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## Thresholds for the European Parliament Elections in Germany Declared Unconstitutional Twice

Bundesverfassungsgericht

Judgment of 9 November 2011, 2 BvC 4/10, *5% threshold*

Judgment of 26 February 2014, 2 BvE 2/13, 2 BvR 2220/13, *3% threshold*

Bastian Michel\*

A uniform system for elections to the European Parliament on the basis of Article 223(1) TFEU has yet to be adopted and there is no prospect that this will happen in the near future. For the time being, elections to the European Parliament are governed by 28 separate electoral regimes under the national laws of the 28 member states. The 28 regimes have to comply with the respective national constitutional requirements; they are subject to, and to some degree harmonised by, Union law, in particular the Direct Elections Act; and they have to respect the minimum standards flowing from the European Convention of Human Rights, specifically Article 3 of the First Protocol. These layered requirements are in basic agreement with each other on the four principles of direct and universal suffrage by free and secret ballot, although it must be noted that even as far as these four notions are concerned the 28 regimes differ on the details.<sup>1</sup> But regarding a fifth principle, equality of votes, there is a more profound problem.

Elections to the European Parliament are intentionally unequal in one respect: the degressive apportionment of seats to member states, laid down in Article 14(2) TEU. As a consequence, European citizens in smaller member states are over-represented compared to their fellow European citizens in larger member states. A vote cast in Malta has about three times as much influence on the composition of the European Parliament as a vote cast in the Czech Republic and about seven times as much as one

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<sup>1</sup> E.g. limitation on universality by an age requirement, ranging from 16 years for the right to vote in Austria, § 10 Europawahlordnung, to 25 for the right to stand as a candidate in Italy, Art. 4 Legge 24 Gennaio 1979, n. 18; on universal suffrage as a tripartite question between UK law, EU law and the Convention, see A. Lansbergen, 'Prisoner Disenfranchisement in the United Kingdom and the Scope of EU Law', 10 *EuConst* (2014) p. 126; and, in this issue, J.W. van Rossem and H. van Eijken, 'Prisoner Disenfranchisement and the Right to Vote in Elections for the European Parliament', 12 *EuConst* (2016) p. ###.

cast in Germany.<sup>2</sup> Equality is conspicuously absent from the enumeration of principles in Article 14(3) TEU and Article 39(2) of the Charter. Where does this leave electoral equality?

In 1995 the German Bundesverfassungsgericht rejected a constitutional complaint against the skewed allocation of seats. It recognised that because of the degressive apportionment, electoral equality throughout Europe did not exist, but nor did it need to. In a democratic state equal political rights within the sovereign people were essential, but the European Union was not a state, it was an association of states, and the Parliament was the representative assembly not of one European people, but of the several national peoples. In approving the degressive apportionment of seats as enshrined in the latest amendment treaty, the German legislature had not breached the Grundgesetz.<sup>3</sup> The Court developed this view on the European Parliament's democratic standing further in its *Lisbon* judgment of 2009.<sup>4</sup>

In the two judgments treated here, the Bundesverfassungsgericht was concerned with a slightly narrower problem: equality of votes cast within Germany, for the German seat contingent in the European Parliament. The Court dissociated this question from the broader complex of electoral equality throughout Europe. As a matter of the German Constitution alone, votes cast in Germany had to be treated equally. The same held for the parallel principle of equal opportunities for political parties. In 2011, this led to the 5 per cent threshold for European elections in Germany being declared unconstitutional:

The severe interference with the principles of electoral equality and equal opportunities for political parties, as a consequence of the 5 per cent threshold in § 2(7) Europawahlgesetz, cannot be justified in the current legal and factual circumstances.<sup>5</sup>

In the summer of 2013 the German legislature introduced a 3 per cent threshold, which the Bundesverfassungsgericht declared void as well.<sup>6</sup>

Both judgments are marked by a strict standard of constitutionality review. They feature an extensive assessment of the legal and factual circumstances under which the European Parliament functions; but apart from this, considerations reaching beyond the confines of Germany are hardly to be found. After summarising the two judgments, this

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<sup>2</sup> Estimated on the basis of valid votes cast in the EP elections 2009 and 2014; factors of around 7 and 11 if based on entitled voters.

<sup>3</sup> BVerfG 31 May 1995, 2 BvR 635/95, published in *NJW* (1995) p. 2216; with reference to BVerfGE 89, 155, *Maastricht*.

<sup>4</sup> BVerfGE 123, 267; for a critical comment see R. Bieber, "An Association of Sovereign States", 5 *EuConst* (2009) p. 391.

<sup>5</sup> 2011 case, *Leitsatz*, the official one-sentence summary, translation by the author; longer summary in English in BVerfG, press release 70/2011, 9 November 2011, <[www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2011/bvg11-070.html](http://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2011/bvg11-070.html)>, visited 21 September 2015; the judgment is also published in BVerfGE 129, 300.

<sup>6</sup> 2014 case; summary in English in BVerfG, press release 14/2014, 26 February 2014, <[www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2014/bvg14-014.html](http://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2014/bvg14-014.html)>, visited 21 September 2015; the judgment is also published in BVerfGE 135, 259.

note provides some remarks on this strange disparity and then returns to the broader question: what about electoral equality between European citizens throughout the Union?

#### THE 2011 CASE

The 2011 judgment arose from electoral complaints against the 2009 European Parliament election result. Such complaints are made to the Bundestag, from where an appeal lies to the Bundesverfassungsgericht. The Bundestag decides on the validity of the poll in the light of the relevant law, the Court not only reviews this decision on the lawfulness of the poll, it also entertains complaints as to the unconstitutionality of the law.<sup>7</sup> Three complainants obtained a decision by the Bundestag and then appealed it to the Court. They argued that the 5 per cent threshold for European elections in Germany, laid down in § 2(7) Europawahlgesetz, amounted to a violation of their electoral equality rights.

The Court's review follows the lines of a proportionality review in the broad sense. As a first step, the Court held that the 5 per cent threshold amounted to an interference with electoral equality rights. The only aim that could be regarded as legitimate and therefore able to justify the interference, was safeguarding the proper functioning of the European Parliament. A threshold had to be necessary: it had to be demonstrated that, in reality, the proper functioning of the European Parliament indeed would be endangered if the threshold were not there. According to the Court this test was not met: the 5 per cent threshold was not necessary. A closer look at whether a threshold set at 5 per cent was proportionate in the narrow sense, was not needed. § 2(7) of the Europawahlgesetz was declared void.

#### *Parameters of the review*

The Court pointed out that the Europawahlgesetz was a German federal law and therefore subject to constitutional review against the Grundgesetz. EU law did not change anything about that. Article 3 of the Direct Elections Act allowed member states to introduce a threshold of up to 5 per cent but did not require them to do so. Where the German legislature was free, under EU law, to either introduce a threshold or not, it was

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<sup>7</sup> The competence of the Court to entertain this incidental question on constitutionality has no direct basis in the written law but flows from the Court's own case law; BVerfGE 16, 130 (135-136); 2011 case, paras 75 and 136; without this competence, there would be a hiatus in the system of constitutional review arising from a concrete case, *cf.* for the same problem within a different procedural framework the jurisprudence of the Italian Constitutional Court, on which, in this issue, G. Piccirilli, 'Maintaining a 4% Electoral Threshold for European Elections, in order to clarify the access to constitutional justice in the electoral matter', 12 *EuConst* (2016) p. ###, text at n. 15 onwards.

still bound by (and only by) the Grundgesetz, so the review process was the same as in the purely national context.<sup>8</sup>

Nor did the degressive apportionment of seats to member states change anything. Here, the Court repeated its findings from the *Lisbon* judgment: the unequal weight of votes cast in the different member states indicated that the European Parliament was still essentially a representation of the several peoples of the Union, even if Union citizenship was now mentioned with particular stress. The unequal treatment of voters in different member states neither required nor justified unequal treatment of voters for the German allotment.<sup>9</sup>

The Grundgesetz does not contain a provision on electoral equality rights specifically for European elections, as it does for elections to the Bundestag. But, the Court held, electoral equality in European elections flowed from the general principle of equality in Article 3(1) Grundgesetz. The right to equal opportunities for political parties ran neatly parallel and required the same review standard as equality of voters.<sup>10</sup>

The Court departed from the observation that a threshold interfered with electoral equality, not because it violated the one-person-one-vote principle (equal counting value, *Zählwert*) as truly unequal rules like a census would do, but because it set the effect of some votes to nil (success value, *Erfolgswert*).<sup>11</sup> Given the paramount importance of electoral equality in the democratic system, the room for such an interference was particularly narrow. A justification could only lie in an aim that was legitimate and of such importance that it could counterweigh the importance of equality. Such aims could, in particular, be found in

safeguarding the nature of elections as an integrative process in the will-formation of the people and, in connection with this, safeguarding the representative assembly's capacity to function.<sup>12</sup>

The notion of 'integration' that the Court invoked here, stems from the darkest times of constitutional thinking in Germany,<sup>13</sup> but with regard to thresholds the notion is perhaps not altogether repugnant. The idea behind it is that in a large polity the broad diversity of opinion amongst the electorate has to be consolidated into a few clearly distinguishable options so that, on each topic, a decisive choice can be made. A

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<sup>8</sup> 2011 case, paras 76-77.

<sup>9</sup> 2011 case, para. 81.

<sup>10</sup> 2011 case, paras 78-82.

<sup>11</sup> Stable case law going back to a 1952 decision, BVerfGE 1, 208 (243-246), with reference to a 1930 decision of the Constitutional Court of the Weimar Republic; on the latter *see also*, with a convincing analysis, E. Jacobi, 'Die verfassungsmäßigen Wahlrechtsgrundsätze als Gegenstand richterlicher Entscheidung', in Gmelin and Koellenreutter (eds.), *Festgabe für Richard Schmidt* (Hirschfeld 1932) vol. 2, p. 59-93

<sup>12</sup> 2011 case, para. 88.

<sup>13</sup> Originally proposed with clearly anti-pluralistic aims in Rudolph Smend, *Verfassung und Verfassungsrecht* (Duncker & Humblot 1928); on the influence on legal thinking in post-war Germany *see* R.C. van Ooyen, *Integration* (Springer 2014).

threshold chips off the less significant currents of opinion even before the elected assembly sits, so that parliamentary debate can concentrate on building majorities on the basis of the more significant currents. One could assume, without being unreasonable, that there is a subtle choice to be made here – how much diversity should an elected assembly reflect, how much streamlining should take place in its creation already?

The Bundesverfassungsgericht held that there was no such subtle choice; the notion of elections as an ‘integrative process’ simply was not a relevant consideration:

Nor do[es] the character of an election as an integrative process of political will formation [...] justify barring smaller parties, by means of a threshold, from entering the European Parliament. It is not the task of an electoral regime to reduce the range of political opinion in order to, say, simplify decision-making within the representative organ. To the contrary, openness of the political process has to be maintained, especially on the European level.<sup>14</sup>

The only limit on this requirement to maintain broadest plurality that the Court accepted was that plurality must not render the Parliament incapable of reaching decisions at all: safeguarding the proper functioning of the European Parliament was the only aim that the Court considered legitimate and apt to justify a threshold. Such a safeguard had to be necessary:

Only an impairment of the representative body’s capacity to function that is to be expected with some degree of probability, can justify the 5 per cent threshold.<sup>15</sup>

It was not a task for the Court to appreciate the facts on the ground and weigh them to come to a balanced solution, this was for the legislature. But electoral law concerned the rules of political competition. The majority in the legislature acted, ‘as it were’, in its own cause and there was a danger that it might be led not by the public interest but by an aim to cement its own position of power. Therefore, control by the Court had to be strict.<sup>16</sup>

### *The reality of the parliamentary process in Strasbourg*

The Court acknowledged that without a threshold in Germany, there would be more parties sending only one or two representatives to Strasbourg. Were other member states to follow Germany and abandon their thresholds, the overall impact on the composition of the European Parliament might be significant; but that other member states should do so was an abstract consideration, not one that carried much weight once one realised how stable the relative strength of groups in the Parliament had been over the years.<sup>17</sup>

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<sup>14</sup> 2011 case, para. 126.

<sup>15</sup> 2011 case, para. 92.

<sup>16</sup> 2011 case, para. 93.

<sup>17</sup> 2011 case, paras 97-99.

Already some 160 political parties were represented in Strasbourg and there was no clear prospect that a few additional smallest parties, with just one or two seats, would hamper the functioning of the European Parliament. New members for smallest parties might join an existing group. The groups already integrated members from different national parties under the umbrella of common political aims, something in which they had been quite successful.<sup>18</sup>

The general pattern of parliamentary practice in Strasbourg was cooperation of the two largest groups, which amongst them accounted for some 60 per cent of seats. How many independent members or small groups existed next to the two large ones was irrelevant for this practice to continue. Even if the two large groups were to take on new members from smallest parties, the risk that this might overstretch their integrative capacity and render them dysfunctional was remote. Should the general pattern change into one more commonly seen in national parliaments, into a clear antagonism between government majority and opposition, then this might have relevant consequences, but as such a development would depend on many factors, the exact consequences remained a matter of speculation.<sup>19</sup>

The Court realised that in some cases a simple majority of votes cast was not enough for the European Parliament to make a decision. An absolute majority of members, for instance, was needed in order to overturn a Council amendment in the ordinary legislative procedure (Article 294(7)(b) TFEU), or a two thirds majority for ousting the Commission (Article 234 TFEU). Organising such qualified majorities would certainly become more burdensome if a large number of members were unavailable for cooperation. But that was the very point of requiring increased majorities, especially with a view to the inter-institutional balance: if the Parliament was not able to organise a qualified majority, it could not take an effective decision. Only if members unwilling to cooperate on principle were to enter the Parliament in such large numbers that increased majorities could not, in general, be organised anymore – and only if on a realistic estimation one came to judge the situation like this – could one start to think that the Parliament's ability to function had been impeded. It was not to be expected that abandoning the 5 per cent threshold in Germany would have such consequences.<sup>20</sup>

The Court was not convinced by arguments put forward by several experts and members of the European Parliament who had given evidence during the hearing in Karlsruhe. They had pointed at specific parts of the parliamentary process and argued that current practice would be endangered by the entrance of more small parties or independent members. In particular, they had stressed that no coalition agreements

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<sup>18</sup> 2011 case, paras 103-106.

<sup>19</sup> 2011 case, paras 107-110.

<sup>20</sup> 2011 case, para. 111.

existed between groups, so that deals had to be struck each time a decision had to be made, something which would become more burdensome if the Parliament were even more splintered. But the Court held:

The assumption that this additional effort might put into question the Parliament's capability to fulfil its functions does not stand up to the capability to adapt that the European Parliament has shown in the past. Parliamentary practice is not fixed, but is adapted to changing circumstances. This is demonstrated, in particular, by the evolution of the European Parliament, which, due to increasing legislative competences, has progressively evolved from a debating parliament (1979) towards being a working parliament with a sophisticated committee structure and professional, ultimately coherent activity within parliamentary groups.<sup>21</sup>

So, in the Court's view, it was wrong to measure changes in circumstances, in so far as they were to be expected at all, against current practice: practice would adapt.

### *The functions of the European Parliament*

The Bundesverfassungsgericht then contrasted the European Parliament's functions with those of a national parliament like the Bundestag. For Bundestag elections, the Court has always held the threshold of 5 per cent to be permissible, the decisive reason being that the Bundestag has to sustain a government which is dependent on one unchanging parliamentary majority.<sup>22</sup> On the European level, this was not the case. The Parliament voted the Commission into office, but after that the Commission was not dependent upon the continuous support of one unchanging majority to fulfil its functions. In particular, it did not have to rely on a stable combination of groups in order to roll out a legislative programme.<sup>23</sup>

The Court first turned to the ordinary legislative procedure. There, a simple majority of votes cast was enough for the Parliament to adopt a position at the first reading stage (Article 294(3) TFEU). In later stages, a majority was not needed in order for the proposal to be adopted, quite to the contrary: it was rejecting a Council position that required an absolute majority of members (Article 294(7) TFEU). Union legislation could be enacted without necessarily requiring assent of the Parliament, which meant that a pivotal argument in the justification for a threshold was not there. The same was true for the budget: it, too, could be adopted without the Parliament's assent (Article 314(4) TFEU).<sup>24</sup>

Then turning to Acts adopted under a special legislative procedure, the Court remarked that in some cases an enhanced majority in the Parliament was required. But

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<sup>21</sup> 2011 case, para. 116.

<sup>22</sup> Stable case law from 1956 in BVerfGE 5, 77; lately BVerfG 31 January 2012, 2 BvC 11/11.

<sup>23</sup> 2011 case, paras 118-119.

<sup>24</sup> 2011 case, paras 120-123.

such an increased majority needed not to be adopted by one stable majority; if changing majorities would make negotiations with the Commission and the Council more difficult on the one hand, it could also be said, on the other, that they increased the possibilities of where to find such majorities. More importantly, acts adopted under a special legislative procedure, for instance on anti-discrimination legislation (Article 19(1) TFEU) or on establishing a European public prosecutor's office (Article 86(1) TFEU), were so diverse that a general blockage of parliamentary activity was not to be expected. The same was true for constitutional decisions like accession of new member states (Article 49(1) TEU), rule of law enforcement against member states (Article 7 TEU) or international treaties (Article 18(6)(a) TFEU).<sup>25</sup>

The Parliament's function of monitoring the Commission, other executive bodies and the Council was underpinned by specific rights, but these were mostly minority rights, so control could take place without majority formation.<sup>26</sup>

### *Dictum and dissenting opinion*

§ 2(7) of the Europawahlgesetz was found to be incompatible with Articles 3(1) and 21 Grundgesetz and declared void in a five to three decision.<sup>27</sup> On the primary point of the electoral complaints, the Court refused to declare the 2009 elections to the European Parliament invalid: the public interest in not disrupting the work of the Parliament outweighed that of repairing the irregularity in its composition.

Two judges voting in the minority presented a dissenting opinion to the judgment. They criticised the inappropriately high standard of review that their colleagues demanded and accused them of ignoring the fact that responsibility for the proper functioning of the Parliament was shared between member states.<sup>28</sup>

### THE INTRODUCTION OF A 3 PER CENT THRESHOLD AND THE 2014 JUDGMENT

Whilst scholarly comments on the judgment were divided,<sup>29</sup> German politics was deeply unhappy with the outcome of the 2011 case. In the summer of 2013 all parties in

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<sup>25</sup> 2011 case, para. 124.

<sup>26</sup> 2011 case, para. 125.

<sup>27</sup> One of the five judges in the majority agreed to the outcome but not to the reasoning, which leaves doubt as to its authoritativeness of the reasoning; critical C. Schönberger, 'Das Bundesverfassungsgericht und die Fünf-Prozent-Klausel bei der Wahl zum Europäischen Parlament', 67 *Juristenzeitung* (2012) p. 80 at p. 80.

<sup>28</sup> 2011 case, paras 147-160.

<sup>29</sup> See B. Grzeszick, 'Demokratie und Wahlen im europäischen Verbund der Parlamente', *Europarecht* (2012) p. 667, himself critical, pointing to other critical scholars at p. 668 n. 4 and to positive reactions at p. 668 n. 3.

the Bundestag save *Die Linke* introduced a bill to enact a new threshold, set this time at 3 per cent.

During a hearing of expert witnesses in the Bundestag committee for internal affairs, several of the more critical scholars explained why the fate of this new proposal under any future review was uncertain. They stressed that the 2011 judgment had not resulted in an unconstitutionality verdict because the 5 per cent threshold had been set too high, but because it had been held to be unnecessary. This reasoning would doom a 3 per cent threshold just as well, so the new proposal could survive any future constitutionality review only if the Court were persuaded to lower its review standards, or if it could be convinced that circumstances in the real world had changed in the meantime.<sup>30</sup>

The newly introduced 3 per cent threshold<sup>31</sup> was put to the Bundesverfassungsgericht shortly after its adoption. There was no need to wait for the next European elections and bring an electoral complaint: European citizens in Germany were directly affected as to their electoral rights by the amending law and could bring a constitutional complaint against the Bundestag. Some 1000 voters did so, joined by several smaller political parties who mounted an *Organstreit*.

On the strict review standard, the legal representatives for the Bundestag argued against all layers of the reasoning.<sup>32</sup> The Court rejected all of this. EU law, including the permission of a threshold of up to 5 per cent in Article 3 of the Direct Elections Act, changed nothing about the constitutional review process on the national level; a preliminary reference on this point was unnecessary.<sup>33</sup> Lowering the review standard was not opportune, as electoral law concerned the rules of political competition.<sup>34</sup> Nor did the Court accept that circumstances in the real world had changed. If in the European Parliament there was a development towards antagonism between government majority and opposition, then it was barely nascent. It was unclear how the proposal of candidates for the Commission presidency could contribute to this. The European Parliament's resolution of 22 November 2012, on which counsel for the Bundestag relied, was merely a call for member states to introduce thresholds, a call that was not legally binding and therefore irrelevant.<sup>35</sup>

The 3 per cent threshold was declared void for the same reasons the 5 per cent threshold had been, the dictum and the reasons for it being adopted by five to three. One judge in the minority presented a dissenting opinion. He called into question the strict

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<sup>30</sup> Bundestag Innenausschuss 10 June 2013, minutes and written statements, <[webarchiv.bundestag.de/cgi/show.php?fileToLoad=4125&id=1223](http://webarchiv.bundestag.de/cgi/show.php?fileToLoad=4125&id=1223)>, visited 19 November 2015.

<sup>31</sup> Art. 1 sub 2. d) amending act of 7 October 2013, BGBl. I 3794; for parliamentary proceedings see <[dipbt.bundestag.de/extrakt/ba/WP17/537/53796.html](http://dipbt.bundestag.de/extrakt/ba/WP17/537/53796.html)>, visited 6 December 2015.

<sup>32</sup> 2014 case, paras 25-27.

<sup>33</sup> 2014 case, paras 40-44.

<sup>34</sup> 2014 case, paras 62-64.

<sup>35</sup> 2014 case, paras 71-78.

review standard applied, which put Germany onto a path of isolation compared to other member states.<sup>36</sup>

#### THE BROADER EUROPEAN CONTEXT

Virtually all critical scholarly commentators agreed with the dissenting judge in 2014: the abandonment of any threshold has taken Germany out of a concerted pan-European effort to safeguard the European Parliament's functioning.<sup>37</sup> That criticism pertains directly to two aspects: the Bundesverfassungsgericht's somewhat startling findings on the functioning of the European Parliament, and the Court's striking unwillingness to engage in any comparative exercise. On a closer look, however, it turns out that there is good reason to welcome the outcomes of the two judgments, at least if one's primary concern is electoral equality throughout Europe. Whether this concern also amounts to a legal requirement in EU law remains an open question.

#### *The findings on the parliamentary process in Strasbourg*

Looking at practice in Strasbourg, the Bundesverfassungsgericht found that the European Parliament did not need the safeguard of a threshold in Germany, essentially because it was much better in integrating new political forces than the German legislature would have it. To some of the critics this sounded like a rather cynical compliment, something the like of 'you have coped well with difficulties in the past, here are some more.'<sup>38</sup> But the Court's estimation is largely borne out by experience after the 2014 elections. Due to the end of the threshold in Germany, seven additional members for small parties entered Parliament, five of whom have joined pre-existing groups. It cannot be said that a new adversarial pattern of government majority against opposition has developed, and the collaboration of the two largest groups sharing the Commission and the Parliament presidencies amongst them might even indicate that the informal grand coalition is as strong as it has ever been.

The Court's findings become more startling where, in the 2011 judgment, it turned away from practice and concentrated on the relevant law. Majority formation was not needed for the European Parliament to fulfil its functions as set out in the Treaties, so the Court reasoned, pointing out that EU legislation could be passed without the Parliament's assent. This is a dubious argument: can a co-legislature that does not

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<sup>36</sup> 2014 case, dissenting opinion Müller.

<sup>37</sup> For references see Grzeszick, *supra* n. 29; and W. Frenz, '3%-Klausel als europäischer Mindeststandard beim Wahlrecht', 67 *Die Öffentliche Verwaltung* (2014) p. 960 at p. 961 n. 7 and n. 8.

<sup>38</sup> Cf. 2011 case, dissenting opinion, para. 160.

influence legislation be regarded as functioning properly simply because legislation can be passed in spite of it?

According to Christoph Schönberger, the reasoning on this point betrays the Bundesverfassungsgericht's distorted view of the European Parliament: the Court refuses to extend practical assistance to the Parliament in the form of a threshold, which neatly reflects the theoretical attacks on its legitimacy that can be found in the *Lisbon* judgment.<sup>39</sup> According to Court President Andreas Voßkuhle, on the other hand, the reasoning testifies to the Court's proper understanding of the European Parliament in its specific nature and the Court's high esteem for the Parliament.<sup>40</sup>

Whichever side one might tend to take in this dispute, it must be stressed that the Court's findings on this point were not decisive. Once the Court had found that the end of the threshold in Germany would make no significant difference in reality, the look at the Parliament's functions as defined in the Treaties was an obiter dictum, one which it might have been better for the Court to leave out. It does not reappear in the 2014 judgment.

#### *The refusal to engage in any comparative exercise*

The only context in which the Bundesverfassungsgericht mentioned other member states was the theoretical prospect of them following the German route and abandoning their own thresholds for European elections. The Court accepted that this might have a significant impact on the European Parliament's functionality but saw no concrete signs that other member states had such plans. The maxim behind this reasoning, if any, seems to be: 'we are doing the right thing, which is not a problem as long as others do not suddenly start doing the right thing as well.'<sup>41</sup> Such national solipsism does not chime with the fact that, for the time being, responsibility for the legal regime on European elections is shared amongst the Union and its 28 member states.

But what findings would a proper comparison with the electoral regimes in the other member states deliver?

#### *Similar thresholds do not amount to equal treatment of votes*

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<sup>39</sup> Schönberger, *supra* n. 27, p. 80 and p. 86; similarly B. Grzeszick, 'Weil nicht sein kann, was nicht sein darf', *Neue Zeitschrift für Verwaltungsrecht* (2014) p. 537 at p. 540.

<sup>40</sup> Speaking extrajudicially, Bundestag Wissenschaftsforum, 17 November 2011, <dbtg.tv/cvid/1421201>, visited 19 November 2015, from time index 01:12:00 onwards.

<sup>41</sup> *Cf.* 2011 case, dissenting opinion, para. 157, with a clear invocation of Immanuel Kant's moral imperative.

A recurring idea is that a concerted European approach would mean that thresholds have to be more or less uniform throughout the Union. The picture then presented is roughly this: smaller member states have an effective threshold of at least 3 per cent anyway;<sup>42</sup> most larger member states either have a threshold, or are split up into several electoral districts, thereby augmenting the effective threshold to a comparable level; Germany and Spain are now the only larger member states with a single national electoral district and no threshold.<sup>43</sup> The same logic clearly underlies the proposal, recently adopted by the European Parliament, to amend Article 3 of the Direct Elections Act so it would require a threshold of at least 3 per cent or a division into subnational electoral districts with no more than 26 seats each.<sup>44</sup>

This approach is problematic. Splitting a member state into several districts does not simply increase the effective threshold, it does so only for parties that obtain votes in several districts; for regionally concentrated parties it makes no difference.<sup>45</sup> And comparing thresholds across national borders is not particularly informative. Some 5.8 per cent of votes cast in the Dutch-speaking electoral district of Belgium are effectively needed to gain a seat there. This might seem similar to the old German threshold of 5 per cent, but in absolute numbers the one percentage amounts to some 244,000 votes, the other to almost 1.5 million,<sup>46</sup> so one is really comparing apples and oranges.

More than that, cross-border comparison of percentages is not just uninformative, from the point of view of electoral equality in Europe it can be positively misleading. Because of the degressive apportionment of seats, many more votes are needed to gain a seat in one of the larger member states than in a smaller one. But with a threshold in the larger member state, the disparity becomes more extreme. Take the comparison of Germany and Malta: without a threshold, the number of votes needed to gain a first seat in Germany is now about 7 times as many as in Malta; with a 3 per cent threshold, it would be about 20 times as many.<sup>47</sup>

A threshold in the larger member states significantly adds to the inequality between European voters and candidates that, due to the skewed allocation of seats, exists

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<sup>42</sup> On how to estimate an effective threshold, *see*, in this issue, H. Smekal and L. Vyhnánek, 'Equal voting power under scrutiny', 12 *EuConst* (2016) p. ###, text at n. 15 and onwards.

<sup>43</sup> Along these lines: T. Felten, 'Durfte das Bundesverfassungsgericht die Drei-Prozent-Hürde bei der Europawahl überprüfen?', *Europarecht* (2014) p. 298 at p. 308; W. Heun, written statement before the BT committee, n. 30 *supra*, p. 4; 2014 case, dissenting opinion Müller, para. 29; similarly BVerfGE 51, 222 (250-254).

<sup>44</sup> EP resolution of 11 November 2015, P8\_TA(2015)0395; *see also* exposé of arguments in favour of that proposal, M. Nogaj and E.-M. Poptcheva, 'The Reform of the Electoral Law of the European Union', EP Research Service PE 558.775 (September 2015) p. 17-19.

<sup>45</sup> *Cf.* national results of the 2014 EP elections in the UK, with 2.37% of votes cast for the Scottish National Party delivering 2 seats and 6.61% for the Liberal Democrats delivering just 1 seat.

<sup>46</sup> Estimation based on valid votes cast in 2014.

<sup>47</sup> *Cf.* speech Ulrike Müller, EP debate 27 October 2015, CRE 27/10/2015 - 16.

anyway. If one is concerned with the general ideal of electoral equality in Europe, then the two German judgments are to be welcomed.

This leads to a next question: does the ‘general ideal of electoral equality in Europe’ amount to an effective legal rule?

### *Electoral equality in EU law and other open questions*

It is an open question as to whether electoral equality, despite not being mentioned in Article 14(3) TEU or Article 39(2) of the Charter, is a principle in EU law. Perhaps electoral equality can be derived from the general principle of equality in Article 2 TEU or from the common values of member states to which that provision refers.<sup>48</sup> This might seem a rather remote legal basis, but it may be noted that the Bundesverfassungsgericht’s review in the two cases at hand was based on no more than the laconic ‘all persons are equal before the law’ of Article 3(1) Grundgesetz either. Equality of Union citizens as enshrined in Article 9 TEU might provide another basis for electoral equality, perhaps a more promising one.

If this first hurdle were overcome, a raft of further questions would arise. How should the ‘permission’ of a threshold of up to 5 per cent in Article 3 of the Direct Elections Act be interpreted? Is it merely a clarification that the requirement for proportional representation in Article 1 of the Act does not in itself prohibit thresholds? If so, member states introducing a threshold might be in danger of breaching Union law, even when that threshold is set no higher than at 5 per cent and therefore in full compliance with Article 3 of the Direct Elections Act. Alternatively, Article 3 might purport to authorise a deviation from a primary EU law principle of electoral equality. In that case the question would be whether Article 3 does so successfully or is in itself unlawful. For both alternatives, it would be essential to establish whether the Direct Elections Act is still primary treaty law, as initially it undoubtedly was,<sup>49</sup> or whether by the time Article 3 was inserted it had acquired the quality of secondary Union law.<sup>50</sup>

Whilst none of this is clear, there can be little doubt that the European Court of Justice would be the competent court to decide these questions. It would merely need one judge competent to adjudicate on election complaints somewhere in the European Union to trigger a case in Luxembourg.<sup>51</sup> As election complaints procedure in Germany

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<sup>48</sup> P.M. Huber, ‘Art. 14 EUV’, in Streinz (ed.), *EUV/AEUV*, 2<sup>nd</sup> edn. (C.H. Beck 2012) paras 63-67.

<sup>49</sup> See Huber, *supra* n. 48, para. 51; and *cf.* ECtHR 18 February 1999, Case No. 24833/94, *Mattews v United Kingdom*, para. 31, relied upon in BVerfG 22 November 2001, 2 BvB 1/01, para. 20.

<sup>50</sup> Convincingly Felten, *supra* n. 43, p. 310-313.

<sup>51</sup> *Cf.*, in this issue, G. Piccirilli, ‘Maintaining a 4% Electoral Threshold for European Elections, in order to clarify the access to constitutional justice in the electoral matter’, 12 *EuConst* (2016) p. ###, text at n. 29.

is centralised to the Bundesverfassungsgericht, a reference coming from Germany does not seem the most likely scenario.

## CONCLUSION

Elections to the European Parliament are governed by the relevant laws of the member states, only loosely harmonised by EU rules. The European electoral regime in fact consists of 28 separate national electoral regimes. This complicates matters even where there is basic agreement, such as on the principles of direct and universal suffrage by free and secret ballot. Regarding the principle of electoral equality, matters become still more complicated. The degressive apportionment of seats to member states, in itself infringing electoral equality, has secondary effects which can easily be overlooked. For instance – and most importantly in the present context – it means that apparently similar national measures, like thresholds set a roughly the same percentage, can lead to hugely unequal treatment of voters and candidates. Put the other way around, very different thresholds can be conducive to electoral equality throughout Europe. This is exactly what happened in Germany: the 5 per cent threshold, which until 2011 worsened the situation, has now been scrapped; the introduction of a 3 per cent threshold, which would have restored the worsening effect to a slightly lesser degree in 2014, has been stopped. The outcome of the two judgments is to be welcomed.

The same cannot be said about the Bundesverfassungsgericht's reasoning. The electoral regime for the European Parliament is a responsibility shared between the Union and its member states, and so is the responsibility for safeguarding the Parliament's functionality. Even if the Bundesverfassungsgericht was right in assuming that the end of the threshold in Germany would not endanger the Parliament's proper functioning – and subsequent experience would suggest it was – then still the Court's retreating into its own national compartment betrays a clear unwillingness to take on its share of responsibility. Had it done so, it might have noticed that other courts approach the same questions rather differently.

The very point of departure for the Bundesverfassungsgericht's review, holding that a threshold infringes electoral equality rights, is not universally accepted throughout Europe. The notion that votes must have equal 'success value' is controversial within Germany already,<sup>52</sup> and several of the more critical scholars believe that it is almost unique in Europe, with only the Italian Constitutional Court holding the same view.<sup>53</sup>

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<sup>52</sup> Cf. C. Lenz, 'Die Wahlrechtsgleichheit und das Bundesverfassungsgericht', 121 *Archiv des öffentlichen Rechts* (1996) p. 337.

<sup>53</sup> L. Michael, *Verfassungsunmittelbare Sperrklauseln auf Landesebene* (Nomos 2015) p. 33 with further literature references and citing Italian Constitutional Court 13 January 2014, Sentenza 1/2014, Considerato in diritto para. 3.1; indeed, in Belgium the notion that votes must have equal success value

The requirement for necessity in practice and the narrow focus on functionality of the assembly elected – the German Court’s denial that streamlining will-formation in a large polity is a valid consideration at all – are additional points on which other constitutional courts are likely to adopt a more lenient view. In these respects, the Czech Constitutional Court’s recent judgment provides an illuminating comparison.<sup>54</sup>

What might look especially unusual from an outside perspective, is the German Court’s robust stance against the danger of electoral politicking: Bundestag majorities legislate in their own cause when setting the rules for European elections, so they have to be subjected to particularly strict control. The Italian case law, in contrast, seems to show some reluctance on the part of the Constitutional Court to mingle with electoral politics.<sup>55</sup>

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seems to be rejected, *cf.* Belgian Constitutional Court 27 April 2005, Arrêt no. 78/2005, para. B.11.1; on the Czech Constitutional Court’s stance in this regard, *see*, in this issue, H. Smekal and L. Vyhnánek, ‘Equal voting power under scrutiny’, 12 *EuConst* (2016) p. ###, text at n. 20 and onwards.

<sup>54</sup> *See*, in this issue, H. Smekal and L. Vyhnánek, ‘Equal voting power under scrutiny’, 12 *EuConst* (2016) p. ###.

<sup>55</sup> *See*, in this issue, G. Piccirilli, ‘Maintaining a 4% Electoral Threshold for European Elections, in order to clarify the access to constitutional justice in the electoral matter’, 12 *EuConst* (2016) p. ###.