revenue from income taxes, corporation taxes, and turnover taxes shall accrue jointly to the Federation and the Länder (joint taxes) to the extent that the revenue from the income tax is not allocated to municipalities pursuant to paragraph (5) of this Article. The Federation and the Länder shall share equally the revenues from income taxes and corporation taxes. The respective shares of the Federation and the Länder in the revenue from the turnover tax shall be determined by a federal law requiring the consent of the Bundesrat. Such determination shall be based on the following principles:
1. The Federation and the Länder shall have an equal claim against current revenues to cover their necessary expenditures. The extent of such expenditures shall be determined with due regard to multi-year financial planning.
2. The financial requirements of the Federation and of the Länder shall be coordinated in such a way as to establish a fair balance, avoid excessive burdens on taxpayers, and ensure uniformity of living standards throughout the federal territory.

(4) The respective shares of the Federation and the Länder in the revenue from the turnover tax shall be apportioned anew whenever the ratio of revenues to expenditures of the Federation becomes substantially different from that of the Länder. If a federal law imposes additional expenditures on or withdraws revenue from the Länder, the additional burden may be compensated for by federal grants pursuant to a federal law requiring the consent of the Bundesrat, provided the additional burden is limited to a short period of time. This law shall establish the principles for calculating such grants and distributing them among the Länder.

(5) A share of the revenue from the income tax shall accrue to the municipalities, to be passed on by the Länder to their municipalities on the basis of the income taxes paid by their inhabitants. Details shall be regulated by a federal law requiring the consent of the Bundesrat. This law may provide that municipalities may establish supplementary or reduced rates with respect to their share of the tax.

(6) Revenue from taxes on real property shall accrue to the municipalities; revenue from local taxes on consumption and expenditures shall accrue to the municipalities or, as may be provided for by Land legislation, to associations of municipalities. Municipalities shall be authorised to establish the rates at which taxes on real property are levied, within the framework of the laws. If there are no municipalities in a Land, revenue from taxes on real property as well as from local taxes on consumption and expenditures shall accrue to the Land. The Federation and the Länder may participate, by virtue of an apportionment, in the revenue from the tax on trades. Details regarding such apportionment shall be regulated by a federal law requiring the consent of the Bundesrat. In accordance with Land legislation, taxes on real property as well as the municipalities' share of revenue from the income tax may be taken as a basis for calculating the amount of apportionment.

(7) An overall percentage of the Land share of total revenue from joint taxes, to be determined by Land legislation, shall accrue to the municipalities or associations of municipalities. In all other respects Land legislation shall determine whether and to what extent revenue from Land taxes shall accrue to municipalities (associations of municipalities).

(8) If in individual Länder or municipalities (associations of municipalities) the Federation requires special facilities to be established that directly result in an increase of expenditure or in reductions in revenue (special burden) to these Länder or municipalities (associations of municipalities), the Federation shall grant the necessary compensation if and insofar as the Länder or municipalities (associations of municipalities) cannot reasonably be expected to bear the burden. In granting such compensation, due account shall be taken of indemnities paid by third parties and financial benefits accruing to these Länder or municipalities (associations of municipalities) as a result of the establishment of such facilities.

(9) For the purpose of this Article, revenues and expenditures of municipalities (associations of municipalities) shall also be deemed to be revenues and expenditures of the Länder.

Article 107 [Financial equalisation]

(1) Revenue from Land taxes and the Land share of revenue from income and corporation taxes shall accrue to the individual Länder to the extent that such taxes are collected by revenue authorities within their respective territories (local revenue). Details respecting the delimitation as well as the manner and scope of allotment of local revenue from corporation and wage taxes shall be regulated by a federal law requiring the consent of the Bundesrat. This law may also provide for the delimitation and allotment of local revenue from other taxes. The Land share of revenue from the turnover tax shall accrue to the individual Länder on a per capita basis; a federal law requiring the consent of the Bundesrat may provide for the grant of supplementary shares not exceeding one quarter of a Land share to Länder whose per capita revenue from Land taxes and from income and corporation taxes is below the average of all the Länder combined.

(2) Such law shall ensure a reasonable equalisation of the disparate financial capacities of the Länder, with due regard for the financial capacities and needs of municipalities (associations of municipalities). It shall specify the conditions governing the claims of Länder entitled to equalisation payments and the liabilities of Länder required to make them as well as the criteria for determining the amounts of such payments. It may also provide for grants to be made by the Federation to financially weak Länder from its own funds to assist them in meeting their general financial needs (supplementary grants).

5. The formula for apportioning fiscal revenue in the German federal system[58]

(This page is not available online).

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6. Allocation of votes in the Bundesrat[59]

Baden-Württemberg	6	Saxony	4
Lower Saxony	6	Saxony-Anhalt	4
Bavaria	6	Schleswig-Holstein	4
Nordrhein-Westfalen	6	Thuringia	4
Berlin	4	Bremen	3
Brandenburg	4	Hamburg	3
Hessen	5	Mecklenburg-Western Pomerania	3
Rheinland-Pfalz	4	Saarland	3

At least three representatives per *Land*, four votes for two to six million inhabitants, five votes for six million inhabitants and six votes for more than seven million inhabitants.

[59] Source: Bundesrat, Public Relations Office, Bonn : The German Federal Council (Bundesrat)

7. Decision-making procedures for federal legislation[60]

Procedure for laws requiring the consent of the *Bundesrat*

(This page is not available online).

[60] Source: Bundesrat, Public Relations Office, Bonn : The German Federal Council (Bundesrat)

Procedure for objection bills

(This page is not available online).

8. Extract from the Federal Constitutional Court (*Bundesverfassungsgericht*) ruling on the conformity of the Maastricht Treaty with the Basic Law[61]

« In so far as the complaint of unconstitutionality entered by the complainant at 1 is admissible, it is unfounded. The Federal Constitutional Court can examine here the grant of sovereign powers to the European Union and the Communities which it comprises only by the criterion of the guarantees contained in Article 38 of the Basic Law. Those guarantees are not violated by the Law Approving the Union Treaty, as can be seen from the content of the Treaty: the Treaty establishes a European Union of States which is to be borne by the Member States and respects their national identity. It relates to Germany's membership of supranational organisations, not membership of a European State. The tasks of the European Union and the powers granted for their exercise are laid down in a way which makes them sufficiently foreseeable: the principle of limited specific empowerment is adhered to, the European Union is not granted a power to determine its own competences (*Kompetenz-Kompetenz*) and the assumption by the European Union and the European communities of further tasks and powers is made contingent upon additions and amendments to the Treaty, and therefore subject to the consent of the national Parliaments. The extent of the tasks and powers granted, and the way in which the Treaty governs the formation of will in the European Union and in the institutions of the European Communities, do not go so far as to undermine the German *Bundestag*'s decision-making and scrutiny powers to the point where the principle of democracy, in so far as Article 79(3) of the Basic Law declares it inviolable, is violated.

...

If the Federal Republic of Germany becomes a member of a community of States with authority to act in a sovereign capacity, and if that community of States is granted autonomous sovereign powers – both are expressly permitted under the Basic Law for the purpose of creating a united Europe (Article 23(1) of the Basic Law) – then to that extent democratic legitimation cannot take the same form as within a State order governed in a uniform and definitive manner by a State constitution. If supranational organisations are given sovereign rights, the organ representing and elected by the people, the German *Bundestag*, and with it the citizens who are entitled to vote, necessarily lose influence over the forming of the political will and the decision-making process. Any accession to a community of States has as its result that the member who accedes to such a community is bound by that community's decisions. But the Member State, and with it its citizens, also gain possibilities for exerting influence by participation in the forming of the community's will in the pursuit of common – and therefore also the Member State's own – aims, the outcome of which is binding on all Member States and therefore also requires each Member state to acknowledge that binding effect upon itself.

…

Nevertheless, as the Community's tasks and powers are expanded, so the need grows to add to the democratic legitimacy and influence imparted through the national parliaments by securing the representation of the national populations of the Member States in a European Parliament, as a source of additional democratic underpinning for the policies of the European Union. In the Union citizenship established by the Maastricht Treaty, an enduring legal bond is formed between the nationals of the Member States. This bond, while not having a closeness comparable to common citizenship of a State, nevertheless gives legally binding expression to the existing degree of *de facto* community of interest (*cf.* in particular Article 8(b)(1) and (2) of the Treaty). The exertion of influence by the citizens of the Union can result in democratic legitimation for the European institutions to the extent that the prerequisites exist within the peoples of the European Union themselves.

…

Democratic legitimacy in the Union of States constituting the European Union is therefore necessarily conferred by feedback from the actions of the European institutions in the parliaments of the Member

[61] Source: Oppenheimer, Andrew : *The Relationship between European Community Law and National Law. The Cases.* Cambridge University Press, 1994, pp. 527-576.

States. In addition, and increasingly as the European nations grow together, democratic legitimacy will be conferred within the structure of the European Union by the European Parliament elected by the citizens of the Member States. Even at this early stage of the process, the legitimacy conferred by the European Parliament already has a supporting role which could be reinforced if that Parliament were elected in accordance with a uniform elect-oral law in all Member States, as provided for by Article 138(3) of the EC Treaty, and its influence on the politics and legislation of the European Communities were to grow. What is crucial is that development of the democratic foundations of the Union keeps pace with integration and that, as integration progresses, a living democracy continues to operate in the Member States. If the European Union of States were to have an excessive number of tasks and powers, that would permanently weaken democracy at Member State level, with the result that the parliaments of the Member States could no longer adequately confer legitimacy on the sovereign authority exercised by the Union.

…

The exercise of sovereign authority by a union of States such as the European Union is based on powers conferred by States which remain sovereign and which, at international level, always act through their governments and thereby control the process of integration. The exercise of such authority is therefore primarily governmentally determined… »