

Headnote

to the Order of the Second Senate of 31 March 1998

– 2 BvR 1877/97 and 2 BvR 50/98 –

Germany's involvement in European Monetary Union is provided for in the Maastricht Treaty, as well as being permitted in principle by Art. 23 and Art. 88, second sentence, of the Basic Law (cf. BVerfGE 89, 155 <199ff.>). For the implementation of these legal requirements, in particular the decision on the States participating in the Monetary Union, the Maastricht Treaty prescribes the criterion and procedure for entry to the third stage of the Monetary Union. In so doing it leaves room for economic and political evaluation and forecasting. This renders the federal government and parliament responsible for safeguarding monetary property. The owner of money does not however acquire the right to have the content of this decision, in justifying which parliament shares, reviewed through the procedure of constitutional complaint.

Federal Constitutional Court

– 2 BvR 1877/97 –

– 2 BvR 50/98 –

IN THE NAME OF THE PEOPLE

In the proceedings

on

the constitutional complaints

1. of Professor Dr. R...

against the failure of the Federal Government and especially the Federal Chancellor, as well as the other constitutional authorities of the Federal Republic, to explain with the needful unambiguousness to the German population and to the Member States of the European Union, and to take into consideration, that Germany – in accordance with the Federal Constitutional Court's judgment of 12 October 1993 (BVerfGE 89, 155) – would join the European the Monetary Union only given strict fulfilment of the convergence criteria by Germany and the other Member States willing to join and only on condition that neither the Federal Republic nor other Member States of the European Union engaged in "creative accounting" or other anti-stability manipulations to calculate the gross domestic product so as to simulate lasting monetary stability and compliance with the convergence criteria for the reference year 1997 and thereby gain entry to the Monetary Union by artifice

and application for an interim injunction

– **2 BvR 1877/97** –,

2. a) of Dr. H...,

b) of Dr. N...,

c) Professor Dr. S...,

d) of Dr. S...

– Attorney: Professor Dr. Karl Albrecht Schachtschneider, Hubertusstraße 6, Nürnberg –

against the Federal Government's failure to act to bring about postponement of the start of the third stage of the Monetary Union until such time as the economies of the Member States to take part in the single currency met the necessary conditions, especially being lastingly convergent,

and application for an interim injunction

– 2 BvR 50/98 –,

the Second Senate of the Federal Constitutional Court – Judges

President Limbach, Graßhof, Kruis, Kirchhof, Winter, Sommer, Jentsch, Hassemer –

decided on 31 March 1998, pursuant to § 24 BVerfGG, unanimously as follows:

The constitutional complaints are dismissed.

Grounds:

A.

The constitutional complaints are directed against Germany's participation in European the Monetary Union as from 1 January 1999. 1

I.

On 7 February 1992 the Member States of the European Community signed the Treaty on European Union in Maastricht (BGBl II 1992 p. 1253). This treaty also amended the EC Treaty (ECT), and now provides in Title VI, Chapter 2, Art. 105ff., for a common monetary policy of Member States. The Maastricht Treaty entered into force on 1 November 1993 (BGBl 1993 II p. 1947). 2

The common monetary policy is intended to establish a European Monetary Union by stages, ultimately communitarizing monetary policy in the hands of a European System of Central Banks (ESCB). 3

The first two stages of the transition to the Monetary Union have already been accomplished. At present entry to the third stage – the introduction of a single currency – is being prepared.

1. For the transition to the third stage, Art. 109j ECT provides for a decision-making procedure in which the legal and economic requirements for the Monetary Union are checked and the participating States determined on that basis. 4

a) The Council of Heads of State or of Government decided on 13 December 1996 that at that date there was no majority of Member States meeting the conditions for entry to the third stage of the Monetary Union. The procedure of Art. 109j(4) ECT was accordingly to begin at the next possible date (OJ N° L335/48, 24 December 1996). 5

Art. 109j(4) ECT provides that the Council, meeting in the composition of the Heads of State or Government, shall confirm, on the basis of recommendations of the Council of Economic and Finance Ministers and taking into account reports from the Commission and the European Monetary Institute (EMI) and an opinion of the European Parliament, which Member States fulfil the necessary conditions for the adoption of a single currency. 6

The recommendations of the Council of Economic and Finance Ministers are to be submitted on 1 May 1998 and the European Parliament's opinion on 2 May 1998. Confirmation of the participant States by the Council meeting in the composition of the Heads of State or 7

Government is to follow on 2/3 May 1998. By Art. 109j(4) ECT the third stage is to start on 1 January 1999.

b) The criterion for verifying legal convergence is, by Art. 109j(1), "the compatibility between each Member State's national legislation, including the statutes of its national central bank, and Articles 107 and 108 of this Treaty and the Statute of the ESCB." 8

To verify economic convergence, the Treaty, by Art. 109j(1) taken together with the Protocol on the convergence criteria, provides for four stability criteria: 9

(1) The achievement of a high degree of price stability, apparent from a rate of inflation that does not exceed by more than 1½ percentage points that of, at most, the three best performing Member States in terms of price stability. 10

(2) The sustainability of the government financial position, apparent from the Member State's not being the subject of a Council decision under Art. 104c(6) ECT that an excessive deficit exists. 11

For the Council decision pursuant to Art. 104c(6) ECT, the requirements of Art. 104(2) ECT taken together with the Protocol on the excessive deficit procedure apply. These provide for two criteria: a value to assess government deficit (deficit criterion) and one to assess government indebtedness (debt criterion). The deficit criterion requires that the ratio of the planned or actual government deficit to gross domestic product at market prices (GDP) not exceed a reference value of 3%, unless: 12

– either the ratio has declined substantially and continuously and reached a level that comes close to the reference value; 13

– or, alternatively, the excess over the reference value is only exceptional and temporary and the ratio remains close to the reference value. 14

The debt criterion requires that the ratio of government debt to GDP not exceed the reference value of 60%, unless the ratio is sufficiently diminishing and approaching the reference value at a satisfactory pace. 15

(3) The observance of the normal fluctuation margins provided for by the exchange- 16

rate mechanism of the European Monetary System, for at least two years, without devaluing against the currency of any other Member State.

(4) The durability of convergence achieved by the Member State, reflected in a long-term interest rate that does not exceed by more than 2 percentage points that of, at most, the three best performing Member States in terms of price stability. 17

c) On 17 June 1977 the European Council adopted the Stability and Growth Pact, to guarantee the durability of Member States' convergence (OJ N° C236/1). For the transposition of the Stability Pact there are two Council Regulations (Council Regulation (EC) N° 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies <OJ N° L209/1>; Council Regulation (EC) N° 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure <OJ N° L209/6>) and a "Recommendation on the broad guidelines of the economic policies of the Member States and of the Community" (OJ N° L209/12). 18

d) In its 25 March 1998 convergence report the EMI finds major improvements in terms of convergence since publication of its report "Progress towards Convergence, 1966" (November 1966). At the same time it criticizes various measures and results as inadequate and calls for further efforts towards sustainable convergence. 19

aa) The EMI positively assesses the basic trend of developments in Member States. Measured by Harmonized Indices of Consumer Prices (HICPs), average inflation in the Community had fallen from 2.2% to 1.3%. Except for Greece, all Member States had a rate of around 2% or less. In parallel, long-term interest rates had also fallen, and at an average of some 5.5% were now at a low level. Bilateral exchange rates in the EMS exchange-rate mechanism had been largely stable over the two-year reference period. And the countries that had not taken part in the EMS, or not for two years, were tending, if to differing extents, to show exchange rates that had as a rule moved in the neighbourhood of the unchanged central rates against the other EMS currencies. Again, budget deficits in the Union had been reduced considerably. In the Union as a whole they now measured 2.4%; this represented a decline of 1.8 percentage points compared with 1996. Furthermore, since 1997 the debt-to-GDP ratio for the EU as a whole had for the first time declined. 20

bb) The report contains a number of critical observations calling particularly for increased exertions in future. The EMI stresses that the average debt ratio still stood at 72.1% of GDP, and was much higher in three Member States. Regarding these three countries, the EMI was concerned whether the ratio of public debt to GDP will be "sufficiently diminishing and approaching the reference value at a satisfactory pace" and whether "sustainability of the fiscal position has been achieved ". The decline in deficit ratios below the reference value and the fall in debt in some countries had only recently been realized. A number of one-off measures had been employed that hampered an assessment of fiscal policy and could not guarantee sustainability. These 21

measures would have to be replaced by durable alternatives in order to avoid an increase in net borrowing requirements in 1998 or subsequent years.

The EMI accordingly, for most countries, calls for decisive and sustained corrective measures of a structural nature. Considerable further consolidation was required in order to reduce the high debt ratios and bring them down to 60% in an appropriate period of time. This was warranted, first, in order to diminish vulnerability to changes in interest rates and second, to make it easier to cope with the medium- and long-term challenges arising from structural unemployment and the increasing burden of old-age pensions because of the population's changing age structure. Third, reducing budgetary imbalances was also necessary in order to restore a degree of flexibility for fiscal policies which enables countries to respond to adverse cyclical developments. 22

cc) For individual Member States the EMI still insists on improvements regarding adjustment of legal provisions on the national central bank to the EC Treaty requirements. At all events, the functionality of the Monetary Union at the start of stage three could not be seen as jeopardized. Only for Sweden were two remaining incompatibilities with the Treaty requirements and the ESCB statutes noted. 23

e) On the basis of its own and the EMI's report the Commission arrives at the following recommendations: 24

aa) The Commission finds that Belgium, Germany, Spain, France, Italy, Austria, Portugal, Sweden and the United Kingdom have corrected their excessive deficit situations. It is accordingly adopting and sending to the Council, for each of these Member States, a recommendation for the Council to abrogate, in accordance with Art. 104c(12) ECT, its previous decisions on the existence of an excessive deficit in those Member States. It considers that the convergence criterion of a sustainable public-sector financial position will be met if the Council acts upon this recommendation. Only for Greece should the decision regarding the existence of an excessive deficit not be set aside. 25

bb) On the basis of its overall assessment of convergence in the Member States, the commission recommends that eleven Member States should take part in the Monetary Union. 26

Denmark and the United Kingdom are not assessed since both countries are taking the agreed 27

option not to take part in the Monetary Union.

Greece cannot, because of the continuing Council decision regarding an excessive deficit, take part in the Monetary Union, and Sweden's participation fails because the provisions there on the national central bank are incompatible with the EC Treaty requirements. For the other Member States the Commission regards the convergence criteria as met. On the basis of this assessment, it accordingly recommends the finding, as a Council recommendation in accordance with Art. 109j(2) ECT, that Belgium,

Germany, Spain, France, Ireland, Italy, Luxembourg, the Netherlands, Austria, Portugal and Finland fulfil the conditions for adopting a single currency.

f) The German Bundesbank (the central bank) also submitted a report on its assessment of Member States' convergence, on 27 March 1998 at the request of the Federal Chancellor. 28

The Bundesbank considers entry to the Monetary Union as from 1999 to be defensible in terms of stability policy, against the background of the convergence advances achieved in many Member States and after considering the still-existing problems and risks. As regards the conditions for a lastingly sustainable public-finance position, however, there were serious concerns in the cases of Belgium and Italy. These could only be assuaged if additional substantive commitments were bindingly entered into. 29

In the Monetary Union, blameless or careless regional disparities might arise. The Maastricht Treaty provided that these were to be overcome by Member States through their own efforts. To be 30

sure, the Treaty (Art. 104b) ruled out any assumption of liabilities among Member States or by the Community. But it should be made clear that given the degree of integration now being aimed at, even additional transfer payments could not be a solution for regional or national problems.

The Monetary Union's chances of lasting success depended not just on meeting the convergence criteria mentioned in the treaty, but also and especially on satisfactory developments in the real economy in all parts of the Union. This did not however mean that the criteria to the fore in the convergence assessment thereby lost significance. Quite the contrary: the less the criteria were met and could be regarded as lastingly guaranteed, the greater were the risks to economic growth and employment in the Monetary Union, and the less fulfillable were the expectations associated with it. 31

Success with the Monetary Union was bound up with an economic policy in harmony with the goal of stability, and speedy adjustment of the public and private sectors to the new framework conditions. 32

Despite the considerable progress made in the meantime in these areas, considerable efforts by the participating Member States were still called for in order to create reliable conditions for a lasting community of stability in the whole currency area. Entry into the Monetary Union had considerable economic consequences that must be carefully weighed in deciding. The choice of participants remained ultimately a political decision, however.

g) By a decision of 27 March 1998 the Federal Government announced its intention to follow, in its voting behaviour on the Council of Economic and Finance Ministers (pursuant to Art. 109j(2) ECT) and the Council in the composition of the Heads of State or Government (pursuant to Art. 109j(4) ECT) – taking the EMI report and the 33

opinion of the German Bundesbank into account – the European Commission's recommendation of 25 March 1998 on the group of participants in the third stage of the Monetary Union, continuing emphatically to advocate the stability of the convergence attained, called for by the Maastricht Treaty, and to pay special attention to it. The Federal Government requested the upper and lower Houses (Bundestag and Bundesrat) to take note and to assent.

2. In the vote on the Assenting Act to the Treaty of Maastricht on European Union, the German Bundestag adopted a resolution on economic and monetary union on 2 December 1992, stating: 34

...3. The German Bundestag recognizes that the Treaty on European Union lays a basis for a stable future European currency, in particular by guaranteeing the independence of the European Central Bank and agreeing stability criteria for the Member States taking part. 35

Here the stability criteria are to be interpreted narrowly and strictly on transition to the third stage of economic and monetary union. The decision on transition to the stage can be taken only on the basis of 36

– 12 –

proven stability, parallelism of fundamental economic data and proven lasting budgetary and finance-policy solidity of the participating Member States. It must be guided not by opportunistic viewpoints but by real economic facts. The nature of the criteria means that meeting them is something that cannot be guaranteed purely statistically. Their lasting fulfilment must instead be credible from the course of the convergence process too. The future European currency must be and remain as stable as the German mark.

The German Bundestag will oppose any attempt to soften the stability criteria agreed in Maastricht. It will be vigilant that the transition Monetary Union be strictly oriented to these criteria. 37

The transition to the third stage of economic and monetary union also requires an assessment by the German Bundestag. The Federal Government accordingly requires an assenting vote by the German Bundestag to its voting behaviour on Council decisions pursuant to Article 109j(3) and (4) of the Treaty establishing the European Union. 38

The German Bundestag's vote will relate to the same matters as the assessment by the Council of Economic and Finance Ministers and the decision

by the Council in the composition of Heads of State or of Govern-

ment.

4. The German Bundestag calls on the Federal Government to declare that it will respect this vote of the German Bundestag. 39

5. It calls on the Federal Government to notify the treaty partners, the European Commission and the European Parliament of this procedure. 40

6. The German Bundestag calls on the Federal Government to bring before it an annual report from 1994 onward on the development of convergence in the European Union ... (BTDrucks. 12/3906; StenBer 12/126 p. 10879ff.). 41

At its session on 18 December 1992 the Bundesrat adopted a largely identical resolution (BRDrucks 810/92 p. 6f.). On 2 April 1993 the Federal Finance Minister Dr. Waigel sent the Chair of the German Bundestag's Committee on Europe, Dr. Hellwig, a letter stating *inter alia*: 42

"...At the plenary session of the German Bundestag I already stated on 2 December 1992 that the Federal Government would, before the important step into the Monetary Union, 'secure the backing of the legislative bodies'. 43

I referred in that connection to the 'assenting vote' mentioned in the concordant resolutions of the Bundestag and Bundesrat.

I also declared my willingness, in cooperation with the Federal Foreign Minister, to notify our partners in the Community of the procedure agreed between parliament and Federal Government. 44

This notification should come about immediately after submission of the instrument of ratification by the Federal Government, completing our ratification procedure ..." (BVerfGE 89, 155 <164>). 45

The Bundestag's decision on Germany's participation in the Monetary Union is scheduled for 23 April 1998. The Bundesrat will decide on 24 April 1998. 46

3. The preliminary proceedings on entry to the third stage of the Monetary Union have sparked off lively public debate, particularly on whether a common currency makes political and economic sense, whether a planned monetary union without economic union, as opposed to the term "economic and monetary union" in the Treaty, can guarantee stability of the value of money, whether the Member States have already created the treaty and economic conditions for a common currency, and what States should take part in the Monetary Union. 47

The Federal Government expects the breaking down of currency barriers to bring a consequent further development of the European internal market, and the dropping away of currency risks to mean increasing certainty in planning and 48

calculation, the abolition of currency-related transaction and exchange-rate guarantee costs, a reduction in costs of payment transactions, more transparency in prices and costs, and new investment and financing opportunities in a Community-wide financial market (cf. the Federal Government's draft Act introducing the Euro, BT-Drucks 13/9347, explanatory statement p. 21). The Commission's 1995 Green Paper names as further advantages the stimulation of growth and employment and "enhanced joint monetary sovereignty for the Member States" (Green Paper on the Practical Arrangements for the Introduction of the Single Currency, COM (95), 333 final, p.2). An additional advantage of the Monetary Union is seen as being that the enlarged currency area will form a counterweight to the dollar and yen.

Against the Monetary Union, it is objected first and foremost that it does not adequately guarantee the goal of price stability. The inflation dangers in a currency union are seen as greater than with a competition among national central banks. Often the discrepancy between the continuing independence of the budgetary and economic policies of the participatory countries on the one hand and the communitarized single currency on the other is criticized as a basic design flaw in the Monetary Union. Moreover, concerns are expressed that in view of the unemployment in Europe and the partial non-fulfilment of the convergence criteria, the introduction of a common currency at the present moment is premature, making it threaten to become unstable (cf. Willecke <ed.> Die Zukunft der D-Mark <1997>, and the opinion by 165 economics professors: "The Euro is coming too early").

For the future development of European law, with the introduction of a common currency the requirement for mutual harmonization of national and supranational legal systems and for taking each other into account becomes still stronger. Here it is pointed out in particular that the present European Community must not in its economic approach weaken non-economic legal values and fundamental-rights guarantees and that the formation of a the Monetary Union within the European Union must not endanger the coherence of that Union nor hamper the planned enlargement of the group of EC Member States. In the further development of the European internal market the State's function of guaranteeing rights and equality must – especially given the globalization of markets – be strengthened in relation to the economic powers, and the requirement of parliamentary legitimation for every exercise of sovereign power renewed and confirmed.

II.

The constitutional complaints are directed against Germany's participation in the Monetary Union as from 1 January 1999. Complainant 1 takes exception to infringement of his right, similar to a fundamental right, under Art. 38(1) Basic Law; complainants 2 to infringement of their fundamental rights under Art. 2(1) and Art. 14(1) and their right similar to a fundamental right under Art. 38(I) Basic Law.

1. Complainant 1 sees himself as a voter having his rights to participate in an open process of decision-making on European policy infringed. The

precondition for a rational choice was an objective information policy by the Federal Government that did not gloss over the problems. The right to democratic participation under Art. 38(1) Basic Law accordingly guaranteed a claim to defence against an insufficiently educative information policy.

After the Federal Constitutional Court's Maastricht judgment it was unconstitutional so to nullify the citizens' right of codecision guaranteed in Art. 38(1) Basic Law by transferring the Bundestag's tasks and powers as to infringe the democratic principle and the democratic legitimation of all public authority. In particular, the Federal Chancellor and the Federal Government headed by him were setting about Germany's accession to the Monetary Union although the convergence criteria had been only ostensibly met, thanks to "creative accounting".

53

Recently there had also been increasing calls to open the convergence criteria to interpretation and let approximate fulfilment suffice for participation in the Monetary Union. This sort of interpretation of the Maastricht Treaty would particularly disappoint the complainants in the 1993 Maastricht case before the Federal Constitutional Court, since it was the very indefiniteness of the convergence criteria that was one of their criticisms. That had however been regarded as not relevant at the time, with reference to the requirement for strict compliance with the convergence criteria.

54

Moreover, the currency union was now, by contrast with earlier statements, to be brought about without accompanying political union, thus

55

serving as a vehicle towards the achievement of political union. But the Community derived its legitimation from its orientation to economic-policy themes and competences. This sort of control from economic perspectives meant that integration threatened more to hinder than to promote a development in the direction of a political unity of Europe committed to the principle of democracy and the rule of law.

All in all, the danger existed of the competence-and-tasks sector of the Basic Law's democracy going lost because of a policy leading to a considerable transfer of tasks to the European Community, without any serious political debate on this having taken place; this at the same time undermined the right of political participation of all citizens enshrined in the right to vote.

56

2. a) Complainants 2 also see their right under Art. 38(1) Basic Law as infringed by the current monetary policy. The German Bundestag had taken on responsibility for the Monetary Union in accordance with the provisions of the Maastricht Treaty; that made the stability requirements of the treaty a binding limit on integration policy. Involvement of Germany in the Monetary Union against the concept of the stability community could no longer be justified by the German Bundestag, nor covered by the Assenting Act.

57

Were the German Bundestag itself to ignore the stability concept in its vote on Germany's participation in the third stage of the Monetary Union, then this could be challenged by appealing to Art. 38(1), second sentence, Basic Law, since Germany's par-

58

ticipation was justifiable in

parliamentary terms only if the Monetary Union remained calculable. The complainants base themselves here particularly on a subjective right to freedom in all policy. This was, ultimately, cognizance of the law. That meant the individual had a civil right to have the German Bundestag keep to the law in its decisions. If it represented the people contrary to the law, that infringed the constitutionally complainable right to representation of morality and practical reason by the people's representatives.

The complainants further assert that the European Union would acquire substantive statehood through the transition to central monetary-policy powers. Member State Parliaments would, with the setting up of the Monetary Union, be left with no powers or tasks of any substantive weight. The move to the Monetary Union led to statehood for Europe, and hence required a new constitution.

59

b) The complainants further object to infringement of the property guarantee under Art. 14(1) Basic Law. Admittedly, the Federal Constitutional Court had hitherto been rather reticent towards fundamental-rights protection against inflationary damage to wealth. This reluctance was unproblematic as long as inflation could not with adequate certainty be attributed to government measures. Should however the State – as with the decision on participation in the Monetary Union with other States – spawn the sole cause for inflation, then the area protected by Art. 14 Basic Law was affected. The complainants mention in particular seven aspects whereby in their view a constitutionally relevant inflation danger might arise:

60

(1) The agreement on the Monetary Union without simultaneous political union was a structural flaw in the Maastricht Treaty that would inevitably favour inflationary developments. In the absence of political union, an ECB policy oriented to the goal of price stability could be undermined by the Member States. The Treaty pursued a "roundabout strategy of creating facts", through which political union was to be attained by way of the Monetary Union. But all experience taught the contrary, that conversely political union was a prerequisite for the Monetary Union. Without political union the Community was an imperfect State, unable just because of the currency union to cope with social questions. The unharmonious shape of the Monetary Union, in which economy and currency, market and competition, would be Community-regulated but social aspects were to be dealt with nationally was only feasible if social policy were minimized. In view of the high unemployment, a European monetary policy oriented to the priority of price stability would come into conflict with the Social State principle of the Basic Law.

61

(2) The disappearance of monetary competition among national central banks would take away a central feature of the stability guarantee. In the existing system of the EMS the role of anchor currency went to the currency in which investors had most trust. In this way competition for the position of anchor currency had emerged that had ensured stability-oriented policies by all Member States. The Monetary Union would replace this competition-oriented system by a monopoly position for the ECB,

62

which would neither be subject to the

competition described nor able to lay claim to the German Bundesbank's reputation for stability. Admittedly, the ECB was structurally patterned on the Bundesbank; yet no comparably stability-oriented monetary policy could be expected from it, since a common stability culture among participant States was lacking.

The crucial risk was of bringing "inner dissent" into the Monetary Union. The irrevocable fixing of exchange rates would take away the possibility of balancing out differing economic developments through prices, interest rates and exchange rates. That would make a political conflict out of what had previously been smoothly channelled and regulated through market mechanisms. A Monetary Union loaded with conflict in this way could prove potentially explosive for the Community. 63

(3) The differing stability culture became particularly clear in the different notions in France and Germany about priorities between stability of the value of money and high employment. It was significant in this connection that the objectives of Art. 2 ECT had been supplemented by the Amsterdam Treaty, where high employment was now mentioned before stability in the value of money . 64

(4) A special danger of inflationary developments came from the differing economic position in the participating States . The price-stability criterion was wrong because of the high structural unemployment in Europe. It was not enough for prices as such to remain unchanged; instead, price stability required overall economic balance but also an adequately high level of employment. Price stability in this sense had not been reached because of the high unemployment in Europe. 65

The budgetary-discipline criterion was likewise in the main wrong, because in most Member States the conditions for "excessive deficit" within the meaning of Art. 104c ECT were present. How far the deficit criterion of 3.0% was being met only because the States concerned were applying methods of "creative accounting" need not be gone into, since in the majority of States the indebtedness criterion of 60% was greatly exceeded. 66

Even where the value was close to 60% – as with the Member State Germany – an exceptional position did not come into consideration, since the proportion was not falling but rising.

The third convergence criterion, keeping exchange rates within normal fluctuation margins, could not be met at the moment. For it presupposed "normal" spreads. At the time of the Maastricht Treaty these had lain at a tolerance of $\pm 2.25\%$. Since 1993 they had been stretched to $\pm 15\%$ and thereby changed in essence. As long as the original "normal" bands had not been restored, this requirement could not be met. 67

Nor could interest-rate stability, the fourth criterion, be met at present. The outward maintenance of the values by most Member States was not probative as long as there had not been a return to the narrow bands in the European Monetary System 68

nor convergence according to the other criteria reached.

(5) Nor could the Stability and Growth Pact concluded in Amsterdam on 17 June 1997 banish the danger of inflationary developments. It left the treaty sanction mechanisms for unsound budget policy essentially as in the regulation of Art. 104c(11) ECT, and in particular contained Council discretion as to its decision on the nature and extent of penalties. To the extent that on some points it sought to go beyond the provisions of Art. 104c ECT to introduce measures to compel budget discipline, it was contrary to the treaties. 69

(6) Inflationary developments would continue to be encouraged through the loosening of the nominal-value principle. The Act introducing the Euro allowed agreement on indexing clauses, dropping the nominal-value principle. That sort of indexing could, however, even strengthen inflation. 70

(7) Alongside redistribution through the expectable inflationary developments there was a further redistributive effect brought by the fixing of exchange rates. Correct setting of the exchange rates was not to be expected. It presupposed that the nominally set parity was also in line with real purchasing power. Were that the case, then there was a threat of considerable redistribution in which the wealth of German savers and owners of monetary assets calculated in euros would shrink in real terms, while that of holders of monetary assets in the former soft-currency countries would by contrast grow in real terms. For the conversion a comprehensive study of purchasing power was called for, but to date was lacking. 71

c) Should the Federal Constitutional Court not see fit to measure wealth-reducing measures against 72

the property guarantee, the complainants at any rate saw their right to general freedom of action under Art. 2(1) Basic Law as infringed.

III.

Of those entitled by § 94(1) and (4) taken together with § 77 BVerfGG to speak, the Federal Minister of Finance took a position on behalf of the Federal Government. The Federal Government regards the constitutional complaints as manifestly inadmissible, but in any case as manifestly unjustified. 73

B.

Whether the impending occurrence of sovereign acts here justifies regarding the constitutional complaints as admissible to that extent need not be gone into. They are in any case manifestly unfounded on the merits, so that the procedure of § 24 BVerfGG may be followed (cf. BVerfGE 53, 100 <106>; 79, 223 <231>; 96, 1 <5>). That also disposes of the applications for issue of an interim injunction. 74

Germany's involvement in European Monetary Union is provided for in the Maastricht Treaty, as well as permitted in principle by Art. 23 and Art. 88, second sentence, 75

of the Basic Law (cf. BVerfGE 89, 155 <199ff.>). For the implementation of these legal requirements, in particular the decision on the States participating in the Monetary Union, the Maastricht Treaty prescribes the criteria and procedure for entering to the third stage of the Monetary Union. In so doing it leaves room for economic and political evaluation and forecasting. This renders the federal government and parliament responsible for safeguarding monetary property. The owner of money does not however acquire the right to have the content of this decision, the responsibility of which is shared by Parliament, reviewed through the procedure of constitutional complaint.

I.

Art. 38(1) Basic Law is not affected. 76

1. Art. 38(1) and (2) Basic Law guarantee voters the subjective right to take part in electing the deputies to the German Bundestag. This guarantee also extends to the basic democratic content of this right: voters are, in accordance with more detailed statutory provisions, guaranteed participation through elections in legitimating State power at federal level, as well as influence over its exercise. In the area of application of Art. 23 Basic Law, Art. 38 Basic Law rules out nullification of the legitimation of State power brought about by elections or of influence on its exercise through the transfer of tasks and powers of the Bundestag in such a way as to infringe the democratic principle insofar as it is declared inviolable by Art. 79(3) taken together with Art. 20(1) and (2) Basic Law (BVerfGE 89, 155 <171f.>). 77

Democracy presupposes ongoing free debate between social forces, interests and ideas that encounter each other, in which political objectives too are clarified and change, and out of which public opinion pre-shapes political will. This also implies that the decisional procedures of the bodies exercising sovereign power and the policy objectives pursued in each case be generally perceptible and comprehensible (BVerfGE 89, 155 <185>). However, such – pre-legal – constitutional requirements are not guaranteed by Art. 38(1) Basic Law in the same way as fundamental rights. 78

2. a) Establishing the European Monetary Union is an object of the Maastricht Treaty. Germany concluded that treaty with the other Member States, set it on a constitutional basis in Art. 23(1) Basic Law and declared it applicable in Germany in the Assenting Act pursuant to Art. 23(1), second 79

sentence, and (3) Basic Law. The exercise of German membership rights in the European institutions is shared by parliament through the Bundestag's rights of involvement (Art. 23(2) and (3) Basic Law). Entry to the third stage of the Monetary Union too can be adequately democratically legitimated thereby (cf. BVerfGE 89, 155 <190f., 199f.>).

b) The same applies to the decision on the concrete shape of the Monetary Union on the basis of the Maastricht Treaty, which establishes a Monetary Union without simultaneous or immediately ensuing political union. Should it emerge that the Monetary Union cannot in reality be achieved without a political union, then a new political 80

decision will be required as to the conclusions to be drawn for the Monetary Union and for the pattern of the treaties in other respects. For this decision treaty amendment is necessary, and can come about only through assent by the national State organs, on their political responsibility (BVerfGE 89, 155 <207>).

c) According to these requirements the Member States and the European Union now face the decision to introduce the Monetary Union, with the participating States still to be decided on. The criterion for and course of entry into the third stage of the Monetary Union are regulated in the treaty, and become legally binding for Germany through the Assenting Act, on the responsibility of the Bundestag and Bundesrat. The exercise of these sovereign rights already transferred by the Maastricht Treaty takes no further competences or powers from the Bundestag. To that extent

81

infringement of Art. 38(1) Basic Law does not come into consideration.

d) Insofar as complainant 1 complains that the policy objectives pursued by the Federal Government are not generally perceptible and comprehensible, this concerns the pre-legal requirements for democracy. These cannot at any rate be exacted on the basis of Art. 38(1) Basic Law as a guarantee similar to a fundamental right. Accordingly, the stagewise procedure towards the Monetary Union provided for in the EC treaty and the Federal Government's, Bundestag's, Bundesrat's and Bundesländer's presentation of their objectives since the parliamentary debate on the Maastricht Treaty and the associated constitutional amendment are not to be evaluated here.

82

II.

The Assenting Act to the Maastricht Treaty, as a determination of content and limits within the meaning of Art. 14(1), second sentence, Basic Law, changes the content of monetary property in German marks. If in application of the Maastricht Treaty the assessment and forecast of the competent State organs leads to the finding that the planned the Monetary Union will be a stability community, then an owner of money is not entitled to have these assessments and evaluations reviewed by the Federal Constitutional Court by way of a constitutional complaint.

83

1. Art. 14(1) Basic Law guarantees the right to own, use, manage and dispose of real and monetary property.

84

a) In the property guarantee of Art. 14(1), first sentence, Basic Law the Basic Law guarantees the privately disposable economic basis of individual freedom. In the overall structure of the fundamental rights the property guarantee has the task of "guaranteeing the bearer of the fundamental right freedom of manoeuvre in the property sphere, thereby enabling him to shape his life on his own responsibility" (BVerfGE 50, 290 <339>; 53, 257 <290>). In today's society the great majority of citizens guarantee the economic basis of their existence "less through private material assets than through income from work and the associated mutually borne provision for elementary requirements that was historically always closely bound up with the idea of property" (BVerfGE 40, 65 <84>; 53, 257 <290>).

85

Accordingly, the property guarantee protects not just physically tangible things but also monetary receivables due the bearer of the right in the nature of an exclusive right, based on his own efforts and serving as the material basis for personal freedom (cf. in detail BVerfGE 40, 65, <82f.>; 45, 142 <179>; 69, 272 <300>; 70, 278 <285>). One essential guarantee of the freedom of property is specifically to be able to exchange goods and money for each other. The equivalence of material and monetary property is also one of the functional bases of Art. 14 Basic Law. Money is coined freedom; it can be freely exchanged for things. 86

b) To be sure, the value of money is community-related and community-dependent in a specific way. 87

Within the context of State monetary sovereignty and finance policy it is also essentially formed by

the conduct of the fundamental-rights bearers themselves, especially through prices, wages, interest rates, economic assessments and evaluations. The external value of money follows from the relation between the national currency and other currencies and their governmental, economic and social bases. Given these dependencies, the State cannot guarantee the value of money as a fundamental right. Just as in the case of material property Art. 14(1) Basic Law can only guarantee the supplier and owner's right of disposal but not also the demander's willingness, so in the case of money too the property-owner's fundamental right can guarantee only the institutional foundation and the individual allocation.

2. If the German mark is replaced by another currency, and so the sovereign guarantor of trust in redemption changed, then this changes the legal framework that guarantees the freedom objectified in money in the sphere of property rights. Trust in redemption will in the future no longer be based on the nationally constituted legal community of the Federal Republic of Germany, but borne by another legal community and the economic power that underpins it. Whether and to what extent this sovereignly ordered exchange of currencies affects the area protected by Art. 14(1) Basic Law requires no conclusive assessment here. It at any rate finds an adequate constitutional basis in Art. 88(2) Basic Law and in the assent by Bundestag and Bundesrat to the Maastricht Treaty pursuant to Art. 23(1), second and third sentences, Basic Law and their collaboration on legislative acts for its implementation pursuant to Art. 23(2) ff. Basic Law. 88

a) The Maastricht Treaty regulates a European Union aimed at steady further development, borne by the constitutions of the Member States and their earnest willingness to cooperate (cf. BVerfGE 89, 155 <200>). The Basic Law recognizes and justifies, in Art. 23(1), first sentence, Germany's collaboration in this development of the European Union. When the Act amending the Basic Law of 21 December 1992 (BGBl I p.2086) laid an explicit constitutional foundation for European integration in Art. 23 Basic Law, the constitutional amending legislator was faced, as the next step in integration, with the decision for the Monetary Union (BTDrucks 12/3338, p. 5). Art. 88, 89

second sentence, Basic Law expresses the constitutional legislator's will to accept the transfer of the German Bundesbank's tasks and powers to a European Central Bank on condition that the European Central Bank be independent and committed to the priority goal of guaranteeing price stability. The continued construction of the European Union constitutionally legitimated in this way is aimed at a decision on entering the Monetary Union among particular participating States.

b) By assenting to the Monetary Union the German legislature determined the content and limits of monetary property within the meaning of Art. 14(1), second sentence, Basic Law in such a way that Germany can be included in a Monetary Union (Art. 109j ECT), on legal conditions which are further specified, and the German mark accordingly converted to the Euro and absorbed into this independent currency following adoption of a single currency. Since then, every owner of DM property has had a legal position oriented towards being brought into a European Monetary Union.

90

This requirement has *de jure* the consequence that the guarantor of this money is no longer the German State and the economic power existing in Germany. This national guarantor is instead replaced by the countries participating in the Monetary union and the national economies belonging to them (cf. earlier BVerfGE 89, 155 <174>).

c) The EC Treaty and the Basic Law regulate the criteria and procedure for entering to the third stage of the Monetary Union with clear legal requirements, stressing the competence and responsibility of the Federal Government and parliament.

91

aa) Art. 109j taken together with Art. 104c ECT requires essentially, for the now imminent decision on the start of the Monetary Union with particular participating States, an assessment of the lasting stability of the Monetary Union on the basis of the legal and economic convergence of the participating States. The criteria for this convergence are regulated by the Treaty in clear norms as legally binding bases for decision (Art. 109j(1) taken together with Art. 104c and the Protocol on the convergence criteria pursuant to Art. 109j ECT and the Protocol on the excessive deficit procedure). These legal criteria admittedly open room for assessment, evaluation and forecast (BVerfGE 89, 155 <203>): the verification and examination of the figures presented by the EMI and the Commission call for empirical findings, assessments and evaluations that can be based only approximately on empirical knowledge. Assessing the developments requires analyses and predictions using practical reason that allow only probability judgements but do not convey certainty. The overall assessment of

92

a high degree of lasting convergence and the associated forecast for a durable stability community call for decisions from the responsible bodies in which factual findings, empirical values and deliberate creativity are mixed in fluid transitions. Insofar as the Treaty also requires a certain approach to reference values as a legal basis for the criteria of budget deficit and indebtedness pursuant to Art. 104c(2) ECT, the decision builds upon a forecast that can only be an assessment according to probability and must therefore be extrapolated in accompanying tests and decisions. In this

sphere of legally open factual positions between economic knowledge and political creativity, the Basic Law assigns the responsibilities for decision to government and parliament (Art. 23(2) ff. Basic Law).

bb) The requirement for a long-term overall forecast on the basis of assessments and evaluations of economic, social and political factors and of predictions about future behaviour of economy and society and about the financial discipline of the participating States has caused the Bundestag and the Bundesrat to reserve the right to an assessment of their own for the transition to the third stage of the Monetary Union (cf. BVerfGE 89, 155 <202>).

93

Primary responsibility for transferring monetary sovereignty to the European Community and further development through a change in the treaty bases lies with the legislator (Art. 23(1) Basic Law), and, for implementing the treaty, with the Federal Government (BVerfGE 92, 203 <230ff.>). While the Federal Government exercises Germany's membership rights in the European institutions, the

94

Bundestag participates in government decision-making on integration matters in accordance with Art. 23(2) and (3) Basic Law and the Act on Cooperation between Federal Government and Bundestag in European Union Matters of 12 March 1993 enacted to implement this (BGBl I p. 311). The Bundesrat's involvement is determined by Art. 23(2), (4) and (5) Basic Law. These interacting competences are to be exercised in a spirit of interinstitutional comity (BVerfGE 89, 155 <190ff.>).

cc) The decision of the Council in the composition of Heads of State or of Government pursuant to Art. 109j(4) ECT on the States to participate in the Monetary Union is a legislative act within the meaning of Art. 23(3) Basic Law, which applies the Treaty effectively in legally binding fashion and affects the Federal Republic of Germany as a Member State. The Bundestag's opinion has accordingly to be taken into account by the Federal Government pursuant to Art. 23(3), second sentence, and the Bundesrat's pursuant to Art. 23(5), first sentence, Basic Law. The arrangement between Bundestag and Bundesrat on the one hand and Federal Government on the other in December 1992 remains within the framework of what the new version – in force since 22 December 1992 – of Art. 23 provides in relation to cooperation of Bundestag and Bundesrat in mutual interinstitutional comity.

95

d) Insofar as Art. 109j(1), second sentence, taken together with Art. 107 and Art. 108 ECT require the "legal convergence" (cf. Deutsche Bundesbank, InfBrief zur Europäischen Wirtschafts- und Währungsunion, Nr. 10, February 1998, p.3) of ECB and national central banks and in particular

96

make their legally guaranteed independence a condition of the Monetary Union, this provision too contains primarily a testing and guaranteeing mandate on the Federal Government, and on parliament which has to politically accompany the further development of monetary union and assume responsibility for then. Art. 88, second sentence, Basic Law requires, for the European Central Bank, its independence and

commitment to the primary aim of safeguarding price stability. The EC Treaty enlarges the independence requirement, extending it beyond the ECB (Art. 107 ECT) to the central banks of Member States, and clarifies the priority goal of price stability in substantive and institutional individual requirements (Art. 105ff. ECT). This legal convergence is however accomplished – apart from the requirements on the German Bundesbank – in Community law and the law of other Member States. In relation to other Member States it will at any rate primarily be met through political agreement.

e) The Federal Government, as well as Bundestag and Bundesrat, also contribute to the objective legal guaranteeing of monetary property and to that extent to the guarantee under Art. 14(1) Basic Law through their mandate to help shape the Monetary Union as a stability community and thereby meet the requirements of Art. 88, second sentence, Basic Law. But the complainants miss the scope of the fundamental-rights entitlement guaranteed in Art. 14(1) Basic Law when, appealing to Art. 14 Basic Law, they wish to commit the politically responsible institutions to guaranteeing the stability of the European Monetary Union otherwise and to postponing the start of that union. Insofar as Federal Government and parliament have by Art. 109j(1), third sentence, ECT to test and evaluate

97

economic data, by Art. 109j(l), fourth sentence, ECT to observe developments and assess them in their further course, then to make an individual forecast for Member States wishing to take part and an overall forecast for the stability of the planned Monetary Union, and finally also work towards legal convergence in the Community and in the legal systems of the Member States, the decisions to be taken in this connection cannot be judged by the individualizing criteria of a fundamental right. They are to be justified by the political bodies competent for an overall assessment of general developments and able to check and correct their decisions in the light of developments.

III.

Nor do the other fundamental rights or guarantees similar to fundamental rights give the complainants any entitlement to the requested postponement of the Monetary Union.

98

1. Insofar as the complainants, as public servants, are due pay and pension entitlements from public funds, Art. 33(5) Basic Law protects these pecuniary legal positions (BVerfGE 52, 303 <344f.>, consistent case law). Art. 33(5) Basic Law obliges "due regard" to the traditional principles of the professional civil service, thereby permitting steady development to adapt the law of the public service in its individual manifestations to changed circumstances (cf. BVerfGE 43, 154 <168>; 67,1 <14>). In this openness to development, the pecuniary legal positions of a public servant are, in the same way as with Art. 14 Basic Law,

99

placed under the reservation of a common European currency.

2. Insofar as the complainants appeal to Art. 2(1) Basic Law, they have no success with this objection either. Irrespective of the question of how the guarantee content of

100

Art. 2(1) Basic Law is to be determined in detail, and how infringement of this fundamental right is distinguished from merely being affected by an objectively legally unlawful burden, the general freedom of action, just like all the other fundamental rights, offers no protection against the decision to be taken in implementing the EC Treaty about the establishment of a European Monetary Union with particular member States, based on findings, assessments, evaluations and forecasts to be justified politically, for which, in the area to which the Basic Law applies, the Federal Government, Bundestag and Bundesrat are responsible. Long-term economic developments and the conclusions to be drawn from them for the stability of a currency cannot be judged from the viewpoint of an individual, one-off action, but must constantly and together be shaped and continually checked. This is a matter not for the courts but for government and parliament.

This decision is unappealable.

101

Limbach	Graßhof	Kruis
Kirchhof	Winter	Sommer
Jentsch	Hassemer	–

**Bundesverfassungsgericht, Beschluss des Zweiten Senats vom 31. März 1998 -
2 BvR 1877/97, 2 BvR 50/98**

Zitiervorschlag BVerfG, Beschluss des Zweiten Senats vom 31. März 1998 -
2 BvR 1877/97, 2 BvR 50/98 - Rn. (1 - 101), [http://www.bverfg.de/e/
rs19980331_2bvr187797en.html](http://www.bverfg.de/e/rs19980331_2bvr187797en.html)

ECLI ECLI:DE:BVerfG:1998:rs19980331.2bvr187797