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European Dimension of the Constitution
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The Duty of the Federal Republic of Germany to Participate in the European Integration

I. The duty to participate as *Staatsziel* (state objective) – the preamble and Article 23 (1) of the Basic Law for the Federal Republic of Germany

In its preamble, the Basic Law for the Federal Republic of Germany expresses the will of the German people "to promote world peace […] in a united Europe". One can conclude that the organs of the Federal Republic of Germany must hence strive towards European unification[1]. What such a united Europe should look like is not to be found in the preamble – neither does it specify which countries do belong to this united Europe (and which do not)[2], nor does it say anything about whether it should be an association of sovereign states or a federal state[3]. The preamble's requirement to promote European unification is clarified by Article 23 (1) of the Basic Law. Accordingly, the Federal Republic of Germany contributes to the realization of a united Europe by promoting the development of the European Union that is committed to democratic, social and federal principles, the rule of law and the principle of subsidiarity, and that guarantees a level of protection of fundamental rights that is essentially comparable to that of the Basic Law. Article 23 (1) of the Basic Law specifies the requirement set out in the preamble to the effect that the binding national objective of achieving a united Europe should be pursued precisely

[1] A. Randelzhofer believes that this is only "a desirable but not a binding constitutional goal", "VVDStRL" 1990, vol.49, pp. 101, 118.

[2] H. Dreier, [in:] Dreier (ed.), *Grundgesetz-Kommentar*, 3rd ed., vol. 1, 2013, mn. 45 for Präambel; A. Hopfauf, [in:] Schmidt-Bleibtreu/Klein, *Kommentar zum Grundgesetz*, 15th ed., 2022, mn. 53 for Präambel.

[3] H. Dreier, [in:] Dreier (ed.), *Grundgesetz-Kommentar*, 3rd ed., vol. 1, 2013, mn. 46 for Präambel; A. Hopfauf, [in:] Schmidt-Bleibtreu/Klein, *Kommentar zum Grundgesetz*, 15th ed., 2022, mn. 53 for Präambel.

within the framework of the European Union[4]. The term "European Union" refers to the association[5] of states established[6] by the Treaty of Maastricht and put on a new legal basis by the Treaty of Lisbon[7]. The constitutional duty of the Federal Republic of Germany to participate in the process of European integration thus refers to the EU as an already existing political entity. Should there ever be a reform of the treaties or complete exchange of this legal basis, the duty to cooperate as laid down in Article 23 (1) of the Basic Law would apply to those organizations which would replace the existing EU as its functional successors[8].

In doctrinal terms, the duty of the Federal Republic to participate in the process of European unification is considered to be a state objective (*Staatszielbestimmung*)[9]; sometimes it is also referred to as a constitutional mandate (*Verfassungsauftrag*)[10]. State objectives and constitutional mandates define the course of state action[11]. They require public authorities to take appropriate measures to achieve the objective. When it comes to deciding how and by what means the objective is to be pursued, the state bodies; however, have a wide margin of judgment[12]. State objectives and constitutional mandates are therefore not subject to the same degree of jurisdiction as other constitutional provisions[13]. Moreover, a state only has to pursue such goals and mandates within the scope of its possibilities[14] – *ad impossibilia nemo tenetur*. The codification of state objectives in a constitutional text is based on political decisions that fundamentally depend on the situation at the very moment of codification and are changeable. This also applies to the constitutional duty to participate

[4] Ch. Hillgruber, [in:] Schmidt-Bleibtreu/Klein, *Kommentar zum Grundgesetz*, 15th ed., 2022, mn. 9 for Art. 23; P. M. Huber, [in:] Sachs (ed.), *Grundgesetz*, 9th ed., 2022, mn. 44 for Präambel.

[5] The Federal Constitutional Court has spoken of the European Union as an "association of states" (*Staatenverbund*) in consistent jurisdiction since E 89, 155. For detailed information on the concept of "association", see R. Lehner, *Souveränität im Bundesstaat und in der Europäischen Union*, 2021, p. 559 ff.

[6] Building on the European Communities; for the historical development see M. Herdegen, *Europarecht*, 24th ed., 2023, § 4.

[7] Ch. Hillgruber, [in:] Schmidt-Bleibtreu/Klein, *Kommentar zum Grundgesetz*, 15th ed., 2022, mn. 9 for Art. 23; M. Zuleeg, [in:] Denninger/Hoffmann-Riem/Schneider/Stein (eds.), *Kommentar zum Grundgesetz für die Bundesrepublik Deutschland (Alternativkommentar)*, 3rd ed., 2001, mn. 9 for Art. 23.

[8] Cf. also F. Wollenschläger, [in:] H. Dreier (ed.), *Grundgesetz-Kommentar*, 3rd ed., vol. 2, 2015, mn. 36 for Art. 23.

[9] W. Durner, [in:] Isensee/Kirchhof (eds.), *Handbuch des Staatsrechts*, 3rd ed., vol. X, 2012, § 216 mn. 16; M. Zuleeg, [in:] Denninger/Hoffmann-Riem/Schneider/Stein (eds.), *Kommentar zum Grundgesetz für die Bundesrepublik Deutschland (Alternativkommentar)*, 3rd ed., 2001, mn. 9 for Art. 23.

[10] BVerfGE 123, 267, 346; see also: H. Gött, EuR 2014, pp. 514, 543; W. Heintschel von Heinegg/R. Frau, [in:] Epping/Hillgruber (eds.), BeckOK Grundgesetz, 55th ed. (May 2023), mn. 4 for Art. 23; *A. Voßkuhle*, NVwZ 2010, pp. 1, 2.

[11] A. Katz, G. Sander, *Staatsrecht*, 19th ed., 2019, mn. 144.

[12] D. Murswiek, "NVwZ" 1996, pp. 222, 223.

[13] *Ibidem*.

[14] Ch. Degenhart, *Staatsrecht I. Staatsorganisationsrecht*, 38th ed., 2022, mn. 588. See in general: O. Depenheuer, [in:] Isensee/Kirchhof (eds.), *Handbuch des Staatsrechts*, 3rd ed., vol. XII, 2014, § 269.

in the EU[15]. Their limits are partly derived from the wording of Article 23 (1) of the Basic Law, discussed below. Partly they rest on the premise that Article 23 (1) of the Basic Law (in the same way as any other state objective)[16] has to be balanced with other constitutional matters when a conflict arises – this also plays an altogether important role for the following. No state objective – not even the duty of the Federal Republic of Germany to participate in the development of European integration – is of such weight that it can unconditionally and unreservedly assert itself against conflicting constitutional law. Step by step, it will now be worked out where these limits lie – in other words, it will be shown for what reasons, at what point in time and with what consequences the duty of the German state authority to participate in European integration in its present form would end.

II. Limits of the duty to cooperate…

1. …if the structural requirements of Article 23 (1) of the Basic Law are disregarded

Article 23 (1) of the Basic Law limits Germany's duty to participate in the process of European integration to the development of an EU that is committed to democratic, social and federal principles, to the principle of subsidiarity as well as the rule of law, and that guarantees a level of protection of fundamental rights essentially comparable with that of the Basic Law. This provision is referred to as the structural safeguard clause (*Struktursicherungsklausel*)[17]. How are the requirements mentioned in the Basic Law to be interpreted? What would be the constitutional consequences if the EU no longer complied with one or more of these principles? Furthermore, there is the eternal question: *quis iudicabit?* German constitutional jurisprudence is familiar with the aforementioned principles due to the constitutional order of the Federal Republic of Germany – except for the principle of subsidiarity[18]. As Article 23 (1) of the Basic Law declares these principles to be the benchmark for the character of the EU, the question arises how and to what extent they are applicable if the EU is not supposed to be a state but a supranational union. The theory of the modern constitutional state linked most of the principles mentioned in Article 23 (1) of the Basic Law, particularly the rule of law, democracy and the protection of

[15] Cf. also H. Dreier, [in:] Dreier (ed.), *Grundgesetz-Kommentar*, 3rd ed., vol. 1, 2013, mn. 45 for Präambel.

[16] Ch. Degenhart, *Staatsrecht I. Staatsorganisationsrecht*, 38th ed., 2022, mn. 622.

[17] BVerfGE 123, 267, 363 ff.; regarding literature see, instead of many, Ch. Hillgruber, [in:] Schmidt-Bleibtreu/Klein, *Kommentar zum Grundgesetz*, 15th ed., 2022, mn. 11 for Art. 23.

[18] Concerning the controversy whether German constitutional law recognizes a general principle of subsidiarity, cf. E. Šarčević, *Das Bundesstaatsprinzip*, 2000, p. 172 ff. (with extensive further references).

fundamental rights, to the nature of the state and developed them in relation to it[19]. Accordingly, the principle of democracy was directly related to the establishment of parliamentary rule by the constituent power of a people within a state. The rule of law denotes the binding nature and controllability of state action following the law (enacted by the state) based on legal positions to be asserted individually. In principle, fundamental rights, too, are primarily directed against state action. Insofar as the state continues to be understood as the linchpin for the existence and legitimation of a supranational association of states (and much speaks for this assertion), it has to be stated that Article 23 (1) of the Basic Law prohibits a separation of the EU from the inner legitimation procedures of its member states – more precisely, it prohibits a continued participation in the development of an EU that appears to be decoupled from the "chains of national legitimation" (*mitgliedstaatliche Legitimationsketten*)[20]. It likewise prohibits participation in the EU if its actions are not subject to a judicial review, which can be initiated by the affected parties – the constitutional protection of the citizen against public authority simultaneously demands protection against restrictions of freedom by the supranational Union. The demand for comparable protection of fundamental rights must also be understood against this background: where the state seems to be prevented from developing its protection of fundamental rights for reasons of EU law, the constitution upholds the ideal to guarantee the fundamental rights to its citizens (which is linked to its nature and therefore cannot be revealed) by linking Germany's participation in the EU to a comparable protection of fundamental rights at a European level.

When these limits are reached cannot be further elaborated at this point. In the present context, it is sufficient to identify tensions that have come to light. On the one hand, the principles and postulates of parliamentary democracy, the rule of law and the protection of fundamental rights (to stick with the three requirements of Article 23 (1) of the Basic Law) cannot be transferred one by one from a nation-state to the EU – not to mention the fact that the interpretations of these constitutional principles vary greatly in various states. On the other hand, the terms used to describe the structural requirements under Article 23 (1) of the Basic Law cannot be interpreted in an entirely new fashion and thus be left to arbitrariness. If to a supranational association of states, the concept of democracy is in no way correlated with that of domestic democracy as realized by the Basic Law, if – in other words – domestic democracy both structurally and conceptually

[19] For this and the following see B. Schöbener/M. Knauff, *Allgemeine Staatslehre*, 5th ed., 2023, p. 192 ff. (on democracy in the modern constitutional state), p. 211 ff. (on fundamental rights), p. 223 ff. (on the development of the rule of law).

[20] In detail see S. Haack, *Verlust der Staatlichkeit*, 2007, p. 431 ff. (with extensive further references); in the same direction: Ch. Hillgruber, [in:] Schmidt-Bleibtreu/Klein, *Kommentar zum Grundgesetz*, 15th ed., 2022, mn. 13 ff. for Art. 23.

had ceased to be the decisive point of reference for the legitimization of European public authority, then the constitutional framework that Article 23 (1) sentence 1 of the Basic Law set out for the participation of the Federal Republic of Germany in the development of the EU would be deserted. The same applied if the binding of supranational authorities to rules and norms substantially differed from the rule-of-law concept as established by Articles 20 (3) and 19 (4) of the Basic Law. One would have to deal with such a development, for instance, if the right to group action as an instrument of objective control allowed individual legal protection to recede into the background. This relationship to fundamental rights requirements is most evident where Article 23 (1) of the Basic Law speaks of comparability. It excludes any conception of fundamental rights that differs significantly from that of German constitutional law. If there are substantial shortcomings in one or more of the structural features mentioned in Article 23 (1) of the Basic Law, the constitutional duty of the Federal Republic of Germany to participate in the EU ends[21] – presuming that they have been serious and persistent. However, before the right to leave the EU can even be considered, the duty to participate laid down by Article 23 (1) of the Basic Law requires the Federal Republic to strive for an approximation of the existing situation to the constitutionally required condition[22]. Regarding the chances of succeeding in such an endeavour – since it involves a prognosis of long-term political developments that are linked to numerous imponderables – the constitutional bodies involved must be allowed considerable margin of judgment. If the Parliament and the Federal Government, as the relevant supreme federal bodies, believe that a structurally appropriate congruence of principles (*struktur-angepasste Grundsatzkongruenz*[23]) with the Basic Law can no longer be established in the near future despite all efforts, the Federal Constitutional Court must accept this assessment – unless it is an obvious and clearly refutable pretext to initiate a withdrawal of the Federal Republic of Germany from the EU.

2. …in case of repeated and serious violations of competence by the EU

A second, closely connected, constellation concerns serious and repeated violations of competence by the EU. As the Federal Constitutional Court has pointed out in various decisions, ultra vires measures are to be denied national effectiveness under

[21] S. Hölscheidt, „DÖV" 2020, pp. 69, 71; cf. Also C. D. Classen, [in:] von Mangoldt/Klein/Starck, *Grundgesetz*, 7th ed., vol. 2, 2018, mn. 7 for Art. 23; W. Meng, [in:] von der Groeben/Schwarze/Hatje (eds.), *Europäisches Unionsrecht*, 7th ed., vol. 1, 2015, mn. 9 for Art. 50 TEU.

[22] Cf. also R. Uerpmann-Wittzack, [in:] von Münch/Kunig, *Grundgesetz-Kommentar*, 7th ed., vol. 1, 2021, mn. 15 for Art. 23.

[23] F. Wollenschläger, [in:] Dreier (ed.), *Grundgesetz-Kommentar*, 3rd ed., vol. 2, 2015, mn. 63 for Art. 23 (with extensive further references).

certain conditions[24]. Could it be possible that repeated and serious violations of competences by the EU could render the duties to participate under Article 23 (1) of the Basic Law invalid? The considerations of the Federal Constitutional Court[25] that ultra vires actions of the EU might contradict the democratic principle provide a satisfactory answer. The duty to participate in the EU under Article 23 (1) of the Basic Law is therefore limited by a barrier inherent in the constitution. The constitutional ideal of practical concordance leads to a gradual relativization. If one is dealing with a single transgression of competence or a manageable number of selective violations, the objective of European integration as set out in Article 23 (1) of the Basic Law is subordinated to the principle of democracy as set out in Article 20 (1) of the Basic Law only to the extent that the judges in Karlsruhe can, under certain conditions[26], deny the domestic applicability of European legal acts that were passed ultra vires. In its jurisdiction regarding the purchase of government bonds by the ECB and the European Banking Union, the Federal Constitutional Court, for reasons of openness towards EU law (*Europarechtsfreundlichkeit*), exercised particular restraint and granted the European Court of Justice, to which it had submitted the questions of competence by way of a preliminary ruling procedure for the interpretation of European law[27], a margin of error[28]. These standards were reaffirmed by the Federal Constitutional Court in its judgment of May 5, 2020, in which it for the first time denied domestic binding force to an ultra vires act of the EU[29]. The situation is however different if the transgressions of competences by the EU are so prevalent, both quantitatively and qualitatively, that a further remaining in the EU appears to be ruled out given the (now permanent) transgressions of competences: in such a case, the democratic principle supersedes the duty to participate in the EU so that there is even an obligation to leave.[30]

3. …in case of repeated and serious violations of the identity of the constitution

The above-mentioned aspects can be generalized and applied to other cases of violation of constitutional identity[31]. If certain European legal acts violate the fundamental principles of the Basic Law, as laid down in Article 79 (3), their effectiveness must be denied within the German legal system. This is what is at stake

[24] BVerfGE 123, 267, 353 f.; 126, 286, 302; 142, 123, 198 ff.; 154, 17, 151 – consistent jurisdiction.
[25] BVerfGE 142, 123, 174; 151, 202, 275; 154, 17, 87.
[26] For details see Ch. Degenhart, *Staatsrecht I. Staatsorganisationsrecht*, 38th ed., 2022, mn. 281 ff.
[27] BVerfGE 134, 366; 146, 216.
[28] BVerfGE 142, 123, 200 ff.; 151, 202, 300.
[29] BVerfGE 154, 17.
[30] BVerfGE 123, 267, 365.
[31] The Federal Constitutional Court regards the control of ultra vires measures as a special case of the identity review; cf. BVerfGE 142, 123, 203.

when, since the decision on the Treaty of Lisbon, the Federal Constitutional Court reserves for itself an identity control *vis-à-vis* the legal acts of the EU[32]. Similar to the case of transgressions of competences by EU institutions, one can imagine a scenario in which such selective corrections of violations of the constitutional identity would not meet the requirements of constitutional law. This would be the case, for example, if the constitutional principles set out in Article 79(3) of the Basic Law were to be frequently and seriously impaired by European legal acts (particularly as these conflicts would require legal clarification on a case-by-case basis, which could only be achieved in lengthy processes). Such a development would relieve the parliament and government of the constitutional mandate to participate in the EU under Article 23 (1) of the Basic Law: where there is no prospect of satisfactory compensation in the foreseeable future, the constitutional principles especially protected under Article 79 (3) of the Basic Law prevail over the state's objectives set out in Article 23 (1) of the Basic Law.

4. …in case of EU membership of states that are not democratically constituted or not governed by the rule of law

The wording of Article 23 (1) of the Basic Law indicates that the principles mentioned there concern the European Union as such, i.e., as a supranational organization[33]. The nature and work of its organs and institutions thus appear to be decisive for a judicial examination of whether the principles are respected or not[34]. This differs from the question of the possible limits of a duty to participate if the character of the European Union was changed by fundamental upheavals in one or more of its member states. What constitutional consequences would arise concerning the duty to participate if, as a result of internal political changes in one or more states, the EU had members failing to meet democratic or rule-of-law standards?

As soon as it becomes evident that such a condition is entrenched and more than an ephemeral domestic political crisis or an isolated instance of maladministration, the duty under Article 23 (1) of the Basic Law to participate in the EU ends. In this case, one would have to deal with a fundamental change in the character of the Union, to the extent that it would no longer be the same EU (regardless of its international legal status) as the one referred to in Article 23 (1) of the Basic Law. In terms of legal doctrine, this can be justified regarding Article 2 sentence 2 TEU: if a state could be a member of the EU without respecting the values referred to in Article 2 TEU, a provision decisive for the overall character of the

[32] BVerfGE 123, 267, 353 ff.; 140, 317, 336 ff.; 142, 123, 194 ff.; 151, 202, 302.

[33] F. Wollenschläger, [in:] Dreier (ed.), *Grundgesetz-Kommentar*, 3rd ed., vol. 2, 2015, mn. 64 for Art. 23.

[34] See above: 1.

Union would lose its meaning. However, as has been stated above[35], Article 23 (1) of the Basic Law does not refer to just any association of states, which merely has to be called the "European Union", but to the very essence of the EU in its present form, as decisively shaped by Article 2 TEU. In addition, the membership of states that are not democratically constituted or not governed by the rule of law poses considerable difficulties when it comes to cooperation in the areas of police and justice. As another member state moves further away from the rule of law and democratic standards, cooperation would have to lead more frequently to conflicts with other constitutional principles, in particular with fundamental rights and freedoms. These form constitutional boundaries for cooperating with states that are not democratically constituted or not governed by the rule of law (for example, in the case of extradition or recognition of decisions of foreign courts)[36].

In this context, however, it should be noted that only long-term and fundamental changes in another member state remove the duties arising from Article 23 (1) of the Basic Law. Neither here nor in other places where German legislation requires an assessment of other states it is permitted to make one's own constitutional and democratic standards the standard for foreign legal systems. The decision as to where such a constitutional line may be drawn is in turn connected with a wide scope of assessment – essentially, it is also a matter of forecasting political developments that appear highly complex and open. By their very nature, assessments of this kind are only partially justiciable.

5. …in the event of failure of European integration

If the European Union as a political project fails, the duty under Article 23 (1) of the Basic Law would become irrelevant[37]. In this case, the general definition of state objectives in the preamble would remain to work towards European unification and, if necessary, to make a new attempt together with other states.

The question to be asked at this point is under what conditions such a complete failure of European integration can be assumed; it seems (how could it be otherwise?) to be associated with considerable difficulties[38]. First of all, the withdrawal of a single member state is not enough to assume total failure. This applies even if it is one of the largest and most efficient members. Even the withdrawal of a relatively small group of states may not be sufficient in itself if the remaining members intend

[35] See above: I.

[36] For details see M. Herdegen, [in:] Dürig/Herzog/Scholz, *Grundgesetz*, loose-leaf, updated September 2022, mn. 97 ff. for Art. 1 (3) (with extensive further references).

[37] See C. D. Classen, [in:] von Mangoldt/Klein/Starck, *Grundgesetz*, 7th ed., vol. 2, 2018, mn. 7 for Art. 23; T. Groß, „EuR" 2018, pp. 387, 403 f.

[38] C. D. Classen focuses on the "unanimous assessment of the partners" ([in:] von Mangoldt/Klein/Starck, *Grundgesetz*, 7th ed., vol. 2, 2018, mn. 7 for Art. 23).

and appear to be able to continue the integration process. The limits of the constitutional duty to participate would be reached if several of the largest states – such as France, Italy, and Spain – declared their withdrawal: Article 23 (1) of the Basic Law does not require being the last one to abandon the sinking ship. The same is likely to apply if – without formal withdrawal by the states concerned – there is a greater number of continuous and serious breaches of the Treaty. In both cases, a comprehensive assessment of the overall political situation would be essential. The question of when the time has come to leave the failed integration project in the event of the EU disintegrating is not a constitutional issue, but a political decision. Would not perseverance at all costs reflect the same arrogance and hubris that repeatedly had disastrous consequences in Germany?

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The Duty of the Federal Republic of Germany to Participate in the European Integration

Summary: In its preamble, the Basic Law of the Federal Republic of Germany admits Germany's participation in the process of European unification. This aim is specified by Article 23 of the Basic Law: as a result, the Federal Republic of Germany is required by its constitution to participate in the EU. This provision amounts to a state objective (*Staatszielbestimmung*). At the same time, Article 23 of the Basic Law imposes limits on this duty. Germany is only required to participate, if the European Union is committed to democratic, social and federal principles, the rule of law, the principle of subsidiarity, and to guarantee a level of protection of fundamental rights which is essentially comparable to that of the Basic Law. Further limits to the duty to participate in the EU arise from conflicting constitutional law. This may be relevant if there are repeated and serious transgressions of competences by the EU, as well as serious violations of constitutional identity. Additionally, an EU membership of non-democratic states or a collapse of the European Union altogether would render the duty imposed by Art. 23 (1) Basic Law no longer applicable. The requirements for these scenarios are very high. Nevertheless, the political decision-makers have a scope of judgement that the Federal Constitutional Court can only control to a certain extent.

Keywords: EU law, the Basic Law of the Federal Republic of Germany, the Federal Constitutional Court

Obowiązek udziału Republiki Federalnej Niemiec w integracji europejskiej

Streszczenie: Ustawa Zasadnicza Republiki Federalnej Niemiec w swojej preambule dopuszcza udział Niemiec w procesie jednoczenia Europy. Cel ten określa art. 23 Ustawy Zasadniczej: w rezultacie Republika Federalna Niemiec jest zobowiązana swoją konstytucją do uczestnictwa w UE. Przepis ten odpowiada celowi państwa („Staatszielbestimmung"). Jednocześnie art. 23 Ustawy Zasadniczej ogranicza ten obowiązek. Republika Federalna Niemiec jest zobowiązana do uczestnictwa w tym procesie tylko wtedy, gdy Unia Europejska jest zobowiązana do przestrzegania zasad demokratycznych, socjalnych i federalnych, praworządności, zasady pomocniczości oraz do zagwarantowania poziomu ochrony praw podstawowych, który jest zasadniczo porównywalny do praw podstawowych. Dalsze ograniczenia obowiązku przynależności do UE wynikają ze sprzeczności przepisów konstytucyjnych. Może to mieć znaczenie w przypadku powtarzających się i poważnych naruszeń kompetencji przez UE, a także poważnych naruszeń tożsamości konstytucyjnej. Dodatkowo członkostwo w UE państw niedemokratycznych lub całkowity rozpad Unii Europejskiej oznaczałoby, że obowiązek nałożony na mocy art. 23 ust. 1 Ustawy Zasadniczej już nie obowiązuje. Wystąpienie takiej sytuacji jest wysoce prawdopodobne. Niemniej jednak decydenci polityczni dysponują zakresem osądu, który Federalny Trybunał Konstytucyjny może kontrolować tylko do pewnego stopnia.

Słowa kluczowe: Federalny Sąd Konstytucyjny, Ustawa Zasadnicza Federalnej Republiki Niemiec, prawo unijne