Zentrum für Europäische Integrationsforschung
Center for European Integration Studies
Rheinische Friedrich-Wilhelms-Universität Bonn

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Martin Seidel

Legal Aspects of European Economic and Monetary Union

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"Legal Aspects of European Economic and Monetary Union"[1]

Professor Dr. Martin Seidel [i2]

A) The European Community`s Legal and Constitutional Order in general, the special Constitutional Structure of the European Economic and Monetary Union

The European Economic and Monetary Union, established by the Treaty of Maastricht of 7th February 1992, is not an international or supranational union of its own; it is an integral part of the European Community, as the European Economic Community, being established by theTreaty of Rome from 1957, has been renamed by the Treaty of Maastricht. Before the Treaty of Maastricht became law of the European Community, the two main tasks the European Economic Community had to accomplish were "establishing a Common Market" and "progressively approximating" (i.e. co-ordinating) "the economic policies of the Member States" (cf. the old version of Article 2 of the EEC Treaty). Following Maastricht, the second main task is no longer the "progressive approximation of the economic policies of the Member States", but

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[1] [1] Vom Verfasser 1999 in Oslo und 2000 in Bergen / Norwegen gehaltenen Vorlesung über „Rechtliche Aspekte der Wirtschafts- und Währungsunion", veröffentlicht in Martin Seidel, „European Economic and Monetray Union – Constitutional and Legal Aspects", Bd. 3 des von Peter-Christian Müller Graff und Erling Selvig, unterstützt von der Ruhrgas AG, Essen sowie dem Stifterverband für die Deutsche Wissenschaft und dem Norges forskningsrad (Norwegischer Wissenschaftsrat) herausgegebenen Deutsch-Norwegischen Forum des Rechts, 2001, Berlin, S. 11-66; Nachdruck mit freundlicher Genehmigung des Berliner Wissenschaftsverlags, vormals Berlin Verlag Arno Spitz.

[2] Der Verfasser, früherer Angehöriger des Bundesministeriums für Wirtschaft und seiner Zeit langjähriger Bevollmächtigter der Bundesregierung in Verfahren vor dem Europäischen Gerichtshof sowie später Mitglied der deutschen Delegation der Maastrichter Konferenz über die Wirtschafts- und Währungsunion, u. a. Mitglied des Vorstands der Wissenschaftlichen Gesellschaft für Europarecht, Mitglied des Wissenschaftlichen Direktoriums des Instituts für Europäische Politik, Berlin, hat Europarecht an der Westfälischen Wilhelms-Universität, Münster, sowie Subventionsrecht der EU an der Universität des Saarlandes gelehrt, lehrt weiterhin europäisches Währungs- und Wirtschaftsrecht an der Donau-Universität in Kremsan der Donau und ist am Zentrum für Europäische Integrationsforschung an der Rheinischen Friedrich-Wilhelm- Universität Bonn als Senior Fellow sowie als Lehrbeauftragter für das Recht der Wirtschafts- und Währungsunion der EU tätig.•

"establishing an Economic and Monetary Union" (cf. Article 2 of the Maastricht and Amsterdam version of the EC Treaty).

Economic and Monetary Union being the new second main task of the Economic Community consequently means that all the rules constituting and governing Economic and Monetary Union are an integral part of the legal and constitutional order of the European Community (including the European Coal and Steel Community and the European Atomic Energy Community from 1952 and from 1958 respectively, being separate international organisations but having since 1965 the same organs as the European (Economic) Community). The legal framework of Economic and Monetary Union comprises not only those rules which were adopted by the Member States at the conference of Maastricht but, as far as relevant to economic and monetary matters, the whole constitutional and legal order of the European Community, the jurisdiction of the Community's Court of Justice, as main shaper of the Community's legal and constitutional order, included. All general principles of the Community's legal order apply to Economic and Monetary Union and so even more importantly do all rules for interpreting the law of the Community as developed and applied by the Court of Justice and the legislator of the Community.

The European Community, though being one "pillar" of the European Union, has its own constitutional and legal order; it does not share its constitutional and legal order with the two other "pillars" of the European Union, i.e. the "Common, Foreign and Security Policy" and the "Cooperation of the Member States in the fields of Justice and Home Affairs".

The European Union, as created by the Treaty of Maastricht, is not a legal entity. It consists of the „pillars“ or bases, one of which are the three European Communities - i.e. the European (former: Economic) Community, as well as those regarding Coal, Steel and Atomic Energy; the cooperation among Member States in foreign and security policy; thirdly, the cooperation among Member States in domestic and judicial affairs. According to the Treaty of Maastricht, the "European Union" has a "single institutional framework“, but as far as the second and the third mainstays are concerned the European Union is no more than an intergovernmental procedure for cooperation among Member States, and for cooperation between the Member States on the one hand and the European Communities on the other.

Legally, the Member States have not transferred their foreign and security policy to the Union, they have only agreed to co-operate in this field within the framework of the European Union. Any transfer of competences in the future to the Union in the field of foreign and security policy, or in the field of justice and home affairs, requires a new agreement to be adopted by the Member States and its ratified according to national law. This has partially happened at the conference of Amsterdam in 1997.

The Treaty clearly states that the "organs" of the Union as mentioned in Article 5 EU Treaty, namely the European Parliament, the Council, the Commission and the Court of Justice, only exercise their functions according to the provisions in the treaties of the Communities. Article 5 of the Treaty of the European Union does not assign to the four organs any competences; it only transfers new competences to the European Council, but these competences are restricted to giving new impulses to integration without any legally binding effect.

The European Union, especially within its second and third fields, is a programme for and a political pledge to a further step towards a more integrated confederation, or even federation, of European states.

The European Union only functions within the European Community as its first pillar by means of the European Council´s special competence to give impulses to integration. But the European Council, as it will be described later, has been embedded into the constitutional framework of the European Community, especially into the special framework of Economic and Monetary Union.

I) The General Structure of the Community´s Legal and Constitutional order as Framework of Economic and Monetary Union

1) The Institutional Structure of the European Community

By its very structure, the European (Economic) Community is an association of states, i.e. a confederation, and this regardless of its conversion into an Economic and Monetary Union, which is associated with a surrender by the Member States of their monetary policy sovereignty to the Community.

Insofar as the European Community exercises authority on the basis of the sovereign rights transferred to it, this authority is derived from the Member States in terms of both its origin and its legitimation. The legal entities bearing responsibility for the Community's authority are the Member States; the citizens of the European Community do not enjoy any substantial protection from the European Community nor do they owe it substantial obedience. It is to them that the Member States are ultimately accountable for all decisions and acts that emanate from the European Community.

This structure of the Community is mainly reflected in the fact that the power to legislate in the Community remains in the hands of the Council of Ministers, where the Member States are represented by members of their governments. The European Parliament's part in the legislative and political decision-making process is confined to the right to be consulted; this takes the shape of what is known as the cooperation procedure, introduced as part of the reforms made to

the European Community by the Single European Act in 1987, and the co-decision procedure brought in by Article 189 b (now Article 251) of the Treaty of Maastricht. In specific fields of action, the European Parliament has a right of approval.

The Community's character as a simple community of states (confederation) is also evidenced by the fact that the limiting effects of the basic rights and freedoms under Community law, as recognised in the jurisprudence of the European Court of Justice, are confined to Community sovereignty alone. These basic rights and freedoms are binding on the Member States only where they act to apply or implement Community law. Where the Member States exercise their own residual sovereignty to act, those basic rights and freedoms have no limiting effect. Firms and private individuals who are affected by a national measure falling outside Community sovereignty can only rely on the protection afforded by the Member State in question. Where such protected basic rights and interests are affected by national measures, such as expropriation, they cannot take their case to a Community authority such as the Court of Justice. The limited scope of the fundamental rights afforded by the Community legal order are, then, a clear indication of the confederal rather than federal nature of the Community constitutional order.

The European Community (EEC, Euratom and ECSC) does, in fact, possess some supranational features. Decision-making by qualified majority in the Council, the jurisdiction of the Court of Justice, the authority given to the Commission to monitor and control Member States´ aids and enforce competition law as well as the precedence of Community law over national law are all evidence of a pre-eminence of the Community over its Member States. Article 48 EU Treaty, however, gives constitution-making power solely to the Member States. The Commission has no right of proposal under the procedure for amending the Treaty, nor does amendment of the Treaty require the approval of the European Parliament. Exercise of the powers assigned to the Community requires the participation of the Member States in two ways. Firstly, it is through the Member States, or more precisely via their Parliaments, that the exercise of Community competence is given democratic legitimacy. Secondly, the Community depends on the Member States for the political and legal implementation of the policies entrusted to it.

In the European Parliament the Community possesses an institution which appears to represent a genuine Community authority. Since 1979 the members of the European Parliament are directly elected in each of the Member States. In terms of its organisation, however, Parliament, too, reflects the confederal structure of the Community as an association of states. Unlike a national parliament, the European Parliament is not representative of a European "nation", i. e. of the peoples of the Community taken as a single electorate or of all citizens of the Union. In the terms of the legal definition contained in Article

189 of the EC Treaty, the European Parliament represents the peoples of States brought together in the Community. The Members of the European Parliament, although directly elected since 1979, are representatives of the people of each Member State, rather than of Union citizens as a whole, in other words of all nationals of the Member States seen as a community with a common will and destiny. And although the seats in Parliament are apportioned so that the larger Member States have more MEPs, the smaller Member States are over-represented for the size of their electorates. An important basic democratic principle which is implemented in all the Member States - equality in terms of the vote - is not guaranteed in the Community. In some cases the votes of electors in the larger Member States count for considerably less than those of electors in the smaller Member States. Depending on where Union citizens choose to reside, they can increase the weight of their vote by two, three or maybe even eleven times.

This lack of voting equality is due to the fact that the European Parliament is, in origin, an assembly of representatives of - equal - Member States. Its constitution is based on the principle in international law that each state in a community has an equal right to share in the exercise of their common sovereignty. The "Parliament" of such a community does not have to abide by the principle that each citizen should share equally in the exercise of that sovereignty. The constitutional principle that all citizens should take an equal part in the exercise of state authority is the essential foundation of a federal union, but not necessarily of a confederal union of states.

Voting equality is the key feature of a genuine parliament. If the state derives its authority from the nation, the parliament representing the people must be organised on the basis of equal voting rights.

Transforming the European Community from a union of states to a federally structured state was not one of the aims of the Maastricht conference. Under the Treaty of Maastricht the constitution and institutional structure of the Community, as laid down in the Treaty of Rome, remain unchanged. The European Parliament has neither gained a new position nor has the protection afforded to fundamental rights in the Community been recast accordingly. There was a consensus among those taking part in the conference that the fundamental structure of the Community should remain unchanged, notwithstanding the new powers assigned to it, in particular the transfer to the Community of powers in the monetary field. This consensus was reflected above all in the fact that the extension of the powers of the European Parliament was not a major priority aim for the conference. The thinking of the Member States went no further than to allow the European Parliament an increased role in the legislative process. The new "co-decision procedure", which applies in several areas, does not affect the decision-making powers of the Council as the real authority exercising Community legislative power. To counterbalance the reduction in the powers of

the national parliaments through the transfer of new powers to the Community, the Member States - in a joint declaration, adopted as part of the Final Act of the Treaty of Maastricht - called on the European Parliament and the national parliaments to meet jointly in a "Conference of Parliaments" (Assizes) for the purpose of consultation and reporting. This declaration clearly shows that the Member States regard the legitimation for Community legislation and policy-making as stemming primarily from the national parliaments rather than from the European Parliament.

As a "community of states", the European Community can only take over new tasks and functions to a limited extent. Some tasks and functions of the state necessarily require the organisational structure of a federally structured state for their effective exercise and formulation. Political debate in the European Community is shaped by the fact that some extensive tasks of the state are due to be transferred to the Community, while there is no intention that it should abandon its basic structure as a community of states; so far, a "United Europe" is not a generally acceptable goal; the concept of a "United Nations of Europe" reflects the present structure of the Community.

If the European Community (European Union) is to be given powers that can only be exercised on the basis of a genuine state structure, the European Union must first be transformed into a federal-style state.

Any such transformation of the European Community would have to start with the European Parliament. A prerequisite for the transfer of more extensive powers to the European Community is not solely their assignment to the European Parliament, but first its restructuring into a genuine representation of the Community electorate. There is, of course, no European "nation" from which "Community sovereignty" could be held to derive, as with the nation within a state. Even the substantial integrating impact of the Community in social-political terms will not lead to the emergence of a "European nation" for a long time yet. The peoples of the European Community have lived within the constitutional framework of nation states for too long and developed traditions that differ too widely. Their systems of communications and education are still too steeped in national attitudes. Equality in terms of voting may result in smaller countries being denied any influence on the political decision-making process. A parliament, however, is not so much concerned with the influence of smaller or larger states but with the influence of social trends and movements. If a Member State was too small and its citizens therefore found themselves completely excluded from playing a part in the exercise of common sovereignty, the principle of protecting minorities would justify giving them some special position. The only option to ensure that every country has a fair chance to influence Community legislation and policy would be to establish a second legislative chamber. In the European Community this could be the Council, with appropriate arrangements made to ensure that the smaller Member States could

properly defend their interests. The parliament representing the "community of citizens" must not be burdened with the additional function of ensuring that each individual Member State has a fair share of influence on its decision.

The crucial question is whether a European Community with a parliamentary system would be governable, in other words whether its transformation into a federal-style union is realistic. The question arises not only because the "European community of citizens" with whom Community sovereignty remains will, as noted earlier, continue to consist of separate nations for a long time to come, but above all because a properly functioning parliamentary system of government requires more than just the formal transformation of the European Parliament and the introduction of voting equality. An effective parliamentary system at Community level is only feasible with some kind of centralised political filtering system to serve as an infrastructure. Because of the Community's size, this political filtering system would have to be highly centralised. For it to operate effectively, a framework would have to be established at central level to weigh up and balance all communications relevant to policy in a proper and efficient manner. Replacing the existing communications frameworks which are for the time being encrusted in national attitudes there would have to be a uniform Community framework for such communication. The key players in shaping public opinion, in particular the mass media, would have to be organised and, above all, would have to operate along central lines. Without the formation of public opinion, a properly functioning democracy is no more possible at Community level than it is at national level. This would generate a centralised political culture oriented towards the European Parliament. The effect of this process would be to overcome nationally centred attitudes. A properly functioning parliamentary system therefore implies to some extent a rejection of the call for multiculturalism and regionalism in the Community. In terms of constitutional policy, the Community will have to reconsider the demand for multiculturalism and regionalism in the context of extending the role of the European Parliament to that of a genuine representation of the citizens of the Union.

The functional prerequisites for a European parliamentary system of government cannot be imposed by a *fiat* of the European Community. They can only develop of their own accord as the result of a process of social and political integration. The task of the European Community, however, is to remove the obstacles and barriers to their emergence, in particular to the growth of an integrated filtering system in the shape of political parties and social groupings.

The initiative and responsibility for transforming the European Community into a genuine federation to which more extensive tasks can be assigned by the Member States remains with the European Parliament; for it is unlikely that the Member States will set the ball rolling in that direction. Its first step should be to adopt a structure which clearly reflects its position as the true representative of

Community authority. Such a restructuring would give the European Parliament sufficient legitimacy to claim the authority to exercise Community legislative and policy-making power and to demand the transfer of further powers and tasks to the Community.

2) The Main Principles of the Legal Order of the European Community relevant to Economic and Monetary Union

a) Contractual and Derivative Law

The legal order of the European Community consists of the "contractual" or primary Community law and the so-called derivative or secondary Community law. The primary Community law comprises all stipulations and legal standards which are embodied within the Treaties, i.e. the Treaties of Paris (1952) and Rome (1958) as well as all Treaties which, like the Treaties of Luxembourg (Single European Act), of Maastricht and of Amsterdam, supplemented the basic Treaties. The accession Treaties belong to the "contractual" Community law, too. The "derivative" Community law is the law which is set by the Community's legislator, i.e. the Council in cooperation with the European Parliament, and in subordinate cases by the Commission. The distinction between contractual and derivative Community law has importance insofar as contractual Community law can be changed and altered only in the same way as it has been set, namely by a way of convention agreed by all Member States under international law and following ratification by the Member States according to their internal constitutional law governing the ratification of international law. This means ratification by the national Parliaments and, given the case, by consensus of the people by means of referendum. The secondary or derivative Community law can be altered by the Community's legislator in the way it has been set. National Parliaments are consulted if national constitutional law requires consultation.

The means of setting derivative law are the regulation, the directive and the decision. The regulation is comparable to a formal national legislative measure, it sets general rules and is directly applicable. The directive is a two-stage legislative instrument, it is binding on the Member States and requires that Member States adapt their national legislation to the model legislation as contained in the directive. The decision rules individual cases and has the character of an administrative order (Articles 249 EC Treaty).

The legal order of the Community is mainly the product of the jurisprudence of the Court of Justice. The main structural characteristics of the European Community's legal system in particular derive from the rulings of the Court. This applies to the precedence given to Community law over member-state law, to the restrictions imposed by guarantees of fundamental freedoms on the sovereign law-making powers of the European Community, and particularly to

the special quality of that Community law binding on Member States implicit in the concept of direct effect of the regulatory system, including directives, to the benefit of private individuals.

b) Precedence of Community Law over National Law

The precedence of EC legislation over member-state law does not derive from the Community's status as a federal state with a superior state sovereignty. The precedence of the legal system of the Community and the rulings of the Court can only be justified by the function of Community law. This function is intended to reflect the degree of integration, which must be protected from unilateral challenges by individual Member States. The means of protection is that of precedence; if Community law did not have precedence over Member State law, every Member State legislator could place the current status of integration in question by independently changing laws made by the Community.

The fact that the Community is not equal to a unitary or federal state and that it lacks a federal constitution means that the claims to precedence for Community law meet with acceptability problems. In the Federal Republic of Germany, for example, the Federal Constitutional Court still refuses to recognise the claims to precedence of Community law on the grounds of the basic rights contained in the federal constitution and of the distribution of responsibilities between the Federation and the Länder.

c) Fundamental Rights

The law-making of the Community is subject - and this, too, is due to rulings by the European Court - to the limitations imposed by the guarantees of freedom and fundamental rights of the Community's legal system. In shaping fundamental rights, the European Court bases its rulings on the common principles of the constitutions of the Member States and the Strasbourg Convention for the Protection of Human Rights and Fundamental Freedoms.

According to current doctrine, the basic rights in the legal system of the Community have a limiting effect only on the Community; as pointed out above, Member States are bound by the basic rights in the legal system of the Community only when implementing Community law. Unlike those of a federal state, the Community's basic rights cannot apply to the Member States where the Member States are working within their remaining competences.

d) Direct Effect of Member States` Obligations and Directives

A third structural element of the Community's legal system, the so-called direct effect to the benefit of private individuals of Community law binding on Member States, is - like the precedence of and the limitation to Community sovereignty deriving from basic rights - exclusively dependent on rulings of the Court. The direct effect to the benefit of private individuals of requirements to refrain from action contained in the Treaty and directives was not initially fully accepted by all Member States; even today, it still creates difficulties for practical implementation.

The extent of the direct effect of Community law binding on Member States is still not unequivocally definable. The Court's original formula was that an individual can defend himself before a national court against Member-State law if, by maintaining this national law, the Member State violates a sufficiently specific Community requirement that it refrains from action. The characteristic elements of the direct effect were the violation by a Member State of a specific requirement that it refrains from action and the imposition on the individual of a national stipulation counter to Community law; the direct effect justifies a claim of defence under Community law, which, however, the individual can only make to the national courts, and not prior to that to the administration of the Member State.

The European Court extended this ruling in 1970 to a decision aimed at the Member States, later to the directives. It was immediately accused of thereby making the directive equal to the regulation, despite the differing legal definitions in Article 249 of the EC Treaty.

But, irrespective of the continuing lack of clarity concerning the limits of the direct effect, the ruling of the Court on the direct effect to the benefit of private individuals has to be welcomed. It alone ensures that Community law adopted in two stages is implemented and applied uniformly in the Member States and it alone justifies rights of defence and petition for the individual, rights which are denied to him by the legal supervision stipulated in Article 226 of the EC Treaty. According to this Article, the right to take a Member State to court is limited to the Commission and the other Member States, when the matter relates to the application of Community law; since the Member States hardly ever take each other to court and the Commission is not required to act when it assumes its supervisory role, the rights of petition granted to the individual by the rulings on the direct effect of Community law binding on Member States are a happy addition to the system of redress.

Within Economic and Monetary Union the judicial system, as described above does not apply to its full extent.

II) The special Constitutional Structure of Economic and Monetary Union

The aim of the conference of Maastricht to upgrade the European Community to a political union on the one hand and to an economic and monetary union on the other would have suggested the conversion of the Community into a federation. In particular, the surrender of monetary authority to the Community envisaged at the Maastricht Conference has as its result a comprehensive transfer of Member State sovereignty to the Community. Being a pre-eminent policy, common monetary policy presupposes subordination and loyalty of business on a scale that replaces current subordination and loyalty to Member States. However, the Treaty of Maastricht has not touched upon the European Community's basic structure as laid down in the Treaty of Rome. The consensus, reached by the Member States at the Maastricht Conference, for retaining the Community's basic structure is reflected especially in the fact that the European Community will also in future obey the European Council as the supreme body responsible for guideline-setting.

The remaining structure of the European Community explains the special constitutional structure of Economic and Monetary Union. It is an explanation of why the legal constitution of the Economic Union totally differs from that of the Monetary Union. Whilst within the Monetary Union the relevant competences are assigned to the European Community as a field of exclusive authority, the Economic Union remains vested on the European Community's decentralised structure as a confederation.

1) The Economic Union

As under the Treaty of Rome, economic policy decision-making is also a Member-State responsibility and competence under the Treaty of Maastricht. The competence for economic-policy decision-making has not been assigned to the European Community as distinct from the competence for monetary-policy decision-making. In this context, the Member States' responsibility and competences comprise: short-term economic policy; medium-term economic policy, especially sectoral and regional structural policies; economic infrastructure policy, including educational and vocational training policies relevant for business, especially employment policy as well as social and societal policy extending beyond the field of economic policy decision-making in the narrower sense.

Article 98 ff of the EC Treaty assign primary responsibility for economic policy to the Member States. Article 98 and Article 99 of the EC Treaty expressly address the responsibility of the Member States by defining regulatory criteria for the Member States' economic policy (Article 98 of the EC Treaty) and/or by

requiring the Member States to regard "their policies as a matter of common concern".

The main reason why - irrespective of the surrender of monetary sovereignty to the European Community - the competence and responsibility for economic policy has remained with the Member States even after Maastricht is that transferring the responsibility for economic policy to the European Community - as in the case of monetary policy - would have required the Community's conversion from a confederation into a federation.

Centralised management of the Member States' economic processes by the European Community would presuppose revenue raising and spending authority of the European Community on a scale that would require a Community budget much greater than that of the aggregated Member-State budgets. The shaping of macroeconomic conditions is carried out by way of uniform legislation, whilst the management of particular economic processes is through taxation and governmental spending. Any - so-called - "dominant budget" of the European Community in the sense of a comprehensive shaping of revenues and expenditures would require the Member States to surrender to the European Community their responsibilities and competences for infrastructure, social, educational, scientific, research and - what matters most - defence policies. As long as these national government tasks have not been transferred to the European Community, expenditures by the Community within the scope of a dominant budget would be inconceivable. Making these policy areas the exclusive realm of the European Community would mean for the Member States the assignment to the Community of their legislative authority for all business-relevant social and societal policy areas as well. However, in order to enable the European Community to fund these tasks, it would need to have comprehensive taxation authority surrendered to it at the expense of its Member States.

Centralised management of the European Community's economy by its bodies would presuppose that the Member States abandon sovereign rights to the European Community on a considerable scale. A "genuine" economic union would be tantamount to an "economic state" and require - besides converting the European Community into a federally structured state - the status of its Member States to be reduced to that of Member States answerable to a legally superior entity.

The political willingness for such an extensive surrender of sovereignty by the at present still sovereign Member States in their core governmental areas does not exist, to date. It was first tested on the basis of a proposal for establishing a "genuine" economic union between 1969 and 1973 by converting the European Community into a genuine economic and monetary union; this proposal was postponed at the time as a politically doomed attempt. Together with this proposal for establishing an economic union, that for setting up a monetary

union was also abandoned at the same time. The prevalent view - as distinct from the one that prevailed at Maastricht - was that centralised economic policy-shaping would require a "genuine" economic union and, thus, a European Union structured as a federation. At the Maastricht Conference, converting the European Community into a confederation was not on the agenda.

The constitution of the economic union as stipulated by the provisions of the Treaty of Maastricht is - contrary to wide-spread assumption - not based on the principle of subsidiarity. Its decentralised structure is reflected in the opinion that converting the European Community into a federation, which would be a precondition of a "genuine" economic union, would not be feasible in view of the Member States' lack of political willingness.

2) Monetary Union

Governing monetary union, currency policy, including credit policy and interest policy, as well as exchange-rate policy will be an exclusive competence of the European Community. These exclusive competences of the European Community will exercise themselves without any mediation on behalf of the Member States. Transfer of monetary sovereignty has not taken place in one step, but on the basis of a three-stage procedure, however this three-stage procedure works as a mechanism which makes the process more or less irreversible.

The final stage could have begun in the year 1996/1997, provided that at least seven of the twelve Member States had fulfilled the so-called "convergence criteria". It has now commenced with the beginning of 1999, since eleven members had fulfilled the criteria governing entry into monetary union. The remaining Member States might enter the Monetary Union at a later date.

The monetary competences at the level of the Community primarily remain with the European System of Central Banks (ESCB), established for this purpose. The ESCB will exercise its political and regulatory powers and competences without any mediation on behalf of the Member States, the Member States will not have any chance of taking part in the shaping of monetary policy by the Community by way of additional national currency policy and currency measures. The monetary policy, which includes credit and interest policy, will be exercised on behalf of the European Community by the ESCB in the same way as Member States exercise their monetary policy functions. The way the European Community and the ESCB will operate means for individual enterprises and private banks that their relationships with the European Community will acquire a new dimension. This new relationship will, in the long run, probably substitute their traditional relationships with national authorities.

The ESCB consists of the European Central Bank and the national central banks. In order to ensure the independence of the ESCB and a common monetary policy, the national central banks are taken out of the hands of the national administrations and becoming an „integral part“ of the System insofar as their functions as national central banks are concerned.

Not the European System of Central Banks, but the European Council will have responsibility for exchange-rate policy towards third countries.

B) The Legal Basis of the Market Economy System of the Member States and of the Community

Since the Member States are responsible for formulating and managing economic policies, they are also responsible for setting the legal framework of their economic order. Economic activities in the Member States are traditionally regulated by the rules of competition and the market. It follows from this that competition-guided market economy as seen in the Member States' economic order has - since its establishment - also been the pattern for the European Community. The Treaty of Maastricht imposes on the Member States the obligation to formulate economic policy in accordance with the "principle of an open market economy with free competition“ (Article 98 EC Treaty) .

Through a variety of legal standards and legal institutions, the Common Market's regulatory system strengthens the concept of market economy with free competition as the Community's economic order without, however, expressly institutionalising market economy with free competition as the economic order of the Member States and of the Community. The four basic freedoms of the Common Market presuppose the existence of market-economy conditions in all of the Member States. The way in which the European Court of Justice has interpreted the freedoms of free circulation of merchandise, free trade in services as well as free movement of persons and capital means that the Member States' lawful acts of intervention into their own decision-making in the fields of production, consumption and conducting business must be kept within the closest possible limits. The Treaty of Rome places public-sector businesses on a par with private-sector businesses; exempting public-sector businesses from the workings of competition law makes it necessary to justify such acts of intervention vis-à-vis the European Community. Article 86 of the EC Treaty gives rise to far-reaching deregulation and privatisation constraints which - in turn - strengthen free market economy in the Member States' public-sector businesses.

Subsidies monitoring by the European Community is designed to ensure smooth competition in the Common Market. It excludes the downright use of

instruments for economic promotion such as awards of public contracts to bidders of domestic companies for their products or to public-sector enterprises as a matter of priority. Such monitoring permits the European Community to obligate the Member States to employ such instruments rather as they are in conformity with market principles, e.g. financial assistance and tax relief. The European Community's tasks of monitoring cartels and abuse of dominant positions as well as of controlling mergers are also based on the freedom of conducting business. These instruments serve to ensure a market economy committed to competition and presupposes that the European Community's economic order be a market economy as well.

Further elements of market economy and free competition as the European Community's economic order are the constitutionally guaranteed basic freedoms which the market participants enjoy due to the European Community's legal order. As mentioned above, the European Court of Justice has confirmed, by way of its current rulings, that the European Community's legislative and administrative authority is limited by Community basic rights and basic freedoms, especially the free choice of occupation and the guarantee of private ownership. According to the current state of integration, the basic Community rights are - as mentioned before - binding on the Member States only where they execute Community law, but not where they exercise the sovereign rights reserved to them. When - with progressive integration - the basic Community rights eventually also cover the Member States' exclusive fields of action, the Community system of basic rights and freedoms will be the only constitutionally binding regulatory criteria for a liberal, competition-guided social market order of both the Community and its Member States.

Article 295 EC Treaty stipulates that the Treaty does not touch the system of property within the Member States. As regards the above mentioned other prescriptions of the Treaty, the field of application of this Article is widely restricted. Member States cannot use this article to deprive the common market and Economic and Monetary Union of their effect.

C) Member States´ Status and Obligations for Conducting their Economic, Budgetary, Social and Societal Policy

I) "Convergence" of economic policy as a basic requirement

The Member States' duty is to shape their economic policies in a way that ensures "convergence" of economic developments (Article 104 EC Treaty). The meaning of such "convergence" is exemplified by general and special economic-policy guidelines set by the Community (Articles 98 and 99 EC Treaty). Within the meaning of this Community-law criterion, convergence of economic policies means that the Member States ensure, while maintaining their domestic and their

external economic balances, continuing qualitative and quantitative economic growth while seeking to attain a high level of employment. Economic policies must be shaped in such a way that the rates of inflation are kept down, the external economic equilibrium is maintained, income policies are oriented to the trend in business productivity, social and political stability is ensured and that the business community benefits from a growth-oriented economic infrastructure. The Member States' "economic performance" must be convergent to such a degree that the internal market can fully develop its potential and that a centrally shaped stability-oriented monetary policy is thereby made feasible.

II) Special requirements

In addition to the general convergence requirement, the Maastricht Treaty includes yet another criterion guiding the Member States' shaping of their economic policies, i.e. the obligation to avoid excessive public-sector deficits. The budgetary-law regulations of the Maastricht Economic Union include a ban on monetary financing of public-sector budgets on the one hand as well as the so-called budgetary-law regulations in the narrower sense.

The ban on monetary financing of public-sector budgets enshrined in the Treaty of Maastricht as the constitutional law of both the Monetary and the Economic Union comprises a ban on central-bank borrowings by government and public entities of any kind (Article 101 EC Treaty). It also includes the even more important prohibition to give public authorities privileged access to financial institutions. The ban includes measures of any kind whose material effect is that of monetary financing; forced sales of public loans, including indirect promotion of such sales by Member States, are outlawed (Article 102 EC Treaty).

The budgetary-law regulations in the narrower sense, the so-called "budget discipline", require a lid to be put on annual borrowings by way of floating loans on the capital market as well as a reduction in the total public-sector debts (Article 104 EC Treaty). The yardsticks for gauging budget discipline are the requirements that annual governmental borrowings shall not exceed 3 % and that the total level of public debt shall not be in excess of 60 %, both measured as a percentage of GDP.

The concept of convergence as generally understood is occasionally criticised in the following way:

The Maastricht Treaty focuses attention on only one aspect of convergence of inflation, interest rates, exchange rates, deficit and debt ratia. It does not deal in either the same detail or the same breath with the problems of:

- real convergence - convergence of GDP per head, unemployment, all the problems of social and economic cohesion,

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- structural convergence - that industrial structures and the availability of
- natural resources are such that the economies respond in a similar manner to external shocks,

- institutional convergence - that economic (and political) institutions are such that they can respond to regulatory change or to economic and political pressures,
-
- political convergence - that „domestic“ policies are consonant: Market and more regulatory solutions cannot necessarily operate hand in hand as some of the problems in implementing the single market show,
-
- behavioural convergence - citizens of the different regions of the European Union have different preference orderings, which mean that common policies may in fact be devisive - the response to incentives may conflict, with anti-inflationary policies actually causing inflation in some Member States, as is well known with the problems of hardening and artificial shortages.

All of these problems emphasise the grounds for scepticism and unless integration in Europe pays greater attention to all of these facts, concentration on much faster progress in just some areas risks distorting the system to the point that some Member States may have to backtrack. The requirements for monetary union may be just such a step too far.

III) Member States` responsibilities

The Member States are required to meet the convergence obligations and the regulatory criteria of the economic union as their own responsibility. The Maastricht Treaty stipulates as a structural principle of the economic union that neither the Community nor the other Member States shall bear liability for any individual Member State's economic policy mistakes (Article 103 EC Treaty). Financial aids to Member States shall only be granted on the basis of a unanimous decision of the Council under the condition that a Member State is menaced by difficulties caused by extraordinary events. In the case of natural catastrophes the decision can be taken by a qualified majority of the Member States (Article 100 EC Treaty).

Exclusion of the Member States' mutual liability for economic policy mistakes is fundamentally different from the way in which liability is structured in a federation. The basis of economic policy liability in a federation is - as in any centrally managed state - financial solidarity.

Solidarity-based liability for economic development in all of the Member States comparable to that found in a federation could only be achieved by the European Community if the Member States' current responsibility were corrected by a transfer of resources to the Community that is much greater than at the present time. However, the solidarity among the Member States and their peoples necessary for a correspondingly increased transfer of resources does not exist for the time being. An association of states can ensure uniform economic conditions only to a limited extent. Pending the conversion of the European Community into a real federation that would ensure centralised economic management throughout, it is necessary, even if it is difficult, to retain the principle of Member-State liability and to exclude mutual liability of the individual Member States.

During the second stage of the economic union, the Member States may obtain, on the basis of the safeguard clauses of Article 119 and Article 120 (previously Articles 108, 109 EC Treaty), foreign exchange credits from the Community and the other Member States in the case of balance-of-payments difficulties, restrict capital movements as well as intervene into the Common Market in other ways. Reference to these safeguards clauses, while allowing the Member States to correct their economic policies, of course excludes - like currency devaluations or currency floating - their eligibility to enter to the Monetary Union.

After joining the final stage of the Monetary Union, Member States are no longer permitted to take recourse to the safeguards clauses (Article 122, paragraph 6 EC Treaty). Since they do not have the possibility to resort to the instrument of exchange-rate adjustment, for them, the exclusion of liability of the Community and the other Member States for economic policy mistakes means that - in the absence of the money creation power - they might become illiquid. The principle of Member-State liability in connection with the transfer of monetary sovereignty to the European Community means that Member States can go bankrupt.

The most important constraint which burdens Member States' economy policy results from the transfer of their monetary sovereignty to the European Community. The monetary policy, i.e. the interest and credit policy as well as the exchange-rate policy, are centrally managed by the European Community without allowing that individual Member States can direct and influence them by additional measures needed by their economic situation. On the level of the European Community, the European System of Central Banks is endowed with the task and power to define the monetary policy. The governors of the national central banks may be represented within the Council of the System and according to the procedure a simple majority of the governors may have the power to define the common monetary policy; all Members of the Council are independent and free from instructions and all are obliged to respect price stability as primary aim of the Monetary Union. The individual Member State

has in no case the possibility to shape the interest policy according to the needs and requirements of its own economy.

D) The Procedure for Co-ordinating and Monitoring Member States`Economic Policies (Article 99 of the EC Treaty) and the Procedure for Monitoring the Member States` Budget Situation (Article 104 0f the EC Treaty)

In order to enforce convergence of the Member States' economic development and to monitor their budget situation, the Treaty of Maastricht has installed two special procedures in Articles 99 and 104 EC Treaty. These procedures replace the co-ordination procedure under the old Article 105 of the EEC Treaty, which guided the co-ordination of the Member States' economic policies before the European Community was converted into the Maastricht Economic Union.

Like the previous procedure, the two new ones, i.e. those monitoring the Member States' economic policies and their budget situation, represent co-ordination procedures in the sense that resolutions legally binding on the Member States cannot be adopted to their detriment and that the authority for adopting resolutions remains with the Council and, thus, with the Member States themselves. However, as distinct from the past, Council resolutions are now adopted by qualified majority.

I) Procedure for Monitoring Member States` Economic Policies (Article 99 of the EC Treaty)

The procedure for monitoring the Member States' economic policies is installed by Article 99 EC Treaty. It is substantially implemented by the Council regulation (EC) No. 1466/97 from 7 July 1997, based on Article 99 paragraph 5 EC Treaty on "the implementation of the budgetary supervision and the supervision and the co-ordination of the economic policies".

The procedure is a co-ordination procedure and aims at the Member States respecting all obligations which are put on them, especially the obligation of the Member States to guarantee convergence of the economic development. The procedure for supervising the economic policy entitles the Council to adopt and to issue general and special guidelines of the European Community for the economic policies of the Member States. It is legally binding insofar as Member States have to participate in the co-ordinating process. The "general and special guidelines" and the "basic aims" for the economic policies of the Member States are mere "recommendations" and are as such without any legally binding effect.

All decisions which are adopted within the supervisory procedures are formally taken by the Council, i.e. the Council of Economic and Finance Ministers. The Council decides by qualified majority voting without being bound to formal propositions from the Commission. The basis of its decisions are recommendations of the Commission, so that the Council, when deviating from the concept of the Commission, contrary to the normal "proposition-procedure" of Article 250 EC Treaty, is not bound by the requirement of consensus and unanimity among all Council Members.

But, the decision-making power does not remain with the Council without restrictions. The decisions of the Council are subject to the approval of the European Council, i.e. the heads of states and governments. Article 99 EC Treaty provides that the Council, deciding by a qualified majority on a recommendation from the Commission, adopts a proposal for the basic aims of the economic policy of the Member States and submits the proposal to the European Council. The European Council discusses the report of the Council and adopts "conclusions to the basic aims of the economic policies of the Member States". Then, the Council decides and adopts the "general lines of the economic policy of the Member States", on the basis of the "conclusions" of the European Council. The "conclusions" may not be binding from a legal point of view; politically, the Council is bound to them. The binding effect of the "conclusions" of the European Council substantially restricts the sovereignty of the Council. From a material point of view the regulatory and decision-making power within the supervisory procedure does not remain with the Council of Ministers but with the European Council. The European Council exercises its regulatory and decision-making power not by qualified or simply majority voting, but by consensus, i.e. by unanimity.

The European Parliament does not play any substantial role under the procedure of co-ordinating the economic policies of the Member States. The president of the Council and the Commission have to inform the European Parliament of the results of the multilateral supervision.

Member States are to inform the Commission and the Council on all important measures in the field of economic policies. Those Member States which participate in the monetary union have, according to the above mentioned regulation, to present „stability programs“ and those Member States, which do not yet participate in the Monetary Union have to present similar "convergence programs". The programs have to be conceived in a way that they form the basis for price stability and for a strong, enduring and the creation of jobs fostering growth of the economy. These strict requirements were introduced into the procedure by the "Growth and Stability Pact" adopted by the European Council in 1997.

If the "Guidelines for the Economic policy" are not respected, the Council may warn the Member State concerned and adopt recommendations. But, no legally binding decision or sanction can be taken by the Council. The Member State which does not comply with the convergence obligations or any other requirement takes part in the procedure without being excluded from the voting.

The procedure of supervision and co-ordination of the economic policy of the Member States works prior to the procedure of supervising the budgetary position of the Member states (Article 104 EC Treaty). Therefore, decisions being taken within the co-ordination procedures may have influence on the decisions which are taken within the budget supervision procedure. At least, they may politically determine the decisions which are taken later within the budget supervision procedure. Therefore the European Council may indirectly play a role in the procedure of supervising the budgetary situation of the Member States although such a role as "gouvernement économique" is not provided for under Article 104 EC Treaty.

II) Procedure of Supervising the Budgetary Situation of the Member States (Article 104 of the EC Treaty)

The procedure of supervising the budgetary situation of the Member States corresponds, in its basic structure, to the procedure of supervising and co-ordinating the economic policies of the Member States. It is regulated in Article 104 EC Treaty and is implemented by the Council Regulation No. 1467/97 of 7 July 1997 "on speeding up and clarifying the implementation of the excessive deficit procedure".

The budget supervising procedure is highly important for the new common currency. It is a procedure of co-ordination and supervision not only in the framework of the Economic Union but also within the Monetary Union. There are fears and apprehensions that governments of Member States might take influence via this procedure as "Economic government" vis-à-vis the "European System of Central Banks" on the management of the monetary policy of the European Community.

Within the budget supervisory procedure, decisions of the Council are also taken by majority voting. But a Member State which is concerned does not take part in the decision-making, starting from a certain stadium of the more staged procedure. Then, the Council decides with a majority of two thirds of the weighted votes, the votes of the Member State concerned being excluded (Article 104 paragraph 13 EC Treaty).

Within the procedure concerned the Council does not take action on the basis of formal proposals from the Commission but on the basis of recommendations from the Commission. Opposite to cases where the Council takes action on the

basis of formal proposals from the Commission, the Council can set aside the concept of the Commission without being bound by the requirement of an unanimous decision.

Within the procedure of supervising the budgetary situation of Member States, the Commission does not play the role which it generally has to play under the Treaty of Rome. According to Article 211 EC Treaty, the Commission, in general, has the task of taking care of the application of the Community law by the Member States. According to this provision the Commission is entitled to adopt and to issue recommendations and opinions to the Member States in all "the fields described in the Treaty, without being specially authorised". But, the rights of the Commission under Article 211 EC Treaty only apply within the field of the "Common Market". When the European Community was restructured into an Economic and Monetary Union, the provision of Article 211 EC Treaty was not extended to Economic and Monetary Union. Since the procedure on the supervision of the budgetary situation of the Member States shows strong features of the supervision of law, it would have been a likely decision of the Maastricht Conference to grant to the Commission those rights which are its own as "born" bearer of the law supervisory function within the field of the Common Market. The function and the participation of the Commission is, within the budget supervisory procedure, mainly limited to assisting the Council. The underlying structure of Economic and Monetary Union is, as the role and position of the Commission demonstrates, not the supranational structure as it can be deduced from the set of rulings governing the Common Market. The economic and monetary union is, as the with the monetary policy of the European Community endowed "European System of Central Banks" makes evident, more orientated towards the basic structure of the European Community as a confederation of states. In Maastricht, as other aspects, the supranational features which characterise the European Community as a Common Market were not extended to Economic and Monetary Union. The right of the Commission and the Member States to take action against a Member State before the Court of Justice does not exist within the field of Economic and Monetary Union to the same extent as it exists within the field of the Common Market. According to Article 104 paragraph 10 EC Treaty, the right of the Commission and the other Member States to take action before the Court of Justice against a Member State which has not fulfilled its obligation to avoid an excessive budgetary deficit can only be exercised under the condition that the Council has attested to the excessive deficit by a decision, taken by a majority voting, and furthermore the Council has in vain monitored for the removal of the budgetary deficit. The right to take action presupposes an authorisation of the Council in form of the said decision instead of the pre-procedure as provided for in Article 226, 227 EC Treaty, which is within the authority of the Commission and cannot be vetoed by the Council or a majority of Member States.

Although the supervision of the budgetary situation of the Member States remains with the Council, the Commission internally has the function of preparing the measures and decisions to be taken by the Council. The Commission has to make sure that Member States stick to the budgetary discipline. It does this by permanently supervising the development of the budgetary situation and the height of the debts of the Member States with a view of "recognising grave defects". Decisive for the estimation of the budgetary situation of the Member States are the two budgetary criteria of a yearly indebtedness of no more than 3 % and a total indebtedness of no more than 60 % of the gross national product.

From a legal point of view, an excessive budgetary deficit is not proved only by the fact that a Member State does not comply with the two budgetary criteria of 3 % and of 60 % respectively. The budgetary deficit must expressly be testified by a decision of the Council (Article 104 paragraph 6 EC Treaty). The Member State concerned is not excluded from taking part in the decision-making process at this stage.

If a decision of the Council for whatever reason is not reached or is not attainable, an excessive deficit is not proven, notwithstanding the fact that the reference criteria are not respected.

When the budgetary deficit is testified the Council has to issue a recommendation to the Member State concerned with the demand that the situation must be cleared within a certain period (Article 104 paragraph 7 EC Treaty). If the Member State does not comply with the recommendation, the Council is then authorised to impose on the Member States those measures which according to its judgement are necessary to remove the budget deficit. At the same time the Council is authorised to put the Member State in default. All decisions and actions taken by the Council after the testifying of the deficit are taken without the participation of the Member State concerned in the decision-making process (Article 104 paragraph 13 EC Treaty).

Against a Member State which has fallen into default the Council can adopt sanction measures. It decides by a majority vote without the participation of the Member State concerned. The sanction measures either consist of obligating the Member State to publish certain information before emitting bonds or other capital market investments, of asking the European Investment Bank to examine its loan granting policy towards this Member State, of demanding a deposit of an apportionate size without interest with the European Community or of the inflicting of fines of an apportionate height.

The Council Regulation "on the acceleration and implementing of the procedure in the case of an excessive deficit" strengthens the procedure in general and in particular, as far as the infliction of fines is concerned. The Council has to take

all decisions within certain time limits, but the taking of the decisions as such is not put under obligation. Even as far as the decision to inflict a fine on a Member State is concerned, the discretion of the Council, as far as a discretion exists under the Treaty, is not touched by the Regulation. The Regulation only says that the Council, in the case that it uses its discretion properly and inflicts a sanction, has as a rule to demand a non-interest deposit. But, the height of the deposit is fixed and so is the conversion of the deposit into a fine, which the Council has to decide "as a rule".

The Council Recommendation on the Growth and Stability Pact of 17th June 1997 has no legal effect and does not constitute legal obligation either of the Member States or of the organs of the Community. But all stipulations and specifications concerning the budget supervisory procedure, as well as the procedure on monitoring the economic policy of the Member States, which are contained in the recommendation do have politically binding effect.

The European Parliament takes part in the supervisory procedure in that the President of the Council has to inform the Parliament on all decisions, taken by the Council (Article 104 paragraph 11 subparagraph 2 EC Treaty).

Until the beginning of the final stage of Economic and Monetary Union, the procedure of supervising the monetary situation of the Member States is restricted to the current supervision of the budgetary situation of the Member States, the assessment of the budgetary deficit and the issuing of a recommendation aimed at the removal of the deficit and of the publishing of the recommendation. The issuing of a recommendation to bring the Member State into default and decisions on sanction measures are not possible as long as the final stage of Economic and Monetary Union has not yet come into effect (Article 116 paragraph 3 subparagraph 2 EC Treaty).

Therefore, for Member States which do not participate in Economic and Monetary Union in its final stage, the procedure of supervising the budgetary situation consists of a demand for the removal of the budgetary deficit, without any legal effectiveness; it restricts itself to the issuing of "blue letters". The procedure under Article 104 EC Treaty is only a more or less legally structured and legally binding supervising procedure from the beginning of the final stage of Economic and Monetary Union onwards and only for those Member States which enter Economic and Monetary Union in its final stage.

The obligation of the Member States to avoid unproportionate budgetary deficits, as laid down in Article 104 paragraph 1 EC Treaty, also obtains legal effect only from the beginning of the final stage of Economic and Monetary Union. Before the beginning of the final stage of Economic and Monetary Union, or rather before entering into Economic and Monetary Union in its final stage, Member States are only obliged "to endeavour" to avoid an

unproportionate deficit. This restriction of their obligation which exists before entering Economic and Monetary Union, i.e. during the pre-stadium of Economic and Monetary Union follows from Article 116 paragraph 4 EC Treaty, a largely unknown and hidden provision of the Treaty, according to which the provision of Article 104 EC Treaty enjoys legal effect only from the beginning of the third stage of Economic and Monetary Union.

Overall, the provisions governing the Economic Union restrict the sovereignty of the Member States to some extent, but these provisions and rules, contrary to the provisions governing Monetary Union, do not create real sovereign power at the Community level.

E)The European Community`s exclusive Competence and Sovereignty in the field of Monetary and Exchange-rate Policy

I) The Structure of the Monetary Union

Unlike the Economic Union, the Monetary Union implies the transfer of monetary sovereignty from the Member States to the European Community. From the beginning of the final stage of Monetary Union, dated 1 January 1999, monetary policy, i.e. monetary-, interest- and credit policy as well as exchange-rate policy are controlled by the Community as an exclusive competence as it has been the case before by the Member States. As a consequence of the transferral of monetary sovereignty to the European Community, Member States lose any competence in this sector.

The monetary policy of the European Community will be under the obligation to ensure the stability of the common European currency, i.e. the stability of the niveau of prices. This envisaged aim of monetary policy and the obligation to ensure price stability have their legal anchor at different places of the Maastricht Treaty. The stability of the currency has been enshrined as a precedent aim in Article 4 and in Article 105 of the Treaty, and above all in Article 2 of the Statute of the European System of Central Banks and the European Central Bank.

The new structure and organisation of the Community which has been created by the Treaty of Maastricht reveals different questions under constitutional policy and constitutional law aspects. Among them, of eminent interest is the question whether the European Community can shoulder its task and responsibility to guarantee the stability of the common currency on the basis and within the framework of its structure as it has been set up in Maastricht.

This question cannot be answered by the simple remark that the stability of the currency has been enshrined in the Treaty with legal effect as an aim of the

monetary policy of the Community as well as an aim of the economic policy of the Member States. The obligation of the organs of the Community and the obligation of the Member States to ensure price stability as well as the attempt to fix monetary stability as a predominant aim within the Treaty do not lay a sufficient foundation for a „Community of Stability“.

In order to conceive a polity as a „Community of Stability“ in addition to the fixing of the aim which should be reached, the competences of the organs of this polity and above all the procedures of how they cooperate politically, have to be structured in such a way that the stability of the currency is guaranteed and reached as the result of the cooperation of the organs quasi in itself, i.e. more or less automatically. The independence of a central bank to which the monetary policy is entrusted is a basic, if not indispensable element on which the constitution of a polity of stability can be based. An independent central bank can only guarantee the running of a monetary policy aimed at price stability under the condition that the stability of prices and the stability of the currency as well as the independence of the central bank itself is sufficiently ensured by a broad consensus of the society and the people. As a basic element of a polity constituted in a way that monetary stability is guaranteed, the independence of the central bank has to be supported by other constitutional elements, above all in the event that the responsibility for monetary stability is shared by other institutional organs being bearers of the power of co-deciding on matters concerning price stability. Bearers of co-responsibility for the price and monetary stability are the budgetary and fiscal policy, the income and wage policy and, if it is not entrusted to the central bank, the exchange rate policy, and this in such a way that the organs charged with these policies belong to other institutions and organisations.

The constitutions of the Member States reveal that these different bearers of responsibility for monetary stability, namely the central bank, the Parliament, the social partners (which are mainly responsible for income and wage policy within a hierarchically structured polity) are settled on the same level of competences and decision-making, even if there is no special system of constitutional and legal links among them. The German Central Bank as bearer of the monetary policy, the Federal Government, the Bundestag and the Bundesrat as bearers of the budgetary and fiscal policy and the centrally organized, or at least centrally administered system of the social partners, i.e. the trade unions and the association of employers as bearers of the income and wage policy confront each other, within the German state, on the upper level of the federation. The consensus which exists with the people and the society and which assesses the price and monetary stability as a high-ranking common concern and by this ensures that price and monetary stability is the result of a process of communication which takes place within the society and its circles which is centrally organized; it consists of the political parties, of the relevant socio-economic groups, of the media and of public opinion. The legitimacy of

the currency policy of the Bundesbank as well as of the independence of the German Central Bank is mediated by the political forces of the country as well as by the public opinion which all unfold themselves centrally without a parallely operating system of opinion - shaping divergent regional structures which might be of substantial influence.

The constitution of the Monetary Union and the way it is legally constituted under the Treaty of Maastricht, according to a general opinion within the community, orientates itself around the constitutional system of responsibility for monetary stability as it exists in Germany. This applies above all as far as the position of the European System of Central Banks as bearer of the common monetary policy on the European level is concerned, especially as far as its continuously cited independence is concerned.

Indeed, if one assesses the constitution of the Monetary Union as created at the Conference of Maastricht one can take as a yardstick the situation and the constitutional system as it exists in Germany, especially the links which bind together the different bearers of responsibility for monetary policy under the German model.
The Federal Republic of Germany is, notwithstanding its federative structure, not a confederation, but a real state, i.e. a centrally structured organisation in the sense that the federal level, the so-called Bund, enfolds its powers, the Bundeshoheit, which of course does not comprise all tasks and functions of a completely centralized state, directly within the whole territory of the Republic whereby the power of the Federation is superior to the powers of the German Member States and precede the latter ones in the event that there is a conflict between the unfolding of the federal power and the unfolding of the powers of the German States. All competences which are exercised by the federal authorities in the field of currency policy do not need any mediation on behalf of the German States; when unfolding themselves the competences of the federal authorities in the field of monetary policy cannot be jeopardized by the German States or other regional authorities or social powers. The political parties, the relevant socio-economic groupings and the bearers of public opinion, which together constitute the societal system of clarifying opinions and which accompany the exercise and the unfolding of the competences of the central state are organized in such a way that all regional structures are more or less hindered in taking influence on the central policy. The bearer of competences and the supplier of legitimacy for the currency policy in the field of monetary policy have the same dominating central status with respect to regional powers and structures of influence.

The Monetary Union, as created on the Conference of Maastricht, is based on the European Community, and thereby on a constitutional structure which substantially differs from the organisational structure of the Federal Republic. Furthermore the monetary union of Maastricht is based on a political system, the

bearers of power and political influence of which are not bound together in a way equal to their equivalents in Germany. On the Community level the three bearers of monetary policy responsibility are connected with each other in a quite different way. Whereas the monetary policy has been transferred to the European Community, or rather to the European System of Central Banks, and this under the condition that any co-competence of the Member States in this field is excluded, the functions and tasks of the European Community in the field of economic policy, apart from its financial assistance to the Member States through the so-called "funds-policy", remain restricted to the co-ordination of the economic policies of the Member States. The European System of Central Banks as bearer of the internal monetary policy and - to a great extent - of the external monetary policy, i.e. the exchange-rate policy has not a single bearer of the economic policy as its counterpart, as is the case on the same level within the Member States, but has as counterparts twelve national bearers of economic policy. The same is the case with the income and wage policy which according to the Treaty of Maastricht remains as a competence of the Member States a national responsibility. The bearer of the monetary policy of the European Community, settled at the level of the Community, has as counterpart twelve national systems of wage and income policy management, settled on the national level which as far as their relation to each other is concerned are not bound together by any form of network of special links.

The founding fathers of the Maastricht Treaty were aware, in any case, that monetary stability is guaranteed only under the condition, that the Member States as bearers of the economic policy, especially as bearers of the budgetary and fiscal policy, are included into the responsibility for stability. It is not without reason that the Treaty of Maastricht puts strong obligations on Member States as bearers of the budgetary and fiscal policy for the purpose of ensuring the stability of the common currency.

It is of course questionable whether the monetary policy, which has been transferred to the European Community, at least at the long run does not presuppose that the European Community is restructured from an association of states into a real federation. The transferral of monetary policy to the European Community, more precisely to the European System of Central Banks, has as consequence that monetary policy is run by the Community as an exclusive competence. The running of a monetary policy on behalf of the European Community on the basis of an exclusive competence implies a common monetary policy, a common credit policy and a common interest policy, with the result that national measures in these fields which were supporting or implementing these common policies are impossible and inadmissible. The European System of Central Banks is responsible for the monetary policy of the Community and exercises the regulatory and political power endowed to it by the Member States vis-à-vis the economy in a direct way. The monetary policy of the Community affects the economic and societal situation within the

Member States without national governments being involved and able to adopt additional measures. The monetary policy is shaped as a supranational state function and run by the European System of Central Banks which can be described as an intergovernmental - an authority of its own - organisation, which is attached to the Community. Being a supranational policy the monetary policy leads on the long run to a situation which creates a new loyalty structure within the economy and society which substitutes the traditional loyalty structures within the Member States.

To justify the constitutional pattern of Monetary Union it is argued that the monetary sovereignty has been transferred on the Community level to an institution, namely the European System of Central Banks, which is allegedly independent and itself represents a supranational structure. Therefore the reconstruction of the European Community itself to a federation could have been omitted. Such a reconstruction would have as its result that the monetary policy would - to a greater extent - fall under Parliamentarian control and influence. Being a purely technocratic regulatory power the monetary sovereignty of the Member States could have been transferred without any danger to the "supranationally structured" European System of Central Banks without that the European Community itself being fundamentally restructured to a federation.

This argumentation does not take into account that the restructuring of the European Community to a - federally structured - state does not mean that the control of the European System of Central Banks is at stake, the restructuring of the European Community is discussed and envisaged for the eventuality that a political power structure might and should come into existence and into force on the level of the Community. The coming into existence of such a supranational political power structure is an indispensable precondition for the establishment of a basic political consensus within economic and societal circles, especially a basic consensus comprising all economic and societal circles that stability of prices and the stability of the common European currency has an adequate value. The policy of the European System of Central Banks needs to be legitimised by the organs of communitarian power, now restructured to a supranational state, as well as by the system of filtering of opinions as it is constituted by European political parties and integrated economic groupings which are ranged against of any Parliament and without which a parliamentarian system cannot properly function. On the basis of frameworks of communication and of filtering opinions which are decentrally and nationally structured and, besides this, historically embedded, a new integrated fundamental consensus among all socio-economic groupings destined to bear the monetary sovereignty cannot come into existence. The decentralised structure of opinion-shaping in monetary policy matters as it exists now is not a sufficient guarantee and above all not a legitimation of the functioning of the European System of Central Banks and of its stability-aimed monetary policy.

Since the European Community has not been restructured into a real federation, an integrated system of communication and of filtering the different opinions, and in particular the necessary framework required by an efficient public opinion on the level of the Community, cannot develop or come into existence. At the level of the Community those institutions do not exist which could take over the task of properly legitimising the envisaged stability-oriented currency policy. There is a great danger that Member States might act within the context of the monetary policy of the European Community on the basis of the national consensusses as these are shaped within the national frameworks of communication and of filtering of opinions and interests. Even Member States which do not persist beyond the common monetary policy with criticism and scepticism would hardly take over the task of procuring legitimacy for the European monetary policy.

II) The Structure of the Treaty of Maastricht`s “Monetary Authority”

The Treaty of Maastricht has transferred the so-called external monetary policy, i.e. the exchange-rate policy, on the level of the Community to the Council of Ministers (see Article 111 EC Treaty). In order that the Community could take over the internal monetary policy, i.e. the currency, the interest and the credit policy, which in Germany is a domain of the Central Bank, the intergovernmental conference of Maastricht created a new monetary authority, called the European System of Central Banks which is and equally structured to the European Community itself, namely structured as a confederation or rather an intergovernmental institution. This new monetary authority is now generally known in a simplified and, as it will be shown later, incorrect manner under the short name "European Central Bank" and is generally compared, as far as its structure and its function are concerned, with the German Federal Bank.

III) The Responsibility for the Internal Monetary Policy (Currency policy) on the European level

Article 8 EC Treaty which has been embodied into the Treaty of Rome by the Treaty of Maastricht provides that there shall be established "according to the procedures of this Treaty a European System of Central Banks (in the following described as "ECBS") and a European Central Bank (in the following described as "ECB")" which "act according to the regulatory powers which are attributed to them by this Treaty and the Statute of the ECBS and the ECB (in the following named as "Statute of the ECBS", annexed to the Treaty". Therefore, in order to run the currency, interest and credit policies, not one but two institutions have been established in Maastricht.

When establishing two institutions the governments of the Member States were totally aware of the fact that within the Member States the monetary sovereignty, if it is not run by the government itself, is held by one single central bank. If they thought in spite of this fact that it be advisable and necessary to establish two institutions on the European level each of them differently structured and each endowed with its own competences, political or constitutional reasons must have been forcing them to do it this way. It is significant that Article 8 EC Treaty states that each of the two institutions only exercises those functions and powers which are expressively attributed to it. The provisions of Article 105 to 113 EC Treaty and the provisions of the Protocol on the "Statute of the European System of Central Banks and the European Central Bank" which has been annexed to the Treaty and has equal legal quality to the Treaty itself describe and lay down the organisation and the competences as they are attributed to both institutions. By doing this these provisions evidently prove that there has been a well thought concept to differ and to deviate from the situation within the Member States and to establish two monetary authorities which are endowed with divided competences and stand in a peculiar relation to one another.

The Treaty of Maastricht describes the currency, credit and interest policy as it is pursued by the Bundesbank in Germany as "defining and implementing the monetary policy of the Community" (Article 105 EC Treaty). The Treaty does not attribute this policy, qualified a "basic task", to the European Central Bank as one might assume but to the European System of Central Banks (ECSB). As far as the further attribution of tasks to the European System of Central Banks is concerned, the provision of Article 105 EC Treaty is equally clear. There is no other provision within the Treaty or within the Statutes of the European System of Central Banks which could serve as a proof for the assumption and for the thesis that the "definition and implementation of the monetary policy for the Community" lies within the competence of the European Central Bank.

The constitutional relation between the two monetary authorities as they have been established in Maastricht is organized in such a way that the European System of Central Banks stands in the foreground. The European Central Bank for its part stands nearby and is even to some extent subordinated to the European System of Central Banks.

The secondary position of the European Central Bank in relation to the European System of Central Banks stems from the fact that the European Central Bank is not only an institution of its own but at the same time together with the national central Banks one of the "partners" of the European System of Central Banks. The subordinated position of the European Central Bank to the European System of Central Banks can be seen in the fact that the private and original functions of the European Central Bank have the character of auxiliary functions.

1) The European System of Central Banks

The European System of Central Banks is composed of the European Central Bank and of the central banks of the Member States. It is an association based on a partnership of the national central banks and the European Central Bank established in Maastricht as an affiliate institution or daughter institute of the now fifteen national central banks. Being a purely intergovernmental association composed of national partners, namely of the fifteen national central banks, and of one commonly owned partner, the European Central Bank, and not having a legal personality the European System of Central Banks is not a new organ of the European Community or a really autonomous or independent organisation. Despite the fact that it is deprived of or rather not endowed with legal personality, the European System of Central Banks might have been endowed with the tasks and functions of a central bank as far as political decisions are concerned; yet the right to emit bank notes and all other rights and powers of a central bank which unfold effects towards third legal entities, such as the definition of minimum reserves of private banks by way of adopting regulations, could not be transferred to the European System of Central Banks because of its lack of legal personality.

In order to assume the tasks and functions of a central bank which have legal effects towards the environment, the European System of Central Banks, not having legal personality, could have been established as an organ of the European Community comparable with the Commission without there having been a need to grant legal personality to it. But in this case its decisions in monetary policy matters would have been regarded as decisions of the European Community as such. But, since according to the Maastricht concept the internal monetary policy, i.e. the currency, interest and credit policy, contrary to the outer monetary policy, i.e. the exchange-rate policy, should not be transferred to the European Community itself, acting through its organs, but should be awarded to a new organisation, staging independent and aside from the European Community the installment of the European System of Central Banks as an organ of the European Community was out of question.

Granting a legal status to the European System of Central Banks under international law or the private law of a Member State would have been possible on condition that the national banks would have been abolished as national institutions and at the same time would have been substituted by regional central banks established under community law as dependently or even independently subordinated affiliate institutions of the European Central Bank. In this case a "real" European Central Bank exclusively associated to the European Community as such and to the utmost extent comparable to a classical central bank would have come into existence.

The installment of a supranationally structured "Bank of Banks" of the European Community by removing the central banks of the Member States and replacing them with affiliated regional central banks would have been the logical consequence of the fact that the monetary sovereignty of the Member States was transferred to the European Community. Such a step of integration in the field of the organisation of the central banking matter which corresponds to the integration of the monetary policy would certainly have legitimised the demand for higher independence of the new monetary authority of the European Community with regard to the Member States. But, the model of a “real" European Central Bank was not in question during the ongoing discussion nor at the discussions during the Maastricht conference itself.

Since the European System of Central Banks, being only an intergovernmental or interstate association, can make recommendations in the field of „defining and implementing the monetary policy“ only in a political way and since it cannot give to its decisions legal effect towards third persons and institutions, for example by issuing bank notes or adopting regulation on minimum reserves of the private banks, this because of its lack of legal personality, the creation of a second institution has been necessary, and this as a second institution which is annexed to the European System of Central Banks. This „executive committee" of the European System of Central Banks, which was endowed with legal personality and could therefore exercise all the functions of a central bank with legal outside effect is the European Central Bank, founded as an affiliate institute, i. e. a daughter institution of the national central banks.

The European Central Bank on the one hand is included into the European System of Central Banks as one of its system-partners and on the other hand stands beside the European System of Central Banks insofar as it is endowed with some competences of its own. But, as far as each of its functions and positions is concerned, the European Central Bank remains subordinated to the European System of Central Banks, which is dominated by the national central banks in a way and to an extent that a dominating role of the European Central Bank, in defining the monetary policy of the European Community is made substantially difficult.

The European System of Central Banks, with its particular structure as an interstate association of the national central banks, makes it possible to offset diverging national concepts to an incomparably greater extent - notwithstanding the fact that the European Central Bank is one of its partners - than would have been possible within a monetary authority which were exclusively attached to the European Community and absolutely centrally organised. This could have been the reason why the creation of a real central bank had been rejected at the Conference of Maastricht and why instead of this a purely intergovernmental institution, such as the European System of Central Banks represents, has been established and endowed with monetary sovereignty. The monetary policy

concepts of the Member States vary with respect to the additional functions of the monetary policy, especially with respect to its use in the context of foreign commercial policy and of employment policy.

Within the European System of Central Banks, the competence for taking decisions rests within the Council, the so-called Governing Council. As far as matters of monetary policy are concerned the Council takes decisions by a simple majority of its members. The council of the European System of Central Banks is composed of the now 11 governors of the national central banks and of the 6 members of the board of directors of the European Central Bank. Therefore, decisions concerning monetary questions and questions of interests can be taken by a majority of the members of the council, which exclusively consists of governors of the national central banks. The members of the board of directors of the European Central Bank (president, vice-president and the up to four other members of the board of directors) who are representatives of the European Central Bank as a "communitarian institution" are a minority faced with governors of the national central banks. This being so, although the so-called larger Member States, especially France and Germany, will be permanently represented within the board of directors the representatives of economically less important countries do have sufficient influence on the shaping of opinion within the Council of the European System of Central Banks. These countries have sufficient possibilities to oppose the group of representatives of economically more important countries by representing their interests in monetary policy matters. A "real" European Central Bank structured and comparable to the German Central Bank would not offer such a possibility for off-setting divergent opinions and interests in monetary and economic policy matters. The European System of Central Banks permits the off-setting of the concepts of monetary policy of the Member States to an extent which had not been offered by the European Monetary System of 1979 which has been substituted by the European Monetary Union of Maastricht; the European Monetary System of 1979 has been more resistant because the burdens of adaptation to its aim, especially to monetary stability, in the Member States were shared, for good reasons in a so-called asymmetrical way, so that the less stable country had to bear the burden of adaptation. The independence of the members of the council from being instructed by the Member States and the organs of the Community as well as the stability of prices enshrined in the Treaty of Maastricht as precedent aim of monetary policy cannot be considered as a sufficiently sure counterweight to act against an undue off-setting of Member States´ interests.

The dual structure of the European monetary authority as being created at the Conference of Maastricht reflects the decentralised structure within which shaping of opinion in monetary policy matters, being embodied with the national frameworks, takes place within the European Community. The organisation of the European monetary authority as created in Maastricht would, insofar as it

reflects the decentralised structure of the process of shaping public opinion, prove to be an obstacle for the creation of a new structure of shaping public opinion in monetary policy matters on the level of the Community, characterised by a centrally organised process of shaping opinion in monetary policy and societal policy matters as it exists within the Member States. A centrally deviced and administered monetary policy requires an integrated means of the process of shaping public opinion on all levels of the society, beginning with science and stretching from the socio-economic groupings and the media to the political parties.

2) The German Central Bank – Model ?

The German Central Bank named as "Währungs- und Notenbank" (Note-issuing and Currency Bank) is a creation of the German Constitution, the „Fundamental Law". By the Law „on the Federal Bank" of July 26th 1957, the federal legislator has merged and restructured the older central banks of the German states, created after World War II with the „Bank of the States", the upper "Central Bank" according to Article 88 of the Fundamental Law, to a new and absolutely centrally structured federal institution, named the Deutsche Bundesbank. It has not „created" this new institution but has by the "creation" of the Deutsche Bundesbank implemented an order which was implicit in the constitution. The Deutsche Bundesbank ranks as an organ of the constitution and of the state despite the fact that for its creation additional federal legislation was necessary. An organ the creation of which is provided for in the constitution does not lose its quality as an organ of the constitution through the fact that its further functional restructuring requires an additional act on behalf of the legislator. It is not important that the federal legislation structuring the German Federal Bank is a legislative act which, according to the Constitution, does not require the consent of the Bundesrat as the second German federal legislative body. The Law on the Federal Central Bank from 1957 is a so-called "simple" or unqualified federal legislative act which does not require the consent of the upper house because monetary policy under the German Constitution is an exclusive competence of the federation. Legislative acts based on exclusive competences of the federation do not require the consent of the upper house in general; but by no means are so-called „simple“ federal legislative acts of lesser quality.

Therefore it cannot be argued that the German Central Bank, contrary to the European System of Central Banks and the European Central Bank, does not have the rank of a constitutional organ. It is easier to deny the rank of constitutional organ to the European System of Central Banks and to the European Central Bank by arguing that the notion of „constitution" is reserved to the organisation of a state so that the European Community being, a mere confederation of states, cannot have a constitution.

According to the federal legislation concerned, the German Central Bank is a "federally organised legal entity of public law" and it is, notwithstanding the fact that its decentralised parts are called "Landeszentralbanken" ("Banks of States"), in its total structure an institution of the federation. It is not, as sometimes argued, a common institution of the federation on the one hand and of the now sixteen states on the other hand. Being a federally chartered corporate body under public law the German Central Bank has its position exclusively within the organisational structure of the federation which has exclusive competence within the field of monetary policy.

The now nine German Central Banks of the States are independent – as the Law on the Federal Central Bank describes them – main administrative bodies of the German Central Bank, and this despite the fact that they have their "own administrative and banking business competences" and despite the fact that they are called "Landeszentralbanken". The governors of the central banks of the states are nominated and called to office by organs of the federation, as it is the case with the members of the board of directors of the German Central Bank. The nomination and calling into office of the governors of the Central Banks of the Länder is performed by the president of the Federal Republic, the nomination of the eight members of the board of directors of the German Central Bank on a proposition from the federal government, the nomination of the governors of the Central Banks of the Länder on a proposition from the upper house, the Bundesrat. When proposing the nomination of the nine governors of the Central Banks of the Länder, the governments of the Länder, largely unknown, only have the right to act and to participate in the decision-making process of the upper house. An individual state government only has the possibility of influencing the decision of the upper house according to the weight of its vote within the decision-making procedure concerned. The organ and the subdivisions of the German Central Bank have the status of federal authorities in as far as they do not act as bank of the banks, but carry out public administration functions; the Central Banks of the Länder do not have the status of state authorities. The law on the German Central Bank and the board of directors states very clearly that the Council of the German Central Bank has the legal status of an „upper federal authority" and that the Central Banks of the Länder and the other main subdivisions have the status of "normal" federal authorities. All employees of the German Central Bank are without exemption employees of the German Central Bank as an independent, but in itself totally integrated federal institution.

Within the German Central Bank, an integrated and hierarchically organised structure for giving and receiving instructions exists, beginning with the Council and the board of directors as the most upper level and stretching to the local offices as the lowest level. The German Central Bank is independent in a double sense, namely because of its legal status and because of its independence of instructions.

The independence of instructions does not only follow, contrary to wide-spread opinion, from the Law of the German Central Bank of 1957. It is institutionalised and guaranteed by the constitution itself to an extent which is not normally seen.
The independence of the German Central Bank from the instructions of the legislative organs of the federation results from the constitutional principle of the division of powers. According to German constitutional law, only the legislative organs can give instructions to the executive branches of the federal government and its institutions, to which the German Central Bank belongs, on the basis of special constitutional or legislative authorisation. On the level of the Community to which the constitutional principle of separation of powers is not known the independence of the European System of Central Banks and of the European Central Bank from receiving instructions of the Council and of the European Parliament as legislator of the Community had to be expressively laid down in the Treaty of Maastricht. The independence of the German Central Bank from receiving instructions of the governments and the Parliaments of the German States also results from the constitution itself and did not have to be expressively inscribed into the Law of the German Central Bank of 1957. The German States have a subordinated position in relation to the federation and the federal institutions. For constitutional reasons they are prevented from giving instructions to the federal organs or to federal institutions.

In Germany, the independence of the Central Banks from receiving instructions from the socio-economic groupings results, as well as the independence of all other organs and institutions of the states, from basic principles of constitutional and public law; the independence is assured and guaranteed by the law governing the status of civil servants and by penalty legislation.

The Law of the Bundesbank of 1957, as implementing legislation to the German constitution, only had to lay down the degree of independence of the German Central Bank from instructions of the federal government, especially the independence from instructions of the federal government in the field and context of economic policy. Insofar a concretisation was necessary since the monetary policy and the economic policy are in many respects a single entity. When concretising the decree of independence in this respect, the Law of the German Central Bank pays attention to the guidelines of the German Constitution and the principles of German constitutional law. The independence of the German Central Bank is described in the Law of the German Central Bank as requiring that the German Central Bank assists the general economic policy of the Federal Government, but under the condition that its main task, that is to assure the currency, is guaranteed. The economic policy measures of the German States, in as far as the German States have competences in the field of economic policy, need not be assisted by the German Central Bank, and this is regarded as a principle.

On the other hand, according to the Treaty of Maastricht, the European System of Central Banks and the European Central Bank as well as the national central banks are obliged to assist the economic policy "within" the Community even if on the condition, that the even stronger obligations to pursue the stability of prices remained precedent. But, within the European Community the competence and responsibility for the economic policy remains primarily with the Member States; Maastricht has not changed the division of responsibilities in this field. Even after Maastricht, the European Community itself only has responsibility in the field of general economic policy insofar as it co-ordinates the economic policy of its Member States by general and specific guidelines which do not have a legally binding effect. The further responsibilities of the European Community are restricted to the agricultural policy, to the transport policy, to the foreign commercial policy as well as to certain measures for assuring the so-called economic and social cohesion among Member States by means of the structural funds.

So, the obligation to assist the economic policy within the Community with which the European Monetary Authority is charged under the Treaty of Maastricht mainly relates to and concerns the economic policy of its Member States.

The European Community encompasses an economic area which is composed of several states. Within this area the legal conditions which constitute the framework of economic conditions are still laid down and guaranteed by the Member States. The same is true of the so-called public goods which are not offered by the Community but by the Member States. This being so, divergent economic processes within the Member States cannot be excluded and as a consequence of them divergent economic measures of the Member States are conceivable and can be necessary in the interest of the Community. As far as the European System of Central Banks is concerned, the structure of competences and responsibilities in the field of economic policy has as a consequence that the monetary policy of the European System of Central Banks, which of course cannot be but the same for the whole Community, might be challenged by the Member States to assist them in a different way. There can be Member States which need a looser currency policy and others which need a tougher monetary policy at the same time. The decentralised structure of the European Community as an economic union with partitioned responsibility for economic policy is a grave burden and big challenge to the monetary policy of the European Community.

A central competence in the field of economic policy as it exists in Germany has as its consequence that the shaping of public opinion on questions of economic policy can take place within the framework of a centrally structured system of clarifying opinion and of off-setting interests. Decentrally structured processes

of shaping public opinion in monetary policy and economic policy matters which are competing and struggling for influence on the centrally administered economic policy have little chance of succeed in the case that there is a central competence in the field of economic policy. On the level of the Community, an integrated system of shaping public opinion and clarifying interests in economic and monetary policy matters covering the whole Community has not yet come into existence, as it can only arise from a situation in which socio-economic groupings and political party-operated media are organised in an integrated manner on a Community-wide basis.

The European System of Central Banks, not comparable to the German Federal Bank, has as its counterparts on the Community level regional systems of shaping public opinions and of clarifying interests in monetary policy and in economic policy matters. There is competition for taking influence on the monetary policy of the Community between these regional and decentralized systems. Therefore, on the level of the Community, the independence from being influenced and instructed can be threatened by challenges which do not exist under the considerably more favourable conditions within the Member States, especially not within the Federal Republic of Germany.

3) The Central Banking Council of the Deutsche Bundesbank and the Governing Council of the European System if Central Banks

The European System of Central Banks as bearer of the currency and credit policy of the European Community is not comparable with the Deutsche Bundesbank as far as its overall organisation and structure and that of the Bundesbank are concerned. Contrary to the Bundesbank, which is attributed to the central level of a state as a real „central“, i. e. centrally structured bank the European System of Central Banks is an intergovernmental or interstate association of central banks of the Member States having as a further partner the European Central Bank which has been established as an affiliate institute of the national central banks. As far as the public discussion is concerned it is not the European System of Central Banks as such which is considered as equal with the Deutsche Bundesbank, but the main organ of both central banking institutions being responsible for monetary policy, the "Central Banking Council" of the Deutsche Bundesbank on the one side and the "Governing Council" of the European System of Central Banks and, respectively, of the European Central Bank which are subject to comparison.

The "Central Banking Council" of the Deutsche Bundesbank is composed of the eight members of the board of directors, the directorate, and the governors of its nine regional departments, called "President of the State Central Bank" of the "Landeszentralbanken". It is a collegial organ the members of which, as officials of one and the same organisation, are responsible for the governing of the Bundesbank, and this in such a way that all members of the Council, especially

the governors of the Landezentralbanken, are absolutely integrated into the Bundesbank's Central Banking Council as a collective organ. In Germany, the shaping of public opinion in monetary policy matters takes place on all levels of society on the basis of a centralised framework and debating infrastructure having as consequence that all members of the German "Central Banking Council", especially the presidents of the Landeszentralbanken, are not confronted with regional counterparts or regional centers of public opinion shaping competing one with the other, but have as intellectual counterpart just one integrated system within which opinion shaping in monetary policy matters takes place.

Totally different from this situation, the Governing Council of the European System of Central Banks, in Germany commonly but wrongly called „Central Banking Council", has as its counterpart for discussion a decentrally structured framework within which public opinion in monetary policy matters find its playing ground and point of orientation. There are different national concepts for the monetary policy of the European Community which compete one with the other in influencing the common monetary policy. The potential influence which national concepts of the monetary policy might have will persist for a long time. The Council of the European Community itself as the competent organ for the supervision of the fulfilment of the convergence obligations will also still be under the constraint of being opposed by the influence of conflicting monetary policy concepts and interests of the Member States for a long time to come. The same is true of the Council of the European Community in its other capacity as the responsible organ for the exchange rate policy of the European Community.

The Governing Council ("Central Banking Council") of the European System of Central Banks is composed of the governors of the national central banks and of the members of the board of directors, the directorate of the European Central Bank. Of the now 17 members of the „Central Banking Council“ of the System, only the six members of the directorate are called into their office according to the so-called communitarian procedure. This procedure provides that the members of a so-called unitarian organ of the Community are nominated as candidates by each Member State but are installed in office on the basis of consent among all Member States. This procedure, especially the requirement of unanimity, reflects the confederative structure of the European Community.

Even as such, the so-called communitarian procedure is not comparable with the procedure according to which the member of the "Central Banking Council" of the Deutsche Bundesbank are installed into office.

The remaining eleven members of the "Central Banking Council" of the European Monetary Authority are not installed into office on the basis of a unanimous decision of the Member States, but each of them individually by „his“ Member State according to the national rules concerned without even a

consultation among all Member States needing to take place. The Treaty of Maastricht restricts itself to two rules of Community Law as far as the calling into office of the governors of the national central banks is concerned. The Treaty prescribes that the governors of the national central banks have to be in office for at least five years and secondly that a national governor, in the event that he is fired by his government, can appeal to the Court of Justice in Luxembourg.

The "Central Banking Council" (officially named „Governing Council“) of the European System of Central Banks is, at the same time, the main organ of the European Central Bank. But, when making decisions as organ of the European Central Bank the Governing Council is composed not differently than when it decides on monetary policy matters as main organ of the European System of Central Banks. As main organ of the European Central Bank the "Central Banking Council" also decides in currency policy matters on the basis of simple majority voting. As a „daughter institute“ of the national central banks the European Central Bank is not attributed to the European Community but to the Member States; not the European Community, like the Federal Government in the case of the Deutsche Bundesbank, but the national central banks and thereby the Member States are owners of its capital and are its partners in banking affairs.

It follows from what has been said above that not the European Community as such, but that the Member States and their institutions, i. e. the national central banks, are masters of the European Central Bank within the framework of the European System of Central Banks. As far as decisions of the Governing Council on the distribution of revenues of the European Central Bank or on other matters concerning the Central Bank are concerned, it is true that the votes of the members of the Governing Council are weighted, but the votes of the members of the board of directors of the European Central Bank are weighted with zero (Article 10.3 of the Statute of the ESCB).

According to the Treaty of Maastricht, decisions can be taken within the „Central Banking Council“ by means of a teleconference provided that this procedure has been introduced on the basis of the standing order of the Council. The Treaty evidently does not much take into account the group dynamic effect which results from the fact that the elaboration of the elements of a decision, the deliberation on a decision and the taking of a decision are carried out when all members of an organ are present. The authorisation for deliberation and voting by teleconference as provided for under the Treaty of Maastricht is not an adequate procedure in the context of the needs of a stability-aimed currency and monetary policy.

Contrary to widespread opinion, the Governing Council does not decide on the "definition of the monetary policy of the Community" as organ of the European

Central Bank. All decisions concerned are taken by the Governing Council on the basis of the competences not of the European Central Bank but of the European System of Central Banks, so that it takes the relevant decisions as organ of the System. Being at the same time the governing organ of the European Central Bank, it can only exercise those few functions which according to the Treaty of Maastricht are attributed to the European Central Bank. The members of the board of directors of the European Central Bank as members of the „Central Banking Council“ of the European System of Central Banks cannot play a decisive independent role within the decision making process of the System by means of decisive voices or a veto, but only by means of their expertise, knowledge, their power to persuade the national governors and by the means of their authority which they have yet to obtain. This situation is simply due to the fact that all competences in matters of monetary policy rest with the European System of Central Banks and that the European Central Bank does not have competences of its own. The subordination of the directorate as second organ of the European Central Bank to the „Central Banking Council“ (Governing Council) as the primary organ of the ESCB and of the ECB works as guarantee that the influence of the governors of the national central banks on the opinion shaping process in matters of monetary policy is also guaranteed within the European Central Bank and, especially, that the influence is not weakened and counterbalanced by the participation in the decision-making process of the members of the directorate.

The predominant position of the European System of Central Banks which the System has in the shaping of the European monetary policy is either restricted or weakened by the fact that the European Central Bank itself is an additional partner of the System. Because of its dependence on the System and because of the majority rule governing the decision making process of the „Central Banking Council“ the European Central Bank being an affiliate institute of the national central banks and thereby being an affiliate institute of the Member States, hardly has any chance of strongly influencing the basic shaping of the monetary policy.

IV) The National Central Banks as instances for the implementation of the Monetary Policy

As far as the carrying out of the monetary policy decisions of the European System of Central Banks is concerned a distinction has to be made. On the European level, at the upper level, the execution of the monetary policy decisions of the European System of Central Banks is attributed to the European Central Bank which in this respect functions in its relation to the European System of Central Banks as a quasi executive committee. This follows from article 110 EC Treaty, which very clearly states that the European Central Bank

has to carry out the tasks which are entrusted to the European System of Central Banks.

The executive committee function of the European Central Bank does not mean that private banks, being clients of the European System of Central Banks, are direct partners of the European Central Bank. Contrary to the private banking system, not the European Central Bank but the national central banks function as institutions which are charged with the execution and the implementation of the Community´s monetary policy decisions. According to the Treaty of Maastricht the national central banks are, each within its territory, subordinated to the European Central Bank and have, as their second function vis-à-vis the private banks, to execute the monetary, the interest and the credit policy as defined by the European System of Central Banks. The national central banks, being members of the European System of Central Banks as bearer of the monetary policy of the Community, have to fulfil their second task as institutions charged with the execution of the monetary policy decisions of the Community under the supervision of the European Central Bank.

The national central banks are institutions of the Member States, not of the European Community. The Treaty of Maastricht does not prescribe the interrelationship between the national central banks and the European System of Central Banks in detail, it restricts itself to the stipulation that the national central banks be an "integral part" of the European System of central banks. Since the European System of Central Banks as an intergovernmental or interstate organisation does not have personality, the categorisation of the national central banks as integral parts of the System does not mean too much, but is of less legal importance. Apart from their categorisation as "integral parts" of the ESCB, the Treaty of Maastricht does not provide a common statute for the national central banks. Those legal provisions of the Treaty of Maastricht which concern the organisation of the national central banks mainly restrict themselves to the rule that the governors of the national central banks should not be instructed by the national governments and should not receive instructions from anybody else. The Treaty of Maastricht neither prescribes that the national central banks should have an independent status in legal terms, as has the Deutsche Bundesbank, nor for example does it prescribe that Member States have to adopt their national legislation concerning the personal of the central bank, especially at top level to the common rules of the European Community. Member States can attach "Scientific Councils" or other advisory bodies to their national central banks without being bound to any obligation under Community law governing the installment of such institutions.

Due to a lack of further prescriptions, the often cited obligation of the Member States to adopt their national statutes of the central bank to the Statute of the European System of Central Banks as stipulated in the Treaty of Maastricht (Article 109 EC Treaty) is restricted to the demand that Member States

guarantee the independence of their central banks from instructions. Since the Treaty of Maastricht does include a very detailed Statute for the European System of Central Banks and for the European Central Bank and an equally detailed statute for the European Monetary Institute, one could have all the more expected that the Treaty would also comprise an equally detailed statute for the national central banks which under the System have to function as the decentralised instances "in site" to carry out the monetary and credit policy of the European Community. For reasons of efficiency and for reasons of the uniform execution of the monetary policy decisions of the Governing Council by the national central banks and respectively their affiliate agencies, the adoption by the Conference of Maastricht of such a model statute would have been a necessary, even a more necessary solution.

According to the Treaty of Maastricht those national central banks which until now had the function of supervising commercial banks, saving banks, assurance companies or stock exchange markets can preserve these functions, at least for the time being. This prescription of the Treaty has as its consequence that the governors of the central banks concerned remain national officials and in this capacity remain subject to instructions from their government. If the national central banks concerned are to be deprived of these functions, a decision of the Governing Council taken by a two third majority vote is needed. Article 109 EC Treaty is not a sufficient legal basis to take legal action against Member State in the event that it fails to adopt the statutes of its central banks to the statute of the European System of Central Banks in such a way that the national central bank is set free of anything other than central banking functions. The precondition that a decision of the Governing Council taken by a two thirds majority vote is needed does not allow any other interpretation of Article 109 EC Treaty.

V) The independence from Instructions of the European System of Central Banks

There is a widespread opinion that the independence from being instructed is much more detailed and guaranteed in a better way by the legal framework of the European System of Central Banks than it is guaranteed by the legal framework of the Deutsche Bundesbank. Indeed, Article 108 EC Treaty stipulates in a very detailed manner:

> „When exercising the powers and carrying out the tasks and duties conferred upon them by this Treaty and the Statute of the ESCB, neither the ECB, nor a national central bank, nor any member of their decision-making bodies shall seek or take instructions from Community institutions or bodies, from any government of a Member State or from any other body. The Community institutions and bodies and the governments of the Member States undertake to respect this principle and not to seek to influence the members of the decision-making bodies

of the ECB or of the national central banks in the performance of their tasks“.

Article 7 of the "Statute of the European System of Central Banks and of the European Central Bank" literally repeats the prescription of Article 108 of the EC Treaty.

Article 108 of the EC Treaty and Article 7 of the Statute being so-called contractual Community Law can only be altered by an agreement under international or respectively under Community law, to be negotiated under the condition of unanimity by all Member States and to be ratified by the national Parliaments and, furthermore, according to requirements of national constitutional law to be presented to the people for a referendum. But to the same extent as a worsening of the prescription has been made difficult by these requirements, any amelioration is hard to reach if these prescriptions should prove not to be sufficient and effective. For example, the independence from instructions of the national central banks can only be further strengthened by additionally obliging the Member States to grant to their central banks real independent status comparable to the status of the Deutsche Bundesbank, under the condition that the above mentioned long and difficult procedure of altering the contractual law of the Community is observed.

The broad verbal legal guarantee of the independence from instruction in itself is hardly decisive, it does not say anything in comparison to the verbal legal guarantee of the independence from instructions of the Deutsche Bundesbank. As mentioned above, the independence of the Deutsche Bundesbank from instructions from the legislator of the federation and from the legislators and the governments of the German states follows from the German federal constitution. The independence of the European System of Central Banks from instructions of the Council and from the European Parliament as legislator of the European Community and the independence of the European System of Central Banks from instructions from the Member States had to be stipulated in the Treaty of Maastricht specifically and explicitly. A broad consensus has not yet developed within the European Community among all groupings of the people which could in additional ways guarantee the independence of the European Central Bank from instructions, in the sense that the independence of a central bank is a necessary and inevitable functional condition of a stability oriented monetary policy. In most of the Member States the independence of the central bank from instructions from the government as a condition of a stable currency has only become part of the full public consciousness during the negotiation period of the Maastricht Conference. For this reason, a much more detailed description of the independence from instructions should have been be introduced into the Treaty of Maastricht.

As far as the independence of the members of the Council of the Community

responsible for the exchange rate policy from any instruction from any side is concerned, the Treaty of Maastricht does not say anything. The Treaty evidently presupposes that members of the Council, i.e. the national ministers, do act and do decide in exchange-rate policy matters under instructions from their respective governments. But, the Council and thereby its members are nonetheless obliged to respect the stability of prices as the precedent aim of monetary policy of the European Community in the same way and to the same extent as all the other institutions of the Monetary Union, the Member States included.

Basically and from a strictly legal point of view, the obligation of the organs and of the guiding officials of the European System of Central Banks to act independently and free from instructions only functions as an appellation. This restriction of a formally legal obligation to a „lex inperfecta“ follows from the fact that the obligation to pay respect to the independence from instruction can nearly be brought before the Court of Justice, i. e that the Court of Justice can hardly be asked to rule that an organ of the European System of Central Banks or one of its guiding officials has not fulfilled his obligation to act independently and free from instruction. The Court of Justice when acting as legislator of the Community is not absolutely free to define and to concretise the independence from instructions in the same way as it has always done with respect to other prescriptions of Community Law. In the event that the obligation to act free from any instructions is not respected by a national central bank, it only is the Member State itself which can be sued before the Court of Justice and it is the Commission of the European Union and the other Member States which are authorised to take action against the Member State concerned. It is highly unlikely that in such a case the Court of Justice would go beyond this and by developing the Community law as it constantly did and does in other fields would grant to individuals the authorisation to take action against the Member State.

Any concretisation of the perception of independence from instructions by the legislator of the Community is not possible because of the fact that contractual Community Law can only be altered by an extremely complicated, difficult to manage and time-consuming procedure. Theoretically, the Council of the Community may have the possibility to legislate on the basis of the general competence of Article 308 EC Treaty, but for political reasons, an attempt to use this to the fullest extent of its highly contested competence does not seem very likely.

VI. The Structure for Giving and Receiving Instructions within the European System of Central Banks

A Community System of Central Banks, the centrally adopted decisions of which have to be carried out within the Member States by their national central

banks and the affiliate agencies of the national central banks, needs to have an efficient structure which guarantees that instructions can be given in such a way that they are followed. Within the Deutsche Bundesbank, which allegedly has been the model of the European System of Central Banks, a structure which guarantees that instructions can be given and are respected does exist in such a form that the monetary policy decisions of its Central Banking Council are carried out at all levels in an efficient way and in an equal manner. Within the Deutsche Bundesbank, being an integrated administrative body, a hierarchical system of levels of dependence subordinated one to the other, starting from the Central Banking Council as the highest level down to the level of the lowest agencies, guarantees that all guidelines and instructions are carried out.

Within the European System of Central Banks the situation is completely different from the situation within a national central bank like the Deutsche Bundesbank. The central banks of the Member States are institutions of the Member States. If they are declared and regarded as an "integral part" of the European System of Central Banks by the Treaty of Maastricht this assessment as such does not have as legal consequence that they are subordinated to the European Community; above all, the inclusion of the national central banks into the European System of Central Banks as an „integral part“ does not mean that such a situation of institutional dependence of the national central banks from the European Community has come into existence, the structure of which would correspond to and could be compared with the situation within an hierarchic organisation.

Corresponding to the principle of attributed competence which governs as constitutional and legal principle its regulating powers, the European Community is not generally authorised to issue instructions to the Member States. Each competence to issue instructions has to be attributed to the European Community by a legal act; beyond this, competences of the European Community to issue instructions only entitle the organs of the Community to address the Member States as such. Any competence to issue instructions to special authorities or institutions of the Member States has always been denied to the European Community by the Member States, until now. The Commission as supervisory instance of the European Community has to observe that the policy measures of the European Community are adequately carried out by the Member States, especially that the legislative acts of the European Community are incorporated into the legal order of the Member States; as a means to fulfil this function the Commission can only take action before the Court of Justice if a Member State fails to fulfil its obligation. The Commission cannot issue any instruction to the Member State concerned; even if it were authorised to do so the instruction from the Commission would only have the effect of a recommendation or an opinion and would not seriously effect the Member State.

Therefore, the Treaty of Maastricht by means of a special legal authorisation has expressly granted to the European Central Bank, as the supervisory authority within the European System of Central Banks, the right to issue instructions to the national central banks. According to Article 12.1 paragraph 2 of the Statute of the European System of Central Banks the directorate of the European Central Bank is entitled – and even obliged towards the Governing Council – to issue all necessary instructions to the national central banks to the end that the monetary policy guidelines and decisions of the Governing Council are properly carried out. Attributing to the European Central Bank the right to issue instructions to the national central banks the constitutional legislator of Maastricht did not oversee that this right of the European Central Bank could only be effective on the condition that there is a real relation of dependence of the national central banks on the European Central Bank. Since such a relation of dependence of the national central banks on the European Central Bank does not exist, an especially could not have been created by the attribution of the right to issue instructions as such, the constitutional legislator had to grant to the European Central Bank the right to take action against the national central banks before the Court of Justice in the event that an instruction of the European Central Bank is not followed by a national central bank. The right to take action before the Court of Justice as granted to the European Central Bank is comparable to the competence which is attributed to the Commission if the Commission functions to supervise Member States´ behaviour in general. Taking action before the Court of Justice in Luxembourg against a national central bank which does not comply with an instruction presupposes that the European Central Bank has monitored the national central bank within a preliminary procedure consisting of giving the national central bank the opportunity to present its opinion on the case and furthermore consisting of having issued a so-called reasoned opinion from the European Central Bank to the Member State concerned. These two steps, being a strict legal condition for taking action before the Court of Justice, are such a time consuming and complicated preliminary procedure that the right to issue instruction cannot be regarded as being sanctioned.

VII) The European Central Bank

The "basic tasks" of the monetary policy which has been transferred to the European Community will be fulfilled on the European level by the European System of Central Banks, not by the European Central Bank. According to the Treaty of Maastricht "basic tasks", besides the main task "to define and implement the monetary policy of the Community", are "to conduct foreign exchange operations consistent with the provisions of Article 111", "to hold and manage the official foreign reserves of the Member States", and "to promote the smooth operations of payment systems". This express attribution of tasks to the European System of Central Banks as stipulated in Article 105 EC Treaty

excludes any doubt that the European Central Bank, in the event that it is asked to manage these tasks, does not manage them as its own tasks but as an executive committee of the European System of Central Banks. The individual and independent function of the European Central Bank is restricted in that it is simply acting as agent of the European System of Central Banks. The European Central Bank, as an institution with legal personality, could be charged and has been charged with the right to issue bank notes and to exercise all those regulatory functions which cannot be exercised by the European System of Central Banks because of its lack of legal personality. The constitutional legislator of Maastricht did not create the European Central Bank to act as counterpart to the European System of Central Banks; the European Central Bank owes its creation to the fact that the European System of Central Banks, lacking an external legal face, simply cannot exercise the functions of a central bank in as far as they have to be exercised towards the private banks.

It is significant that the European Central Bank does not exercise its executive functions through its board of directors, but through the Governing Council which is not a "Central Banking Council" of its own but identical with the Governing Council of the European System of Central Banks. The respective rules of the Treaty of Maastricht and of the Maastricht Statute of the European System of Central Banks generally prescribe that the tasks and functions of the European Central Bank are within the competence of the Governing Council and not within the competence of the board of directors. In those few cases in which the Governing Council is not expressly mentioned within the Treaty or within the Statute as being the bearer of the competence, its competence results from the argument that according to the general principle which partitions the regulatory powers between the Governing Council and the directorate, it has to be assumed that the Governing Council, and not the directorate has the competence in question. The general distribution of competences between the Governing Council and the directorate is described in Article 12.1 of the Statute such that the directorate has "to implement the guidelines and decisions of the Governing Council". The prescription of Article 11.6 of the Statute of the European System of Central Banks states that the directorate is responsible for managing current business and thereabove Article 12.1 of the statute prescribes that any further competence of the directorate requires a respective decision of the Governing Council by which the competence is referred to the directorate. From this, one can deduce that if there are doubts over which of the two organs has the competence concerned, one has to assume that the Governing Council, and not the directorate, has the relevant competence. Among the few competences which are exercised by the directorate of the European Central Bank on the basis of an express authorisation is the less effective right to issue instructions to the national central banks.

One can evidently deduce from the rules of the Treaty and of the Statute, that the constitutional legislator has tried to include the European Central Bank into the

European System of Central Banks to the greatest possible extent but that when doing so it did not want to infringe on the superior position of the European System of Central Banks.

VIII) The Obligation to Guarantee Price Stability

One of the essential rules of the Treaty of Maastricht is the obligation of the European System of Central Banks, as laid down in Article 105 EC Treaty and in Article 2 of the Statute, to guarantee price stability as the precedent aim of the monetary policy of the European Community. The exchange-rate policy, which is a responsibility and competence of the Council of Ministers of the European Community under the Treaty of Maastricht, also has to be exercised in such a way that the stability of prices is guaranteed.

Based on this rule of the Treaty, the thesis is mainly well founded that the statute of the European System of Central Banks is more stringent than the statute of the Deutsche Bundesbank. It is true that the basic aim of the German monetary policy which consists equally of "assurance of the currency" does not spring from the German Fundamental Law, i.e. the German constitution, but from the federal legislative act concerning the Deutsche Bundesbank.

Contrary to the Treaty on the foundation of the European Economic Community and all the other Treaties which, like the Treaty of Maastricht have altered or supplemented the Treaty of Rome, according to German constitutional philosophy the policy aims of the state, i. e. of the federation and its Member States, the Länder, are neither fixed nor enshrined in the constitution. The German constitutional legislator leaves the defining and the fixing of the political aims of the state to the normal legislator, and in cases of aims which have to be pursued and guaranteed by the organs being set up by the constitution it leaves them to the legislation which has to be adopted for the implementation of the constitution. Therefore, the protection of the currency as aim of the economic policy of the federation and of the German states is to be found in a special federal legislative act, namely the federal law "on the Fostering of Stability and Growth of the Economy" from July, 8th, 1967 and besides this, can be found as basic aim of the monetary policy of the Deutsche Bundesbank in a further special legislative act, namely within the „Law on the Deutsche Bundesbank“. Federal legislative acts which set the aims of the state and aims of the polities have strictly to take account of the requirements of the constitution resulting or being deduced from such principles, for example, as the principle of the „rule of law“ or the principle of the „social responsibility of the state“. Federal legislative acts concerned, such as the two mentioned above, fundamental economic acts form, in a material sense, part of the German constitutional law.

On the level of the European Community the defining and fixing of the obligation to guarantee the stability of the currency does not go back merely to the Conference of Maastricht. The Treaty of Rome already knew the obligation, directed to the Member States of the Community, that Member States when managing their economic policy had to assure price stability. The old rule of Article 104 EEC Treaty, which has been cancelled during the negotiations of the Maastricht conference, had been interpreted by European law scholars as meaning that the European Community, too, was bound to the precedent aim of observing stability as prescribed in Article 104 EEC Treaty. The Treaty of Maastricht has strengthened the guarantee on price stability in that the currency stability was expressly fixed as an aim being precedent to other economic policy aims. Besides this, the conference of Maastricht faced the task of assuring the stability of the currency as a policy aim to the Council of Ministers, which is responsible for the exchange-rate policy, as well as to the European System of Central Banks. As described above the constitutional legislator of Maastricht did relate the basic aim of the monetary policy to the general economic policy more but less strongly than the German legislator within the German Law on the Deutsche Bundesbank.

When one compares and assesses the obligation to guarantee stability, as fixed in the Treaty of Maastricht and the obligation to assure monetary stability as fixed in the German federal legislative act on „Stability and Growth of the economy“, one has to take into account the fact that such obligations to assure stability mainly have the character of appellations, even if they are verbally fixed in a written Treaty as "legal" obligations. If such obligations are not respected by the organs or even voluntary broken by them it is normally not possible to take an action before the Court of Justice. It has already been mentioned (in connection with the independence of the European System of Central Banks, with the independence of the European Central Bank and the independence of the national central banks from instruction) that taking actions before the Court of Justice with the aim of reaching a ruling affirming the breaking of the obligation is inconceivable; as far as the breaking of the stability obligation is concerned it can equally be said that the way to the European Court of Justice is not open.

According to the German understanding of basic rights and freedoms a basic right that price and currency stability have to be guaranteed by the state does not exist; this has just been re-asserted by a ruling of the German Constitutional Court. Taking its state of development, the European Law, too, does not guarantee such a basic right which could be used by individuals to take action before the Court of Justice in the case that the obligation under Community Law to assure price stability is not respected.

As far as the potential steps of the organs of the European Community or the potential actions of its Member States before the Court of Justice are concerned,

it is not decisily important whether the obligation to maintain stability, the non-fulfilment of which shall be ascertained by a ruling of the Court of Justice, is based on contractual or on derivative Community law. The qualification of a rule of Community law, as such, especially its categorisation as contractual Community law does not formally substantiate a right to take legal action nor does it substantiate a right to be sued before the Court of Justice in the material sense of the word.

But it is not excluded that there might be a case before the Court of Justice against a Member State dealing with a break with the obligation of a national central bank to refrain from taking instructions from the Member States or of the obligation on the Member States to refrain from issuing instructions to or from influencing the national central bank. Such an action before the Court of Justice would certainly pose very difficult questions of proof of and testification to the alledged assertions that an assertive ruling of the Court against the Member State concerned is not in any case likely to be the outcome of the process. In the past there have been no actions concerning the mismanagement of the obligation to maintain stability of prices emanating from the Community law or from the German federal legislation on the Deutsche Bundesbank, or emanating from the German law on "Stability and Growth of the Economy", either on the European level before the Court of Justice or on the national level before German courts.

IX) The Accountibility Obligation of the European System of Central Banks

According to the general understanding, the perception of autonomy of a central bank comprises the exemption of the central bank from any very far reaching obligation of accountability to other organs of the state. The accountability towards the public paid in form of monthly and yearly reports are on the one hand considered as being compatible with the status of autonomy; on the other hand, on the contrary, this kind of accountability is even considered as an stabilising element of the autonomy.

Under the Treaty of Maastricht the obligation on the European System of Central Banks to render account to the organs of the European Community is stronger than the obligation of the Deutsche Bundesbank to render account to the organs of the German federation. The obligation of the Deutsche Bundesbank to render account on its monetary policy is restricted to monthly reports and to statements to the public. Contrary to the German situation, the European Central Bank is obliged to present to European Parliament every year a special report on the activity of the European System of Central Banks, especially in the previous and in the current year. The European Parliament is entitled to have a general discussion on the report which has to be presented by the president of the European Central Bank. Members of European Parliament are entitled to ask for further explanation during the discussion of the report; on

the request of European Parliament the president and other members of the directorate of the European Central Bank can be called before the committees of the European Parliament for a hearing.

A more far reaching obligation of the governors of the national central banks to render account to the national Parliaments was proposed by one of the national delegations to the conference of Maastricht, but was able to be defeated during the discussions. If such an obligation on the governors of the national central banks to render account to the national Parliament or to the national government should exist under, or should be introduced into national law in the future it would be incompatible with the statute of the European System of Central Banks as a consequence of the negative decision of the Maastricht conference to introduce such a regulation into the Treaty. The Member State concerned would be obliged to abolish this national obligation according to Article 109 EC Treaty; but without legal action before the Court of Justice against the Member State concerned it seems unlikely that the Member State would comply with its strict obligation under Community law to adopt its national central banking law to the law of the Community and to the requirements of a price stability-aimed monetary policy of the Community. Since reflecting on and discussing monetary policy issues at all levels of society and within the media, in the future as in the past, will take place within the national framework it is not excluded that an accountability obligation on the governors of the national central banks or even a simple practice of rendering account to the national public might be set up by the national societal or political forces.

Already the extent of the existing obligation of the European System of Central Banks to render account to other organs of the European Community and to the European public seems to be questionable from a stability-oriented monetary policy point of view. One should be cautious in discussing any extension of the existing obligations, especially an obligation on the European System of Central Banks and on the European Central Bank that the voting behaviour of the members of the Governing Council and of the directorate should be made transparent.

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Zentrum für Europäische Integrationsforschung
Center for European Integration Studies
Rheinische Friedrich-Wilhelms-Universität Bonn

Walter-Flex-Strasse 3
D-53113 Bonn
Germany

Tel.: +49-228-73-1732
Fax: +49-228-73-1809
www.zei.de