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JOHANN WOLFGANG GOETHE-UNIVERSITÄT FRANKFURT AM MAIN

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# **The Burden of an Ageing Society as a Public Debt**

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## INTRODUCTION

Demographic change in industrialized nations has been a matter of common interest for some time. The financial implications of an ageing society are also increasingly discussed, particularly with regard to pension systems. The impact of this development on public finances is, however, only gradually being realized and the constitutional framework of public finances in Germany and the European Union just falls short of ignoring it entirely.

This paper is a preliminary assessment of the burden of an ageing society under the fiscal law, specifically in respect of prospective entitlements to the public pension system. The first part analyses the provisions of the German constitution on finances (*Finanzverfassungsrecht*) to identify what rules, if any, exist addressing such (potential) expenditures, which lie in the immediate or very distant future. The second part of the paper analyses the fiscal requirements under European Union law. In the third and final part a few comments on the proposed national pact on stability and the recent moves to amend the German Federal Constitution are presented.

## A. THE BURDEN OF AN AGEING SOCIETY AS AN “IMPLICIT” PUBLIC DEBT

Not long ago, the European Commission prepared a report that deals extensively with the impact of an ageing society on public expenditure.<sup>1</sup> It attempts a detailed forecast of the payments for pensions, health care, long-term care, education and unemployment benefits up to the year 2050. The results are given in absolute numbers as well as percentages of gross national products, and are specified for each member state. These estimates require careful scrutiny, because the financial statements for the public sector, as prescribed by the fiscal law, capture the financial burden of these payments for future budgets only in a very rudimentary manner.

Economic publications, on the other hand, have for some time discussed the question of payments projected into the future that may cause financial burdens for coming generations that are similar to payments of interest and principal on the public debt.<sup>2</sup> This is especially true for prospective entitlements under social security systems and entitlements under the pension system for public employees, when such entitlements are not covered by an underlying fund, i.e. financed according to a “pay-as-you-go”-principle. Intergenerational balance sheets have been developed in order to examine

<sup>1</sup> *Economic Policy Committee and the European Commission* (Directorate-General For Economic and Financial Affairs – DG ECFIN), The impact of ageing on public expenditure: projection for the EU25 Member States on pensions, health care, long-term care, education and unemployment transfers (2004-2005), Special Report n° 1/2006; to the consequences of the demographic development for the economy as a whole see *Deutsche Bundesbank*, Demographische Belastungen für Wachstum und Wohlstand in Deutschland, Monthly Bulletin, December 2004, p. 15 es seq.

<sup>2</sup> *Corsetti, Giancarlo* and *Roubini, Nouriel*, European versus American Perspectives on Balanced-Budget Rules, *The American Economic Review*, vol. 86 (1996), p. 408, 410 who consider as particularly important future liabilities from first, the growth of public pension (social-security) systems; second, those from the expected increase in health-care expenditures.

this question with greater precision.<sup>3</sup> Notionally, these figures are captured by the terms “prospective” or “implicit” public debt.<sup>4</sup>

With reference to Article 121 EC Treaty, the *German Council of Economic Advisers* has tried to examine the „sustainability“ of government budgets in Germany. According to the Council, this task cannot be performed without an “intertemporal budget equation”.<sup>5</sup> Retirement benefits that are financed by current revenues are not reflected in the overtly stated, “explicit” public debt. The Council finds a pension system that is financed by current revenues to be “economically equivalent ... to a specific time path of overt government debt”. Thus, the Council holds that it is also indispensable for a sustainability analysis to complete the “explicit” public debt by adding a “statement of the implicit public debt”.<sup>6</sup> A sustainability gap exists subsequently if the present value of the projected “primary balances” is not sufficient to cover the sum of the “implicit” and the “explicit” net public debt.<sup>7</sup>

As a result, the Council of Economic Advisers has found an “implicit” debt amounting to 270% of the gross domestic product for the base year 2002. This

<sup>3</sup> This approach can be traced back to *Auerbach, Alan J./Gokhale, Jagadeh/Kotlikoff, Laurence J.*, *Generational Accounting: A Meaningful Way to Evaluate Fiscal Policy*, *Journal of Economic Perspectives*, vol. 8 (1994), pp. 73-94; for Germany see: *Feist, Karen* and *Raffelhüschen, Bernd*, *Möglichkeiten und Grenzen von Generationenbilanzierung*, *Wirtschaftsdienst* 2000, pp. 440-448; *Bonin, Holger*, *Generational Accounting – Theory and Application*, Berlin – Heidelberg – New York, 2001.

<sup>4</sup> *Sachverständigenrat zur Begutachtung der gesamtwirtschaftlichen Entwicklung*, *Jahresgutachten 2003/2004 „Staatsfinanzen konsolidieren – Steuersystem reformieren“*, 2003, p. 270 es seq.; *Deutsche Bundesbank*, *Defizitbegrenzende Haushaltsregeln und nationaler Stabilitätspakt*, *Monthly Bulletin*, April 2005, p. 23, 30; *Blankart, Charles B.*, *Öffentliche Finanzen in der Demokratie*, 6th ed. 2006, p. 379. *Corsetti/Roubini*, supra note 2, use the term “unfunded future liabilities”.

<sup>5</sup> *Sachverständigenrat*, supra note 4, p. 274 (text-no. 441). A formal description can be found at *Blankart*, supra note 4, p. 381, who calls it an „intertemporal budget constraint of the state“.

<sup>6</sup> *Sachverständigenrat*, supra note 4, p. 271 (text-no. 440). The assessment of a pension system which is financed by current revenues (“pay-as-you-go”) as “forced loan” can already be found at *Blankart, Charles B.*, *Öffentliche Finanzen in der Demokratie*, 2nd ed. 1994, p. 351 es seq., but not yet in the 1st ed. 1991; consent. *Siekman, Helmut*, in: *Sachs* (ed.), *Grundgesetz*, 3rd ed. 2003, Art. 115 margin-no. 5.

<sup>7</sup> *Sachverständigenrat*, supra note 4, p. 274 (text-no. 441); reconsidered *Jahresgutachten 2005/2006 „Die Chancen nutzen – Reformen mutig voranbringen“*, p. 297 (text-no. 441). This follows almost exactly *Auerbach/Gokhale/Kotlikoff* supra note 3, p. 75.

greatly exceeds the “explicit” debt<sup>8</sup> of 60.8% of the gross domestic product for that year.<sup>9</sup> This approach shows a significantly greater need for consolidation. The Bundesbank estimates it at 3.5% of the gross domestic product.<sup>10</sup>

## B. THE REGULATION OF THE “IMPLICIT” PUBLIC DEBT BY THE FISCAL CONSTITUTION OF GERMANY

The “implicit” public debt is debt that is not recorded in the book-keeping of the state.<sup>11</sup> This is one of its decisive differences from the “explicit” public debt.

Examined below are the provisions of German constitutional law that offer starting points for capturing the “implicit” public debt.

### I. The Present Day Focus of the Constitutional Rules on Government Borrowing

The relevant provisions of both the German federal constitution (the “Basic Law”, or *Grundgesetz*) and, to a great extent, the state constitutions reveal a differentiated approach to governmental borrowing: As a general rule, however, they permit the credit financing of government projects and services.<sup>12</sup> The balancing requirement in Article 110, para. 1, clause 2 of the Basic Law has to be understood in a strictly formal way. Any revenue can be used to balance the budget including proceeds of borrowed funds.<sup>13</sup> The attempts of legal scholars to expand or enrich it by adding

<sup>8</sup> The explicit debt is the debt, recorded in the budgets.

<sup>9</sup> *Sachverständigenrat*, supra note 4, p. 276 (text-no. 445).

<sup>10</sup> *Zeitler, Franz-Christoph*, Was bleibt vom Stabilitäts- und Wachstumspakt?, 2005, p. 9 (manuscript).

<sup>11</sup> See *Feist/Raffelhüschen*, supra note 3, p. 448.

<sup>12</sup> BVerfGE 79, 311, 334; *Höfling, Wolfram* and *Rixen, Stephan*, in: Bonner Kommentar zum Grundgesetz, Art. 115 margin-no. 63.

<sup>13</sup> *Siekmann*, supra note 6, Art. 110 margin-no. 65; Art. 115 margin-no. 9; *Heun, Werner*, in: Dreier (ed.), Grundgesetz, 2000, Art. 110 margin-no. 25; *Hillgruber, Christian*, in: v. Mangoldt/Klein/Starck (ed.), Kommentar zum Grundgesetz, 5th ed. 2005, Art. 110 margin-no. 54: “exclusively formal meaning”; *Heintzen, Markus*, in: v. Münch/Kunig (ed.), 4th/5th ed. 2003, Art. 110 margin-no. 27; *Jarass, Hans D.*, in: Jarass/Pieroth, Grundgesetz für die Bundesrepublik

substantive contents<sup>14</sup> have failed. The norm does not contain a material “balanced budget clause”.<sup>15</sup> Otherwise, it would be impossible to explain the existence of the elaborate rules for the borrowing of funds in Article 115, para. 1 of the Basic Law. However, it should be noted that credit financing is only permitted under specific conditions and within narrow limits.

The conditions specified in the German constitutional law are principally confined to the ways and limits of borrowing for the next budget. In principle, future developments are not taken into consideration. Thus, not even actual borrowing – in contrast to planned borrowing – is accounted for.<sup>16</sup> Accumulated debt or sustainability gaps have remained beyond the attention of German constitutional law. Some legal scholars even state explicitly that Article 115 of the Basic Law does *not* contain a limit for the accumulated debt of the federal government.<sup>17</sup>

Deutschland, 8th ed. 2006, Art. 110 margin-no. 5; *Kirchhof, Ferdinand*, Der notwendige Ausstieg aus der Staatsverschuldung, DVBl. 2002, p. 1569, 1574; *Gumboldt, Nico*, Europäisches Gemeinschaftsrecht als nachhaltige Verschuldungsbremse?, DÖV 2005, p. 499; *Gröpl, Christoph*, Schwächen des Haushaltsrechts – Wege zu einer nachhaltigen Finanzwirtschaft, Die Verwaltung, vol. 39 (2006), p. 215, 219; with reservation *Höfling, Wolfram*, Staatsschuldenrecht, 1993, p. 311.

<sup>14</sup> *Stern, Klaus*, Das Staatsrecht der Bundesrepublik Deutschland, vol. II, 1980, p. 1250: “Missbrauchsschranke”; *Lappin, Roland*, Kreditäre Finanzierung des Staates unter dem Grundgesetz, 1994, p. 103; crit. *Kirchhof*, supra note 13.

<sup>15</sup> The introduction of such a clause at the federal level in the United States has failed several times; see Senate Joint Resolution 106, 104. Cong., 1 sess. 1995; *U.S. Congress, House Committee on the Budget*, The Balanced Budget Amendment, Hearings, 2 Vols., 102. Cong., 2 sess. 1992; comparatively evaluated by *Corsetti/Roubini*, supra note 2, pp. 408-413.

<sup>16</sup> The majority of legal scholars agree on this see *Heun*, supra note 13, Art. 115 margin-no. 23 with further references to the discussion; see also *Deutsche Bundesbank*, supra note 4, p. 27, which is critical of this; strictly against such an interpretation *Gröpl*, supra note 13, p. 223; *Schemmel, Lothar*, Staatsverschuldung und öffentliche Investitionen, Karl-Bräuer-Institut der Steuerzahler (ed.) (leaflet 99), 2006, p. 157 es seq. with numerous references.

<sup>17</sup> *Heintzen*, supra note 13, Art. 115 margin-no. 5, referencing *Wendt, Rudolf*, in: v. Mangoldt/Klein/Starck (ed.), Kommentar zum Grundgesetz, 5th ed. 2005, Art. 115 margin-no. 33 es seq., where this is not stated. However, the attitude is beginning to change; see the attempts to limit (the accumulated) government debt by: *Gumboldt*, supra note 13, p. 505, and *Gröpl*, supra note 13, p. 226 es seq.; see also *Halstenberg, Friedrich*, Staatsverschuldung ohne Tilgungsplanung, DVBl. 2001, p. 1405, who sees, however, the necessity of amending the constitution (p. 1407). *Kirchhof*, supra note 13, p. 1575, already demands the accounting of the implicit debt arising from future claims against the social security system under the given constitutional rules. He fails, however, to give any legal argument for this proposition.



## II. Starting Points for Capturing Future Financial Development

### 1. The Direct Application of Article 115 of the Basic Law

Even if governments find – in accordance with the opinion of the majority of legal scholars – that the “implicit” public debt is outside the domain of Article 115, this provision merits further consideration. This norm is of central importance in German constitutional law for government credit. Its scope of application encompasses the “borrowing of funds” (1). It is further applicable “to the assumption of surety obligations, guarantees, or other commitments that may lead to expenditures in future fiscal years” (2).

(1) The term “borrowing of funds” is understood as the raising of financial means which have to be paid back.<sup>18</sup> By creating future claims or prospective entitlements in the sense of the “implicit” public debt, the government does *not* raise financial means.<sup>19</sup> However, the transformation of claims against the state into financial claims or the avoidance of payments by granting instruments promising future payment (financial deeds) are also considered to be the “raising of financial means”.<sup>20</sup> This aspect, however, does not lead to a different result, as the government does *not* transform anything into financial claims or financial deeds by creating prospective entitlements. In contrast to the overtly expressed “explicit” public debt, the elements of the “implicit” debt have not yet vested as actionable claims. They are founded on statutory rules which can be changed prior to the relevant payment date. Thus their exact amount can only be given subject to future statutory changes,<sup>21</sup> and most importantly they cannot provide a cause of action prior to their maturity.

<sup>18</sup> *Höfling*, supra note 13, p. 29; *Höfling/Rixen*, supra note 12, margin-no. 124; *Siekmann*, supra note 6, Art. 115 margin-no. 20; *Heun*, supra note 13, Art. 115 margin-no. 11; *Hüsken, Christian Bernd and Mann, Suzanne*, Der Staat als “Homo Oeconomicus”?, DÖV 2005, p. 143, 149.

<sup>19</sup> *Gröpl* is critical of this result with regard to prospective entitlements for government employees but he provides no sound legal alternative, supra note 13, p. 237.

<sup>20</sup> *Heun*, supra note 13, Art. 115 margin-no. 11; against the inclusion of the sparing expenditures as a type of borrowing *Höfling/Rixen*, supra note 12, margin-no. 126.

<sup>21</sup> *Sachverständigenrat*, supra note 4, p. 271 (text-no. 439 at the end).

However, the “implicit” public debt could be regarded as *forced loans* – not only from an economic but also from a legal point of view.<sup>22</sup> The Federal Constitutional Court so far has expressly refrained from deciding whether Article 115, para. 1 of the Basic Law embraces the forced loans of the government.<sup>23</sup> In any case, this has to be denied if the clause requires the acquisition of financial means “by contract on a market”. But there is another caveat: assuming that the prospective entitlements are to be considered as forced loans, the payments of the future beneficiaries into the social security system may amount to an unconstitutional “extra contribution” (*Sonderabgabe*).<sup>24</sup> This would be true regardless of the decision on the applicability of Article 115, para. 1 of the Basic Law. With respect to the entitlements of public employees, such a claim would in any case be barred. In effect, a claim to a defined or definable amount of money is not thereby created. Such a claim, however, is an indispensable prerequisite for the existence of a (forced) loan also.

(2) The last possibility for a direct application of Article 115, para. 1, clause 1 of the Basic Law would be the existence of a “commitment that may lead to expenditures in future fiscal years”. Such a commitment will only be found to exist if the government contractually assumes liability for the obligation of a third party.<sup>25</sup> This is not the case with prospective entitlements created by law.

<sup>22</sup> For the economic point of view see supra note 4.

<sup>23</sup> BVerfGE 67, 256, 280; likewise *Siekmann*, supra note 6, Art. 115 margin-no. 20; agreeing *Höfling*, supra note 13, p. 57; *Höfling/Rixen*, supra note 12, margin-no. 156, who do not count – somewhat inconsistently – the proceeds from forced loans as borrowing in the meaning of Art. 115 para. 1 clause 2, 1st alt. Basic Law; different *Heun*, supra note 13, Art. 115 margin-no. 11.

<sup>24</sup> In this sense, BVerfGE 67, 256, 274, 278, for the “Investitionshilfeabgabe” which had to be judged in that case. The payment were also not qualified as (regular) taxes within the meaning of Art. 105 para. 2 Basic Law.

<sup>25</sup> *Siekmann*, supra note 6, Art. 115 margin-no. 21; consenting: VerfGH Berlin, judgement of 21 March 2003, NVwZ-RR 2003, p. 537, 540.

## 2. *The Indirect Consideration of “Implicit” Public Debt within the Framework of Article 115 Basic Law*

Article 115, para. 1, clause 1 of the Basic Law links the revenue obtained from borrowing to the total investment expenditures provided for in the budget. This rule speaks of global figures that have to correspond. The *total amount* of the planned net increase of debt must not exceed the *total amount* of the planned investment expenditure in the budget.

This correlation of the two figures suggests that the regulation as a whole is future-oriented, even though it expressly states requirements for only one – the next – fiscal period. It is based on the assumption that expenditures for investments result in the acquisition of durable goods. They are ideally ready for use in future periods (for “future generations”) to the same extent as the burden of the debt that finances them has to be borne. The Federal Constitutional Court also sees the “normative intent” of Article 115, para. 1, clause 2 of the Basic Law to limit government debt, and stresses the future benefits of budgetary expenditures for investments.<sup>26</sup> However, the dictum of the Court was pronounced in a different context, it was directed at the lack of a specifying federal law under clause 3 of this provision,<sup>27</sup> and no workable guideline for judging the sustainability of public debt in general can be derived from this.

Another barrier has to be surmounted in so far as the “implicit” public debt is comprised of prospective entitlements to pensions to be paid by the social security system: Here paragraph 2 of Article 115 of the Basic Law is significant. It states that exceptions to the provisions of paragraph 1, Article 115 of the Basic Law may be authorized by federal statute with respect to special trusts of the Federation (*Sondervermögen des Bundes*). However, the German social security system is not comprised of such (semi-independent) special trusts, but rather of *separate legal entities* created by public law. Such legal persons fall under neither paragraph 1 nor

<sup>26</sup> BVerfGE 79, 311, 334, 337; 99, 57, 67; see also *Schwarz, Kyrill-A.*, Voraussetzungen und Grenzen staatlicher Kreditaufnahme, DÖV 1998, p. 721, 722 but ignoring completely the longstanding debate whether government debt is a burden on future generations.

<sup>27</sup> Note also *Gumboldt*, supra note 13, p. 501.

paragraph 2 of Article 115 of the Basic Law. These entities have budgetary autonomy and are not part of the federal budget, even if they are financed by the Federation and/or the Federation is liable for their obligations.<sup>28</sup> For this reason, it does not matter whether a liability of the Federation for the obligations of the social security system can be derived directly from Article 120, para. 1, clause 4 of the Basic Law,<sup>29</sup> and thus an “implicit” debt of the federal government can be construed in respect of prospective entitlements to retirement benefits from the social security system.

Moreover, some legal scholars contend that the borrowing by such legal persons have to be consolidated into the federal budget when there is an abuse of these formal legal structures<sup>30</sup> or simply when they act on behalf or instruction of the state, even if they do it on their own account.<sup>31</sup> Nevertheless, it is difficult to give a sound legal argument for such proposed consolidation; an additional difficulty arises from the elusive nature of the relevant facts.

### 3. Orientation According to the “Overall Economic Equilibrium”

The “overall economic equilibrium” is of significance in two provisions with respect to the borrowing of funds. First, according to Article 109, para. 2 of the Basic Law, the federation and the states have to take due account of the “requirements of the overall economic equilibrium” (*Erfordernisse des gesamtwirtschaftlichen Gleich-*

<sup>28</sup> *Siekmann*, supra note 6, Art. 115 margin-no. 58; agreeing *Heun*, supra note 13, Art. 115 margin-no. 35; consenting VerfGH Berlin, judgement of 21 March 2003, NVwZ-RR 2003, p. 537, 538.

<sup>29</sup> In this sense, BSGE 34, 148 (Headnote and p. 158); disagreeing *Siekmann*, supra note 6, Art. 120 margin-no. 28. *Stefan Muckel* finds that a close examination of the judgement reveals that the BSG also contradicts an application of Art. 120 para. 1 clause 4 Basic Law, and that it derives this finding from the “social state” principle (*Sozialstaatsprinzip*) of Art. 10 para. 1 Basic Law (in: v. Mangoldt/Klein/Starck (ed.), *Kommentar zum Grundgesetz*, 5th ed. 2005, Art. 120 margin-no. 40). In the present context the derivation of the result is irrelevant.

<sup>30</sup> *Hering, Achim*, *Die Kreditfinanzierung des Bundes über Nebenhaushalte*, Diss. Bochum 1997, p. 294; *Siekmann*, supra note 6, Art. 115 margin-no. 59 with further references; consenting: VerfGH Berlin, judgement of 21 March 2003, NVwZ-RR 2003, p. 537, 540; *Heun*, supra note 13, Art. 115 margin-no. 35; see also VerfGH Rheinl.-Pfalz, judgement of 20 November 1996, DÖV 1997, p. 246.

<sup>31</sup> *Hüsken/Mann*, supra note 18, p. 149 but without giving a solid legal justification.

*gewichts*) in managing their respective budgets. These requirements must also be met when borrowing funds. In this respect Article 109, para. 2 of the Basic Law and Article 115, para. 1 of the Basic Law have to be read together.<sup>32</sup>

Second, Article 115, para. 1, clause 2 of the Basic Law allows the borrowing of funds in excess of investment expenditures to avert a disturbance of the overall economic equilibrium. This is an *exception* to the regular borrowing limit (*Regelkreditgrenze*) applicable to the normal economic situation (*Normallage*). As an exception, it has to be construed narrowly and must be used only rarely, unlike the longstanding practice of both the Federation and the majority of the states.<sup>33</sup> Furthermore, there is no legally permissible way to construe further exceptions to these borrowing limits.<sup>34</sup>

The principle of orientation regarding the requirements of the “overall economic equilibrium” was clearly designed to counteract the phenomenon of *cyclical economic fluctuations*.<sup>35</sup> Structural disequilibria are not embraced by any aspects of these norms.<sup>36</sup> Nevertheless, the Federal Constitutional Court has interpreted Article 109, para. 2 of the Basic Law as being designed to limit the continuous accumulation of debt – by government borrowing well below the limit of Article 115, para. 1, clause 2, first part of the Basic Law – which could eventually jeopardize the ability of the budget to accommodate the demands of present or future

<sup>32</sup> *Siekmann*, supra note 6, Art. 115 margin-no. 26; consenting *Wendt*, supra note 17, margin-no. 29.

<sup>33</sup> See the compilation by the *Sachverständigenrat*, supra note 7, p. 312 (text-no. 477); *Deutsche Bundesbank*, supra note 4, p. 30, even without considering depreciation and sale of capital assets whose counting would enlarge the – in economic terms – “true” deficit considerably; *Schemmel*, supra note 16, p. 286 es seq. (= attachments 2 and 3).

<sup>34</sup> Therefore, the construction of an additional exception for a situation of “extreme budgetary distress” (*extreme Haushaltsnotlage*) by the Constitutional Court for the state of Berlin (decision of 31 October 2003, published in: NVwZ 2004, p. 210) is a clear breach of the Constitution; crit. also *Rossi, Matthias*, Verschuldung in extremer Haushaltsnotlage, DVBl. 2005, pp. 269-276.

<sup>35</sup> *Wendt*, supra note 17, margin-no. 31; *Hillgruber*, supra note 13, Art. 109 margin-no. 52, 70; *Gumboldt*, supra note 13, p. 500.

<sup>36</sup> Partially disagreeing *Hillgruber*, supra note 13, Art. 109 margin-no. 52 at the end, but without reference and inconsistent with his overall reasoning.

economic problems.<sup>37</sup> The intention of the Court is certainly understandable, but its legal foundation is erroneous and, in the final analysis, it is an expression of helplessness in the face of political reality. The justification offered in scholarly circles – the excess burden from interest payments unduly limits the flexibility necessary to fight economic fluctuations –<sup>38</sup> appears extremely contrived and does not deliver usable results in court.<sup>39</sup>

#### *4. The Proportionality Principle*

In a much noticed 2003 judgement, the Constitutional Court for the state of North-Rhine-Westphalia declared unconstitutional and void sizeable parts of the budgets for 2001 and 2002.<sup>40</sup> The plaintiffs claimed that a reserve fund had been created in those budgets to cover future expenditures, although the expenditures of the budget had been partially financed by borrowing. The Court did not find an infringement of the specific rules on the borrowing of funds or of other budgetary rules. However, in its opinion, the formation of such a reserve fund in a (partially) credit-financed budget was not compatible with the principle of cost-effectiveness as an expression of the general proportionality principle, which – supposedly – rules all government spending.

It is doubtful in itself that the cost-effectiveness-principle also governs the decisions of the Parliament when acting on the budget.<sup>41</sup> Its establishment in Article 114, para. 2 of the Basic Law speaks against it. Besides, a general rule that the proceeds from borrowing have to be spent in the same fiscal year can not – contrary to the opinion of the Court – be found in the provisions of constitutional law on government borrowing. That means that the specific rules on government borrowing

<sup>37</sup> BVerfGE 79, 311, 255.

<sup>38</sup> *Höfling/Rixen*, supra note 12, margin-no. 358 f.; agreeing: *Wendt*, supra note 17, margin-no. 34.

<sup>39</sup> This is also acknowledged by *Höfling/Rixen*, supra note 12, margin-no. 360.

<sup>40</sup> Judgement of 2 September 2003, NVwZ 2004, p. 217 es seq.; extensive comment by *Wendt, Rudolf* and *Elicker, Michael*, Staatskredit und Rücklagen, VerwArch, vol. 95 (2004), p. 471 es seq.

<sup>41</sup> References to the discussion at *Wendt*, supra note 17, margin-no. 67c.

have to be applied exclusively. Recourse to general principles – as this Court has done – is not permissible.<sup>42</sup>

Moreover, the Federal Constitutional Court explicitly stated in an earlier decision that the general proportionality principle is not an independent and separate barrier for government borrowing.<sup>43</sup> The language of the Basic Law offers no support for construing a specific “fiscal proportionality principle”.<sup>44</sup>

### 5. Democratic Principle

Many attempts have been made to derive limits for public debt from the idea of a democratic form of government. The borrowing of funds ought to be considered a premature use of future revenues, which curtails the freedom of future democratically elected representatives.<sup>45</sup> The democratic principle, however, has already been modified by the provisions of Article 115, para. 1 of the Basic Law. As long as the prerequisites of this norm are fulfilled, an infringement of the democratic principle cannot be found.

Nevertheless, the Federal Constitutional Court has tried to derive legal limits for government debt from the principle of democratic rule. In the Court's opinion, it is a fundamental principle of the constitution that the “government may use credit only up to an amount equal to investment expenditures”.<sup>46</sup> The problem of a perpetually

<sup>42</sup> *Wendt*, id., who was, however, the legal representative of the state legislature which also took part in the law suit like the state government of the state of North-Rhine-Westphalia; crit. to the opinion of the court also *Gumboldt*, supra note 13, p. 502.

<sup>43</sup> BVerfGE 79, 311, 341 f.; consenting: *Siekmann*, supra note 6, Art. 115 margin-no. 10; *Heintzen*, supra note 13, Art. 115 margin-no. 15; *Höfling/Rixen*, supra note 12, margin-no. 325, who demand an explicit normative link to be able to apply the general proportionality principle outside the civil rights context.

<sup>44</sup> For a view favoring such a principle, see especially *Birk, Dieter*, Die finanzverfassungsrechtlichen Vorgaben für die Begrenzung der Staatsverschuldung, DVBl. 1984, p. 745, 748.

<sup>45</sup> *Püttner, Günter*, Staatsverschuldung, 1980, p. 12; crit. *Siekmann, Helmut*, Buchbesprechung, FinArch n.F., vol. 41 (1983), p. 167, 169.

<sup>46</sup> BVerfGE 79, 311, 334, 343; 99, 57, 67, with the result that borrowing funds which exceed the investment expenditures constitute a “serious drawback” in the sense of § 32 BVerfGG.

increasing pedestal of public debt can however no more be solved in this way than it can by the (questionable) use of Article 109, para. 2 of the Basic Law, because the statement of the Court relates only to consumptive government spending.

Aside from that, many decisions of the current government and Parliament – outside of government finances – have had grave effects on future generations and their freedom of action, yet no one has argued such decisions inappropriately curtail democratic rights.

### *6. Creating Transparency*

According to Article 114, para. 1 of the Basic Law, the minister of finance is obliged at the end of each fiscal year to render an accounting not only of all proceeds and expenditures, but also of assets and debts. Such an accounting, if comprehensive and true, would make it possible to achieve transparency with respect to the future burden.<sup>47</sup>

Constitutional law does not provide further details regarding this accounting. Thus, a widely accepted interpretation of Article 114, para. 1 of the Basic Law reaches the conclusion that the norm does *not* have the purpose of producing a balance sheet that discloses the overall net-wealth of the Federation.<sup>48</sup> On the basis of this interpretation, numerous circumventions of the legal obligation are possible and in fact carried out, especially in respect of “extra budgets”<sup>49</sup> and (quasi) public enterprises, where sizeable sums of tax revenues seep away, and where dynamite for future budgets is sometimes buried.

<sup>47</sup> The Bundesbank has made an attempt to produce it. The result is a negative (!) net wealth in 2004 compared with a positive net wealth of 30% of the GDB in 1991 and of 60% in 1991, cp. *Deutsche Bundesbank*, supra note 4, p. 31.

<sup>48</sup> *Heintzen*, supra note 13, Art. 114 margin-no. 12.

<sup>49</sup> See *Schwarz, Kyrill A.*, in: v. Mangoldt/Klein/Starck (ed.), *Kommentar zum Grundgesetz*, 5th ed. 2005, Art. 114 margin-no. 29-32.



Hence severe difficulties arise when trying to take “explicit” public debt into account. It might be possible to solve these difficulties with an adequate interpretation of Article 114, para. 1 of the Basic Law. The attempt to enclose the “implicit” public debt in such an account would, however, be doomed to failure. No category for “reserves for uncertain or undefined obligation” is provided, but such a category would be necessary to take into account the “implicit” public debt.

### *7. Interim Result*

This brief overview of the constitutional provisions that are relevant for government borrowing shows already that the existing provisions are hardly suited to limit the public debt to an amount that is sustainable in the long run. Vague starting points for confining the “implicit” public debt could be found in the democratic principle, which would, however, require a substantially different interpretation. The right place to enhance transparency, which would be very beneficial, would be the accounting rules in Article 114, para. 1 of the Basic Law. Again, a much stricter interpretation and practice is needed as a first step. Further legal research in this field is in any case desirable.

## **III. Further Normative Enhancements**

### *1. The Interdiction of Government Borrowing*

The introduction of a constitutional obligation to preserve financial equilibrium in normal economic situations (*Normallage*) – as now proposed by the Federal Minister of Finance<sup>50</sup> – could mitigate the problem of the “implicit” public debt, but it would not fulfil the already existing need for consolidation. Moreover, its effectiveness in practice is questionable. The experiences of past years have shown that governments often are unwilling to strictly obey the requirements placed on extra borrowing to avert a disturbance of the overall economic equilibrium. In particular – and above

<sup>50</sup> Der Spiegel, 26/2006, p. 48.

all – they have never realized a net reduction of government debt in time of boom,<sup>51</sup> which is crucial in the logic of this exception to borrowing limits. A correct application of the rules would absolutely require that the extra debt incurred to fight disequilibria add up to zero during the course of a full business cycle.<sup>52</sup> In addition, a disturbance of the overall economic equilibrium is much too easily assumed, even if there is no factual basis for it, in order to create new slack for additional borrowings.<sup>53</sup>

On the other hand, the introduction of a full-fledged interdiction of all government borrowing, i.e. without exemption clauses that would allow borrowing under certain circumstances, could result in severe economic disadvantages. Substantial variations of income-tax rates might be inevitable to balance the budget. This, in turn, could aggravate instabilities. Such variations would thus probably have to be prohibited as well.<sup>54</sup>

These new rules might mitigate the problems of the “explicit” public debt but – again – would not automatically solve the problem of the “implicit” debt. Additional provisions would be needed.

<sup>51</sup> For more on this requirement, see *Siekmann*, supra note 6, Art. 115 margin-no. 12, 51; in the same sense now also *Gröpl*, supra note 13, p. 238.

<sup>52</sup> *Siekmann*, supra note 6, Art. 115 margin-no. 51; agreeing: *Wendt*, supra note 17, margin-no. 31; *Wendt/Elicker*, supra note 40, p. 500; *Gumboldt*, supra note 13, p. 500; see also *Deutsche Bundesbank*, supra note 4, p. 27, which erroneously supposes that such a legal obligation does not yet exist (for the extra borrowing).

<sup>53</sup> For example in 2005. As early as fall of 2003 the Council of Economic Advisers could not see any imminent disturbance of the overall economic equilibrium that could justify additional borrowing (*Sachverständigenrat*, supra note 7, p. 328).

<sup>54</sup> *Schmitt-Grohé, Stephanie* and *Uribe, Martin*, Balanced-Budget Rules, Distortionary Taxes, and Aggregate Instability, *Journal of Political Economy*, vol. 5 (1997), p. 976, 978, 998, supposing a Laffer curve-type relationship between tax rate and tax revenue in the steady state (p. 980, 984). See also *Corsetti/Roubini*, supra note 2, p. 409: “Both neoclassical (tax-smoothing) and Keynesian models of fiscal deficits advocate the optimality of deficit spending during recessions.” But experience shows that the necessary (complementary) surplus saving in the boom has not worked in Germany.

## 2. *Enhancement of Transparency*

As already mentioned, it would be possible to enhance transparency,<sup>55</sup> but this would likely be a less effective way to mitigate the problem. Article 114, para. 1 of the Basic Law would have to be amended to create a strict obligation for a comprehensive accounting. It would have to cover all assets and debts, including the “implicit” public debt and all extra budgets, regardless of whether they belong to legally separate entities.

Additionally, one might consider strengthening the individual rights of the members of the Parliaments to demand comprehensive information during the budgetary process. The constitutional courts have already acknowledged these rights judicially,<sup>56</sup> but they need to be enlarged and specified.<sup>57</sup> This is especially desirable with regard to extra-budgets, public enterprises and the recipients of subsidies that absorb a sizeable portion of tax revenues. It has to be expressly provided that, in the course of the budgetary process when the legislature has to apportion vast sums of money, it will no longer be possible to invoke „business secrets“<sup>58</sup> or the „personal rights“ of the potential beneficiaries of government monies to avoid a full disclosure of the relevant facts upon request. In this way, during the deliberation in connection with enacting the budget, the risks for future budgets could be assessed more properly in advance.

<sup>55</sup> The importance of an enhanced transparency is particularly underlined by *Deutsche Bundesbank*, supra note 4, p. 37.

<sup>56</sup> BVerfGE 70, 324, 355, 359; 79, 311, 344; 110, 199, 221 es seq. (as constitutional court for the state of Schleswig-Holstein); VerfGH NW, judgement of 4 October 1993, NWVBl. 1994, p. 10, 11; VerfGH Rheinh.-Pfalz, judgement of 20 November 1996, DÖV 1997, p. 246: expressly requiring transparency of the development of public finances and a corresponding obligation of the parliament to seek disclosure of the facts.

<sup>57</sup> *Corsetti/Roubini*, supra note 2, p. 412 emphasize the importance of procedural budget rules and consider the reform of institutions and procedural rules as a provision of “effective fiscal discipline at lower macroeconomic costs”.

<sup>58</sup> Very popular among the biggest receivers of government subsidies like RAG. There, substantive “implicit” public debt might also be hidden (“eternity burdens” of coal mining - *Ewigkeitslasten*).

### 3. Authorizations for future budget

The instrument of authorizing the government to create obligations for future expenditures (*Verpflichtungserächtigung*) is not expressly regulated in German constitutional law.<sup>59</sup> It is derived from the budget autonomy of the parliaments.<sup>60</sup> Because most parts of the “implicit” public debt are based on statutory regulation a stricter application of the described instrument would also not render useful results for “prospective” entitlements.

## IV. Interim Result

Provisions of German constitutional law on government borrowing are clearly insufficient to properly regulate the fiscal burden of an ageing society, as reflected in the “implicit” public debt. A starting point for enhancement could be a clearer application of the democratic principle specifically to the budgetary process and an articulated obligation for comprehensive accounting. This could be achieved by a stricter interpretation of Article 114, para. 1 of the Basic Law or by an amendment of this norm. The same would be true for the parallel provisions in the state constitutions.

## C. THE REQUIREMENTS OF EUROPEAN UNION LAW

The orientation of European Union Law is not as clearly focused on short term financing for budgetary needs as is German law on public debt. The EU law focuses more strongly on the fact that financial burdens from budgetary decisions, especially from the raising of funds by borrowing, must be bearable in the future. Because of the difficulty of creating a workable definition for a balanced budget after eliminating cyclical distortions (*konjunkturbereinigt ausgeglichener Haushalt*), the

<sup>59</sup> *Gröpl*, supra note 13, p. 232.

<sup>60</sup> VerfGH Rheinl.-Pfalz, judgement of 20 November 1996, DÖV 1997, p. 246, 248 es seq.; *Siekmann, Helmut*, Abhandlungen zum öffentlichen Finanzrecht, vol. 1 (2005), p. 45.

European regulators attempted to keep at least the national debt to gross national product ratio constant over time by introducing the “Maastricht criteria”.<sup>61</sup>

The European Community Treaty (EC Treaty) requires the “sustainability” of the fiscal policy and offers by this at least a rudimentary guideline for a long term budget-policy. Article 121, para. 1, of the EC Treaty, declares “the sustainability of the government financial position” to be the essential criterion for sustainable convergence in the framework of the economic and monetary union. Even if Article 121 of the EC Treaty belongs to the transitional provisions, the requirements of Article 104 of the EC Treaty dealing with the avoidance of an “excessive government deficit” and “budgetary discipline”, as well as the relevant implementing regulations in the framework of the Stability and Growth Pact<sup>62</sup> essentially reinforce this central theme.<sup>63</sup>

## I. The regulations

### 1. Content

Article 104, para. 1 of the EC Treaty simply states: “Member States shall avoid excessive government deficit”. The term “excessive” is not defined as such in the

<sup>61</sup> *Zeitler*, supra note 10, p. 11.

<sup>62</sup> The Pact is not a contract in a legal sense. The term “Pact”, which is also used in legal acts of the European Community, was coined to stress the underlying political consensus. Technically it consists of one resolution of the European Council, which is not compulsive, and two – binding – regulations of the Council:

- (1) Resolution of the European Council on the Stability und Growth Pact of 17 July 1997, Official Journal C 236, 2/8/1997, p. 1
- (2) Council Regulation (EC) no. 466/97 of 7 July 1997 on strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, Official Journal L 209, 2/8/1997, p. 1; amended by the Council Regulation (EC) no. 1055/2005 of 27 June 2005, Official Journal L 174, 7/7/2005, p. 1
- (3) Council Regulation (EC) no. 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure, Official Journal L 209, 2/8/1997, p. 6; amended by the Council Regulation (EC) no. 1056/97 of 27 June 2005, Official Journal L 174, 7/7/2005, p. 5.

<sup>63</sup> *Häde, Ulrich*, in: Callies/Ruffert (ed.), Kommentar zu EU-Vertrag und EG-Vertrag, 2nd ed. 2002, Art. 104 margin-no. 6 es seq.

Treaty. Whether a deficit is “excessive”, shall only be *evaluated* on the basis of the following two criteria:

1. the ratio of the planned or actual government deficit to gross domestic product, and
2. the ratio of government debt to gross domestic product.

This regulation stated in Article 104, para. 2, clause 3 of the EC Treaty, is made manageable by establishing numerically fixed reference values. They are specified in the Protocol on the excessive deficit procedure annexed to the EC Treaty,<sup>64</sup> and therefore belong to primary community law.<sup>65</sup> The regulation reads as follows:

- “The reference values referred to in Article 104c para. 2 of this Treaty are:
- 3% for the ratio of the planned or actual government deficit to gross domestic product at market prices, and
  - 60% for the ratio of government debt to gross domestic product at market prices.”

The values are not arbitrarily fixed, although that is occasionally maintained.<sup>66</sup> They are linked with one another by the fact that with an assumed nominal growth rate of 5% per year for the gross domestic product, the growth rate of government debt may be up to 3% per year without pushing the government debt to gross domestic product-ratio above 60%.<sup>67</sup> Moreover, the historical average of public investment expenditure in the European Community had been about 3 percent of GDP at their introduction. Thus borrowing had been allowed within the limits of capital expenditures.<sup>68</sup>

The legal meaning of these values is debatable. They could be considered as a fixed ceiling.<sup>69</sup> Surpassing one of the reference values would imply the existence of an

<sup>64</sup> BGBl. II 1992, p. 1309 (5. Protokoll). Pursuant to Art. 311 EC-Treaty it is part of the Treaty.

<sup>65</sup> *Kempen, Bernhard*, in: Streinz (ed.), EUV/EGV, 2003, Art. 104 margin-no. 7.

<sup>66</sup> See *Corsetti/Roubini*, supra note 2, p. 408; *Zeitler*, supra note 10, p. 11.

<sup>67</sup>  $3:5 = 0.6$ .

<sup>68</sup> See *Corsetti/Roubini*, supra note 2, p. 409 stating: “The Maastricht deficit criterion can then be interpreted as an implicit *current* account balanced-budget rule”. They give an overall positive evaluation of the European rules.

<sup>69</sup> *Corsetti/Roubini*, supra note 2, p. 409; *Hartmann*, supra note 84, p. 69 es seq.

“excessive government debt”. But they could also be interpreted somewhat more flexibly as the majority of scholars does.<sup>70</sup>

Nevertheless, in essence an obligation for Germany to have a “structurally” almost balanced budget could be derived from the EU law.<sup>71</sup>

## 2. Effect on Domestic Law

The limitations that the EU law imposes on the borrowing of funds by the member states are directly applicable in the member states. They are legally binding without implementation or transformation into national law and, since the beginning of the third stage of the economic and monetary union on 1 January 1999, have to be obeyed without any reservation, Article 116, para. 3 of the EC Treaty.<sup>72</sup> EU law enjoys priority over all national law<sup>73</sup> –, including constitutional law<sup>74</sup>. However, if

<sup>70</sup> *Saint-Étienne, Christian*, Finances publiques européennes : une réforme politiquement acceptable du Pacte de stabilité et de croissance, in: Conseil d'Analyse économique (ed.), Réformer le Pacte de stabilité et de croissance, 2004, p. 49, 51 : “On peut contester que” “la décision par le Conseil des ministres des 24 et 25 novembre 2003 de rejeter les sanctions (...) à l'encontre de la France et de l'Allemagne” “respecte l'esprit de la résolution du 17 Juin 1997, mais les textes ont été respectés”; *Häde*, supra note 63, margin-no. 13; *Kempen*, supra note 65, margin-no. 15.

<sup>71</sup> *Deutsche Bundesbank*, supra note 4, p. 31.

<sup>72</sup> *Kempen*, supra note 65, margin-no. 4.

<sup>73</sup> ECJ, collection of decisions 1964, p. 1251, 1257, 1269 es seq.; 1970, 1125 margin-no. 3; 1978, 629 margin-no. 17 f.; 1981, 1805 margin-no. 43 for executive orders; BVerfGE 73, 339, 375; 75, 223, 244; 85, 191, 202; *Tomuschat, Christian*, in: Bonner Kommentar, Art. 24 (lose leaf: 1985), margin-no. 79, 81 at the end; *Ipsen, Hans Peter*, in: Isensee/Kirchhof (ed.), Handbuch des Staatsrechts, vol. VII, 1992, § 181 margin-no. 59; *Blanke, Hermann-Josef*, Föderalismus und Integrationsgewalt, 1992, p. 290; *Oppermann, Thomas*, Europarecht, 2nd ed. 1999, margin-no. 615 es seq.; *Jarass, Hans D.*, Grundfragen der innerstaatlichen Bedeutung des EG-Rechts, 1994, p. 2 es seq.; *Jarass, Hans D./Beljin, Saša*, Die Bedeutung von Vorrang und Durchführung des EG-Rechts für die nationale Rechtsetzung und Rechtsanwendung, NVwZ 2004, p. 1; *Wegener, Bernhard*, in: Callies/Ruffert (ed.), Kommentar zu EU-Vertrag und EG-Vertrag, 2nd ed. 2002, Art. 220 margin-no. 22; *Streinz, Rudolf*, in: Streinz (ed.), EUV/EGV, 2003, Art. 1 EGV margin-no. 19; *Schroeder, Werner*, in: Streinz (ed.), EUV/EGV, 2003, Art. 249 EGV margin-no. 40 es seq.; *Geiger, Rudolf*, Grundgesetz und Völkerrecht, 3rd ed. 2002, p. 246 es seq.

<sup>74</sup> ECJ, collection of decisions 1970, p. 1125 margin-no. 3; *Streinz*, supra note 73; *Schroeder*, supra note 73, margin-no. 44; *Jarass/Beljin*, supra note 73, p. 2; *Siekman*, supra note 6, Art. 109 margin-no. 54.

domestic law violates a provision of the EU law, the domestic regulation is *not* automatically void. Rather it is only inapplicable.<sup>75</sup>

In effect, the rules of the German constitutional law on the borrowing of funds are superceded but not displaced by the EU law. They can have a parallel existence, since they do not collide with each other in (a) their *application* and (b) their *legal consequences*:<sup>76</sup>

(1) The requirements of the European Union Law refer to the entire public sector of the member states. This means that they cannot create direct obligations for the various parts of the Federal Republic. The EU regulations do not plainly provide a numerically defined or definable upper limit for the government debt of any part of the federally organized state.<sup>77</sup>

(2) The legal consequences of offences are also different. Differently from German national law, a breach of EU law does not lead to the offending budgetary law becoming void or non-applicable.<sup>78</sup> Rather the *special* deficit-limiting regulations of the EU law provide a complex system of mechanisms to discipline the offending member state under Art. 104, para. 2 - 8, 10, 11 - 13 of the EC Treaty. In the case of persistent offenses, the Council of the European Union can impose one or several of the sanctions enumerated in Article 104, para. 11, clause 1 of the EC Treaty.<sup>79</sup> This

<sup>75</sup> Somewhat disputed, but majority opinion: *Wegener*, supra note 73, margin-no. 23; *Streinz*, supra note 73, margin-no. 20; *Schroeder*, supra note 73, margin-no. 43; with additional differentiations *Jarass/Beljin*, supra note 73, p. 4 es seq.; *Siekmann*, supra note 6, Art. 109 margin-no. 54; in effect consenting but with varying argumentation BVerfGE 22, 293, 295 es seq.; 89, 155, 190.

<sup>76</sup> *Gröpl*, supra note 13, p. 227. This could be considered as priority in a wider sense, proposed by *Jarass/Beljin*, supra note 73, p. 3.

<sup>77</sup> *Siekmann*, supra note 6, Art. 115 margin-no. 17; agreeing *Heun*, supra note 13, Art. 115 margin-no. 5; *Gröpl*, supra note 13, p. 227; *Gumboldt*, supra note 13, p. 505 f. Specifically, they do not contain numerically fixed provisions for the acceptable deficit of the federal government. Subsequently Article 104 EC Treaty cannot be considered as an implicit amendment of Art. 115 Basic Law; for this, however, *Häde*, supra note 63, margin-no. 72.

<sup>78</sup> *Siekmann*, supra note 6, Art. 115 margin-no. 18; consent. *Heun*, supra note 13, Art. 115 margin-no. 5.

<sup>79</sup> For more details, see *Wissenschaftlicher Beirat beim Bundesministerium der Finanzen*, Gutachten zur Bedeutung der Maastricht-Kriterien für die Verschuldungsgrenzen von Bund und Ländern (Opinion on the Meaning of the Maastricht Criteria for limits on indebtedness for the Federation and the Federal States), Schriftenreihe Heft 54, 1994.



system of legal sanctions has priority over any general rules as “lex specialis”.<sup>80</sup> For this reason, in the (highly improbable) case that a violation of one of the EU criteria can be attributed to specific budgetary decisions of one or more parts of the Federation, the sanction by itself does not render it void or inapplicable.

### *3. Application to the States of the Federation*

The addressee of the stability requirements of EU law is the Federation (*Bund*). According to Article 3, clause 1 of the Protocol on Excessive Deficits, the Federation is even responsible for those parts of the national deficit<sup>81</sup> that are caused by the other parts of the federal state.

According to Article 109, para. 1 of the Basic Law the Federation and the states have sovereignty over their own budgetary matters. Their budgets are separate and independent. For this reason it would have been necessary to amend Article 109 of the Basic Law after signing the treaty of Maastricht. Only this way the Federation (*Bund*) could be attributed the necessary authority to fulfill its obligations under EU law.<sup>82</sup> The introduction of such an amendment failed and that is the reason why the federal government later pronounced that it was not necessary. Years later, Section 51a was instead inserted into the Basic Budgetary Law (*Haushaltsgrundsatzgesetz*). This clause is, however, insufficient in many ways<sup>83</sup> and is altogether unconstitutional as the Federation, as of this writing, lacks the competence for such

<sup>80</sup> *Siekmann*, supra note 6, Art. 115 margin-no. 18; consent. *Heun*, supra note 13, Art. 115 margin-no. 5.

<sup>81</sup> *Siekmann*, supra note 6, Art. 109 margin-no. 51.

<sup>82</sup> *Wissenschaftlicher Beirat beim Bundesministerium der Finanzen*, supra note 79, p. 48; *Stern, Klaus*, Die Konvergenzkriterien des Vertrags von Maastricht und ihre Umsetzung in der bundesstaatlichen Finanzverfassung, in: Festschrift Everling, vol. I, 1995, p. 1469, 1488; *Höfling, Wolfram*, Haushaltsdisziplinierung der Länder durch Bundesrecht, ZRP 1997, p. 231, 233 es seq.; *Vogel, Klaus/Waldhoff, Christian*, in: Bonner Kommentar, vor Art. 104 a margin-no. 661; *Siekmann*, supra note 6, Art. 109 margin-no. 54 with extensive references; *Hillgruber*, supra note 13, Art. 109 margin-no. 148, *Deutsche Bundesbank*, supra note 4, p. 35; see also *Gumboldt*, supra note 13, p. 504; disagreeing *Heun*, supra note 13, Art. 109 margin-no. 7.

<sup>83</sup> *Kirchhof*, supra note 13, p. 1773; *Deutsche Bundesbank*, supra note 4, p. 33: “fruitless” (*weitgehend wirkungslos*).

legislation.<sup>84</sup> The recently adopted “Maßstäbengesetz”<sup>85</sup> can also not create a binding obligation for the states of the Federation. Its section 4, para. 3 is a futile attempt of regulation.

In addition, the problem of how the burdens of sanctions resulting from violation of EU law are to be distributed within the confederate framework remains unresolved. The regulation of Article 104a, para. 5 (old) of the Basic Law is clearly unsuitable for a solution of this issue, since the clause only aims at administrative actions and the borrowing of funds has to be authorized by law.

But the situation is changing rapidly.<sup>86</sup> The move to amend the Basic Law, which was originally stalled and then deemed unnecessary, has come to fruition in the mean time. Already the first stage of the “Federalism Reform” (*Föderalismusreform*) seeks to solve this hitherto unresolved problem.<sup>87</sup> It was adopted by the parliament (*Bundestag*) on 30 June 2006<sup>88</sup> with the *Bundesrat* consenting a few days later.<sup>89</sup> The newly inserted paragraph 5 of Article 109 of the Basic Law, declares the fulfilment of obligations arising under legal acts of the European Community adopted according to Article 104 of the EC Treaty a common task of the Federation and the states (*Länder*). They have to be borne in the ratio of 65 to 35 by the Federation and the entirety of the states. Furthermore, according to the new Article 104a, para. 6, clause 2 of the Basic Law, burdens arising from financial adjustments demanded by

<sup>84</sup> Art. 109, para. 3 Basic Law does not offer sufficient legislative competence; see *Hillgruber*, supra note 13, Art. 109 margin-no. 144; *Mehde, Volker*, Gesetzgebungskompetenz des Bundes zur Aufteilung der Verschuldungsgrenzen des Vertrags von Maastricht, DÖV 1997, p. 616, 619; disagreeing: *Hartmann, Uwe*, Europäische Union und die Budgetautonomie der deutschen Länder, 1994, p. 178 es seq.; *Heun*, supra note 13, Art. 109 margin-no. 7. Art. 109, para. 4 Basic Law addresses exclusively the competences of the Federation to limit credit financing by the other parts of the Federal Republic and is not fulfilled in the present context, see *Heintzen*, supra note 13, Art. 109 margin-no. 27.

<sup>85</sup> From 9 September 2001, BGBl. I, p. 3202.

<sup>86</sup> This change had urgently been asked for by *Deutsche Bundesbank*, supra note 4, p. 35.

<sup>87</sup> See Draft of Amendments to the Basic Law (*Entwurf eines Gesetzes zur Änderung des Grundgesetzes*), 7 March 2006, BT-Drucks. 16/813.

<sup>88</sup> 44<sup>th</sup> session of the 16<sup>th</sup> term, 30 June 2006, documented first in print by BR-Drucks. 462/06.

<sup>89</sup> 824<sup>th</sup> session, 7 July 2006, BR-Drucks. 462/06 (Beschluss).

the European Union that have effects beyond the borders of a single state are to be borne in the ratio of 15 to 85 by the Federation and the entirety of the states. In both cases the allocation to individual states is under the reservation of more detailed regulation by federal law with consent of the *Bundesrat*.

## II. Addressing “Implicit” Public Debt

In their basic structure, the requirements of EU law are suited to address the problem of “implicit” public debt because of their alignment towards the “sustainability” of the government financial position. In contrast to the financial provisions of German constitutional law, the EU regulations are clearly aligned on a medium- and long-term basis. They aim at the maintenance of a bearable government debt *in the long term*.<sup>90</sup> Since they – in contrast to German law – consider not only intended values, but also the actual raising of credit in the budget execution, they already have an impact on periods subsequent to the passing of the budget.

Crucial for the inclusion of the overall “implicit” public debt is the definition of the term “deficit”. It is defined in Article 2 of the Protocol as “net borrowing as defined in the European System of Integrated Economic Accounts”. The European system of Economic Accounts (ESA) in its present form originated in 1995 and has been amended by various EC regulations of the Council<sup>91</sup> and the Commission since

<sup>90</sup> This is also the reason why there have been proposals to treat public investments and the accounting of capital-movements in a different way by the Pact, cp. *Blanchard, Olivier* and *Giavezzi, Francesco*, Comment améliorer le Pacte de stabilité et de croissance par une comptabilité appropriée de l’investissement public, in : Conseil d’Analyse économique (ed.), Réformer le Pacte de stabilité et de croissance, 2004, p. 15, 21.

<sup>91</sup> Council Regulation (EC) No 2223/96 of 25 June 1996 on the European system of national and regional accounts in the Community, Official Journal L 310, 30/11/1996, p. 1-469; subsequently amended by: Council Regulation (EC) No 448/98 of 16 February 1998 completing and amending Regulation (EC) No 2223/96 with respect to the allocation of financial intermediation services indirectly measured (FISIM) within the European system of national and regional accounts (ESA), Official Journal L 058, 27/02/1998, p. 1-14; Regulation (EC) No 2516/2000 of the European Parliament and of the Council of 7 November 2000 modifying the common principles of the European system of national and regional accounts in the Community (ESA) 95 as concerns taxes and social contributions and amending Council Regulation (EC) No 2223/96, Official Journal L 290, 17/11/2000, p. 1-2; Regulation (EC) No 2558/2001 of the European

then.<sup>92</sup>

By the definition pursuant to these rules, promises to perform that are given under conditions, such as prospective entitlements to pensions, are excluded. Although social security systems belong to the sector “state”<sup>93</sup>, prospective entitlements to pensions are as a rule only “contingent liabilities” for the debtor and only “contingent assets” for the creditor. They are only accounted for by the ESA if the contractual agreement on which they are based „itself has a market value because it is tradable or can be offset on the market”.<sup>94</sup> Prospective entitlements to pensions in Germany's social security system or in the separate system for public employees (*Pensionen der Beamten*)<sup>95</sup> do not satisfy these conditions; therefore, they are not

Parliament and of the Council of 3 December 2001 amending Council Regulation (EC) No 2223/96 as regards the reclassification of settlements under swaps arrangements and under forward rate agreements, Official Journal L 344, 28/12/2001, p. 1-4; Regulation (EC) No 359/2002 of the European Parliament and of the Council of 12 February 2002 amending Council Regulation (EC) No 2223/96 as concerns the use of ESA 95 in the determination of Member States' payments to the VAT-based own resource, Official Journal L 58, 28/02/2002, p. 1-2; Regulation (EC) No 1267/2003 of the European Parliament and of the Council of 16 June 2003 with respect to the time limit for transmission of the main aggregates of national accounts and to the transmission of employment data in hours worked, Official Journal L 180, 28/07/2003, p. 1-22.

<sup>92</sup> Commission Regulation (EC) No 1500/2000 of 10 July 2000 implementing Council Regulation (EC) No 2223/96 with respect to general government expenditure and revenue, Official Journal L 172, 12/07/2000, p. 3-10; Commission Regulation (EC) No 995/2001 of 22 May 2001 implementing Regulation (EC) No 2516/2000 of the European Parliament and of the Council modifying the common principles of the European system of national and regional accounts in the Community (ESA 95) as concerns taxes and social contributions, Official Journal L 139, 23/05/2001, p. 3-8; Commission Regulation (EC) No 113/2002 of 23 January 2002 amending Council Regulation (EC) No 2223/96 with regard to revised classifications of expenditure according to purpose, Official Journal L 021, 24/01/2002, p. 3-9.

<sup>93</sup> As S.1314, cited from the consolidated text, document ID: 1996R2223 from 07/08/2003, p. 41; see also the official edition by eurostat, Europäisches System Volkswirtschaftlicher Gesamtrechnungen – ESG 1995, 1996, p. 31.

<sup>94</sup> ESA, supra note 93, p. 126 (5.05.). This made even clearer by the additional remark, id.: “Otherwise, a contingent asset is not recorded in the system. (1) Insurance technical reserves (AF.6) are unconditional liabilities of insurance corporations and pension funds. However, the counterpart financial assets of individual policy holders and beneficiaries are contingent assets in most cases.” In a “pay-as-you-go” pension system are essentially no technical reserves and the assets of the beneficiaries are only contingent. *Only* „prepayments of insurance premiums and reserves for outstanding claims (F.62)” and “net equity of households in pension funds reserves (F.612)” are shown in funds' liabilities and household assets, supra note 93, p. 351.

<sup>95</sup> The ESA classifies “insurance schemes organized by government units for their own employees” not “as social security schemes, but as private funded or unfunded social insurance schemes”

included within the financing account of the state.<sup>96</sup> As a result they do not contribute to the financing balance or of the state in the national accounting system.<sup>97</sup>

The Deficit Protocol defines the term “debt” as the “total gross debt at nominal value outstanding at the end of the year after consolidation and consolidated between and within the sectors of general government”.<sup>98</sup> Since prospective entitlements are not entered in the financing account of the state, they are at present not treated as a part of the public debt.

### III. Expansion to Include the “Implicit” Public Debt

#### 1. *The Necessity of Amending the Primary Law*

In order to include the “implicit” public debt within the requirements of EU law, the definition of the term “deficit” has to be expanded. It may be sufficient to change the assignments in the European System of Integrated Economic Accounts (ESA),<sup>99</sup> on which the Deficit Protocol is based. In light of the serious consequences for the entire deficit procedure, it can not be assumed that a dynamic reference was intended. Primary EU law would have to be amended.

(supra note 93, p. 348). In Germany they would be basically unfunded social insurance schemes. However, some units have begun to form reserves for that purpose.

<sup>96</sup> ESA, supra note 93, p. 126 (5.05.). Government expenditure and revenue have later been specified more detailed in the annex of Commission Regulation (EC) No 1500/2000, supra note 92. It is table 2 in annex B of the system.

<sup>97</sup> ESA, supra note 93, p. 211 (8.50.).

<sup>98</sup> For the purpose of the Member States' reports to the Commission under the excessive deficit procedure laid down in Council Regulation (EC) No 3605/93 (Official Journal L 332, 31/12/1993, p. 7. Regulation as last amended by Regulation (EC) No 475/2000, Official Journal L 58, 3/3/2000, p. 1), “Government deficit” is the balancing item “net borrowing/net lending” of General Government, including streams of interest payments resulting from swaps arrangements and forward rate agreements. “This balancing item is codified as EDPB9. For this purpose, interest includes the above mentioned flows and is codified as EDPD41”, Regulation (EC) No 2558/2001, supra note 91. The definition of the term “deficit” does not follow a well defined economic concept and could be considered as rather an “arbitrary number whose value depends on how the government chooses to label its receipts and payments”, cp. *Auerbach/Gokhale /Kothlikoff* supra note 3, p. 74.

<sup>99</sup> Expansion of the present accounting system towards a „socio-economic“ general accounting system by *Schwarz, Norbert*, Der Beitrag der Volkswirtschaftlichen Gesamtrechnung zur sozioökonomischen Modellierung, Statistisches Bundesamt (manuscript 2006), p. 5 es seq.

## 2. *The Compliance with the Deficit Criteria*

Within the territory of the states participating in the common European currency, the euro area, the financing balance has been negative since 1970. Only in three periods was a balance almost reached. That was in the years 1970, 1973 and 2001. In this regard, the disciplining effect on the public finances by the Maastricht criteria as a condition for a country's participation in the common currency is clearly visible. However the effect rapidly lost momentum.<sup>100</sup> In every year since 2002, Germany failed to fulfill the criteria of the Deficit Protocol.<sup>101</sup> France, Italy and some other member states have an almost as negative record.<sup>102</sup>

An initial, superficial analysis of the causal nexus indicates that the emergence of the chronic deficits coincides in time with a significant increase in public expenditures at the beginning of the seventies, continuing into the middle of the eighties of the last century. The re-appearance of the financing imbalances after 2000 fall in a period marked by considerable tax reductions that are not accompanied by corresponding reductions in expenditures.<sup>103</sup>

When evaluating these figures, it must be remembered, however, that they are averages for the entire euro area. They consist of a remarkably heterogeneous set of individual values. Above all, the group of the “reform countries” stands out. They launched extensive programs to cut and reform public expenditures, and reduced their primary expenditures by more than 5% of their gross domestic products as measured against their respective, historical maximum expenditures. The “first wave” of “reform countries” consisted of the four states: Belgium, Ireland,

<sup>100</sup> See *Artus, Patrick*, Les mauvaises règles de politique macroéconomique sont-elles responsables de la faible croissance de la zone euro ?, in : Conseil d'Analyse économique (ed.), Réformer le Pacte de stabilité et de croissance, 2004, p. 27, 30.

<sup>101</sup> Deficit ratio to GDP: -3.7% (2002), -4.0 (2003), -3.7 (2004), -3.3 (2005); debt ratio to GDP: 60.3 (2002), 63.8 (2003), 65.5 (2004), 67.7 (2005). The Bundesbank remanded it as the “lacking political will” to transform strictly the existing rules, *Deutsche Bundesbank*, supra note 4, p. 31.

<sup>102</sup> For details see the news release of eurostat 48/2006 of 24 April 2006, and *European Central Bank*, ECB Monthly Bulletin, July 2006, S50 and S51; see also *Artus*, supra note 100, p. 30, 34.

<sup>103</sup> *European Central Bank*, Die Bedeutung von Reformen der Staatsausgaben für Wirtschaftswachstum und Stabilität, ECB Monthly Bulletin, April 2006, p. 67, 69.

Luxembourg and The Netherlands. In a “second wave”, Spain, Austria and Finland followed. In contrast, the remaining five countries of the euro area made no or very little progress. These are the principal findings of the ECB.<sup>104</sup>

The reform countries were able not only to reduce the volume of their total expenditures, but also to improve the composition of their expenditures. Productive expenditures, such as for investments and education, were reduced relatively less than expenditures for state consumption. This way the portion of total expenditures made for those purposes increased. In addition, it became possible to enact tax reductions that were fully covered by other financial means. In effect they did not have to be financed by (additional) borrowing. The states that embedded their spending reductions within extensive structural reforms could thus clearly improve almost all of their macro-economic indicators and set themselves apart not only from the average rates of development in the euro area, but also from the other euro area states, i.e., Germany, France and Italy.<sup>105</sup>

Both the ECB and a considerable part of the economic literature thus see expenditure reductions as an extremely effective means of guaranteeing durable budget consolidation.<sup>106</sup> In reality, however, a remarkable discrepancy existed between the plans of the states of the euro area for recovering budget stability, as announced in their annually updated stability programs, and the existing facts. At least the plan to reduce the portion of public expenditures of the gross domestic product was largely a failure.<sup>107</sup>

### *3. The Lacking Rigidity of the Deficit Criteria*

The fiscal reference values of the EU Law are not judged as a rigid ceiling. Various additional circumstances have to be taken into account when deciding whether

<sup>104</sup> *European Central Bank*, supra note 103, p. 74 es seq.

<sup>105</sup> *European Central Bank*, supra note 103, p. 76.

<sup>106</sup> *European Central Bank*, supra note 103, p. 76; *Deutsche Bundesbank*, supra note 4, p. 35.

<sup>107</sup> European Commission, Autumn Forecast 2005, *European Central Bank*, supra note 103, p. 80.

deficits are “excessive”.<sup>108</sup> But even if an “excessive” deficit can be ascertained the procedures to impose sanctions are complicated and painstaking. The inherent weakness of the sanction mechanisms was rendered even weaker by the amendments of the stability pact in 2005.<sup>109</sup> This makes it even more doubtful that the expansion of the deficit definition alone would achieve the desired results.

#### *4. Interim Result*

Before changing the primary law to include the “implicit” public debt, assurances would therefore first have to be provided that the rules could also be enforced in the large member states like France, Germany and Italy, which had so far undertaken some reform steps, but were still a long way from the goal of a long-term, sustainable state of the public finances.

### **IV. Interim Result**

A question that is even more serious than the obedience to German constitutional law on finance is that of enforcing the requirements of EU law – if not its words, at least its spirit – against the governments of influential member states. This problem must be addressed before the scope of application of the existing rules is to be expanded.

<sup>108</sup> See above at p. 19.

<sup>109</sup> For sources see footnote 62; very critical of the changes *Deutsche Bundesbank*, Die Änderungen am Stabilitäts- und Wachstumspakt, Monthly Bulletin, April 2005, p. 15, 20: “considerable weakening, additional complication and intransparency”, giving the details of the changes in procedure, even though the material substance derived from the EC Treaty remained unchanged; *Deutsche Bundesbank*, supra note 4, p. 32; for the discussion whether there is a need of amending the Pact from an economic point of view see the contributions in : Conseil d’Analyse économique (ed.), Réformer le Pacte de stabilité et de croissance, 2004. At least the weak growth rates in the Euro-zone are not caused by the rules of the Pact, cp. *Artus* (supra note 100), id., p. 36; for the problem of taking into account “exceptional circumstances” see *Bénassy-Quéré, Agnès* and *Penot, Alexis*, Vers une redéfinition des « circonstances exceptionnelles » du Pacte de stabilité et de croissance, id., p. 93.



## D. NATIONAL STABILITY PACT

Because of the quite insufficient compliance of the Federal Republic with the EU-requirements for government deficits<sup>110</sup> and of the extensive borrowing of funds by the various parts of the federal state<sup>111</sup> the establishment of a “National Stability Pact” has been discussed for some time.<sup>112</sup> This way, the different levels of the federal state were to be coordinated in regard of their borrowing funds.<sup>113</sup> The proposals of politicians and scholars suffered, however, from serious drawbacks. They either contain no real legal obligation<sup>114</sup> and could be categorized as one of the usual declamations which are superfluous from the perspective of the constitutional law<sup>115</sup> or, in case they were to contain binding legal obligations, they are – due to the failure to amend Art. 109 of the Basic Law as it would have been appropriate –<sup>116</sup> on their face unconstitutional. The distribution of competences and powers – including the competence to bear financial burdens – among the Federation and the states are strictly regulated by the Basic Law. This regulation is binding and cannot be altered at the discretion of politicians, even if they act unanimously. It is as well not open to contractual agreements between the Federation and a single state or the entirety of states.<sup>117</sup> Even if these principles have often been neglected in the past, that is no justification for further breaches of the law.

<sup>110</sup> Supra note 101.

<sup>111</sup> In 2004 only about 60% of the borrowing was done by the federal government and 40% by the states and their municipalities. The debt of the federal level would only account to a 40% ratio of the GDP and the debt of the states to a more than 25% share, *Deutsche Bundesbank*, supra note 4, p. 24, 25, with vast differences among the various states.

<sup>112</sup> Compare the description *Deutsche Bundesbank*, supra note 4, p. 32 es seq.

<sup>113</sup> *Deutsche Bundesbank*, supra note 4, p. 32.

<sup>114</sup> This is true for the later inserted § 51a HGrG (see supra at note 83). It is also (incorrectly) sometimes called “National Stability Pact”; see *Deutsche Bundesbank*, supra note 4, p. 33. The distribution of the deficit-potential by the *Finanzplanungsrat* for the years of 2004 until 2006 is neither appropriate nor binding, see *Deutsche Bundesbank*, supra note 4, p. 36.

<sup>115</sup> Typical: press release of the state government for Brandenburg from 14 May 2002: Nationaler Stabilitätspakt und Solidarpakt II zwingen zur Haushaltsdisziplin.

<sup>116</sup> Supra at p. 22.

<sup>117</sup> *Vogel/Waldhoff*, supra note 82, margin-no. 661 at the end; problematic therefore: *Hillgruber*, supra note 13, Art. 109 margin-no. 148: “Staatsvertrag”; *Deutsche Bundesbank*, supra note 4,

As already mentioned, the first stage of the “federalism reform” (*Föderalismusreform*) is on track to amend Art. 109 of the Basic Law.<sup>118</sup> But it has not entrenched a “National Stability Pact” as the official motives for the amendments erroneously state.<sup>119</sup> The new paragraph five of Art. 109 of the Basic Law only provides that the requirements from EU law regarding government deficits establish an obligation both for the Federation and the states. This means, that the burdens of the EU requirements are passed on to the various parts of the Federal Republic by national constitutional law. This is under no aspect a pact and in substance it is not national. The requirements are those of the EU law as it does not contain a material substance of its own.<sup>120</sup> This could, however, mean that the EU requirements will be – in effect – in the future also requirements of the national constitutional law. It remains, however, the need to have sufficient complementary rules and institutions on the national level.<sup>121</sup>

## E. CONCLUSIONS

This initial – and necessarily provisional – attempt to place the „implicit“ public debt within a legal framework delivered mainly negative results. Only a few, concrete starting points in the financial provisions of German constitutional law and in the EU law could be found. Nevertheless the systematically correct locations for further

p. 32: “Ein nationaler Stabilitätspakt stellt einen Eingriff in die Haushaltsautonomie von Bund und Ländern dar und erfordert eine rechtliche Regelung, die der Zustimmung beider staatlichen Ebenen bedarf.” Not the consent of the two federal levels is necessary but a formal amendment to the constitution. That is a difference.

<sup>118</sup> Supra at p. 23.

<sup>119</sup> BT-Drucks. 16/813, p. 10. The expression has also been used during the extensive committee-hearings and was part of the official agenda for the joint session by the committee for legal affairs and the committee for internal affairs on 31 May 2006, protocol of the 18<sup>th</sup> session, p. 1 (A), 5 (C), 9 (C), 10 (B), 11 (B), 21 (D), 37 (C), 111 (C), 123 (D), 139 (D), 147 (D), 160 (C).

<sup>120</sup> See also *Korioth*, supra note 119, p. 11, 148 (D) who stated that the provision does not follow a convincing underlying principle and that it does not deal with the problem of preventing a deficit. For the direct application this can be true but not for the indirectly adopted rules of the EU law. Additional research is necessary to clarify the other point whether a material national regulation is desirable.

<sup>121</sup> *European Central Bank*, supra note 103, p. 78.

inquiry could be shown. Particularly serious is the current nonchalance with which a number of governments override mandatory provisions of the financial law or have stretched them in questionable ways to meet their own needs.