

Deutscher Bundestag ■ Wissenschaftliche Dienste

The judgment of the Federal Constitutional Court on the Treaty of Lisbon

In its judgment of 30 June 2009, the Federal Constitutional Court (*Bundesverfassungsgericht*) held that the German **Act Approving the Treaty of Lisbon** is compatible with the Basic Law (*Grundgesetz*). Similarly, there are no constitutional objections to the Act Amending the Basic Law, Articles 23, 45 and 93 (*Gesetz zur Änderung des Grundgesetzes*). In contrast, the Act Extending and Strengthening the Rights of the Bundestag and the Bundesrat in European Union Matters (*Gesetz über die Ausweitung und Stärkung der Rechte des Bundestages und des Bundesrates in Angelegenheiten der Europäischen Union*, known as the **Accompanying Act**) is **unconstitutional** insofar as it does not grant Bundestag and Bundesrat sufficient rights of participation in the European lawmaking and treaty amendment procedures. The instrument of ratification of the Treaty of Lisbon may not be deposited until the Accompanying Act has been amended and has entered into force.

The judgment was passed in response to constitutional complaints and court proceedings between governmental bodies (*Organstreit* proceedings) against the Act Approving the Treaty of Lisbon, the Act Amending the Basic Law and the Accompanying Act. **The complainants** of the constitutional complaints are Dr Peter Gauweiler, Member of the Bundestag, the members of the Left Party parliamentary group in the Bundestag, the Federal Chairman of the ödp, Prof. Dr Klaus Buchner, and four individuals, one of whom is the former MEP Franz Ludwig Graf von Stauffenberg. Dr Peter Gauweiler and the Left Party parliamentary group in the Bundestag also filed applications in the court proceedings between governmental bodies. **The respondents** in the court proceedings between governmental bodies are both the German Bundestag and the Federal Government. The complainants assert that the EU has an ongoing democratic deficit, which is not removed even though the European Parliament is strengthened in the Treaty of Lisbon. They also fear a loss of state sovereignty as a result of the transfer to the EU of sovereign powers.

The Federal Constitutional Court develops the yardstick of its review — taking up the 1993 decision on the Treaty on European Union — on the basis of Article 38 (1) of the Basic Law, the right to vote, which guarantees a right to democratic self-determination. The Court states as follows: this right is a fundamental element of the principle of democracy. It may be infringed if the organisation of state power is altered in such a way that, for example, the German Bundestag, as the body which came into existence in direct pursuance of the principles of free and equal elections, retains no duties of substantial political weight. However, the Basic Law allows Germany to be integrated in an international, and in particular a European, peaceful order; here, the Federal Constitutional Court creates the **principle of openness towards European law**. But the requirement for a transfer of sovereign powers to the EU is compliance with the **principle of conferral**. Under this principle, only limited competences may be transferred to the EU by the Member States; the independent creation of new competences by the EU must be excluded. The Member States must still be able to politically shape the social, economic and cultural circumstances of life. By Article 23 (1), Article 20 (1) and (2) and Article 79 (3) of the Basic Law, European integration may not lead to an erosion of the democratic system of government in Germany. Emphasis is placed on the permanent **responsibility for integration** of the constitutional bodies, including in particular that of the Bundestag. At the same time, the Basic Law requires that the structure of the EU itself must comply with democratic principles. In this connection, the extent of democratic legitimation called for in each case depends on the extent of integration.

The legitimation of the EU, conveyed through the parliaments and governments of the Member States and reinforced by the European Parliament, is sufficient, provided that, inter alia, the principle of conferral is complied with.

Measured by this standard, the Act Approving the Treaty of Lisbon, in the opinion of the Federal Constitutional Court, in principle satisfies the constitutional requirements which the Basic Law imposes regarding the EU. The Court states that under the Treaty of Lisbon the EU is highly integrated, but **no federal state** is created; the EU is an association of sovereign states. In this connection, the Federal Constitutional Court pointedly describes the structure of the European Parliament: This, it states, is an assembly representing the peoples of the Member States, not the citizens; the principle of electoral equality does not apply to it. Nor can this restriction of European sovereignty be removed by other provisions of the Treaty, e.g. by the consultation rights of national parliaments. Germany remains a sovereign state. It is possible to sufficiently monitor compliance with the principle of conferral, at all events, if the rights of participation of the Bundestag and Bundesrat are reinforced; the Court sets this out in more detail when considering the Accompanying Act. Despite the newly created competences of the EU, the Bundestag retains duties of substantial weight. Among other things, although the competences of the EU have been considerably extended in the area of the administration of criminal justice, this is compatible with the Basic Law, provided that it is interpreted narrowly and there is a particular justification. The same applies to the new competences in the area of external trade relations. The mandatory requirement of parliamentary approval for the deployment of the armed forces abroad continues in effect. The Bundestag also retains a sufficient scope of influence in the area of social policy.

On the other hand, parts of the Accompanying Act infringe Article 38 (1) of the Basic Law in conjunction with Article 23 (1) of the Basic Law and must therefore be amended to comply with the Basic Law. Whereas the Federal Constitutional Court does not criticise the provisions of the Accompanying Act governing the exercise of the rights of the Bundestag and Bundesrat in connection with monitoring subsidiarity, it finds shortcomings in particular in the participation of the Bundestag and Bundesrat in the various cases of amendment of the Treaty of Lisbon. Matters as yet not taken into account in the Accompanying Act include the **simplified amendment procedure** under Article 48 (6) of the Treaty on European Union (TEU). This provision gives the government representatives in the European Council a broad scope of action for amendments of primary law, which are scarcely predictable for the German legislature. Every amendment in the simplified procedure therefore requires a statute under Article 23 (1) sentence 2 or sentence 3 of the Basic Law. In addition, the Treaty of Lisbon contains a **general bridging clause** in Article 48 (7) TEU, which provides that the voting modalities in the Council and the legislative procedure to be applied may be changed. This too is an amendment of the Treaties under primary law, and therefore, in order for the German representative on the European Council to consent to this, there must be a statute within the meaning of Article 23 (1) sentence 2 or sentence 3 of the Basic Law. The right of the national parliaments to make known their opposition, granted in Article 48 (7) subparagraph 3 TEU by the Treaty of Lisbon, is not a sufficient equivalent to the requirement of ratification. In addition, the Bundestag must be permitted to exercise its right to make known its opposition independently of a decision of the Bundesrat. Also, where the EU intends to rely on the **flexibility clause** of Article 352 of the Treaty on the Functioning of the European Union in order to round off the existing competences in a goal-related manner, this requires a statute on the basis of Article 23 (1) sentence 2 or sentence 3 of the Basic Law, because future cases to which this applies are undetermined.

The **Bundestag** intends to pass the Accompanying Act amended in accordance with the requirements of the Federal Constitutional Court in this electoral term. There are plans for an **extraordinary sitting on 26 August 2009** for the first reading. The third and final reading is to be held at an **extraordinary sitting on 8 September 2009**. The Bundesrat could then consent on 18 September 2009. Before the Treaty of Lisbon can enter into effect, however, a majority of the Irish people must vote in favour of the Treaty in a second referendum, which will probably take place in October 2009. In addition, the instruments of ratification have not yet been signed by the President

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