



BULLETIN

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German Federal Constitutional Court Ruling on Lisbon Treaty Ratification

by Ryszarda Formuszewicz

The 30 June 2009 ruling of the German Federal Constitutional Court opened the way for completion of the Lisbon Treaty ratification process in the country. But the linkage between deposition of ratification instruments and entry into force of new regulations on the Bundestag's participation in EU-related matters poses a threat to the Treaty's taking effect swiftly. With parliamentary elections to be held soon, delays may be provoked by differences among Christian Democrats on how to interpret the Federal Constitutional Court's instructions. It is also highly probable that the amended provisions will be appealed against once again.

The Federal Constitutional Court reviewed three parliamentary acts passed in connection with Lisbon Treaty ratification: the Act Approving the Lisbon Treaty, the Act Amending the Basic Law (German Constitution), and the Act Extending and Strengthening the Rights of the Bundestag and Bundesrat in European Union Matters (the so-called accompanying law—*Begleitgesetz*). The justices questioned only the constitutionality of the last act, to the extent that it did not ensure the Bundestag and Bundesrat's required participation in treaty amendment and European legislative procedures.

Main Points of the Ruling. The Federal Constitutional Court's deliberation is in line with its earlier jurisprudence on European matters. In the context of new treaty foundations, the Federal Constitutional Court re-examined the relationship between the German state and the EU. Emphasizing the Constitution's openness to European integration, the justices saw generally no threat to German statehood from Lisbon Treaty provisions. While it is true that the Treaty opened a new stage in integration, the European Union, even with its single legal personality, will nevertheless remain an association of states (*Staatenverbund*), rather than a federation—in line with the concept formulated in the 1993 ruling on the Maastricht Treaty. A central guarantee for the member states to retain their position of "masters of the Treaties" is the principle of conferral—and, in the Federal Constitutional Court's opinion, the Lisbon Treaty provisions do not vest the EU with the right to decide on its own competence. The Court emphasized that the German Constitution does not authorize the bodies acting in Germany's name to renounce the right to self-determination of the German people in the form of Germany's sovereignty under international law. Therefore, a hypothetical transformation of the European Union into a federation would require the latter's direct legitimization by the German people and adoption of a new German Constitution.

The Federal Constitutional Court upheld the position that—with the principle of conferral retained—the decisive factor is the EU's democratic legitimacy, as provided by national parliaments elected by free and equal ballot. The European Parliament is only assigned an auxiliary role of representing the peoples of the member states, not the European demos. The ruling stresses the need to keep a balance between EU and member-state competences: despite progress with integration, member states must retain the political capacity to influence economic, cultural and social relations in their respective territories. It would be unacceptable if the organization of state authority were so transformed as to deprive the Bundestag of tasks of major political importance. This applies to the political decisions which are determined in a special way by culture, history or language (e.g. citizenship, the monopoly on the use of force, criminal law, fiscal policy, school and education system, family law, relations with religious communities). In this respect, the Treaty's competences-related provisions require narrow interpretation. The justices reserve the right for the Federal Consti-

tutional Court to review the EU's legal instruments in respect of the observance of division of powers and the principle of subsidiarity and to safeguard "the inviolable core content of the German constitutional identity."

Extent of Legislative Bodies' Participation in Respect of EU Matters. The Court stressed the importance of the German constitutional bodies' responsibility for the compliance of integration process with the constitutional requirements (*Integrationsverantwortung*). Not confined to one-off consent to treaty ratification, this legal and political responsibility also extends to the further implementation of the treaty, and especially the cases where the law laid down in the Treaties might be changed by EU bodies without the requirement of ratification by member states. In such cases, constitutional constraints on sovereignty rights' transfer and possible constitutional revisions have to be respected, which involves passage of a law on more stringent procedural requirements (in accordance with Article 23.1 of the German Constitution).

The ruling specifies the premises for the Bundestag and Bundesrat's so-defined mandatory cooperation on EU matters with the federal government. In respect of simplified treaty-revision procedure, the Federal Constitutional Court pointed to—as a key circumstance—the limited capacity (at the Lisbon ratification stage) to identify the extent of potential modifications of provisions regulating EU internal policies. Nor did the justices find the predictability of integration process to suffice in respect of the flexibility clause (Article 352 TFEU, currently Article 308 TEC). Given its new wording, EU measures taken on its basis are not confined to the operation of the Common Market, but cover "the policies defined in the Treaties," except for the CFSP.

Also in respect of the Treaty's bridging clauses—making room for abolishment of the unanimity requirement in adopting decisions and changing legislative procedure from special into ordinary—the Federal Constitutional Court found the legislative bodies to be under an obligation to assess in the giving case, whether the application of such clause is warranted by a sufficient level of the EU's democratic legitimacy. In the Court's opinion, a national parliament's right to make known their opposition with regard to a general clause and to a clause concerning family law with cross-border implications does not constitute a sufficient equivalent of the ratification requirement. Softer conditions were imposed on Bundestag to give its consent to application of bridging clauses in areas already sufficiently determined in the Lisbon Treaty.

Regarding the Lisbon Treaty's provisions on suspension of ordinary legislative procedure and submission of a legislative draft to the Council at the request of a member state threatened with being outvoted, justified by potential violation of its vital interests (so-called "emergency break"), the federal government may act only in compliance with instructions of the Bundestag or—where necessitated by a vertical division of legislative competences—of the Bundesrat. But dynamic blanket empowerments in the field of the cooperation in criminal matters generally require a statutory consent to transfer sovereignty rights.

Work on Statutory Implementation of the Federal Constitutional Court's Ruling. A timetable adopted by the Bundestag provides for the completion of the legislative process prior to the 27 September election, and prior to Ireland's new referendum. But the new regulation's passage at the planned date of 8 September and its approval by the Bundesrat on 18 September are contingent on whether or not a political agreement is reached as to the content of the regulation.

The demand to strengthen the Bundestag's position on EU matters is by no means new; what remains a bone of contention is its implementation. Although the ruling primarily presents in detail the legislative bodies' rights in case of modifying primary law, the Bavaria-based CSU party (drawing on a broadening interpretation of the Federal Constitutional Court's ruling) has called i.a. for a constitutional provision according to which the position of the Bundestag and Bundesrat would be binding with reference to any draft of EU legal instrument for the federal government during negotiations at EU level. The CSU's demand is backed by the Left Party, which is principally opposed to the Lisbon Treaty. Other parties fear that this would restrict Germany's influence on the EU's decision-making process. The Bavarian initiative also corresponds to the demands from other Länder to considerably broaden the powers of the Bundesrat, whereas the Federal Constitutional Court's priority was to reinforce the directly legitimized Bundestag.

The gap between the future regulation and individual parties' expectations about the extent of modification of the German model of constitutional bodies' cooperation on European policy may result in an appeal being lodged against that regulation. The most likely outcome is that the initiators of the just-ended proceedings on constitutionality of Lisbon Treaty ratification will request to have the new regulations assessed by the Federal Constitutional Court.