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The German Economic Constitution and the Euro Crisis
*Speech on 6 December 2016, Institute of European Studies (IUSE),
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I. Existence of an economic constitution in the Basic Law?¹

The Basic Law for the Federal Republic of Germany (“Grundgesetz” - GG), unlike the Weimar Constitution, does not contain a separate section about an „economic constitution“². Indeed, it results from an overall view on various individual regulations. Those are the economic fundamental rights, i.e. the professional and occupational freedom (Art. 12 (1) GG), the property guarantee (Art. 14 (1) GG) and the freedom of association (Art. 9 (1) GG), as well as the welfare state principle (Art. 20 (1) GG) and Art. 15 GG, which allows a socialisation of property for general purposes. In addition, further specifications are to be found in the basic law. Those will be described in more detail under chapter II.

Therefore, the basic law does not define a certain economic system and is neutral in terms of economic policy according to the Federal Constitutional Court (FCC).³ Furthermore, this overall view on individual regulations does not provide an economic constitution in the sense of a partial constitution, from which independent statements or boundaries for legislative action could be derived.⁴ Consequently, market and competition are not safeguarded institutionally. It is to be kept in mind that, however, especially the relevant fundamental rights considerably restrict the formation of an economic system. This way they constitute a relevant framework for economic policy measures. Apart from fundamental rights, also the constitutional principles generate impulses. Hence, neutrality in terms of economic policy does not mean the Basic Law is devoid of content concerning commercial law issues or does not make any decisions.

II. Contents of the Basic Law’s economic legal framework for the sector

To point out the framework for the economic system under the Basic Law, the limitation by the fundamental rights and other economy-related rules of the Basic Law will be discussed in more detail in the following.

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¹ *Huber*, in: Schoch (ed.), *Besonderes Verwaltungsrecht*, 15th edition, 2013, 3rd chapter, margin number 17 et seq.; *Ruthig/Storr*, *Öffentliches Wirtschaftsrecht*, 4th edition, 2015, § 1, margin number 4.

² Regarding the term and its emergence in advance and within the discussions for the Weimar Constitution *Nörr*, *Journal of Law and Religion* 11 (1994/95), 343.

³ Settled case-law since BVerfGE 4, 1 (17 et seq.); concerning other opinions in detail *Nörr*, in the same (ed.), *Die Republik der Wirtschaft*, volume II, 2007, p. 3 (9 et seq.); *Stober*, *Allgemeines Wirtschaftsverwaltungsrecht*, 18th edition, 2015, § 5 I 3 b.

⁴ BVerfGE 50, 290 (336 et seq.).



1 The most important economy-related basic rights⁵

a) Professional and occupational freedom Art. 12 (1) GG⁶

The professional and occupational freedom is the central basic right of the economic life. It provides the freedom of occupational choice and the freedom of practicing an occupation. This is based on a broad definition of profession and occupation. Among the specific guarantees in Art. 12 GG there are the freedom of trade and the entrepreneurial freedom. However, it does not include the right to work. The professional and occupational freedom is subject to a legal reservation. The more the professional and occupational freedom is affected, the higher are the requirements for the constitutional justification of governmental interference and with it for the proportionality assessment.

b) Property guarantee Art. 14 GG and socialisation Art. 15 GG

The right to hold property establishes an area of freedom in the sphere of property rights. It protects the production factors and the means of production as well as what is purchased by work performance. Therefore, it is the second most important economic fundamental right after the occupational freedom. Art. 14 GG guarantees governing rights, rights of use and rights of disposal concerning the objects for each holder of this fundamental right. This is the basis for the decentralization of economic processes. Property in the sense of the basic law has a broad meaning and includes claims, receivables, resale rights etc.

Art. 14 GG also contains a limitation permitting the legislator to further regulate the property guarantee by defining the content and limits of property. Thus, the Basic Law does not assume a pre-state existence of property. Property is rather a figure created by the legislator. Thereby, the institutional guarantee rooted in Art. 14 GG sets the limit. In other words, the basic law ensures that in principle there is property and it can be used for private-benefit purposes. In turn, the scope of private benefit is limited due to the fact that the owner should use his property in a socially acceptable form (so called “Sozialpflichtigkeit des Eigentums”). The use of property shall also serve the public good (Art. 14 (2) GG). Consequently, in the individual case proportional balance is to be achieved between the property guarantee, the legislator’s regulating function and social restrictions. Besides, Art. 14 (3) GG allows expropriation for the public good – but only in exchange for compensation. This liability for compensation constitutes the main barrier against a transformation into a socialist economic system because of the high costs.

Art. 15 GG enables the legislator to socialize certain means of production, again only in exchange for compensation, but does not oblige him to do so. This regulation rather illustrates the fundamental economic neutrality and openness of the basic law. The regulation has never acquired practical significance so far.

⁵Huber, in: Schoch (ed.), *Besonderes Verwaltungsrecht*, 15th edition, 2013, 3rd chapter, margin number 47 et seqq.; Ruthig/Storr, *Öffentliches Wirtschaftsrecht*, 4th edition, 2015, § 2, margin number 100 et seqq.; Stober, *Allgemeines Wirtschaftsverwaltungsrecht*, 18th edition, 2015, § 17 et seqq.

⁶In detail *Burgi*, in: Kahl/Waldhoff/Walter (ed.), *Bonner Kommentar zum GG*, loose-leaf, Art. 12 GG in preparation for 2017.



c) Freedom of association Art. 9 (1) GG and freedom to form a coalition Art. 9 (3) GG

The Freedom of association Art. 9 (1) GG guarantees the right to establish associations and societies. Hereby, the economic need for the formation of private and capital companies is taken into account. Insofar, this complements the Articles 12 and 14 GG. The freedom to form a coalition Art. 9 (3) GG ensures the right to establish trade and labour unions. This way the principle of collective bargaining autonomy is guaranteed indirectly.

d) General freedom of action Art. 2 (1) GG

The general freedom of action is a special basic right which only takes effect when a behaviour concerning fundamental rights is not included in a more specific right of freedom (so called “Auffanggrundrecht”). In economic affairs this guarantees especially private autonomy, and its most important part the freedom of contract. However, private autonomy can be restricted by every constitutional, meaning in particular proportionate, law.

2 State objectives

a) Welfare state principle Art. 20 (1) GG⁷

The state responsibility for social justice is proclaimed by the welfare state principle as a basic principle of state. The state should care for people in need of protection and help, make equal opportunities possible and bring about distributive justice. Thereby, the welfare state principle does not contain a basis for the citizen’s claims. It is just a determination of state structures, which has to be developed and concretised by legislative measures. It does not oblige the legislator to a certain social legislation. He can also reduce or withdraw social benefits which have been introduced. Administration and jurisdiction have to take into account the welfare state principle in the interpretation of rules as well as discretionary and weighting decision.

However, the Federal Constitutional Court derives from the welfare state principle in conjunction with the guaranty of human dignity of Art. 1 (1) GG a fundamental right to a guarantee of a subsistence minimum that is in line with human dignity. It ensures every person in need the material conditions, which are essential for his physical existence and a minimum level of participation in civic, cultural and political life.⁸ Then again, it is the legislator who can arrange and concretize this claim.

Moreover, from the welfare state principle it can be derived a constitutional obligation to provide prosperity.⁹ The derivation’s connecting factor is the consideration that the ability to finance the social or welfare state depends largely on economic growth that is increasing prosperity. Therefore, the state has to influence the private economy beneficially in order to support the conservation and increase of the material well-being. One of those specific measures can be for example the creation or expansion of an economic infrastructure in the fields of transport, energy and telecommunications.

⁷Huber, in: Schoch (ed.), *Besonderes Verwaltungsrecht*, 15th edition, 2013, 3rd chapter, margin number 23 et seqq.; *Stober*, *Allgemeines Wirtschaftsverwaltungsrecht*, 18th edition, 2015, § 6.

⁸BVerfGE 127, 175 first principle.

⁹Burgi, *AöR Beiheft* 2014, p. 30 et seqq.



b) Environment protection Art. 20a GG¹⁰

Since 1994, Art. 20a GG prescribes the sustainable protection of the natural foundations of life and animals as a state objective. Natural foundations of life means the basis of all forms of life. This particularly includes the biological diversity, the protection of the environmental media air, water and soil, the climatic conditions and the natural integrity of the land. The term „protection“ serves as a generic term for the omission of injuries, the defence of threats and the risk prevention.

As with the welfare state principle this regulation does not grant individuals an enforceable right and the legislator is given a wide scope for policies regarding the achievement of goals. Within this scope he has to find an appropriate balance between economic and environmental concerns. In doing so, the environmental protection shall not take abstract precedence over other goals. Art. 20a GG affects the interpretation of standards as well as discretionary and weighting decisions to the same extent.

c) Overall economic equilibrium and “debt brake” Art. 109 GG¹¹

The regulation of the overall economic equilibrium in Art. 109 (2) GG is not a basic principle of state as the provisions in Art. 20 GG. However, as a result from its systematic position it is to be qualified as a special fiscal and budgetary state objective, which exploits the budget in the sense of an anti-cyclical economic policy for economic governance. Consequently, it can be considered as a mandate of economic and growth policy as part of the economic constitutional regulations of the basic law. In accordance with § 1 of the stability law (“Stabilitätsgesetz”) a stable price level, a high level of employment and the foreign trade equilibrium whilst steady and appropriate economic growth should be brought into balance within this control (so called magic square).

Since 2009, this regulation is complemented and limited by the so called debt brake (“Schuldenbremse”) in Art. 109 (3), 115 (2) GG. The federal and state budgets are basically to be balanced without borrowing. This way, the debt brake takes into account the fact that the anti-cyclical fiscal policy alone (cf. Art. 115 (1) sentence 2 GG old version) is not sufficiently effective in limiting the national debt.

d) Fundamental rights as protective duties¹²

In addition to their functioning in the classic sense as rights of defence against the state, also the government's duty to protect can result from the fundamental rights under strict conditions. Similar to the state objectives, the legislator is given a wide assessment and creative freedom, within which also other concerns are to be taken into account. However, there is a prohibition of insufficient measures (so called “Untermaßverbot“), which means that the state has to ensure a minimum level of protection, which must not be undercut. The best known example of a government's duty to protect is the protection of life and physical integrity (cf. Art. 2 (2) sentence 1 GG),¹³ which matters for example in regards to supervisory actions according to trade. Until now it has not been clarified, in how far pro-

¹⁰Concisely *Stober*, Allgemeines Wirtschaftsverwaltungsrecht, 18th edition, 2015, § 11; in detail *Kloepfer*, Umweltrecht, 4th edition, 2016, § 3 B.

¹¹*Huber*, in: Schoch (ed.), Besonderes Verwaltungsrecht, 15th edition, 2013, 3rd chapter, margin number 108 et seqq.; *Stober*, Allgemeines Wirtschaftsverwaltungsrecht, 18th edition, 2015, § 10 I.

¹²*Ruthig/Storr*, Öffentliches Wirtschaftsrecht, 4th edition, 2015, § 2, margin number 105 et seqq.; *Stober*, Allgemeines Wirtschaftsverwaltungsrecht, 18th edition, 2015, §§ 17 III 2, 18 III.



tective duties can be derived from the economic fundamental rights Art 12 and 14 GG. In any case they do not provide protection from competition, also not from the state.

3 Overall view

There is always to strike a proportionate balance between all these rules and valuations of the basic law in each individual case. This is not always easy but illustrates the openness of the German economic constitution for different political approaches. However, a clear fiscal limit for social „benefits“ seems to be set by the debt brake. It will be exciting to watch, whether and how assertive it will turn out to be in a recession.

III. Relation to the economic constitution of the European Union¹⁴

Unlike the basic law, the treaties of the European Union contain numerous explicit provisions on the economic system. Due to the primacy of application of Union law, those regulations transform the economic law provisions of the basic law.

Since the Treaty of Lisbon 2009, the EU treaty includes as a destination in Art. 3 paragraph 3 subparagraph 1 TEU the requirement to work towards a “highly competitive social market economy, aiming at full employment and social progress”. This regulation replaced Art. 4 (1) EC, which provided an economic policy committed to the principle of an open market economy with free competition. Protocol No 27 and Art. 119 (1) TFEU repeat this formulation, but only in the section on economic policy. In addition, there are in particular the requirements concerning the internal market and fundamental freedoms (Art. 26 seq. TFEU) as well as the rules for competition policy (Art. 101 seq. TFEU). As a result, since the Treaty of Lisbon, in my opinion, one cannot deny a shift of emphasis from a strong accent on internal market and competition towards a (at least a bit) stronger accent on social policy aspects next to the postulation of market and competition.

A system decision for a certain economic theory concept, however, can neither be derived from the treaties of the European Union. On the contrary, the economic constitutional regulations in turn only provide a framework, which is more narrowly and specific defined as the economic constitution of the basic law. As the basic law is economically neutral and, therefore, open, there is no conflict of laws. One can even say, that due to the stronger emphasis on the social aspects in Art. 3 paragraph 3 subparagraph 1 TEU, the economic constitution of the EU harmonises rather more with the German economic constitution now.

A concrete transformation of the basic law is caused by specific rules for the economic and monetary union: Art. 119 (2) sentence 4, and 127 (1) sentence 1 TFEU demand a primacy of the objective of price stability in the context of the overall economic equilibrium. However, there is no conflict as a result of the constitutional specification of this priority in Art. 88 sentence 2 GG. Furthermore, along with the national debt brake 2009 also the so called Maastricht criteria relating to budget discipline (Art. 126 TFEU) in Art. 109 (2) have been incorporated in the basic law.

¹³Fundamental BVerfGE 39, 1.

¹⁴Concise *Ruffert*, in: Calliess/ the same (eds.), EUV/AEUV Kommentar, 5th edition, 2016, Art. 3 EUV, margin numbers 22, 25 et seqq., 38; more detailed *the same*, AöR 134 (2009), 197 (201 et seqq., 215 et seqq.).



IV. Relation between the economic constitution and the Federal Constitutional Court's case-law relating to the EU-treaties and the euro crisis

The federal constitutional court reacted in several decisions to various measures of the European Union within the framework of the euro crisis.¹⁵ Connecting factor and review standards are however not particular German ideas regarding the economic system, which are rooted in the constitution – this impression may be created by institutes like the debt break and the demand for tight budgetary discipline by the German policy in Brussels –, but the so called identity check and the ultra-vires review of the federal constitutional court.¹⁶

1 Identity check

In accordance with Art. 23 (1) sentence 3 GG, the European integration has to be within the so called eternal guarantee of Art. 79 (3) GG. This means that the federal constitutional court examines whether the principles of Art. 1 and 20 GG, which have been declared untouchable in Art. 79 (3) GG, are violated due to the actions of the European institutions¹⁷ and, therefore, the German constitutional identity (cf. also Art. 4 (2) TEU) is hurt. The principles of Art. 20 GG include inter alia the principle of democracy. It requires, that the German Bundestag as the only constitutional body legitimated based on direct democracy is left sufficient creative freedom. According to the federal constitutional court this includes inter alia the budgetary overall responsibility of the Deutschen Bundestag. This way it opens up the possibility to examine financial obligations of Germany entered into in the context of the euro crisis and their institutional framework.

2 Ultra vires review¹⁸

Although Art. 23 GG basically opens the German legal system for EU law, competences are only transferred by means of the principle of conferral (cf. also Art. 5 (1) TEU) – the EU does not have the competence to decide about the distribution of the competences (so called “Kompetenz-Kompetenz”). Therefore, Germany can only participate in an EU, which acts within the scope of its competence. This is examined by federal constitutional court. A possible transgression of competence, a so called ultra-vires-act, has been discussed regarding the OMT-program of the ECB. After the ECJ was seized, this has been negated through the preliminary ruling procedure.

¹⁵BVerfGE 129, 124 (about the rescue of Greece); BVerfGE 132, 195; 135, 317 (about the "European Stability Mechanism", [ESM]) as well as BVerfGE 134, 366 and BVerfG, NJW 2016, 2473 (about the Outright Monetary Transactions [OMT] Program of the ECB); Summarising these decisions and categorizing them into the crisis of the European Economic and Monetary Union *di Fabio*, in: Kirchhof/Kube/Schmidt (eds.), *Von Ursprung und Ziel der Europäischen Union*, 2016, 45 (50 et seq.); *Sauer*, *Staatsrecht III*, 4th edition, 2016, § 9, margin number 45a et seqq.

¹⁶Summarising to these control mechanisms *Sauer*, *Staatsrecht III*, 4th edition, 2016, § 9, margin number 18 et seqq.; *Schweitzer/Dederer*, *Staatsrecht III*, 11th edition, 2016, margin number 204 et seqq.

¹⁷BVerfGE 123, 267 (353).

¹⁸BVerfGE 89, 155 (188); 123, 267 (349 et seqq.).