

JURISPRUDENCE ON EUROPEAN INTEGRATION

Transparency films (presented in the lectures)

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§ 2 Basic concepts, implementation and enforcement of the law of the European Union

I. Community law as an independent (distinct) legal order

- 1) Leading case *van Gend & Loos*¹ (1963): new legal order of international law
 - see presentation by LAURI TALUMÄE
- 2) Other important decisions
 - a) *Busseni*² (1990): coherence of the Treaties
 - b) *Les Verts*³ (1986), *EEA I* (1991)⁴: the EEC Treaty as a constitutional charter
 - see presentation by EDOUARD HAGUET
 - c) *Foto-Frost*⁵ (1987): no jurisdiction of national courts to declare community acts invalid

II. The direct applicability of Community law

- 1) *Van Gend & Loos*⁶ (1963): direct applicability of primary Community law
 - confirmed in the case *Lütticke*⁷ (1966)
- 2) *Leberpfennig*⁸ (1970): direct applicability of decisions
- 3) *Ratti*⁹ (1979): direct applicability of directives
 - see also the case *von Duyn*¹⁰ (1974)

III. The primacy of Community law

- 1) Leading case *Costa/ENEL*¹¹ (1964): primacy of Community law
- 2) *Internationale Handelsgesellschaft*¹² (1970): primacy also over national constitutional law
 - accepted in principle (!) by the constitutional courts of the member states
 - the question of the limits of this primacy is still unsettled (see § 8 of the course)
 - see presentation by TALVI TÖNISMANN
- 3) *Simmenthal II*¹³ (1978): on the effect of the primacy of Community law
- 4) Other important decisions
 - a) *Commission/Italy*¹⁴ (1986): non-applicable national provisions must be repealed
 - b) *Factortame*¹⁵ (1990): if necessary, conflicting provisions of national law must be neutralized by measures of interim relief

IV. The implementation of Community law by the member states

- note: in the nineties, the far-reaching requirements formulated by the ECJ triggered a controversial discussion about the *Europeanisation of administrative law*
- 1) Leading case *Deutsche Milchkontor*¹⁶ (1983): standards for the implementation of Community law by the member states
 - application in accordance to national law must not affect its scope and effectiveness
 - 2) *Harz*¹⁷ und *Colson und Kamann*¹⁸ (1984): national law to be interpreted in the light of the directives

- 3) *Factortame*¹⁹ (1990): interim relief to enforce Community law
- 4) *Zuckerfabrik Süderdithmarschen*²⁰ (1991): interim relief also against the implementation of Community law
- 5) *TA-Luft (Commission/Germany)*²¹ (1991): no implementation of directives through administrative practice or administrative provisions
 - not even through the very special "normkonkretisierende Verwaltungsvorschriften"
 - this decision met strong resistance from national administrative law scholars; see, for example, RUPP, *Juristenzeitung* 1991, 1034
- 6) Other important decisions
 - a) *Vin de table (Commission/Germany)*²² (1990): member states must take coercive measures to enforce Community law
 - see presentation by ARNAUD BOURGEOIS
 - b) *Alcan*²³ (1997): restricted protection of legitimate expectations in cases of the recovery of illegitimate state aids

V. Directives

- see also presentation by MĀRIS BUTĀNS
- 1) *Ratti* (1979): direct applicability of directives in favour of the citizen after expiration of the implementation period
 - only against the state (vertical, not horizontal effect), but wide concept of the "state": *Foster*²⁴ (1990): also bodies, which, pursuant to a measure adopted by the state, are responsible for providing public services under the control of the state
 - 2) *Becker*²⁵ (1982): direct applicability must be ascertained separately for the individual provisions of a directive
 - German Federal Constitutional Court (BVerfGE 75, 223): the jurisprudence on the direct applicability of directives is an admissible judicial development (not a judicial making) of law
 - 3) *Harz and Colson and Kamann* (1984): national law to be interpreted in the light of the directives
 - 4) *Marshall I*²⁶ (1986): no direct applicability of directives against the citizen
 - no direct horizontal effect
 - confirmed in the case *Faccini Dori*²⁷ (1994) despite the criticism of scholars and advocates general
 - further reading: see the opinion of advocate general LENZ in the case *Faccini Dori*
 - 5) *TA-Luft (Commission/Germany)* (1991): no implementation of directives through administrative practice or administrative provisions
 - 6) *Inter-Environnement Wallonie*²⁸ (1997): precursory effect of directives during implementation period
 - member states must not take any measures which could seriously compromise the result prescribed
 - 7) Other important decisions
 - a) *Vegetable Seed Directive (Commission/Italy)*²⁹ (1976): member states cannot invoke transposition delays in other states to justify their own failure

- b) *Public Procurement Directive (Commission/Germany)*³⁰ (1995): transposition requires granting of individual [subjective] rights, where the directive is intended to create rights for individuals
- c) *Großkrotzenburg thermal power station (Commission/Germany)*³¹ (1995): objective effect of directives
 - even directives, which do not intend to create rights for individuals, may become directly applicable (here: directive 85/377 on the assessment of the effects of certain public and private projects on the environment)

VI. State liability pursuant to Community law

- further reading: BETLEM/PÉREZ GONZÁLEZ/GRANGER/SCHOIBWOHL, Francovich Follow-Up, www.asser.nl [at "dossiers"] (overview on the development until 2007)
- 1) Leading case *Francovich*³² (1991): state liability pursuant to Community law for non-implementation of directives
 - reasoning: inherent in the system of the Treaty
 - conditions of liability:
 - result prescribed by the directive entails grant of rights to individuals
 - content of those rights can be identified on the basis of the directive provisions
 - causality
 - see presentation by JAANUS PROST
 - 2) Leading case *Brasserie du Pêcheur and Factortame*³³ (1996): state liability pursuant to Community law for violation of directly applicable provisions
 - judges justify the judicial introduction of state liability with the task conferred on them by art. 164 EC Treaty (later: 220 EC Treaty, today: 19(1) EU Treaty) of ensuring "that ... the law is observed" ("sichern ... die Wahrung des Rechts")
 - definition of the conditions of liability analogously to art. 215(2) EC Treaty (later: 288(2) EC Treaty, today: 340 FEU Treaty) in accordance with the general principles common to the laws of the member states
 - in particular: liability only in case of a sufficiently serious breach of Community law, but fault is not a condition of liability
 - liability also for unlawful legislative acts
 - commensurate extent of the reparation (in principle including loss of profit)
 - 3) Other important decisions
 - a) *British Telecommunications*³⁴ (1996): state liability also for incorrect implementation of directives
 - b) *Dillenkofer*³⁵ (1996): on the conditions of a sufficiently serious breach and the grant of rights to individuals
 - c) *Hedley Lomas*³⁶ (1996): state liability also for violation of Community law by administrative practice
 - d) *Köbler*³⁷ (2003): state liability also for violation of Community law by judgements of a supreme court
 - only in case of a *manifest* infringement, in particular of a "manifest breach of the case-law of the Court in the matter"

§ 3 The competences of the European Union

I. Implied powers of the European Communities

- 1) *FÉDÉCHAR*³⁸ (1956): the idea of *implied powers*
- 2) *AETR*³⁹ (1971): implied power to conclude international treaties
 - this decision was confirmed in the case *Kramer*⁴⁰ (1976)
- 3) *Laying-up Fund for Inland Waterway Vessels*⁴¹ (1977): implied power to establish new institutions of public intern. law in intern. treaties

II. The approximation of laws in the internal market

- 1) *Product Safety Directive*⁴² (1994): art. 100a EEC Treaty (later: 95 EC Treaty, today: 114 FEU Treaty) empowers also to measures relating to specific products or classes of products
- 2) *Tobacco advertising I*⁴³ (2000): no competence of the Community for a general prohibition of advertising for tobacco products
 - no general competence of the Community to regulate the internal market
 - measures based on art. 100a (today: 114) must intend and contribute to improve (!) the conditions for the establishment or functioning of the internal market
 - one of the first cases of a rigorous review with regard to the competences!
 - note, however, the return to a "generous" review in the case *tobacco advertising II*⁴⁴ (2006): the Community has the competence for a general prohibition of advertising in the radio and in consumer-orientated printed and electronic media, because the existing differences in the national regulations have a negative effect on the internal market...

III. The choice between different legal bases

- 1) *System of generalized preferences I*⁴⁵ (1987)
 - a) choice of the legal basis must be based on objective factors amenable to judicial review
 - b) art. 235 EEC Treaty (later: 308 EC Treaty, today: 352 FEU Treaty) only a subsidiary legal basis
- 2) *Airport transit*⁴⁶ (1998): measures under the "Third Pillar" must not encroach upon the powers of the Community
 - in this case the legal basis from *Community* law is relevant
 - insofar ECJ has jurisdiction to review pursuant to art. L (later: 46) EU Treaty

IV. The principle of subsidiarity

- still no important relevant jurisprudence...

V. Other important decisions

- 1) *Accession to ECHR*⁴⁷ (1996): no competence to accede to the European Convention
 - not even arising from art. 235 (today: 352)
- 2) *Immigration policy*⁴⁸ (1987)
 - an example for a purpose-directed handling of Community law (note the style and perspective of the reasoning)
- 3) Other decisions

§ 4 The institutions of the European Union

I. General aspects

- 1) *System of generalized tariff preferences II*⁴⁹ (1995): duty of loyal cooperation of the Community institutions
- 2) *Transparency Directive*⁵⁰ (1982): no dogmatic distinction between Commission directives and Council directives

II. The European Parliament

- 1) *Roquette Frères/Isoglucose*⁵¹ (1980): due consultation of the European Parliament is an essential formality
 - the *institutional balance* as equivalent in Community law to the separation of powers in a state
- 2) *Les Verts*⁵² (1986): possibility to bring actions for annulment against measures adopted by the European Parliament
 - concerning the former art. 173 (later: 230, see today: art. 263), where these actions were not mentioned
 - reasoning: the EEC is a community based on the rule of law...
 - see presentation by EDOUARD HAGUET
- 3) *Tchernobyl I*⁵³ (1990): actions for annulment of the European Parliament
 - concerning the former art. 173 (see today art. 263), where these actions were not mentioned
 - only to safeguard its prerogatives
 - political reasoning with regard to the institutional balance

§ 5 Fundamental rights and the rule of law in the European Union

- further reading: EHLERS (ED.), European Fundamental Rights and Freedoms, 2007, §§ 14 ff.

I. Basic concepts

- 1) *Stauder*⁵⁴ (1969): Fundamental rights as general principles of Community law
- 2) *Internationale Handelsgesellschaft*⁵⁵ (1970): Primacy of Community law also over national fundamental rights - but fundamental rights will be protected in Community law!
- 3) *Nold*⁵⁶ (1974): the constitutional traditions common to the member states as sources of inspiration for the jurisprudence on fundamental rights in Community law
- 4) *Hauer*⁵⁷ (1979): the constitutional traditions common to the member states and the ECHR as sources of inspiration for the jurisprudence on fundamental rights in Community law

II. General dogmatics of the fundamental rights

- 1) *Nold*⁵⁸ (1974): fundamental rights subject to restrictions in the pursuit of public interests
- 2) *Hauer*⁵⁹ (1979): limits and limits of limits
 - no clear distinction between proportionality and the protection of the essence of the rights
- 3) *Hoechst*⁶⁰ (1989): interpretation of Community law in the light of the fundamental rights, requirement of a legal basis for encroachments, respect of procedural guarantees laid down by national law and other aspects
- 4) *Schmidberger* (2003): fundamental rights as limits of the economic fundamental freedoms
 - see § 6 of the course
- 5) *Kadi/Al Barakaat*⁶¹ (2008): Community acts, which are implementing decisions of the Sanctions Committee of the UN Security Council for the fight against terrorism that do not leave autonomous discretion, are not immune from jurisdiction with regard to the review of their compatibility with fundamental rights
 - example for an effective application of fundamental rights (here: the rights to respect for property, to be heard and to effective judicial review)
- 6) Excursus: Summary and confirmation of the ECJ jurisprudence on limits and limits of limits in art. 52(1) of the Charter of Fundamental Rights

III. The fundamental rights regime of the Union and the member states

- 1) *SPUC v. Grogan*⁶² (1991): Community law does not guarantee the freedom to inform for political reasons about possibilities of abortion in other member states
- 2) *Carpenter*⁶³ (2002): freedom to provide services as an obstacle to the expulsion of one's spouse
 - further reading: WEATHERILL, 477; MAGER, *Juristenzeitung* 2003, 204

IV. Important decisions on individual fundamental rights (selection)

- see the inventory of the most important fundamental rights in the *European Parliament Fact Sheets* (2008)⁶⁴
- 1) *Hauer*⁶⁵ (1979): the right to property and the freedom to pursue trade or profession as fundamental rights in Community law
 - 2) *Hoechst*⁶⁶ (1989): the right to the inviolability of the home as a fundamental right in Community law
 - does not extend to business premises of enterprises (abandoned in the case *Roquette Frères*⁶⁷, 2002)
 - 3) *Banana market organisation*⁶⁸ (1994): freedom to pursue trade or profession may be restricted extremely
 - decision *heavily criticised* by scholars in both, European and constitutional law⁶⁹; the .VERWALTUNGSGERICHT FRANKFURT at first refused to follow and referred the case to the German Federal Constitutional Court⁷⁰
 - see also the case *Atlanta Fruchthandelsgesellschaft*⁷¹ (1995)
 - 4) *Directive on biopatents*⁷² (2001): human dignity as a general principle of Community law
 - 5) *Mangold*⁷³ (2005): non-discrimination on grounds of age as a general principle of Community law
 - this *heavily criticised* decision provoked the appeal of the former president of the German Federal Constitutional Court to "Stop the European Court of Justice"⁷⁴
 - after that appel, the ECJ moderated its position in the *Bartsch* judgement⁷⁵ (2008): no prohibition of discrimination where the discriminatory treatment contains no link with Community law

----- December 1, 2009: The Charter of Fundamental Rights enters into force. -----

V. The new fundamental rights regime - the Charter of Fundamental Rights

- not yet any important decisions until April 2010
- on a conference in April 2010, Latvian judge at the ECJ EGILS LEVITS signalizes that he and his colleagues are willing to go deep into the new fundamental rights dogmactis under the Charter

VI. Principles of the rule of law

- see also the jurisprudence presented in § 2 of the course

§ 6 The economic fundamental freedoms of the citizens in the European Union

- further reading: PODDUBNY AND OTHERS, EC Internal Market Law. Relevant Cases of the European Court of Justice (script elaborated by students)⁷⁶

I. General dogmatics of the economic fundamental freedoms

- 1) *French blockades*⁷⁷ (1997): member states obliged to intervene against import blockades set up by private persons
 - *duty of protection* to ensure the enforcement of the fundamental freedoms (not yet recognized with regard to the fundamental rights!)
- 2) *Schmidberger*⁷⁸ (2003): fundamental rights as inherent limits of the economic fundamental freedoms

II. The free movement of goods

- 1) *Diamandarbeiders*⁷⁹ (1969): large concept of charges having equivalent effect to custom duties in art. 12 EEC Treaty (later: 25 EC Treaty, today: 30 FEU Treaty)
- 2) *Dassonville*⁸⁰ (1974): large concept of measures having equivalent effect to quantitative restrictions on imports in art. 30 EEC Treaty (later: 28 EC Treaty, today: 34 FEU Treaty)
 - enlarging considerably the range of the free movement of goods
 - "all trading rules ... which are capable of hindering, directly or indirectly, actually or potentially, intra-community trade"
- 3) *Cassis de Dijon*⁸¹ (1978): regulations on necessary properties of products as measures having equivalent effect to restrictions on imports
- 4) *Buy Irish* (1982): support of publicity campaigns to promote domestic products violates free movement of goods
 - see presentation by OJARS UZTICS
- 5) *Waste shipment*⁸² (1992): waste as goods
- 6) *Keck*⁸³ (1993): corrective reduction of the Dassonville formula: only product-related, no (general) sales-related rules
 - see presentation by IEVA LICE

III. The freedom of movement for workers

- 1) *Walrave and Koch*⁸⁴ (1974): horizontal effect of the freedom of movement for workers on collective regulations of private persons concerning employment or the provision of services
- 2) *Bosman*⁸⁵ (1995): freedom of movement for workers of professional football players
 - large concept of encroachment
 - direct *horizontal effect* limiting regulations of sport associations
- 3) *Angonese*⁸⁶ (2000): horizontal effect against employers
 - no discriminating general regulations of employers

IV. The freedom of establishment

- *Centros*⁸⁷ (1999): right to register a branch of a company which has been established in another member state for the only purpose to evade the application of national law and which does not conduct any business in that state

V. The freedom to provide services

- *Laval*⁸⁸ (2007): horizontal effect of the freedom to provide services against trade unions
 - further reading: REICH, *Juridica International* 2007, 100
 - horizontal effect also limits collective actions
 - noticeable biased balancing in favour of the economic fundamental freedoms and to the disadvantage of human rights

§ 7 The citizenship of the Union

I. General freedom of movement and residence

- 1) *Grzelczyk*⁸⁹ (2001)
- 2) *Zhu und Chen*⁹⁰ (2004)
 - see presentation by KSENJA ELTAZAROVA
- 3) *Trojani*⁹¹ (2004)

II. Other rights deriving from the citizenship of the Union

- 1) *Collins*⁹² (2004)
- 2) *Access to university* (Commission v. Austria)⁹³ (2005)

§ 8 Membership and participation of the state in the European Union

- compilation with regard to important legal aspects; see for details, references and further aspects *Diagram 2* and the materials from the symposiums "Konstitucionālo tiesu prakse. Ceļā no suverenitātes uz integrāciju" / "Verfassungsrechtsprechung zwischen Souveränität und Integration", Rīga, 16.11.2007⁹⁴, 28.11.2008⁹⁵ and 11.12.2009⁹⁶

I. The basic understanding of the European Union

- in particular: the legal nature of the European Union
- 1) Corte costituzionale (Italy): *Frontini*⁹⁷ (1973): the EEC as a new inter-state organization of a supranational type
 - permanent, characterized by its own autonomous and independent legal order
 - 2) Bundesverfassungsgericht (Germany): *Maastricht judgement*⁹⁸ (1993): the EU as a "Staatenverbund"
 - confirmed in the *Lisbon judgement*⁹⁹ (2009)
 - 3) Trybunał Konstytucyjny (Poland): *EU Accession Treaty*¹⁰⁰ (2005): EU not a supranational but special international organisation
 - 4) Satversmes tiesa (Latvia): *Lisbon judgement*¹⁰¹ (2009): EU not a federal state but represents a new form of legal and political order

II. The acceptance of the primacy of Community law by the constitutional courts of the member states and its limits

- 1) Corte costituzionale (Italy)
 - *ICIC*¹⁰² (1975); *Granital*¹⁰³ (1984); *Beca*¹⁰⁴ (1985)
 - on the limits: *Frontini*¹⁰⁵ (1973); *Granital* (1984); *Fragd*¹⁰⁶ (1989): no violation of fundamental principles of the constitutional order or inalienable rights of the human being
- 2) Bundesverfassungsgericht (Germany)
 - e.g. *Milk powder*¹⁰⁷ (1971); *Solange II*¹⁰⁸ (1986); *night work*¹⁰⁹ (1992)
 - on the limits: *Solange I*¹¹⁰ (1974); *Solange II* (1986); *Maastricht judgement*⁹⁸ (1993); *Lisbon judgement*⁹⁹ (2009): no encroachments on the identity of the Constitution
 - first expressed in: *Solange I*
- 3) Verfassungsgerichtshof (Austria)
 - *university entrance qualification*¹¹¹ (1997)
- 4) Conseil constitutionnel (France)
 - *économie numérique*¹¹² (2004): transposition of directives a constitutional demand
 - on the limits: *copyright in the information society*¹¹³ (2006): cannot not run counter to the constitutional identity of France
 - confirmed in: *Treaty of Lisbon*¹¹⁴ (2007)

- 5) Riigikohus (Estonia)
 - *elections coalitions II*¹¹⁵ (2005)
 - on the limits: *opinion on monetary union*¹¹⁶ (2006): unlimited primacy also over the Estonian constitution
- 6) Trybunał Konstytucyjny (Poland)
 - *EU Accession Treaty*¹¹⁷ (2005): no primacy over national constitutional law
- 7) Konstitucinis Teismas (Lithuania)
 - *ownership rights in forest land*¹¹⁸ (2006), *radio and television funding*¹¹⁹ (2006): no primacy over national constitutional law
- 8) Ústavní soud (Czech Republic)
 - *sugar quotas*¹²⁰ (2006): no encroachment on the foundations of state sovereignty or the essence of the "materieller Rechtsstaat" [state governed in a broad, substantive sense by the rule of law]

III. The protection of fundamental rights at the national and European level from the perspective of the national constitutional courts

- 1) Corte costituzionale
 - a) *Frontini Franco*¹²¹ (1973); *Granital*¹⁰³ (1984): We will protect the inalienable rights of the human being
 - i.e. the essence of the fundamental rights under the national constitution
 - by examining the continuing (!) compatibility of the founding treaties with the fundamental principles of the constitution
 - b) *Fragd*¹²² (1989): We have the power to test the consistency of individual provisions of Community law with fundamental human rights.
- 2) Bundesverfassungsgericht
 - a) *EEC regulations*¹²³ (1967): no constitutional complaints against regulations
 - b) *Solange I*¹²⁴ (1974): We will protect the fundamental rights in the Basic Law against the law of the European Communities *as long as* the latter does not include an own binding catalogue of fundamental rights
 - c) *Solange II*¹²⁵ (1986): We will not exercise our jurisdiction to decide on the applicability of secondary Community law *as long as* the Communities ensure an effective protection of fundamental rights
 - d) *Maastricht judgement*¹²⁶ (1993): "relationship of cooperation" ["Kooperationsverhältnis"] between us and the ECJ
 - e) *Banana market organisation*¹²⁷ (2000): We will protect fundamental rights according to the "Solange II" formula
 - f) *European arrest warrant*¹²⁸ (2005): national legislator must use the latitudes left by EU framework decisions in a manner considerate with fundamental rights
- 3) Conseil constitutionnel: *Maastricht I*¹²⁹ (1992): sufficient protection of fundamental rights guaranteed in the EU
- 4) Trybunał Konstytucyjny (Poland)
 - *European arrest warrant*¹³⁰ (2005): implementation requires amendment of the Constitution
 - see presentation by MARTA GOLAK

- 5) Ústavní soud (Czech Republic)
 - *European arrest warrant*¹³¹ (2006)

IV. The enforcement of the limits of competences from the perspective of the constitutional courts and supreme courts of the member states

- 1) Bundesverfassungsgericht
 - a) *Maastricht judgement*¹³² (1993): we will control if the legal acts of the Union comply with the limits of its competences
 - b) *Lisbon judgement*⁹⁹ (2009): *Ultra virus review* of the Union's legal acts
 - in addition to the *identity review* aiming to preserve constitutional identity
 - exclusively by the Bundesverfassungsgericht
- 2) Hojesteret (Danish Supreme Court): *Maastricht judgement*¹³³ (1998): no application of legal acts exceeding the Union's competences in Denmark
 - all Danish courts entitled to review and reject
 - note: the Hojesteret does not mention and discuss the heavy criticism of the German Maastricht judgment in legal science...
- 3) Conseil constitutionnel: *économie numérique*¹¹² (2004): in the absence of explicit provisions in the Constitution (providing for exceptions), any control with regard to the limits of competences by the EU is reserved to the ECJ
- 4) Trybunał Konstytucyjny: *EU Accession Treaty*¹¹⁷ (2005): legal acts exceeding the Union's competences do not enjoy primacy over national law
 - final decision lies with the institutions of the member states

V. Democracy in the European Union from the perspective of the constitutional courts of the member states

- 1) General aspects
 - Bundesverfassungsgericht: *Maastricht judgement*¹³⁴ (1993)
 - democratic legitimation provided primarily by the peoples of the member states through the national parliaments, and only in addition - but more and more - by the EP
 - democratic bases to be strengthened in line with the progress of integration
 - Bundesverfassungsgericht: *Lisbon judgement*⁹⁹ (2009)
 - democracy of the Union not to be shaped in analogy to that of a state
 - Treaty of Lisbon does not create a European people (in the sense of a people of a state)
- 2) The composition and role of the European Parliament
 - Bundesverfassungsgericht: *Lisbon judgement* (2009)
 - degressively proportional representation in the European Parliament incompatible with the idea of democratic equality but acceptable, since the EU is just a "Staatenverbund"
 - "representative democracy" pursuant to art. 10(1) EU Treaty relates to the peoples of the member states
 - Ústavní soud (Czech Republic): *Lisbon judgement II*¹³⁵ (2009)
 - European Parliament not the exclusive source of democratic legitimacy
 - no requirement of absolute equality among voters in the individual member states
- 3) The right of foreign Union citizens to vote and to stand as a candidate at local elections
 - Conseil constitutionnel: *Maastricht I*¹³⁶ (1992)
 - Trybunał Konstytucyjny: *EU Accession Treaty* (2005)

- 4) Limits to the transfer of competences to the European Union
- Bundesverfassungsgericht: *Maastricht judgement* (1993)
 - art. 38 BL [right to vote] limits the transfer of competences and grants the citizen a subjective right to political participation and influence
 - no transfer of the competence of competences
 - Bundesverfassungsgericht: *Lisbon judgement* (2009)
 - from the principle of democracy, limits to the transfer of competences derive that can be overcome by the foundation of a European federal state only
 - member states must retain sufficient room for the political formation of the economic, cultural and social circumstances of life (Court defines problematic areas)
 - Ústavní soud: *Lisbon judgement I¹³⁷ and II* (2008, 2009)
 - transfer of competences cannot go so far as to violate the essence of the Czech republic as a sovereign and democratic state governed by the rule of law; in particular no transfer of the competence of competences
 - it is not possible for the Court to determine in advance a catalogue of non-transferrable powers
 - Satversmes tiesa (Latvia): *Lisbon judgement¹⁰¹* (2009)
 - The constitutional limits to the transfer of competences arise from the fundamental values of the Latvian State. The transfer does not dilute but strengthen the sovereignty of the Latvian people, as long as it is compatible with these values.

VI. Other problems of membership and participation in the European Union (selection)

- 1) The procedure of the ratification of reform treaties
 - Satversmes tiesa (Latvia): *Lisbon judgement* (2009): Important changes in the conditions of EU membership may affect the constitutional foundations and therefore require the special procedure under art. 77 of the Constitution; Saeima must vet the treaty
- 2) Constitutional review of the ratification of reform treaties
 - Bundesverfassungsgericht: *Maastricht judgement* (1993); *Lisbon judgement* (2009)
 - Ústavní soud: *Lisbon judgement II* (2009): Inconsistencies of treaties with the constitutional order must be alleged without undue delay
- 3) No real transfer of sovereign rights to the European Union
 - Bundesverfassungsgericht: *Solange I* (1974)
 - Trybunał Konstytucyjny: *EU Accession Treaty* (2005)
- 4) The order to apply supranational law [Rechtsanwendungsbefehl] as basis for the direct validity and applicability of Community law within the state
 - Bundesverfassungsgericht: *Solange II* (1986)
- 5) The enforcement of Union law within the member state
 - Corte costituzionale: *ICIC* (1975); *Granital* (1984); *Regione Umbria¹³⁸* (1994)
 - Riigikohus: *elections coalitions II* (2005): No abstract review of conformity of national law with EU law
- 6) The participation at the monetary union
 - Bundesverfassungsgericht¹³⁹: Euro introduction no violation of human rights (1998)
 - Riigikohus¹⁴⁰: Estonian constitution allows participation; competences of Eesti Pank will change (2005)

- 7) The admissability of the judicial development [not: making] of law by the European Court of justice
 - Bundesverfassungsgericht: *Kloppenburg*¹⁴¹ (1987)
- 8) The European Court of Justice as lawful judge
 - Bundesverfassungsgericht: *Solange II* (1986)
 - Verfassungsgerichtshof (Austria): *Bundesvergabeamt*¹⁴² (1995)
- 9) Other topics
 - see *Diagram 2*
 - on the constitutionality of the *ratification of the Treaty of Lisbon* see the Lisbon judgments of the *Conseil constitutionnel* (2007), the *Ústavní soud* (2008), the *Satversmes tiesa* (2009) and the *Bundesverfassungsgericht* (2009)

Notes:

- 1 ECJ, case 26/62, van Gend & Loos, [1963] ECR 1 (23 ff.).
- 2 ECJ, case 221/88, Busseni, no. 13 ff.
- 3 ECJ, case 294/83, Les Verts, no. 23.
- 4 ECJ, opinion 1/91, EEA I, no. 21.
- 5 ECJ, case 314/85, Foto Frost, no. 15 ff.
- 6 ECJ, case 26/62, van Gend & Loos, [1963] ECR 1 (25 f.)
- 7 ECJ, case 57/65, Lütticke.
- 8 ECJ, case 9/70, Leberpfennig, no. 5 ff.
- 9 ECJ, case 148/78, Ratti, no. 19 ff.
- 10 ECJ, case 41/74, von Duyn.
- 11 ECJ, case 6/64, Costa/ENEL, [1964] ECR 1251 (1269 ff.).
- 12 ECJ, case 11/70, Internationale Handelsgesellschaft, no. 3 f.
- 13 ECJ, case 106/77, Simmenthal II, no. 17 ff.
- 14 ECJ, case 168/85, Commission/Italy, summary, 1.
- 15 ECJ, case C-213/89, Factortame, no. 20 f.
- 16 ECJ, joint cases 205-215/82, Deutscher Milchkontor, no. 17 ff.
- 17 ECJ, case 79/83, Harz, summary, 1.
- 18 ECJ, case 14/83, Colson and Karmann, summary, 1.
- 19 ECJ, case C-213/89, Factortame, no. 20 f.
- 20 ECJ, joint cases C-143/88 a.o., Zuckerfabrik Süderdithmarschen, no. 16 f., 22 ff.
- 21 ECJ, case C-361/88, Technische Anleitung zur Reinhaltung der Luft (Commission/Germany), no. 20 f., 24.
- 22 ECJ, case C-217/88, vin de table, no. 14 ff., 33.
- 23 ECJ, case C-24/95, Alcan, no. 25, 34.
- 24 ECJ, case C-188/89, Foster, no. 19 f.
- 25 ECJ, case 8/81, Becker, no. 21 ff.
- 26 ECJ, case 152/84, Marshall I, no. 48 ff.
- 27 ECJ, case C-91/92, Faccini Dori, [1994] ECR I-3325 (= WE, 137), no. 23 ff.
- 28 ECJ, case C-129/96, Inter-Environnement Wallonie, [1997] ECR I-7411, no. 44 ff.
- 29 ECJ, case 52/75, Vegetable Seed Directive (Commission/Italy), no. 11 ff.
- 30 ECJ, case C-433/93, Public Procurement Directive (Commission/Germany), no. 18 ff.
- 31 ECJ, case C-431/92, Großkrotzenburg thermal power station (Commission/Germany), no. 24 ff.
- 32 ECJ, joint cases C-6/90 and C-9/90, Francovich, [1991] ECR I-5357, no. 31 ff.
- 33 ECJ, joint cases C-46/93 and C-48/93, Brasserie du Pêcheur and Factortame, [1996] ECR I-1029, no. 16 ff.
- 34 ECJ, case C-392/93, British Telecommunications, no. 40 ff.
- 35 ECJ, joint cases C-178/94 and others, Dillenkofer, no. 23 ff.
- 36 ECJ, case C-5/94, Hedley Lomas, no. 28.
- 37 ECJ, case C-224/01, Köbler, no. 32 ff., 51 ff.
- 38 ECJ, case 8/55, FÉDÉCHAR, p. 299.
- 39 ECJ, case 22/70, AETR, no. 13 ff.
- 40 ECJ, joint cases 3, 4 and 6, Kramer, no. 13 ff.
- 41 ECJ, opinion 1/76, Laying-up Fund for Inland Waterway Vessels, no. 3 ff.
- 42 ECJ, case C-359/92, Product Safety Directive, no. 37.
- 43 ECJ, case C-376/98, Tobacco advertising I, no. 76 ff.
- 44 ECJ, case C-380/03, Tobacco advertising II.
- 45 ECJ, case 45/86, System of generalized preferences I, no. 11, 13; confirmed in 1991 in: ECJ, case C-300/89, titanium dioxide, no. 11, 13.
- 46 ECJ, case C-170/96, airport transit, no. 14 ff.
- 47 ECJ, opinion 2/94, accession to ECHR, no. 24 ff.
- 48 ECJ, joint cases 281, 283 - 285, 287/85, immigration policy, no. 10 ff.
- 49 ECJ, case C-65/93, System of generalized tariff preferences II, no. 21 ff.; see also ECJ, case 204/86, Greece/Council, no. 16.
- 50 ECJ, joint cases 188 - 190/80, transparency directive, no. 4 ff.
- 51 ECJ, case 138/79, Roquette Frères/Isoglucose, Summary, 4, no. 33 ff.
- 52 ECJ, case 294/83, Les Verts, no. 21 ff.
- 53 ECJ, case C-70/88, Tschernobyl I, no. 16 ff.
- 54 ECJ, case 29/69, Stauder, no. 7 (just a passing remark).
- 55 ECJ, case 11/70, Internationale Handelsgesellschaft, no. 4; note the context with the postulation of primacy of Community law over national constitutional law.
- 56 ECJ, case 4/73, Nold, no. 12 ff.
- 57 ECJ, case 44/79, Hauer, no. 14 ff.
- 58 ECJ, case 4/73, Nold, 14 f.
- 59 ECJ, case 44/79, Hauer, no. 19 ff.
- 60 ECJ, joint cases 46/87 and 227/88, Hoechst, no. 12 ff.
- 61 ECJ, joint cases C-402/05 P., C-415/05 P., no. 278 ff.
- 62 ECJ, case C-159/90, SPUC v. Grogan, no. 22 ff.
- 63 ECJ, case C-60/00, Carpenter, no. 37 ff.
- 64 www.europarl.europa.eu/parliament/expert/displayFtu.do?sessionId=34AA70A2D5450D9F0BC084C0AD47938B.node1?language=EN&ftuId=FTU_2.1.html&id=74.
- 65 ECJ, case 44/79, Hauer, no. 17 ff., 31 f.
- 66 joint cases 46/87 and 227/88, Hoechst, no. 17 f.
- 67 ECJ, case C-94/00, Roquette Frères, no. 29 with regard to ECHR, 16.04.2002, Stés Colas Est a.o. v. France.

- 68 ECJ, case C-280/93, banana market order, no. 81 ff.
- 69 See, for example, *Huber*, Europäische Zeitschrift für Wirtschaftsrecht 1997, 517; *Stein*, Europäische Zeitschrift für Wirtschaftsrecht 1998, 261; *Rupp*, Juristenzeitung 1998, 213.
- 70 See *Verwaltungsgericht Frankfurt*, Europäische Zeitschrift für Wirtschaftsrecht 1997, 182. The decision of the Federal Constitutional Court (BVerfGE 102, 147) will be studied in § 7 of the course.
- 71 ECJ, case C-466/93, Atlanta Fruchthandels-gesellschaft.
- 72 ECJ, case C-377/98, directive on biopatents, no. 69 ff.
- 73 ECJ, case C-144/04, Mangold.
- 74 *Roman Herzog/ Lüder Gerken*, Stop the European Court of Justice, EU Observer 10.09.2008 (<http://euobserver.com/9/26714/?rk=1>) = Stoppt den Europäischen Gerichtshof, FAZ vom 08.09.2008, p. 8.
- 75 ECJ, case C-427/06, Bartsch.
- 76 Script elaborated by participants of the course "Business Law - EC Internal Market Law" (MBA programm, autumn semester 2007), for the preparation of the examinations, http://home.lanet.lv/~tschmit1/Downloads/Poddubny-and-others_Relevant_ECJ-Cases.pdf.
- 77 ECJ, case C-265/95, French blockades.
- 78 ECJ, case C-112/00, Schmidberger, no. 71 ff., in particular no. 74.
- 79 ECJ, joint cases 2 and 3/69, Diamantarbeiders.
- 80 ECJ, case 8/74, Dassonville.
- 81 ECJ, case 120/78, Cassis de Dijon.
- 82 ECJ, case C-2/90, waste shipment.
- 83 ECJ, joint cases C-267, C-268/91, Keck.
- 84 ECJ, case 36/74, Walrave and Koch.
- 85 ECJ, case C-415/93, Bosman.
- 86 ECJ, case C-281/98, Angonese.
- 87 ECJ, case C-212/97, Centros.
- 88 ECJ, case C-341/05, Laval.
- 89 EuGH, Rs. C-184/99, Rudy Grzelczyk v Centre public d' aide sociale d'Ottignie (CPAS) - Louvain-la-Neuve, Slg. 2001, I-6193 16.
- 90 EuGH, Rs. C-200/02, Kunqian Catherine Zhu, Man Lavette Chen v. Secretary of State for the Home Department, Slg. 2004, I-9925.
- 91 EuGH, Rs. C-456/02, Michel Trojani v. Centre public d' aide sociale de Bruxelles (CPAS), Slg. 2004, I-7573.
- 92 EuGH, Rs. C-137/02, Brian Francis Collins v Secretary of State for Work and Pensions, Slg. 2004, I-2703.
- 93 EuGH, Rs. C-147/03, Slg. 2005, I-5969.
- 94 [Http://home.lanet.lv/~tschmit1/Veranstaltungen/Simpozijis_16.11.2007.htm](http://home.lanet.lv/~tschmit1/Veranstaltungen/Simpozijis_16.11.2007.htm) (in Latvian) and [/Symposium_16.11.2007.htm](http://home.lanet.lv/~tschmit1/Symposium_16.11.2007.htm) (in German).
- 95 [Http://home.lanet.lv/~tschmit1/Veranstaltungen/Simpozijis_28.11.2008.htm](http://home.lanet.lv/~tschmit1/Veranstaltungen/Simpozijis_28.11.2008.htm) (in Latvian) and [/Symposium_28.11.2008.htm](http://home.lanet.lv/~tschmit1/Symposium_28.11.2008.htm) (in German).
- 96 [Http://home.lu.lv/~tschmit1/Veranstaltungen/Simpozijis_11.12.2009.htm](http://home.lu.lv/~tschmit1/Veranstaltungen/Simpozijis_11.12.2009.htm) (in Latvian) and [/Symposium_11.12.2009.htm](http://home.lu.lv/~tschmit1/Symposium_11.12.2009.htm) (in German).
- 97 Sent. 14/64, CMLRev 1964, 224.
- 98 BVerfGE 89, 155, www.servat.unibe.ch/law/dfir/bv089155.html.
- 99 BVerfGE 123, 267, www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208.html; English translation: [/es20090630_2bve000208en.html](http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html).
- 100 Case K 18/04.
- 101 Case 2008-35-01, www.satv.tiesa.gov.lv/upload/spriedums_2008-35-01.htm; English translation: [/upload/judg_2008_35.htm](http://www.satv.tiesa.gov.lv/upload/judg_2008_35.htm).
- 102 Sent. 232/75.
- 103 Sent. 170/84, CMLRev 1984, 760.
- 104 Sent. 113/85.
- 105 Sent. 183/73, Europarecht 1974, 255.
- 106 Sent. 232/89.
- 107 BVerfGE 31, 145.
- 108 BVerfGE 73, 339 (366 ff.).
- 109 BVerfGE 85, 191.
- 110 BVerfGE 37, 271 (277 ff.).
- 111 Case B877/96.
- 112 Case 2004-496 DC, Recueil, p. 101.
- 113 Case 2006-540-DC, Recueil, p. 88.
- 114 Case 2007-560 DC, Recueil, p. 459.
- 115 Case 3-4-1-1-05, Riigi Teataja III 2005, 13, 128.
- 116 Opinion 3-4-1-3-06, Riigi Teataja III 2006, 19, 176.
- 117 Case K 18/04, OTK ZU 2005, A, No. 7, Pos. 81.
- 118 Cases 17/02, 24/02, 06/03, 22/04.
- 119 Case 30/03.
- 120 Case Pl. ÚS 50/04.
- 121 EuR 1974, 255 (in particular p. 261 f.).
- 122 Sent. 232/89.
- 123 BVerfGE 22, 293 (296 ff.).
- 124 BVerfGE 37, 271 (summary, 1 and p. 277 ff.).
- 125 BVerfGE 73, 339 (summary, 2 and p. 366 ff.).
- 126 BVerfGE 89, 155 (summary, 7 and p. 173 ff.).
- 127 BVerfGE 102, 147 (summary, 1 and 2, and p. 160 ff.).
- 128 BVerfGE 113, 273.
- 129 See the part "Sur la garantie des droits et libertés des citoyens".
- 130 Case P 1/05, OTK ZU 2005, A, No. 4, Pos. 42.
- 131 Case Pl. ÚS 66/04.
- 132 BVerfGE 89, 155 (summary, 5 and 6, and p. 187 f.).
- 133 Case I 361/1997.

- 134 BVerfGE 89, 155.
135 Case PL. ÚS 29/09.
136 Case 92-308 DC. See also the much stricter view of the Bundesverfassungsgericht (BVerfGE 83, 37), concerning the right to vote of foreigners in general; see now, however, the new regulation in art. 28(1) phrase 3 BL, which avoided this problem in context with the Treaty of Maastricht.
137 Case Pl. ÚS 19/08.
138 Sent. 384/94.
139 BVerfGE 97, 350.
140 Opinion 3-4-1-3-06.
141 BVerfGE 75, 223.
142 Case B2300/95.