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Judgment of 30 June 2009

- 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08 und 2 BvR 1

**Act Approving the Treaty of Lisbon compatible with the Basic Law;
accompanying law unconstitutional to the extent that legislative bodies
have not been accorded sufficient rights of participation**

The Second Senate of the Federal Constitutional Court has decided today that the Act Approving the Treaty of Lisbon (*Zustimmungsgesetz zum Vertrag von Lissabon*) is compatible with the Basic Law. 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*) infringes Article 38.1 in conjunction with Article 23.1 of the Basic Law (*Grundgesetz - GG*) insofar as the Bundestag and the Bundesrat have not been accorded sufficient rights of participation in European lawmaking procedures and treaty amendment procedures. The Federal Republic of Germany's instrument of ratification of the Treaty of Lisbon may not be deposited as long as the constitutionally required legal elaboration of the parliamentary rights of participation has not entered into force. The decision was reached unanimously as regards the result, by seven votes to one as regards the reasoning (for the facts see German press releases no. 2/2009 of 16 January 2009 and no. 9/2009 of 29 January 2009).

In essence, the decision is based on the following considerations:

1. Overview of the central aspects of the judgment

The judgment focuses on the connection between the democratic system prescribed by the Basic Law on the level of the Federation and the level of independent rule which has been reached on the European level. The structural problem of the European Union is at the centre of the review of constitutionality. The extent of the Union's freedom of action has steadily and considerably increased, not least by the Treaty of Lisbon, so that meanwhile in some fields of policy, the European Union has a shape that corresponds to that of a federal state, i.e. is analogous to that of a state. In contrast, the internal decision-making and appointment procedures remain predominantly committed to the pattern of an international organisation, i.e. are analogous to international law; as before, the structure of the European Union essentially follows the principle of the equality of states.

As long as, consequently, no uniform European people, as the subject of legitimisation, can express its majority will in a politically effective manner that takes due account of equality in the context of the foundation of a European federal state, the peoples of the European Union, which are constituted in their Member States, remain the decisive holders of public authority, including Union authority. In Germany,

accession to a European federal state would require the creation of a new constitution, which would go along with the declared waiver of the sovereign statehood safeguarded by the Basic Law. There is no such act here. The European Union continues to constitute a union of rule (*Herrschaftsverband*) founded on international law, a union which is permanently supported by the intention of the sovereign Member States. The primary responsibility for integration is in the hands of the national constitutional bodies which act on behalf of the peoples. With increasing competences and further independence of the institutions of the Union, safeguards that keep up with this development are necessary in order to preserve the fundamental principle of conferral exercised in a restricted and controlled manner by the Member States. With progressing integration, fields of action which are essential for the development of the Member States' democratic opinion-formation must be retained. In particular, it must be guaranteed that the responsibility for integration can be exercised by the state bodies of representation of the peoples.

The further development of the competences of the European Parliament can reduce, but not completely fill, the gap between the extent of the decision-making power of the Union's institutions and the citizens' democratic power of action in the Member States. Neither as regards its composition nor its position in the European competence structure is the European Parliament sufficiently prepared to take representative and assignable majority decisions as uniform decisions on political direction. Measured against requirements placed on democracy in states, its election does not take due account of equality, and it is not competent to take authoritative decisions on political direction in the context of the supranational balancing of interest between the states. It therefore cannot support a parliamentary government and organise itself with regard to party politics in the system of government and opposition in such a way that a decision on political direction taken by the European electorate could have a politically decisive effect. Due to this structural democratic deficit, which cannot be resolved in a *Staatenverbund*, further steps of integration that go beyond the *status quo* may undermine neither the States' political power of action nor the principle of conferral.

The peoples of the Member States are the holders of the constituent power. The Basic Law does not permit the special bodies of the legislative, executive and judicial power to dispose of the essential elements of the constitution, i.e. of the constitutional identity (Article 23.1 sentence 3, Article 79.3 GG). The constitutional identity is an inalienable element of the democratic self-determination of a people. To ensure the effectiveness of the right to vote and to preserve democratic self-determination, it is necessary for the Federal Constitutional Court to watch, within the boundaries of its competences, over the Community or Union authority's not violating the constitutional identity by its acts and not evidently transgressing the competences conferred on it. The transfer of competences, which has been increased once again by the Treaty of Lisbon, and the independence of decision-making procedures therefore require an effective *ultra vires* review and an identity review of instruments of European origin in the area of application of the Federal Republic of Germany.

2. The standard of review

a) The Act Approving the Treaty of Lisbon is measured by the Federal Constitutional Court against the standard of the right to vote. As a right that is equivalent to fundamental right, a violation of the right to vote can be challenged by a constitutional complaint (Article 38.1 sentence 1 in conjunction with Article 93.1 no. 4a GG). The right to vote specifies the right to democratic self-determination, to free and equal participation in the state authority exercised in Germany and to compliance with the principle of democracy including the respect of the

constituent power of the people. The review of a violation of the right to vote also comprises encroachments on the principles which are codified in Article 79.3 of the Basic Law as the identity of the constitution. The citizens' right to determine, in equality and freedom, public authority affecting them with regard to persons and subject-matters through elections and other votes is anchored in human dignity and is the fundamental element of the principle of democracy. The principle of democracy is not amenable to weighing with other legal interests. Amendments of the Basic Law affecting the principles laid down in Article 1 and Article 20 of the Basic Law shall be inadmissible (Article 79.3 of the Basic Law). The so-called eternity guarantee takes the disposal of the identity of the free constitutional order even out of the hands of the constitution-amending legislature. The constituent power has not granted the representatives and bodies of the people a mandate to change the constitutional principles which are fundamental pursuant to Article 79.3 GG.

b) At the same time, the elaboration of the principle of democracy by the Basic Law is open to the objective of integrating Germany into an international and European peaceful order. The German constitution is oriented towards opening the state system of rule to the peaceful cooperation of the nations and towards European integration. Neither the integration *pari passu* into the European Union nor the integration into peacekeeping systems such as the United Nations necessarily lead to a change in the system of exercise of public authority in the Federal Republic of Germany. Instead, it is a voluntary, mutual commitment *pari passu*, which secures peace and strengthens the possibilities of shaping policy by joint coordinated action. The constitutional mandate to realise a united Europe which follows from Article 23.1 of the Basic Law and its Preamble means with regard to the German constitutional bodies that participation in European integration is not left to their political discretion. The Basic Law wants European integration and an international peaceful order. Therefore not only the principle of openness towards international law (*Völkerrechtsfreundlichkeit*), but also the principle of openness towards European law (*Europarechtsfreundlichkeit*) applies.

c) The authorisation to transfer sovereign powers to the European Union pursuant to Article 23.1 GG is, however, granted under the condition that the sovereign statehood of a constitutional state is maintained on the basis of a responsible integration programme according to the principle of conferral and respecting the Member States' constitutional identity, and that at the same time the Federal Republic of Germany does not lose its ability to politically and socially shape the living conditions on its own responsibility. Article 23.1 GG and the Preamble do not say anything about the final character of the political organisation of Europe. With its Article 23, the Basic Law grants powers to participate and develop a European Union which is designed as an association of sovereign national states (*Staatenverbund*). The concept of *Verbund* covers a close long-term association of states which remain sovereign, an association which exercises public authority on the basis of a treaty, whose fundamental order is, however, subject to the disposal of the Member States alone and in which the peoples of their Member States, i.e. the citizens of the states, remain the subjects of democratic legitimisation. The European Union must comply with democratic principles as regards its nature and extent and also as regards its own organisational and procedural elaboration (Article 23.1, Article 20.1 and 20.2 in conjunction with Article 79.3 of the Basic Law). This means firstly that European integration may not result in the system of democratic rule in Germany being undermined. This does not mean that a number of sovereign powers which can be determined from the outset or specific types of sovereign powers must remain in the hands of the state. European unification on the basis of a union of sovereign states under the Treaties may, however, not be realised in such a way

that the Member States do not retain sufficient room for the political formation of the economic, cultural and social circumstances of life. This applies in particular to areas which shape the citizens' circumstances of life, in particular the private space of their own responsibility and of political and social security, which is protected by the fundamental rights, and to political decisions that particularly depend on previous understanding as regards culture, history and language and which unfold in discourses in the space of a political public that is organised by party politics and Parliament. To the extent that in these areas, which are of particular importance for democracy, a transfer of sovereign powers is permitted at all, a narrow interpretation is required. This concerns in particular the administration of criminal law, the civil and the military monopoly on the use of force, fundamental fiscal decisions on revenue and expenditure, the shaping of the circumstances of life by social policy and important decisions on cultural issues such as the school and education system, the provisions governing the media, and dealing with religious communities.

d) The Basic Law does not grant the German state bodies powers to transfer sovereign powers in such a way that their exercise can independently establish other competences for the European Union. It prohibits the transfer of competence to decide on its own competence (*Kompetenz-Kompetenz*). The principle of conferral is therefore not only a principle of European law (Article 5.1 of the Treaty on European Union ; Article 5.1 sentence 1 and 5.12 of the Treaty on European Union in its version of the Treaty of Lisbon), but, just like the European Union's obligation to respect the Member States' national identity (Article 6.3 TEU; Article 4.2 sentence 1 TEU Lisbon), it takes up constitutional principles from the Member States. The integration programme of the European Union must therefore be sufficiently precise. To the extent that the Member States elaborate the law laid down in the Treaties in such a way that, with the principle of conferral fundamentally continuing to apply, an amendment of the law laid down in the Treaties can be brought about without a ratification procedure, a special responsibility is incumbent on the legislative bodies, apart from the Federal Government, as regards participation, which, in Germany, must, on the national level, comply with the requirements under Article 23.1 of the Basic Law (responsibility for integration). The act approving a treaty amending a European Treaty and the national accompanying laws must therefore be such that European integration continues to take place according to the principle of conferral without the possibility for the European Union of taking possession of *Kompetenz-Kompetenz* or to violate the Member States' constitutional identity which is not amenable to integration, in this case, that of the Basic Law. For borderline cases of what is still constitutionally admissible, the German legislature must, if necessary, make arrangements with its laws that accompany approval to ensure that the responsibility for integration of the legislative bodies can sufficiently develop.

e) The Federal Constitutional Court reviews whether legal instruments of the European institutions and bodies, adhering to the principle of subsidiarity under Community and Union law (Article 5.2 ECT; Article 5.1 sentence 2 and 5.3 TEU Lisbon), keep within the boundaries of the sovereign powers accorded to them by way of conferred power (*ultra vires* review). Furthermore, the Federal Constitutional Court reviews whether the inviolable core content of the constitutional identity of the Basic Law pursuant to Article 23.1 sentence 3 in conjunction with Article 79.3 of the Basic Law is respected (identity review). The exercise of these competences of review, which are constitutionally required, safeguards the fundamental political and constitutional structures of sovereign Member States, which are recognised by Article 4.2 sentence 1 TEU Lisbon, even with progressing integration. Its application in a given case follows the principle of the Basic Law's openness towards European

Law.

3. The subsumption

a) There are no decisive constitutional objections to the Act Approving the Treaty of Lisbon.

aa) With the present status of integration, the European Union does, even upon the entry into force of the Treaty of Lisbon, not yet attain a shape that corresponds to the level of legitimisation of a democracy constituted as a state. It is not a federal state but remains an association of sovereign states to which the principle of conferral applies.

The European Parliament is not a body of representation of a sovereign European people but a supranational body of representation of the peoples of the Member States, so that the principle of electoral election, which is common to all European states, is not applicable with regard to the European Parliament. Other provisions of the Treaty of Lisbon, such as the double qualified majority in the Council (Article 16.4 TEU Lisbon, Article 238.2 of the Treaty on the Functioning of the European Union), the elements of participative, associative and direct democracy (Art. 11 TEU Lisbon) as well as the institutional recognition of the national Parliaments (Article 12 TEU Lisbon) cannot compensate the deficit of European public authority that exists when measured against requirements on democracy in states, but can nevertheless increase the level of legitimisation of the *Staatenverbund*.

bb) With the entry into force of the Treaty of Lisbon, the Federal Republic of Germany will remain a sovereign state. In particular, the substance of German state authority is protected. The distribution of the European Union's competences, and their delimitation from those of the Member States, takes place according to the principle of conferral and according to other mechanisms of protection, in particular according to provisions concerning the exercise of competences. The transfer of sovereign powers to the European Union, which is thus performed in a controlled and responsible manner, is not called into question by individual provisions of the Treaty of Lisbon. This applies first of all to the simplified amendment procedure (see in particular Article 48.6 TEU Lisbon). The "approval" of the Federal Republic of Germany in simplified revision procedures requires a law within the meaning of Article 23.1 sentence 2 of the Basic Law as a *lex specialis* with regard to Article 59.2.

cc) To the extent that the general bridging clause under Article 48.7 TEU Lisbon makes possible the transition from the principle of unanimity to the principle of qualified majority in the decision-making of the Council, or the transition from the special to the ordinary legislative procedure, this is also a Treaty amendment under primary law, which is to be assessed pursuant to Article 23.1 sentence 2 of the Basic Law. The national parliaments' right to make known their opposition (Article 48.7(3) TEU Lisbon) is not a sufficient equivalent to the requirement of ratification. The representative of the German government in the European Council may only consent to a Treaty amendment brought about by the application of the general bridging clause if the German *Bundestag* and the *Bundesrat* have adopted within a period yet to be determined a law pursuant to Article 23.1 of the Basic Law, which takes the purpose of Article 48.7(3) TEU Lisbon as an orientation. This also applies in case of the special bridging clause pursuant to Article 81.3(2) TFEU being used.

dd) A law within the meaning of Article 23.1 sentence 2 of the Basic Law is not required to the extent that special bridging clauses are restricted to areas which are already sufficiently determined by the Treaty of Lisbon, and which do not provide for a right for national

Parliaments to make known their opposition. Also in these cases, however, it is incumbent on the *Bundestag* and, to the extent that the legislative competences of the *Länder* are affected, on the *Bundesrat*, to comply with their responsibility for integration in another suitable manner. The veto right in the Council may not be waived without the participation of the competent legislative bodies even as regards subject-matters which have already been factually determined in the Treaties. The representative of the German government in the European Council or in the Council may therefore only consent to an amendment of primary legislation through the application of one of the special bridging clauses on behalf of the Federal Republic of Germany if the German *Bundestag* and, to the extent that this is required by the provisions on legislation, the *Bundesrat*, have approved this decision within a period yet to be determined, which takes the purpose of Article 48.7(3) TEU Lisbon as an orientation.

ee) Also the flexibility clause under Article 352 TFEU can be construed in such a way that the integration programme envisaged in the provisions can still be predicted and determined by the German legislative bodies. With a view to the undetermined nature of possible cases of application, the use of the flexibility clause constitutionally requires ratification by the German *Bundestag* and the *Bundesrat* on the basis of Article 23.1 sentences 2 and 3 of the Basic Law.

ff) The Federal Constitutional Court's competence of review is not affected by Declaration no. 17 on Primacy annexed to the Final Act of the Treaty of Lisbon. The foundation and the limit of the applicability of European Union law in the Federal Republic of Germany is the order to apply the law which is contained in the Act Approving the Treaty of Lisbon, which can only be given within the limits of the current constitutional order. In this respect, it is insignificant whether the primacy of application, which the Federal Constitutional Court has already essentially recognised for Community law, is provided for in the Treaties themselves or in Declaration no. 17 annexed to the Final Act of the Treaty of Lisbon.

gg) The competences that have been newly established or deepened by the Treaty of Lisbon in the areas of judicial cooperation in criminal and civil matters, external trade relations, common defence and with regard to social concerns can, within the meaning of an interpretation of the Treaty that does justice to its purpose, and must, in order to avoid imminent unconstitutionality, be exercised by the institutions of the European Union in such a way that on the level of the Member States, tasks of sufficient weight as to their extent as well as their substance remain which legally and practically are the precondition of a living democracy. In this context, the following aspects must be given particular attention:

- Due to the fact that democratic self-determination is affected in an especially sensitive manner by provisions of criminal law and law of criminal procedure, the corresponding foundations of competence in the Treaties must be interpreted strictly - on no account extensively -, and their use requires particular justification.
- The use of the dynamic blanket authorisation pursuant to Article 83.1(3) TFEU to extend the list of particularly serious crimes with a cross-border dimension "on the basis of developments in crime" is factually tantamount to an extension of the competences of the European Union and is therefore subject to the requirement of the enactment of a specific statute under Article 23.1 sentence 2 GG.
- In the area of judicial cooperation in criminal matters, particular requirements must additionally be placed on the provisions which accord a Member State special rights in the legislative procedure (Article

82.3, Article 83.3 TFEU: so-called emergency brake procedure). From the perspective of German constitutional law, the necessary measure of democratic legitimisation via the national parliaments can only be safeguarded by the German representative in the Council exercising the Member State's rights set out in Article 82.3 and Article 83.3 TFEU only on the instruction of the *Bundestag* and, to the extent that this is required by the provisions on legislation, of the *Bundesrat*.

- The mandatory requirement of parliamentary approval for the deployment of the armed forces abroad will continue to exist upon the entry into force of the Treaty of Lisbon. The Treaty of Lisbon does not confer on the European Union the competence to use the Member States' armed forces without the approval of the respective Member State affected or of its parliament. It also does not restrict the possibilities of action of the German *Bundestag* in the area of social policy to such an extent that this would impair the principle of the social state (Article 23.1 sentence 3 in conjunction with Article 79.3 GG) in a constitutionally objectionable manner and inadmissibly curtail the democratic scope for decision-making that is required in this context.

b) There are also no decisive constitutional objections against the Act Amending the Basic Law (Articles 23, 45 and 93) (*Gesetz zur Änderung des Grundgesetzes*). A violation of democratic principles pursuant to Article 79.3 GG occurs neither by Article 23.1a GG, new version, which elaborates the right to bring a subsidiarity action as a minority right and sets the quorum at one fourth of the Members, nor by Article 45 sentence 3 GG, new version.

c) In contrast, the Act Extending and Strengthening the Rights of the *Bundestag* and the *Bundesrat* in European Union Matters infringes Article 38.1 in conjunction with Article 23.1 of the Basic Law insofar as rights of participation of the German *Bundestag* and the *Bundesrat* have not been elaborated to the constitutionally required extent. If the Member States elaborate the European law laid down in the Treaties on the basis of the principle of conferral in such a way that an amendment of the Treaty law can be brought about solely or decisively by the institutions of the European Union - albeit under the requirement of unanimity in the Council -, a special responsibility is incumbent on the national constitutional bodies in the context of participation. In Germany, this responsibility for integration must on the national level comply with the constitutional requirements made in particular under Article 23.1 GG.

This press release is also available in the original german version.

Zum ANFANG des Dokuments