A Perspective of EU Constitutional Law

A Dynamic Constitutional Treaty and the Specific Constitutional Elements of the Association of Sovereign States

Franz Cromme

Albrecht Weber sought, through his teaching and research, a path towards European integration, primarily by way of a sustainable European constitutional law. He also accompanied and helped other scientists to this endeavour, such as the author of this essay. The three different editions of the book[1] about a "Constitutional Treaty of the European Union" (published in three editions in 1987, 2003, and 2010) clarify the dynamic development of European primary and constitutional law, in addition to discussing possible visions of the future. *A. Weber* wrote critical, realistic and supplementary critiques[2] for each of the three editions. He was also amenable to the opportunity to engage in dialogues, whether they be brief or long.

In the past few years, the sometimes theoretical and idealistic discussions about European constitutional law have become increasingly progressive and realistic in their point of view. In conjunction with the sovereign financial debt crisis, this perspective has further increased since the Treaty of Lisbon entered into force.[3] On this topic, an overview of the perspective of EU constitutional law from the book "Die Zukunft des Lissabon-Vertrages"[4] (The Future of the Treaty of Lisbon – hereinafter: "Draft 2010")[5] ought to be examined. This book will be updated and expanded by 2015. This overview encompasses all organs, "working methods", and policies of the EU. It will be kept as brief as possible. However, in order to expand the discussion, some digressions (excurses) will have to be incorporated, above all the up-to-date "specific constitutional elements"[6] and the currently applicable "association of sovereign States" (*Staatenverbund*). This perspective should promote and supplement the *Common European Legal Thinking* at the Union level.

[1] Cromme 1987, p. 13–84; Cromme 2003, p. 27–277; Cromme 2010, p. 25–319.
[2] Weber 1988, p. 800; Weber 2005, p. 561; Weber 2011, p. 88.
[3] Cf. Blanke and Mangiameli 2011.
[4] Cromme 2010, p. 25–319.
[5] The headings of this essay will include corresponding references to the "Draft 2010" (= Cromme 2010).
[6] Cromme 1997, p. 1–56.

H.-J. Blanke et al. (eds.), *Common European Legal Thinking*,
DOI 10.1007/978-3-319-19300-7_4

1 Introduction[7]

1.1 The Majority for European Unification Versus the Missing Consensus on Some Important Questions

Despite much backlash, the majority of European citizens favour further European unification. A long-term goal for the European Union could be something like "The United States of Europe", which could be achieved by using the proven and easily transferable constitutional models from federal states such as Germany and the United States. Nevertheless, one crucial development of the EU into a federal state is not yet possible to ascertain, for the reason that lasting consensus still has not been reached as to important questions regarding the economy, society and the state. This is particularly apparent in the financial culture,[8] and to some extent in the administration, justice, and democracy culture as well. And the new British reform-considerations must be kept in mind.

1.2 Excursus A: Democratic Decisions by Majority or with Consent of a Large Majority

The principle of majority rule is regarded by theorists and practitioners alike as an essential – even self-evident – procedural element of a true democracy. It has made democracy in the Member States both operational and successful, in addition to resolving basic questions of economic and social affairs within the EU.

However, conferring the principle of majority rule onto everyone, especially regarding financial decisions of the EU, would be premature in the forthcoming phase of development. This transfer would neglect the democratically theoretical prerequisite of majority rule, namely minimum homogeneity[9] and fundamental consensus.[10] A large part of the EU would be dominated without its consent. Even the former Commission President *M. Barroso* declared in Brussels on 9 October 2012 that the European states have a different "financial culture".[11] However, if clear consensus cannot be reached in one area, then on a case by case basis, there needs to be either consensus by unanimity or by way of a "large majority". This already applies to the large, individual decisions that are made within the ESM System.

[7] Cromme 2010, p. 104/105,109,110,113 (Art. 1 I, IV, Art. 8, Art. 49, IV) and explanations p. 107, 115–118, 189/90.
[8] Quotation of Barroso, M., *Frankfurter Allgemeine Zeitung/dpa,* 12.10.2012, p. 14 and 5.4.2013 p. 6 et seq.
[9] Nohlen and Schultze 2002, p. 432.
[10] Cromme 2012b, p. 12; Cromme 2013b, p. 33.
[11] Quotation of Barroso, M., *Frankfurter Allgemeine Zeitung/dpa,* 12.10.2012 p. 14 and 5.4.2013 p. 6, 7; cf. *Frankfurter Allgemeine Zeitung*, 22.4.2013, p. 18, with regard to the political term culture (*Kultur*) Nohlen and Schultze 2002, p. 469 No. 3.

It also appears that an agreement by all participating European states with regard to consensus is necessary, including the convergence and restructuring programme that was proposed by the European Council.

According to remarks made by the governments of key states (and also according to the case law of the German Constitutional Court[12] regarding ESM), there are no signs that the currently unresolved macroeconomic problems will be resolved principally by way of intergovernmental measures (excepting newly created supranational banking oversight). This would nonetheless have to happen in accordance with the rights of the European Parliament as well with the *aquis communautaire* (primarily with regard to the communitised competition system of EU internal markets and the autonomy of the ECB), and it would additionally have to conform to the Commission's decidedly politically stable control rights (not just according to the supranational Six Pack, etc., but also according to the ESM Treaty and the Fiscal Pact).

Regardless, EU primary law will ultimately advance towards the German Federal Constitutional Court's concept of *Staatenverbund*, or as coined by Federal Chancellor *A. Merkel*, the so-called "union method". Gradually, a trend counter to the Community method will develop once again.

1.3 The Steps to Unification

Nevertheless, if one were to attempt to achieve the European "United States" as a federal state, then one more hurdle would still need to be cleared: the state identities of the EU states, as they are understood by the German Constitutional Court,[13] would no longer be guaranteed; in Germany, for example, a national referendum would be needed (Art. 146 GG). Thus, for the time being, it should only be envisaged as a medium-term perspective[14] of integration in advance of a European "federation" (or a reinforced "association of sovereign States").

As a first major step, this goal should be realised according to a constitutional convention (in perhaps 5–10 years), namely through new EU primary law/constitutional law. Because one would have to envisage additional long-term phases of development, it would be necessary to clarify the development perspective of the new constitutional law (up to the conceivable limit of the loss of state identity). An additional constitutional process would obviously be needed. The EU's proposed new constitutional law must set forth effective rules for the ensuing longer development phases, primarily for the period after its entry into

[12] German Federal Constitutional Court (Bundesverfassungsgericht), 2 BvE 6/12, et al. (preliminary ruling of 12 September 2012; judgment of 18 March 2014) – *ESM Treaty*.
[13] German Federal Constitutional Court (Bundesverfassungsgericht), 2 BvE 2/08 et al. (judgment of 30 June 2009) para 233 et seqq. – *Lisbon*: integration limit (German: "Integrationsschranke").
[14] Comprehensive: Sommermann 2013, p. 708 et seqq.; to federation (German: "Föderation"): von Bogdandy 2001, p. 157 et seqq.; Fischer 2000, p. 171, 179 et seq.; short term measures: see below Part IV.

force, such as that which will be discussed in Part IV, "The Development of the European Union and the Development of the Constitutional Treaty".

Even on this long road to a "federation in development", the Member States would still, for all intents and purposes, remain the "masters of the treaties". New primary law (in conjunction with the national constitutions) should also have constitutional status. It could be given the designation of "basic treaty", or more fittingly, "constitutional treaty" (*Verfassungsvertrag*). The new primary law/constitutional treaty should be "exempt" according to "institutional laws" (*verfassungsausführende Gesetze*, following the French model); and it should succinctly[15] reflect the constitutional core of the current and evolving European Union law. Above all, in its Part I ("The Principles"), it should be made clear and coherent for interested citizens.

1.4 Excursus B: The Constitutional Treaty – its Exemptions According to "Institutional Laws"

In 2004, the European Constitutional Convention approved a draft of a "Treaty Establishing a Constitution for Europe", but it was ultimately rejected by referendums in both France and the Netherlands. However, the text of the draft still did not reach the level of a "self-supporting"[16] constitution (which was desired by many);[17] thus the Member States still remain the "masters of the treaties" with regard to this draft. The Treaty of Lisbon also declined to use the word "constitution". The complete phrase "constitutional treaty" should nonetheless be sufficiently clarified regarding the remaining constitutional sovereignty of the Member States. It can also be concluded that even today the European people would have no objection to a "constitutional treaty" (within the European "constitutional union" – *Verfassungsverbund*)[18] assuming it did not supersede, but rather coexisted parallel to the national constitutions.[19] The term "constitutional treaty" (*Verfassungsvertrag*) was coined by *Carl Schmitt*.[20] At that time, however, this term still had not yet established a link to a scarcely conceivable European constitutional law. The phrase "constitutional treaty" was first introduced to the European literature and discussion in 1987.[21]

Owing to the preeminent importance of constitutional law, a constitution as well as a constitutional treaty should be kept short and succinct. The aim of the *Dehane*, *Simon* and *von Weizsäcker* commission[22] was on the one hand to "succinctly" contractually establish the principles of European constitutional law, and on the other

[15] Cromme 2010 (with transitional regulations) Art. 9 I, II, V; Expl. p. 109–10, 311–12.
[16] Böckenförde 1991, p. 29 et seqq., 38.
[17] Cromme 2010, p. 106; Cromme 2009, p. 177, 180.
[18] Pernice 2001, p. 148, 163 et seqq.
[19] Cromme 2010, p. 105.
[20] Schmitt 1928, p. 63, 69, 367, 371.
[21] Cromme 1987.
[22] Dehaene et al. 1999.

hand to structure the multitude of additional rules of European primary law in a flexible way and as a result be able to liberate required changes from the necessity of a treaty amendment (or unanimity). This goal could not be achieved by the extensive Treaty of Lisbon (with its equal components of TEU and TFEU). Accordingly, an instrument of French constitutional law ought to be used, specifically its institutional law (Art. 34 and 46 of the French Constitution).

The institutional laws (*lois organiques*; *verfassungsausführende Gesetze*)[23] serve primarily to streamline the breadth of the constitutional treaty and to improve the intelligibility of the summarised texts of the constitution. They must be limited according to the "content, purpose and extent" of the authority granted by the constitutional treaty; they also require the "large majority" of the European Parliament and the European Council (with greater involvement of the national parliaments).[24]

1.5 The Concept for the EU Constitutional Law

In terms of content, the proposed constitutional treaty envisages graduated (in each specific department) levels of integration of constitutional law of the proposed "federation in development". These would fall between the Treaty of Lisbon and the distantly conceivable European federal state in the hierarchy.

The constitutional treaty should be characterised by the following principles:

a) the value of the Charter of Fundamental Rights as constitutional law of the Union (as in the TCE/Treaty of Lisbon) and also as establishing basic principles for the Member States,
b) the fundamental competence-competence of the Member States,
c) the same importance of supranational action of the Union and the intergovernmental cooperation of States – graded according to policy areas and with precedence of the already established (enumerative) supranational competences,
d) the gradual development of the constitutional treaty (even in accordance with the convention process) on the basis of existing community and union law, and as a general rule, with the principle of subsidiarity and a moderate increase of supranational competences,
e) the equal decision-making power of the European Parliament and the European Council/Council of Ministers with regard to Union legislation,
f) the blanket application of the principle of majority rule in the European Council/Council of Ministers in supranational affairs,
g) the application of the consensus principle (unanimous or by a "large majority" with "constructive abstention" of the minority) for the cooperation of the states in the frame of the European Council/Council of Ministers,
h) the involvement of national parliaments,
i) the preservation of the identity of the Member States as states.

[23] Cromme 2010 Art. 9, Expl. p. 110–11, 147–48 (with handling and transitional regulations Art. 156 I, II; Expl. p. 311/12); Cromme 2003, Art. 12a.
[24] Cromme 2010: Art. 20 III.

1.6 *Excursus C: The Further Development of the "Specific Constitutional Elements of the Association of Sovereign States"*[25]

According to the principles of the proposed new constitutional treaty, the competence-competence of the Member States and the provisionally equal importance of supranational and international acting can above all be considered important specifics regarding the association of sovereign States. Lately, this has also applied to the (evolving) participation of the national parliaments in decisions of the Council of Ministers at the EU level as well as to the (recently further developed by the German Constitutional Court) obligation to safeguard the national identity[26] of the Member States.[27]

Of particular importance are some additional specific constitutional elements, such as the equal rank of national and European fundamental rights, citizenship rights of the EU that were derived from national citizenship rights, as well as the "binding cooperation"[28] of Member States in the realm of foreign policy (Art. 28 and 31 TEU). Furthermore, the cooperative relationship between the ECJ and the national constitutional courts as well as the concept of the "ever-closer Union" are also important.

Moreover, there are other constitutional elements, that are demanded to be modified, such as the European Parliament as a "parliament of the people", but that is not apportioned according to the populations of the various states – or conversely, constitutional elements that could still be developed, such as the constitutional convention as a regular institute of innovation, in addition to the connection between supranational and intergovernmental actions,[29] or the prohibition of horizontal financial compensation.[30]

In which direction, and with which specific constitutional elements the development of EU constitutional law proceeds, remains to be seen. Many things can be complex and difficult to classify.[31] The German Federal Constitutional Court's case law with regards to the association of sovereign States should not be seen as an obstacle in the way of further development of EU constitutional law: The Court's general descriptions of the association of sovereign States are still not very extensive and detailed; they therefore leave a great deal open for future interpretation. For example, the German Constitutional Court ranks the "ever-closer Union"[32] as

[25] Cromme 1997, p. 1–56 (Critique: Weber 1998, p. 103).
[26] German Federal Constitutional Court (Bundesverfassungsgericht), 2 BvE 2/08 et al. (judgment of 30 June 2009) para. 233 et seqq. – *Lisbon*.
[27] cf. Cromme 1997, p. 6: "Erhaltung eines Kernbereiches der Souveränität".
[28] Cromme 2012a, p. 215; see below Excursus D.
[29] Cromme 2012a, p. 209 et seqq.
[30] Cromme 2012a, p. 215; Cromme 2010: Art. 140 II; Expl. p. 297 et seq. (= Art. 157 IV 1st edn., Cromme 1987).
[31] Cromme 2012a, p. 214.
[32] German Federal Constitutional Court (Bundesverfassungsgericht), 2 BvR 2134/92, 2 BvR 2159/92 (judgment of 12 October 1993) – *Maastricht*.

being one of the most important elements, because it is carried out through "public authority"[33] (as a supranational element). In addition, the court also stressed the importance of the "state-organised" nations[34] in the "sovereign permanent" states[35] (as an intergovernmental element). Both these elements were joined together through the Treaty of Maastricht. In its Maastricht ruling (as well as in the Lisbon ruling), the German Federal Constitutional Court relatively openly characterised the EU as an association of sovereign States and in accordance with the German Basic Law.

The association of sovereign States (or the "federation in development") is accordingly not a fixed "ideal type", but rather is an actual "real type", [36] and is thus appropriately designated for "flexible systems".[37] At any rate, an analysis of EU constitutional law should not be fixated on the "state model"[38] or the "federal state model".

2 Proposals for a Constitutional Treaty of the EU (Parts I, II, III, IV)

2.1 Part I – The Principles[39]

The fundamental elements of the new primary law/constitutional law should adhere to the comprehensive and basic standards of the Treaty of Lisbon. Chief among these elements are values, fundamental rights, objectives, and Union citizenship as it is derived from state citizenship.

The European Charter of Fundamental Rights, which, in conjunction with the constitutions of the Member States, has its own significance, should survive as a stand-alone constitutional charter (according to the British model), and should also be valid and protected as an equally important part of constitutional law alongside the EU constitutional treaty.

With the principle of subsidiarity comes the ability to check whether competences of the union can be reduced. The national identity of the Member States, particularly with regard to their "basic functions" (Art. 4 TEU), should not merely be "respected" but should also be "guaranteed".

---

[33] German Federal Constitutional Court (Bundesverfassungsgericht), 2 BvE 2/08 et al. (judgment of 30 June 2009) – *Lisbon*.

[34] German Federal Constitutional Court (Bundesverfassungsgericht), 2 BvR 2134/92, 2 BvR 2159/92 (judgment of 12 October 1993) para 108 – *Maastricht*.

[35] German Federal Constitutional Court (Bundesverfassungsgericht), 2 BvE 2/08 et al. (judgment of 30 June 2009) – *Lisbon*.

[36] According to Larenz 1991, p. 221–22, 463, 465; Cromme 1997, p. 5–6.

[37] Larenz 1991, p. 469.

[38] Grimm 1995, p. 587 and there notes 28, 50 (to Cromme 1987). With the same view Blanke and Böttner in this Volume.

[39] Cromme 2010, Art. 1 IV,V – Art. 2 u.3; Expl. p. 127–28, 134–35 – Art. 6; Expl. p. 144–45 – Art. 7; Expl. p. 118, 133.

Because of the current inconsistencies[40] regarding the legal personality of the EU, a clarification is needed, especially in relation to the inclusion (but only in the medium term) of increased intergovernmental actions in the EU: "The Union has legal personality. The states act in conjunction with one another, as well as with the Union. The European Union, through its institutions, possesses a single institutional framework for the Union's undertakings and for the cooperation between states".

With respect to relations between Member States, their external solidarity ("The Principles" – Part I), should especially be emphasised, namely via a mutual assistance obligation that is more apparent than in Art. 42.7 TEU (in addition to obligations under the NATO Treaty).

Pertaining to the scope of EU constitutional law "for an indefinite period of time", a comprehensive constitutional principle of sustainability (*Nachhaltigkeit*) should be set forth in Part I and should be emphasised, not just for environmental law, but also for fiscal management and the entire legislation and administration.

2.2 Part II – The Institutions and Functioning of the EU

2.2.1 European Parliament and Legislation[41]

In a uniform electoral law, an incremental distribution of seats should be introduced according to the population of the states (with a small "adjustment" for small and medium-sized states).

Laws originating from the "ordinary legislative procedure" (Art. 289.1 TFEU) should also be referred to as "laws" of the EU. Under these laws, the right of initiative should lay not only with the Commission, but also with the Parliament and the Council of Ministers. Important laws[42] should be introduced formally and concurrently by the European Parliament and by the national parliaments. And along with the consultation of the national parliaments, the European Parliament as well as the (now in parliamentary form) European Council/Council of Ministers should decide these laws.

It will be necessary to have "direct regulations" for the European Council/Council of Ministers, in particular in the areas of foreign and defence policy, as well as domestic policy in addition to the regulations implemented by the Commission on the basis of law.

Given the increasing "binding cooperation" between Member States within the European Council/Council of Ministers, above all in the areas of foreign policy and financial policy (Art. 28, 31, 36 TEU), it is now more self-evident that the opinion of the European Parliament *must* be taken into account (Art. 23.3 GG).

[40] Geiger, in Geiger et al. (2010), Art. 47 TEU para 1–3; Cromme 2010, Expl. p. 134–35.
[41] Cromme 2010: Art. 11 Alternative; Expl. p. 153–54; (similar to the Council of Ministers: Art. 26 III) – Art. 13, 20, 24 II, 33, 61; Expl. p. 155–57, 220–21; cf. Art. 23.3 GG.
[42] Especially institutional laws; see above Excursus B.

2.2.2 European Council and Council of Ministers[43]

The (newly formed) European Council respectively the Council of Ministers will continue to play an important role with regard to decisions, co-decisions, and the right of participation of the Member States in government functions (especially in foreign policy), as well as in administrative functions (for example with restricted comitology). In addition to these operational responsibilities, the right of co-decision in the Union should be given to the Council of Ministers. In this way, the tasks of the Member States in the EU can be pooled and coordinated with each other. In any case, a second chamber comprising members of national parliaments along with the European Council/Council of Ministers, should be avoided.[44] However, the involvement of the national parliaments should not only be left to national constitutional law and the different national practises, but also should be largely determined by European constitutional law.

At the same time, the Council formations should be restructured (Laeken Declaration), and the former European Council and Council of Ministers should be joined together as a newly styled "European Council". In its role as law maker of the EU, the European Council should be "parliamentised" and modelled after the German *Bundesrat*: several members of government (deciding uniformly for each state) would be delegated to the "plenum", depending on the number of inhabitants in each state. Other than the heads of government, two to six Ministers (or their representatives) would be active in the "new" European Council, for a total of over 120 members of government. There they would vote essentially according to the double voting rights provided for in the Treaty of Lisbon.

Certain operational tasks should remain under the authority of specific departments within the Council of Ministers and these departments should have decision-making powers (i. e. "special committees" such as a foreign affairs council, defence council, council for national security, fiscal council). In the wake of the former European Council, the political and strategic leadership of the entire European Council/Council of Ministers should be overtaken by a "council of heads of state and government" (*Rat der Staats- und Regierungschefs*) – under the chairmanship of the President of the European Council.

2.2.3 The European Commission[45]

Compared to the reformed European Council/Council of Ministers as the focus of the Member States regarding the leadership of the EU (as an organ of the supranational Union as well as a "borrowed" organ for the cooperation and the "binding cooperation" between the Member States), the unity[46] of the Union should be

[43] Cromme 2010: Art. 25, 26 I, II, III, 29, 30, 32; Expl. p. 161–64, 173–74.
[44] With the same view Blanke and Böttner in this Volume.
[45] Cromme 2010: Art. 37–39; Expl. p. 179 – Art. 34 and 42; Expl. p. 176–77.
[46] Regarding the EU as a connection of states and of a supranational union cf. Pechstein and Koenig 2000, para 92; Cromme 2010, p. 27 et seqq., note 175 – Regarding the "equality of the

equally represented by the European Parliament "in tandem" with the European Commission. Parliament and the Commission should cooperate both politically and personally. The Commission should thereby become less bureaucratic, but remain guardian of the Treaties. Its importance became more relevant during the financial crisis due to its control measures and other executive powers. Conversely, the Commission should be under a legal and political obligation according to the principle of subsidiarity to phase out and reduce excessive activities at the task level of the Member States.

From now on, the Commission President should be elected directly by the European Parliament; the members of the Commission (including the "European Foreign Minister" and the "European Finance Minister"), should be appointed by the President of the Commission, each with subsequent consent of the European Council. The President of the Commission should be strengthened in his role, such as to determine the guidelines of the policy of the Commission, or even being able to dismiss members of the Commission. With regard to the function of the Commission as guardian of the Treaties, it is important to keep in mind the limited right of appeal that the European Council (respectively the Parliament) has. Moreover, introducing a constructive vote of no confidence ought to be considered.

Additionally, a voting member of the Commission from each Member State should be appointed. However, only half of the Commission members should be head of a department (including the coordinating Vice President); the other Commissioners would have supplementary deputies and representative functions (following the Bavarian model).

The Commission can also, so far as is necessary, be charged with the enforcement of intergovernmental contract law (on the basis of "binding cooperation"). Along with actions for breach of the Treaties brought before the ECJ, additional competences of the Commission (together with the Council of Ministers) should be created for better administrative enforcement and better implementation of Union law in the Member States.

2.2.4 The European Court of Justice[47]

The institutional arrangements for the ECJ and other courts can remain essentially the same. The "cooperative relationship" between the ECJ and the national constitutional courts should be encouraged.[48] Regardless, a partially expanded jurisdiction of the EU should be planned (especially in the enforcement of the principles for the States as laid out in Part I), as well as for the implementation of the agreements between the Member States on the basis of "binding cooperation". The latter particularly applies to the obligations of states in the areas of macroeconomic finance- and economic policy.

Member States before the treaties and regarding the differentiated integration as well the opt-outs (above Great Britain and Turkey): Cromme 2007, p. 821 et seqq.

[47] Cromme 2010: Expl. p. 189–90.

[48] Cromme 2010: Expl, p. 187–88.

2.2.5 Cooperation Between the States and the Institutions of the Union[49]

In many areas, preference has been given to supranational regulations aimed at equal treatment of all EU States, in addition to those aimed at legal precision. In contrast, however, the cooperation between states within the framework of the European Council/Council of Ministers (with participation of the European Parliament) should no longer be concealed or denied, but rather regulated in a general manner within a special subsection of primary law/constitutional law.

The "binding cooperation" of the "willing states" in foreign policy (with "constructive abstention" of up to one-third of Member States under Art. 28, 31, 36 TEU) should be facilitated and developed with respect to procedure (for example, also with regard to a small number of *dissenting* votes). It should also be tasked in the areas of freedom, security and justice, but above all in financial and stability policy and in growth, structure and convergence policy (which is currently under development). The general primacy of supranational competence (achieved through existing primary law) would remain as it is.

This (notably also operational) "binding cooperation" needs to be distinguished from "enhanced cooperation" (closer cooperation; *verstärkte Zusammenarbeit*) which more generally includes middle and small-sized groups of states. However, the principle of binding cooperation aspires for consensus from all or a large part of the Member States. The enhanced cooperation should remain in the text of the Treaty of Lisbon, as it refers to the permanent transfer of supranational competences.

2.2.6 Excursus D: "Binding Cooperation" of the EU States According to Applicable Law

The concept of a European association of sovereign States agrees with the case law of the German Federal Constitutional Court and is authoritative for Germany.[50] The details are not yet entirely set in stone, thus it can (as stated) be developed for the purpose of further European integration. In the Convention's draft of a treaty for a European constitution, an attempt was made to supplant or even deny the importance of intergovernmental cooperation at the European level. This cooperation, however, remains a reality even under the Treaty of Lisbon, especially in the arena of foreign policy.

At the same time, the EU's association of sovereign States created specific constitutional elements of the EU. One of these is the binding "resolutions" of the EU states in the realm of foreign and security policy, with the special feature of the so-called constructive abstention for individual states (according to Art. 28, 31, and 36 TEU). These resolutions are already established law. No Member State can be majority-dominated by this specific intergovernmental action (based upon the

[49] Cromme 2010: Art. 53, 54, 59; Expl. p. 131–32, 214–18.

[50] German Federal Constitutional Court (Bundesverfassungsgericht), 2 BvE 2/08 et al. (judgment of 30 June 2009) headnote 1, para 229 – *Lisbon*.

consensus of as many states as possible). Rather, in this case, a "resolution" of a "large majority" is only legally binding on those Member States voting in favour of it. This large majority is achieved when not more than one-third of the states (with concurrent participation of the EU population) abstain from voting. The loyal "constructive abstention" applies to this minority. One should speak here of a "binding cooperation"[51] at the government level. In some cases, even an already qualified majority of the Council of Ministers (with opposing votes) is sufficient.

This binding cooperation between Member States in the realm of foreign policy, which the European Parliament is also consulted on, is considered a little-examined constitutional element of European law.[52] It should, at least, prevent blocking by small blocking minorities and should also indicate the threshold of when we can speak of clear consensus.[53] Regardless, larger EU states could hardly be outvoted, as neither could large groups within middle and small-sized states. Conversely, individual states from the minority could use their right of proposal to get a decision of a large majority. More general insights into the changing formation of coalitions with the European Council and Council of Ministers can be obtained by the so-called cooperative game theory and by actual EU case studies.

Binding cooperation formally came into play during the Kosovo War. This however did not happen during the Libya crisis even though a more differentiated and sustainable decision was objectively possible for the Europeans; only a partially satisfactory result was achieved, though informally. Binding cooperation involves organised joint decisions of the individual Member States within the framework of the Council of Ministers. More success may be found in the area of foreign policy under the applicable law, but only if the "willing" states were to demand solidarity and leadership, and the irresolute states were to participate gradually, at least partially. The presently already applicable "binding cooperation" would gain overall importance and would be more widely practised, if it (as proposed), would be further developed in regards to procedure and then transferred to other areas of expertise.

2.3 Part III – The Policies of the EU[54]

The rules of the internal market (especially according to the pervious EEC Treaty) can remain as they are in essence (in the above-mentioned focus on the core of the constitution). More detailed regulations of primary law (especially in the TFEU) would be acquired by the applicable "institutional laws" (*lois organiques*; *verfassungsausführende Gesetze*) or be transferred via transitional arrangements (Part IV).

[51] Cromme 2010: Expl. p. 131, 196; Cromme 2012a, p. 215; Cromme 2003: Art. 69a; Expl. p. 194.
[52] Terhechte, in Schwarze (2009), Art. 12 TEU para 2, 3; Cromme 2010: Expl. p. 197 with further reference.
[53] Regelsberger & Kugelmann, in Streinz (2012), Art. 31 TEU para 9.
[54] Cromme 2010: Art. 82 III, 156; Expl. p. 204–05, 210–11, 241–243.

In other departments, the intergovernmental cooperation between the states initially increased (especially after the financial crisis, both within and outside the institutions of the Union). This intergovernmental cooperation should safeguard the core of the national constitutional law and the identity of the states (according to the view of some states and their citizens). However, in the new constitution-treaty of the "federation in development" (and furthermore in the subsequent constitutional process under Part IV) an additional "communitisation" (*Vergemeinschaftung*) of supranational actions could be possible (incrementally, for example, after having considered the necessity of a decisive common foreign policy and after the emergence of a common finance culture).

2.3.1 Foreign Policy[55]

The "common foreign policy" of the Treaty of Lisbon is characterised by a juxtaposition of intergovernmental and supranational action.[56] The merging of both parts requires a holistic and complete way of thinking and an appropriate allocation of roles between the Member States and the institutions of the Union.

The "special foreign policy" of the Union is essentially already supranational, especially in the areas of foreign trade and developmental policy, alongside the trade and arms embargo and finally with regard to international treaties (in all areas of Part III of the TFEU). It is equivalent in importance to the other "general foreign policy", especially the classic "political" foreign and security policy.

This "general foreign policy" (including the non-contractual duty of external relations) is still intergovernmental, however. Here, there should be some further changes in the development of constitutional law. Firstly, one can achieve more progress with a further restriction on unanimity in the Council of Ministers by expanding the (already mentioned) "binding cooperation" between the "willing" states according to the applicable Art. 28, 31 and 36 TEU. In addition, there is an already proposed new remedy at law in the ECJ.

It should be emphasised (more so than in Art. 18 and 41 TEU), that the "European Foreign Minister" (as Vice President of the Commission, Chairman of the Foreign Affairs Council and head of the European External Action Service) coordinates the intergovernmental and the supranational foreign policy and controls it together with the Member States. He should also be responsible for the use of external funds from the EU budget. But above all he must ensure that the "general foreign policy" will be reinforced by way of an effective "special foreign policy" of the Union. Indeed, the foreign minister of the EU is in all (also "mixed") negotiations essentially also the negotiator of the EU.

In consequence of its increasingly coordinating and controlling role, the "critical mass" of competence must be achieved, so that the "high representative" for Foreign

[55] Cromme 2010: Art. 59 II Expl. p. 216–219.
[56] Art. 18.1, 18.2, 18.3, Art. 24.1 (3), Art. 40 TEU on the one hand and Art. 18.4, 40 TEU, Art. 218 TFEU on the other hand.

Affairs can now be named and accepted as the "EU Foreign Minister". He would be appointed by the President of the Commission and confirmed by the European Council (like other members of the Commission). Prior to the appointment of the Minister of Foreign Affairs, however, the President of the Commission must adjust an agreement with the President of the European Council, who would still retain his (primarily representative) role in European foreign policy.

2.3.2 Defence[57]

With the (almost exclusive) intergovernmental defence policy of the TEU, there needs to be a new set of intergovernmental and supranational competences (also in the interest of a growing division of responsibilities between the States), especially in the joint European armaments,[58] in order to increase efficiency of the various national armaments while lowering the costs. In this way, the EU could increase its importance in relation to the United States, Russia and China with regard to security policy and the protection of European interests.

In the possible event that the United States partially pulls out of Europe as well as out of the European NATO Organisation, the creation of a permanent military command structure of the EU in Europe will have to be considered, even for further missions outside Europe. However, as long as EU foreign and security policy depends upon the (still to be improved) "binding cooperation" between the States, those states' troops are subject to their jurisdiction. The States must still retain their rights, even with respect to the decision to place their troops under the EU guide units (as it is currently with NATO). Within this European context, the parliamentary reservation in Germany can indeed become more effective.

2.3.3 Internal Market, Agriculture, Energy, Transportation, Labour and Social Affairs, Environment, Euratom, Research[59]

As we have seen, the different areas of EU law relating to the internal market can remain, but in a condensed form. A protectionist "industrial policy" for the benefit of individual sectors and in individual States should be further excluded. The same should also apply to the EU's foreign trade. However, (cooperative, market and cost-oriented) innovative EU actions to maintain and extend the European position in global free trade should be possible.

In some areas of the internal market, insufficient supranational competences of the Union will need to be amended and updated, for instance in energy policy (especially for a Europe-wide, market-driven supply security), and in environmental policy (e. g. for the abolition of unanimity in the Council of Ministers on international climate protection treaties).

[57] Cromme 2010: Art. 72, 73, 77a; Expl. p. 229–30, 234–236, 238.
[58] Cromme 2003: Art. 94.1, 2, 3; Expl. p. 209–10.
[59] Cromme 2010: Art. 82 I, 85, 91, 104, 106, 113 IV; Expl. p. 240, 246 – energy: Art. 104; Expl. p. 265–66, 287–88 – environment: Art. 119, 120; Expl. p. 277–283, 287–88.

While there are limits on the Union's social policy (including the German Constitutional Court's case law regarding identity), the free labour market, on the other hand, should include the wage formation process (differentiated by region, while respecting the role of the social partners), and requires partial European governance through an expanding "deepened economic and monetary union".

2.3.4 Macroeconomic and Monetary Union[60]

2.3.4.1 Intergovernmental and Supranational Competences

Apart from the European Central Bank, the general "coordination of economic policies" is essentially regulated through intergovernmental means (Art. 121 et seqq. TFEU) – but only in principle. To a large part supranational powers were in development during the financial crisis (for example with the Six Pack, but also with the banking union related to systematically important banks), but especially in the latter, because individually precise regulations are required. In the new European primary law/constitutional law, the legal basis for these supranational regulations should be clarified and partially expanded upon and supplemented with executive competences of the "European Finance Minister". Also, the supplementary intergovernmental agreements and institutions (such as the Fiscal Pact, ESM Funds, and the bank funds) should be adapted with the national law and integrated into the text of the constitution.

The European Central Bank requires a concentration of its "core functions" on "monetary policy" (especially with regard to the funding of Member States and to the so-called TARGET 2 loans). Furthermore, it should be made clear that the ECB (until further notice?) can take over extensive duties in the area of EU banking supervision. Completion and control of the stability and growth policies requires an overarching coordination (especially through the planned limited "reform treaties" between the Union and countries in crisis for the convergence in the EU and structural improvement in those countries), namely through the new "binding cooperation" in an intergovernmental (only macroeconomic) "economic government".[61]

2.3.4.2 Excursus E: Autonomous Powers in the System: The ECB, the "Invisible Hand" of the Financial Markets and the Social Partners

How does the independent ECB, as we have understood it so far and as we now observe it, fit in with a (coordinating or even "overarching") European economic government? How does it fit in with the new redesigned, consistent economic

[60] Cromme 2010: Art. 94, 97; Expl. p. 252–53, 257–58; up to date additions: Calliess 2013, p. 785 et seqq.; Cromme 2013, p. 594 et seqq.
[61] Also feasible in the short term; see below Part IV (at the end); Cromme 2014, p. 448, 455–56.

system of the EU? A controversial topic is the "unlimited" purchase of government bonds by the ECB – next to that at the same order of magnitude are the so-called TARGET2 loans from the ECB to the national central banks, which one could characterise as overdrafts between national central banks with unlimited overdraft protection. Both financing aids of the ECB are considered by some experts, as well as by policy, as a fast and flexible addition to EMS assistance in the Euro zone. As a corrective measure, a (controversial) nexus between bond purchases and ESM procedure, in addition to other further requirements is intended, even with a partial policy link (which would need to be limited).

On the one hand, the ECB is an independent and without "braking" control of the European Parliament and the national parliaments; on the other hand, however, it is expressly legally limited by the "monetary policy" and by the primary objective of price stability. It is not yet sufficiently clear in the legal sense to what extent the interest rate policy and the credit policy belong to the monetary policy. After all, it is conceivable that the German *Bundestag* or the institutions of other Member States would intervene in the event of an increasing risk of inflation or increasing loss of interest rate. In the event that the ECB overextends its authority regarding monetary policy one could "block" this, using other areas of the stability systems, namely in extreme cases at releases of ESM guarantees. One could also demand and assert a clarification of the term "monetary policy", and that a procedural limitation of indirect acquisition of state bonds in addition to a limit on TARGET2 loans would be set. This clarification would be achieved in any case through an amendment of the statutes of the ECB, or by a change in EU primary law in accordance with simplified procedure (Art. 48.6 TEU) – and thus probably without referendums in the States.

On the one hand, the "smoothing" of troubled international money markets is one of the tasks of the central banks. On the other hand, the German Constitutional Court, in its first ruling on the ESM, pointed out that the ECB may also not unrestrictedly acquire assets (government bonds) on the secondary market. Economists and lawyers should understand the grounds for the reasoning of the court as one of the most important statements of the court: according to the ruling, the ECB may not "target financing of states, which is independent from the capital markets".[62] Neither the global private sector nor the worldwide state budgets can finance themselves with their own resources or subsidies "from above"; if necessary, their funds must also be supplemented through the capital market. And this must also be controlled by the interest rates. These aspects highlight the fact that the macroeconomic system of the EU is not only dependent upon the diverse organisation of the state action of the Member States and of the EU, but also that the "invisible hand" of the (disciplined by the state) capital market is constitutionally protected.

Similarly, the same applies to the (mostly silent) role that the wage policy could have in the recovery of the European economy, especially in respect to the debtor states. The wage determination process (*Lohnfindung*) is part of the free labour

[62] German Federal Constitutional Court (Bundesverfassungsgericht), 2 BvE 6/12 et al. (preliminary ruling of 12 September 2012) para 278; cf. Art. 120, 124 TFEU.

market. However, it is largely entrusted to the autonomous social partnership of trade unions and employers' associations. It is constitutionally protected in Germany and the EU. There still remains a limited scope for a cautious, but not just declamatory, wage policy of the Member States and the Union; and the wage policy must recognise the social partners as responsible key players. The EU must act despite, and because of, the cultural differences in Northern and Southern Europe regarding social partnerships. However, detailed government-imposed wage levels are extremely unlikely, but are perhaps possible in the medium term as guidelines or directives for wage increases. The goal must be a uniform, but regionally differentiated labour market that is supported by social protection policies.

2.3.4.3 Excursus F: Growth in the Indebted Countries through Structured Reform and Economic Development

It is not just about stable finances and a functioning labour market, but also about new economic and political chances for both the crisis States and also for the EU. It will be necessary to develop current aid measures of the ESM and the ECB, as well as the on-going state budget beyond a new concept for the economic and growth policies of the EU, and to realise (initially as an intergovernmental concept) an eventual way to a simplified amendment of EU Treaties (Art. 48.6 TEU).

This last building block of the EU's economic policy could only be realised as a small supranational part within the framework of the current EU Treaties. In addition to the aforementioned wage policy, the rules of convergence would have to be created in the entire EU area (temporarily only in the Euro zone), which still has diverse economic areas. In order to complete this internal development policy of the EU, a programme of limited duration and scope would need to be built, namely a convergence, structure, rehabilitation and solidarity programme. Approaches can be seen (in Part IV) in the Fiscal Pact and the *Van Rompuy* report of October 2012 to the European Council.[63] As part of this package, it is important to ponder gradual structural changes of economic and labour law, the tax system, and the economically relevant administration in those states which need to be rehabilitated – but ultimately, it is for the benefit of the workers and those groups which are most socially vulnerable.

In order to implement this temporary restructuring plan – as it is cautiously called in the Van Rompuy report – "limited, temporary, flexible, and targeted" funds will be needed; this is blurred in the October 2012 report by talk of "fiscal capacity". On the one hand, the many and sometimes small-scale funding resources should be estimated in the EU budget (probably in a partial budget for the Euro zone) and be appropriated individually by the Commission. As a general rule, the services, together with the restructuring conditions, should be contractually agreed to between the Commission and the individual states.

[63] Van Rompuy 2012, p. 34 et seqq.

On the other hand, the availability and the gradual release of these considerable financial resources would only be possible with the consent of the Member States regarding a fund (similar to the ESM and bank funds), because only the EU states as a whole have the ability to procure additional funds, and they especially have the ability to take out larger loans, so long as they are not themselves hit hard by the financial crisis.

2.3.4.4 Excursus G: The Intergovernmental Macroeconomic "Economic Government"

In addition to the completion of the financial and stability union (including the banking union), a new labour market policy and in particular a new growth policy also emerged. For these related tasks, the described legally "binding cooperation" [64] according to Art. 28, 31, 36 TEU (which should be further developed procedurally) should be conferred on the entire financial policy as well as the macroeconomic policy.[65] A comparable (so far only de facto) cooperation at the governmental level would be practised in the stability policy, in the "resolutions" of the Fiscal Pact, and in the ESM Treaty within the framework of the European Council.

The economic government would be formed in a similar, but legally binding way, which would be established through an amendment of the TFEU. It would not be an additional EU institution, but rather a part and component of the Council of Ministers/European Council[66] with a special "method of operating". It would consist of heads of government and ministers of all governments of the Member States whose currency is the Euro or who honestly wish to join the Euro area. The European Parliament would have a right to be consulted.

This new intergovernmental joint economic government has, in relation to the Member States, a functional overarching responsibility in all macroeconomic areas, of the supranational law of the EU. The law on the internal market would not be called into question.

This "government" would not be able to pass any laws. However, in addition to various operative measures (such as the general economic policy or for the amendment of the stability policy), it would above all determine binding long-term planning of the future convergence policy, as well as work on the development of relevant structural policies with respect to the aforementioned treaties that the Union has with the crisis countries. The legally binding resolutions must in principle be made by consensus; otherwise the "large majority" of the states (as explained)[67] must work with the binding nature of the decision for the "willing" states; namely accompanied by the minority's fulfilment of the duty of loyalty.

[64] See above Excursus D.
[65] Cromme 2010: Art. 94 IV.
[66] See above Sect. 2.2.2 (European Council and Council of Ministers).
[67] See above Excursus D.

The economic government would either supplement or replace the currently existing Euro Group. As needed, it could meet together with the members of the Council of Ministers that do not belong to the Euro zone, and could coordinate decisions regarding common interests; the same especially applies to the consultation of the entire Council of Ministers with respect to co-decisions in supranational legislation. The introduction of an economic government would also follow the previous French proposal. Additionally important: since there would be no "expansion of the Union" but rather only more cooperation between states, the simple procedure for the amendment of a treaty (Art. 48.6 TEU) would suffice[68] and holding state referendums would not be necessary.

An overarching new Art. 121 TFEU is conceivable:

> Common Economic Government:
>
> (1) In the European Council and in the Council[69] of the governments of those Member States whose currency is the Euro (or those who have declared a willingness to adopt the Euro with the approval of their national parliaments) in connection with the European Commission adjust their common action in the conjuncture, employment and growth policies as well as in the stability and budget policies. Principles, general guidelines and common strategies shall be fixed in the European Council, as well as additional in the Council of Ministers guidelines, necessary operative and executive measures, common positions regarding foreign policy and recommendations for necessary laws and necessary agreements of implementation between the Member States.
>
> (2) Decisions according to Paragraph 1 are binding; Articles 28 (2), 32 (1) and 36 of the Treaty on European Union shall apply analogous.

2.3.5 Areas of Freedom, Security and Justice[70]

In domestic and legal policy, there are (similar to the macroeconomic economic and monetary union) some possible precise supranational regulations, in particular for the (limited) legislation on the harmonisation of civil and criminal law, and for the cooperation of the police and judicial authorities in the Member States. Here it can remain largely unchanged with regards to the provisions of the Treaty of Lisbon.

The executive competences of the Union in the areas of immigration and border policy should be developed in connection with specific development aid in the countries of origin.

In addition to the supranational competences, there must be an overarching "binding cooperation" within the framework of the European Council/Council of Ministers for the operative cooperation and the further development of new concepts in the areas of freedom, security and justice. Above all, the entirety of Art. 67 through 89 TFEU should be replaced with a concise and systematic version.[71]

---

[68] Cromme 2012a, p. 215.

[69] Distinguish here "European Council" and "Council of Ministers" according to the current setting; to the new formation proposed here see above Sect. 2.2.2 "European Council and Council of Ministers".

[70] Cromme 2010: Art. 143, 144, 146, 151, 152; Expl. p. 298–302.

[71] Monar 2008, p. 397: The Regulations of Articles 67–89 TFEU "speaks of the Principles of Transparency Scorn".

2.3.6 Budget and Finance and the Union[72]

The budgetary law of the supranational Union can be implemented in the new constitutional law. However, it must be closely linked with the overriding macroeconomic finance policy of the Union and the States (in the context of a reinforced economic and currency union). Also, the borrowing of money by the Union, which has long been practised, albeit secretively to the primary law, should be legalised, clarified and limited under strict rules.

Also some tighter rules regarding the tasks of the Commission in the interest of economy and efficiency appear necessary, from eventual emergency budgets to the implementation of the budget. Structural aid for agriculture and the economy (with appropriate conditions) should be retained. However, persistent and comprehensive financial compensation (based on the German model) should explicitly be excluded.

Art. 311.2 TFEU speaks of the "Union's own resources", whereby only the currently existing tax on Union personnel earned this designation. Art. 311 TFEU provides for "new categories of own resources" and for implementing measures for "special legislative procedures" that correspond basically to a unanimous treaty amendment for the simplified treaty amendment procedure (Art. 48.6 TEU). This provision can be included in the corresponding general provisions in Part IV for the further "development of the EU and the development of the constitutional treaty". Early major shifts in the EU's financial constitution do not appear realistic (at any rate, not as a hurdle for the next big step towards a new European constitutional law).

The new constitutional law could provide a specific further competence of the Union from the outset in matters of taxation, provided there is a qualified majority, namely for harmonisation and implementation measures in the existing system (such as improving the uniform tax base) or for instance making an eco-tax (a steering tax/ecological incentive tax) or a market-stabilising financial transaction tax.[73]

2.4 Part IV – The Development of the EU and the Development of the Constitutional Treaty[74]

2.4.1 The Masters of the Treaties and the Constitution Convention

As was pointed out in the introduction, the desired new constitutional law of the "federation in development" has not yet been accomplished. Rather, further steps in the development of the EU and of the constitutional treaty as an essential element

[72] Cromme 2010: Art. 94 I, 95 I II, 133,136; Expl. p. 288, 294–95 – Art. 133, 135, 140 I, II, III and Art. 140 IV; Expl. p. 291, 297–98 – Art. 132 I, III; Expl. p. 289–90.
[73] If necessary, initially as "enhanced cooperation".
[74] Cromme 2010: Art. 8, 155, 156, 159, 172–74; Expl. p. 309, 310–313, 316–319; Cromme 2003, Art. 188 III, IV; Expl. p. 276.

of the new constitutional law should be considered in Part IV. Further developments are still within the purview of the Member States as the masters of the Treaties, especially with the participation of the Parliament, the European Council, and the Commission.

Regardless, the constitutional convention should not[75] be the controlling instrument for individual small steps with respect to the organic development of the still incomplete new constitutional law. Rather, the "simplified treaty amendment procedure" according to Art. 48.6 TEU must now be accepted as a more normal procedure, which will be finished through the ratification by the states. However, the European Council should reach a preliminary amendment decision not just after consultation with the European Parliament, but rather with its consent.

The constitutional convention should be considered much more an "organ of innovation", and should, but only for longer intervals (or for specific reasons), develop comprehensive and far-reaching amendments for a mature and broad constitutional law, with the approval in the ratification procedure in the Member States.

With regard to this special significance of the convention, it ought to be considered whether a concluding decision by a "large majority" of the European Council and the European Parliament would be sufficient.[76] This single exception to the unanimity principle (or the principal of amendment of primary law through contract) must be adopted with the approval of all states from the outset in accordance with the new constitutional law; only then would it be accepted from the beginning. The abolition of the unanimous vote is only compatible with sovereignty of the Member States, because the States that vote against an amendment will still have the right (since the Treaty of Lisbon) to withdraw from the EU. In this context, the right of withdrawal from the EU should be eliminated under the new constitutional law (except for withdrawal according to convention procedure). This is because the EU was created to last in perpetuity ("for an indefinite period of time").

For future constitutional conventions, there are certainly some important and innovative topics which are not yet ripe for the proposed new constitutional law, but which may be possible later within the framework of the development of the constitutional treaty (in the sought-after "federation of states") and without the loss of state identity.[77] For example, some of these topics are the aforementioned "own resources" of the Union, the desire for more authority in the realm of foreign relation policy and tax law, and a more thorough macroeconomic economic and monetary union, in addition to the rules of the European veto law in the United Nations and participation in international disarmament.

[75] Cromme 1987, p. 82; Cromme 2005, p. 36, 50–51.
[76] Cromme 2003, Art. 188 III, IV; Cromme 1997, p. 45: right to withdraw.
[77] Sommermann 2013, p. 708 et seqq.

2.4.2 Start with Minor Changes to Primary Law – Create a Concurrent Impetus for Progressive Integration

In light of the medium and long-term perspective of European constitutional law (with a constitutional treaty in approximately five to ten years and "development of the constitutional treaty" in subsequent stages), early first steps for the further development of the EU are both possible and necessary. This applies to the possible necessity[78] for clarification regarding the banking union and the monetary policy of the ECB, but above all to the proposed introduction of an intergovernmental macroeconomic "economic government".[79] These limited changes to primary law can be enforced in simplified procedures (Art. 48.6 TEU) because they do not include an "expansion" of the (supranational) Union.[80]

The "masters of the Treaties" should demonstrate a constitutional concept within the framework of the proposed (narrow) change – just an extensive "perspective for EU constitutional law". In this context, the soon-to-be limited change to the Treaties can be understood as momentum for the future of European constitutional law as well as a "yes" to the EU and the Euro.

References

Blanke, H.-J., & Mangiameli, S. (Eds.). (2011). *The European Union after Lisbon – Constitutional, Economic and External Actions*. Berlin: Springer.

Böckenförde, E.-W. (1991). *Staat, Verfassung, Demokratie: Studien zur Verfassungstheorie und zum Verfassungsrecht*. Frankfurt a. M.: Suhrkamp.

v. Bogdandy, A. (2001). Grundrechtsgemeinschaft als Integrationsziel? *JZ*, *56*(4), 157–171.

Calliess, C. (2013). Die Reform der Wirtschafts- und Währungsunion als Herausforderung für die Integrationsarchitektur der EU – Europa- und Verfassungsrechtliche Überlegungen. *DÖV*, *20*, 785–794.

Cromme, F. (1987). *Verfassungsvertrag der Gemeinschaft der Vereinigten Europäischen Staaten*. Delmenhorst: Riek.

Cromme, F. (1997). *Spezifische Verfassungselemente des Staatenverbundes: Bausteine für die Europäische Union*. Berlin: Köster.

Cromme, F. (2002). Verfassungsvertrag der Europäischen Union – Begriff und Konzept. *DÖV*, *14*, 593–600.

Cromme, F. (2003). *Verfassungsvertrag der Europäischen Union: Entwurf und Begründung* (2nd edn.). Baden-Baden: Nomos.

Cromme, F. (2005). Spezifische Bauelemente der europäischen Verfassung. *Europarecht*, *40*(1), 36–53.

Cromme, F. (2007). Die primärrechtliche Absicherung der Einheit der EU bei der differenzierten Integration – Die Entwicklung bis zum Brüsseler Mandat. *Europarecht*, *42*(6), 821–828.

[78] See above Excursus E.
[79] See above Excursus G; Cromme 2014, p. 448, 455–56.
[80] See above Excursus G.

Cromme, F. (2009). Juristische Irrlichter auf dem Wege zum Europäischen Verfassungsvertrag und zum Lissabon-Vertrag. *DÖV*, *5*, 177–180.

Cromme, F. (2010). *Die Zukunft des Lissabon-Vertrages: ein kurzgefasster und dynamischer Verfassungsvertrag* (3rd edn.). Baden-Baden: Nomos.

Cromme, F. (2012a). Eine Konsequenz aus der Krise: Fortentwicklung der EU als Staatenverbund? – Verknüpfung intergouvermentalen und supranationalen Handelns. *DÖV*, *6*, 209–216.

Cromme, F. (2012b). Letter to the Editor. *Der Spiegel*, *38*(17.09.2012), 12.

Cromme, F. (2013a). Vom ESM und Fiskalpakt zu einem makroökonomischen Rechtssystem der EU. *DÖV*, *15*, 594–599.

Cromme, F. (2013b). Letter to the Editor. *Frankfurter Allgemeine Zeitung*, *33*(12.4.2013), p. 33.

Cromme, F. (2014). Die Einführung einer Wirtschaftsregierung der EU – ein Impuls für die fortschreitende Integration. *Europarecht*, *49*(4), 448–458.

Dehaene, J.-L., Simon, D., & von Weizsäcker, R. (1999). *Die institutionellen Auswirkungen der Erweiterung: Bericht an die Europäische Kommission*. Luxembourg: European Commission.

Fischer, J. (2000). Vom Staatenverbund zur Föderation. Gedanken über die Finalität der Europäischen Integration. In Walter Hallstein-Institut für Europäisches Verfassungsrecht (Ed.), *Verfassungsrechtliche Reformen zur Erweiterung der Europäischen Union* (pp. 171–181). Baden-Baden: Nomos.

Geiger, R., Kahn, D.-E., & Kotzur, M. (Eds.). (2010). *EUV/AEUV. Kommentar* (5th edn.). Munich: Beck.

Grimm, D. (1995). *Braucht die EU eine Verfassung?* Munich: Carl-Friedrich-von-Siemens-Stiftung.

Larenz, K. (1991). *Methodenlehre der Rechtswissenschaft* (6th edn.). Berlin: Springer.

Monar, J. (2008). Die Vertragsreformen von Lissabon in den Bereichen Inneres und Justiz: verstärkte Handlungsfähigkeit, Kontrolle und Differenzierung. *Integration*, *31*(4), 379–398.

Nohlen, D., & Schultze, R.-O. (Eds.). (2002). *Lexikon der Politikwissenschaft* vol. Band 1: A-M. Munich: Beck.

Pechstein, M., & Koenig, C. (2000). *Die Europäische Union* (3rd edn.). Tübingen: Mohr Siebeck.

Pernice, I. (2001). Europa und nationales Verfassungsrecht. Bericht von Prof. Dr. Ingolf Pernice. *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer*, *60*, 148–193.

Van Rompuy, H. (2012). *Auf dem Weg zu einer echten Wirtschafts- und Währungunion* Brussels, 12 October 2012.

Schmitt, C. (1928). *Verfassungslehre*. Munich: Duncker & Humblot.

Schwarze, J. (Ed.). (2009). *EU – Kommentar* (2nd edn.). Baden-Baden: Nomos.

Sommermann, K.-P. (2013). Integrationsgrenzen des Grundgesetzes und des europäischen Verfassungsverbundes: Brauchen wir eine neue Verfassung? *DÖV*, *18*, 708–714.

Streinz, R. (Ed.). (2012). *EUV/AEUV* (2nd edn.). Munich: Beck.

Weber, A. (1988). Buchbesprechung Franz Cromme: „Verfassungsvertrag der Gemeinschaft der Vereinigten Europäischen Staaten. *DVBl*, *103*(16), 800–801.

Weber, A. (1998). Buchbesprechung Franz Cromme: „Spezifische Verfassungselemente des Staatenverbundes: Bausteine für die Europäische Union. *DVBl*, *113*(23), 1303.

Weber, A. (2005). Buchbesprechung Franz Cromme: „Verfassungsvertrag der Europäischen Union: Entwurf und Begründung. *DVBl*, *120*(9), 561–562.

Weber, A. (2011). Buchbesprechung Franz Cromme: „Die Zukunft des Lissabon-Vertrages: ein kurzgefasster und dynamischer Verfassungsvertrag“. *DVBl*, *126*(2), 88–89.