



Europaudvalget EU-konsulent

Til: Udvalgets medlemmer og stedfortrædere
Dato: 1. juli 2009

Tysklands forfatningsdomstol godkender Lissabontraktaten og præciserer grænserne for Tysklands deltagelse i EU-samarbejdet

Den tyske forfatningsdomstol, *Bundesverfassungsgericht*, i Karlsruhe har den 30. juni 2009 fastslået, at Tysklands lov om ratifikation af Lissabontraktaten ikke strider mod den tyske forfatning, *Grundgesetz*. Afgørelsen er truffet med enstemmighed for så vidt angår resultatet, og med syv stemmer mod én for så vidt angår begrundelsen.

Forfatningsdomstolen annullerer dog samtidig en tysk lov, som ledsager ratifikationsloven, fordi den ikke sikrer det tyske parlaments to kamre, Forbundsagen og Forbundsrådet tilstrækkelig deltagelse i beslutningsprocessen efter Lissabontraktatens ikrafttræden. Det betyder, at Tysklands præsident må afvente vedtagelsen af en ny – forfatningsmæssigt korrekt – lov, før han kan afslutte ratifikationsprocessen, som kun mangler oversendelsen af ratifikationsdokumentet.

Dommen bringer samtidig en række interessante præciseringer, som udstikker grænserne for Tysklands fremtidige deltagelse i EU-samarbejdet efter en evt. ikrafttræden af Lissabontraktaten.

Det bemærkes, at denne note navnlig er udarbejdet på grundlag af den omfattende pressemeddelelse fra *Bundesverfassungsgericht*, som vedlægges (på engelsk), samt sporadiske opslag i den godt 100 sider lange dom.

Sagens baggrund

Sagen var anlagt af en broget gruppe af borgere samt af politikere fra bl.a. det bayerske kristne parti CSU, som er søsterparti til CDU, og venstrefløjspartiet "Die Linke", som er efterfølger for det østtyske kommunistparti. Sagsøgerne

havde nedlagt påstand om, at den tyske lov om ratifikation af Lissabontraktaten var i strid med den tyske *Grundgesetz*, da den påtænkte suverænitetsoverdragelse fratager det tyske Parlament dets grundlovshjelmede prerogativer og navnlig ikke overholder de demokratiske værdier, der er forankret i den tyske grundlov.

I den forbindelse havde sagsøgerne bl.a. gjort gældende, at Lissabontraktaten udvandede det demokratiprincip, som gælder i den tyske forfatning, og at den tyske forfatning derfor blev sat ud af kraft, hvilket ifølge artikel 146 i *Grundgesetz* kun kan ske ved folkeafstemning.

Den tyske suverænitetsdebat sammenholdt med den danske

De suverænitets- og forfatningsspørgsmål, sagen drejede sig om, adskiller sig en del fra den danske debat om overdragelse af suverænitet til EU, som tager afsæt i den særlige formulering af den danske Grundlovs § 20.

Hvor den danske grundlov kræver, at overdragelse af suverænitet skal vedtages ved en særlig lov med 5/6-dels flertal i Folketinget eller ved folkeafstemning, indeholder den tyske *Grundgesetz* ikke noget krav om folkeafstemning eller om et særligt, kvalificeret flertal i parlamentet. Formelt set kræver overdragelsen alene, at der vedtages en lov, som godkendes af Forbundsrådet.

Til gengæld følger det af den danske grundlov, at suverænitet kun kan overdrages "i nærmere bestemt omfang", hvorimod der af den tyske *Grundgesetz* kan udledes en række indholdsmæssige forudsætninger for, at Tyskland – ved lov – kan overdrage suverænitet til EU.

Disse væsentlige forskelle på overdragelse af suverænitet efter de to landes forfatninger indebærer således, at der ikke kan sættes lighedstegn mellem den danske og den tyske suverænitetsdiskussion. Eller med andre ord mens den danske grundlov primært fokuserer på, om og i hvilket omfang der overdrages suverænitet, handler den tyske problemstilling overvejende om, hvorvidt de nærmere forudsætninger for overdragelsen af suveræniteten til stadighed er opfyldt.

Det er disse forudsætninger for Tysklands deltagelse i EU-samarbejdet, dommen handler om, og som har rod i artikel 23, stk. 1, i *Grundgesetz*, som er den tyske pendant til grundlovens § 20.

Artikel 23, stk. 1, i Grundgesetz lyder:

"(1) Zur Verwirklichung eines Vereinten Europas wirkt die Bundesrepublik Deutschland bei der Entwicklung der Europäischen Union mit, die demokratischen, rechtsstaatlichen, sozialen und föderativen Grundsätzen und dem Grundsatz der Subsidiarität verpflichtet ist und einen diesem Grundgesetz im wesentlichen vergleichbaren Grundrechtsschutz gewährleistet. Der Bund kann hierzu durch Gesetz mit Zustimmung des Bundesrates Hoheitsrechte übertragen. [...]"

På dansk (egen oversættelse)

*"Med henblik på virkeliggørelsen af et forenet Europa deltager Forbundsrepublikken Tyskland i udviklingen af Den Europæiske Union, som er underlagt demokratiske, retsstatslige, sociale og føderative principper, samt nærhedsprincippet, og som sikrer en beskyttelse af de grundlæggende rettigheder, der i det væsentlige svarer til den, der sikres med denne Grundlov. **Til dette formål kan Forbundet ved lov overdrage suverænitet med Forbundsrådets samtykke [...]***

Dommens hovedkonklusion

Dommens hovedkonklusion er, at Lissabontraktaten ikke er i strid med den tyske forfatning, da den ikke fratager Tysklands institutioner deres beføjelser til selv at regere over landet.

Denne konklusion når forfatningsdomstolen frem til på baggrund af en generel argumentation om EU's opbygning og en analyse af grænserne for de beføjelser, der overlades til EU, som underbygges af en række væsentlige forudsætninger.

- EU's manglende føderale karakter og bevarelsen af Tysklands identitet

Forfatningsdomstolen indleder med at fastslå, at EU inden for visse politikområder har en opbygning, der har lighedspunkter med en forbundsstats, men at dens interne beslutningsprocedurer overvejende følger mønstret i internationale organisationer. Argumentationen understøttes af en evaluering af Europa-Parlamentets demokratiske rolle i EU-beslutningsprocessen. Efter Bundesverfassungsgerichts opfattelse er Parlamentet ikke i dag i stand til at tage repræsentative flertalsafgørelser, da valget af medlemmer af Europa-Parlamentet ikke sker på ligeligt grundlag. Herved hentydes formentlig til den store ubalance mellem de enkelte EU-

landes repræsentation i Europa-Parlamentet, som betyder, at de store lande (som Tyskland) ikke har et antal MEP'ere, som er proportionalt med deres befolkningsandel i EU. Domstolen konkluderer, at så længe et ensartet europæisk folk ikke kan udtrykke sin vilje på en måde, som tager hensyn til ligheden som fundamentet for en forbundsstat, er det befolkningerne i de enkelte EU-lande, som sidder inde med nøglen til den offentlige magt, herunder EU's magt.

Lissabontraktaten vurderes herefter i forhold til stemmeretten, som udgør en grundlæggende og umistelig rettighed efter den tyske *Grundgesetz*. Befolkningens ret til ved valg at udpege de myndigheder, der skal regere over dem, er det grundlæggende element i demokratiprincippet. Imidlertid er demokratiprincippet ikke til hinder for at integrere Tyskland i et internationalt og europæisk fællesskab. Det forfatningsmæssige mandat herfor er artikel 23, stk. 1, i *Grundgesetz*, som overlader den europæiske integration til de politiske instanser.

Imidlertid gives tilladelsen til suverænitetsoverdragelse i artikel 23, stk. 1, i *Grundgesetz* under den forudsætning, at den suveræne stat i henhold til forfatningen bevares på grundlag af et ansvarligt integrationsprogram, som respekterer statens forfatningsmæssige identitet, og at Tyskland ikke mister evnen til politisk og socialt at fastsætte levevilkårene for sin befolkning. Artikel 23 i *Grundgesetz* giver tilladelse til at deltage i og udvikle en Europæisk Union, som er et fællesskab af suveræne nationale stater. Det betyder, at EU skal overholde demokratiske principper, hvilket navnlig vil sige, at den europæiske integration ikke må føre til, at Tysklands demokratiske styreform undermineres. Det europæiske samarbejde må ikke gennemføres på en sådan måde, at medlemsstaterne ikke bevarer passende rum til politisk at fastsætte befolkningens økonomiske, kulturelle eller sociale levevilkår.

Domstolen understreger i den forbindelse betydningen af princippet om tildelte kompetencer, som det bærende princip i EU-samarbejdet, og gentager sine tidligere udtalelser om, at den tyske forfatning forhindrer, at EU kan overdrages kompetence til at fastsætte sin egen kompetence (kompetenz-kompetenz).

Således ligger hovedansvaret for EU's integration fortsat i hænderne på de nationale forfatningsmæssige institutioner, som handler på vegne af befolkningen.

Så vidt kan dommen udlægges som en forfatningsmæssig "frifindelse" af Lissabontraktaten. Men af dommens præmisser kan også læses en række forbehold og løftede pegefingre i forhold til Tysklands deltagelse i EU-

samarbejdet og til den fremtidige udvikling heraf og ikke mindst til den konkrete fortolkning af de nye bestemmelser i Lissabontraktaten.

Krav om særlig ratifikation efter den tyske grundlovs artikel 23

Domstolen præciserer således, at en række mekanismer i Lissabontraktaten kræver, at der vedtages en særskilt lov efter artikel 23, stk. 1, i Grundgesetz, dvs. gives et udtrykkeligt samtykke af Forbundsdagen og Forbundsrådet.

Det gælder bl.a.:

- anvendelsen af den generelle passerelle i artikel 48, stk. 7, i EU-traktaten (efter Lissabontraktaten), dvs. muligheden for at ændre beslutningsprocedurer fra enstemmighed til kvalificeret flertal eller fra særlig beslutningsprocedure til almindelig beslutningsprocedure
- anvendelse af de såkaldte "nødbremser". Med Lissabontraktaten overgår en del politikområder til at blive vedtaget med kvalificeret flertal. Nogle af disse overgange til kvalificeret flertal bliver ledsaget af en "nødbremse". Nødbremsen gør det muligt for et medlemsland at henvise et uønsket forslag til Det Europæiske Råd, hvor beslutninger tages med enstemmighed. Nødbremsen findes på området om social tryghed for vandrende og på det strafferetlige område..
- ved udsendelse af væbnede styrker
- anvendelse af fleksibilitetsklausulen i artikel 352 (nuværende artikel 308), dvs. den hjemmel der bliver anvendt til at vedtage EU-lovgivning uden specifik hjemmel
- udvidelse af listen over kriminalitetsområder i artikel 83, stk. 1, i traktatens om EU's funktionsmåde .

Erklæring nr. 17 om forrangsprincippet

Bundesverfassungsgericht gentager sin hidtidige argumentation om, at Lissabontraktatens henvisning til forrangsprincippet ikke fratager Forfatningsdomstolens ret til at prøve, om EU-rettens strider mod den tyske Grundgesetz.

Særlige politikområder, som forfatningsdomstolen vil holde et vågent øje med

Hvad der måske kan være mere relevant for andre end tyske myndigheder er imidlertid forfatningsdomstolens forbehold i forhold til den måde, hvorpå nogle af de nye bestemmelser i Lissabontraktaten vil blive fortolket på.

Således anfører forfatningsdomstolen, at de nyligt overførte kompetencer på området for retligt samarbejde og strafferetlig og civilretlige områder, handelspolitik, fælles forsvar og sociale anliggender skal udføres af EU-institutionerne på en måde, at der bevares et tilstrækkeligt omfang af opgaver i medlemsstaterne.

I den forbindelse henviser forfatningsdomstolen særligt til, at EU-landenes demokratiske selvbestemmelse er påvirket på særlig følsom måde inden for områderne strafferet og strafferetspleje. Derfor skal de nye kompetencebestemmelser på disse områder ifølge forfatningsdomstolen fortolkes strengt - og aldrig udvidende – og deres anvendelse kræver særlig begrundelse.

Sidstnævnte kommentar er ikke blot rettet til de lovgivningsmæssige aktive EU-institutioner, men lige så meget til EF-Domstolen, som til syvende og sidst er ansvarlig for fortolkningen af traktaten.

Annulation af lov om styrkelse af parlamentets rettigheder i EU-sager

Forfatningsdomstolen slutter af med at annullere loven om Bundestags og Bundesrat's rettigheder i EU-sager. Begrundelsen er, at den ikke lever op til Grundgesetz, da den ikke sikrer deres deltagelse i de tilfælde, hvor EU-institutionerne – dog med enstemmighed i Rådet – kan gennemføre ændringer af traktaten (EU-traktatens Artikel 48).

./. Pressemeddelelsen vedlægges på engelsk¹.

Med venlig hilsen

Thomas Fich
(3611)

¹ Den tyske udgave af dommen kan findes på hjemmesiden:
<http://www.bundesverfassungsgericht.de/pressemitteilungen/bvg09-072.html>
Dommen kan læses (på engelsk og på tysk) på
http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208.html.

Press releases

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Federal Constitutional Court - Press office -

Press release no. 72/2009 of 30 June 2009

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 182/09](#) -

**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

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in international 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.

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