

Special Section: The Federal Constitutional Court's *Lisbon Case*

German Participation in EU Decision-Making after the *Lisbon Case*: A Comparative View on Domestic Parliamentary Clearance Procedures

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A. Introduction

When the German Federal Constitutional Court pronounced itself on the constitutionality of the Treaty of Lisbon,¹ its general reasoning on the character of the European Union sounded familiar. In its judgment, the Court recalls that the German Basic Law is a Europe-friendly constitution: its Preamble and its Article 23, regarding European integration, allow, and in fact prescribe, Germany's participation in the establishment of a united Europe. However, the Court also stresses the paramount position of the member states, their peoples, and their national parliaments in the institutional architecture of the EU. Already in its *Maastricht Case*,² the Court had put an emphasis on institutional guarantees regarding the conditions under which sovereign competences may be conferred upon the EU from its constituent member states. The *Lisbon Case* builds upon the *Maastricht* doctrine, but now adds concrete instructions to the German legislature: whenever the EU institutions wish to apply certain strategic decisions under the Treaty of Lisbon, the German government may agree to them only after the two national legislative chambers, the German Federal Parliament (*Bundestag*) and the German Federal Council of States (*Bundesrat*), have given their prior approval. The national statute that regulates this must (and will) be changed accordingly before Germany may ratify the Treaty of Lisbon. The strategic decisions in question mainly concern what the Court considers to be, or at least potentially to be, *de facto* treaty amendment procedures by which EU institutions may dynamically expand their competences or change decision-making rules without having to resort to the regular ratification procedure for new treaties. The most prominent example is the so-called *passerelle* (or simplified treaty revision procedure), allowing the European Council unanimously, and with the European Parliament's assent, to introduce qualified majority voting and co-decision in areas where this does not yet apply. National

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¹ Lisbon Case, BVerfG, 2 BvE 2/08, from 30 June 2009, available at http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208.html.

² Maastricht Case, BVerfGE 89, 155.

parliaments are informed six months in advance and each of them may cast a binding veto, but ordinary positive ratification in all member states is not required. Also for the application of the flexibility clause, allowing for EU action to attain EU goals in the absence of a specific legal basis, the German Constitutional Court requires prior bicameral approval by the national legislature. The Court rejects the idea of future treaty amendment by tacit consent, because that would undermine the prerogatives of the national legislature and, essentially, German sovereign statehood. At the risk of sounding corny, we may therefore dub the *Lisbon Case* “*Solange III*,” after the two previous *Solange Cases*, and summarize it as follows: As long as (or, *solange*, in German) the European Union is not a federal state but comprises constituent member states, the people, through the national legislature, must consciously legitimize European integration step by step. The partially enhanced flexibility of future treaty reforms envisaged under the Treaty of Lisbon is, as far as Germany is concerned, undone. But what about the other member states? Where does the *Lisbon* case put Germany on the European map of parliamentary democracy? How do the ratification procedures on which the German Court insists compare with the procedures of national parliamentary oversight as they exist in the rest of the Union? The present article shall put the envisaged German procedures in a comparative perspective. But first it shall reflect on some of the main features of the judgment itself.

B. The *Lisbon Case*: General Observations

It is not surprising that the German Constitutional Court declared the Treaty of Lisbon to be compatible with the Basic Law. The applicants had challenged the Treaty, and sought to bar Germany from ratifying it, mainly by arguing that the treaty sapped the powers of the national legislature, rendered Germans’ right to vote for the national parliament meaningless, and violated democratic principles as the EU, the recipient of sovereign competences, enjoys insufficient democratic legitimacy. At the same time the Constitutional Court tied Germany’s ratification of the Lisbon Treaty to certain conditions, which, at least with hindsight, should not have been too surprising either. It would actually have been very odd and atypical if the Court had simply given its blessing to the Treaty without formulating at least a few stern dicta, as usual taking the form of conditions, rules on interpretation, and warnings. And this it did: the Treaty itself is constitutional, but the accompanying national statute regulating the involvement of the national legislature in EU decision-making is not and must, therefore, be changed so that the roles of the *Bundestag* and the *Bundesrat* are strengthened. Prior legislative approval is required for Germany’s consent to the application of the general *passerelle* clause;³ the special *passerelle* in the area of family law with cross-border implications (which, like the general *passerelle*, allows each national parliament to veto its application; this the Court finds insufficient);⁴ other

³ Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, art. 48(7) 2007 O.J. (C 306) 1 [hereinafter Lisbon Treaty].

⁴ Consolidated Version of the Treaty on the Functioning of the European Union, May 9, 2008, art. 81, 2008 O.J. (C 115) 47, 78 [hereinafter TFEU].

special *passerelle*-type procedures that do not include a national parliamentary veto;⁵ the flexibility clause;⁶ the emergency brake procedures, whereby the Council of Ministers may refer sensitive matters to the European Council;⁷ the expansion of EU competences in the area of criminal justice to tackle new areas “on the basis of developments in crime”;⁸ and an expansion of the competences of the European Public Prosecutor’s Office.⁹ The deployment of German troops abroad pursuant to EU measures is an issue that is, according to the Court, “integration-proof.” Thus, no matter what the treaties say, the existing parliamentary reserve applies and each deployment requires the approval of the *Bundestag*. Not all of the subjects listed above require the consent of the *Bundesrat*. But where an EU decision would effectively constitute a treaty amendment touching upon the institutional foundations of the EU and deviating from the Basic Law, bicameral consent must be given with the same super-majorities as would apply to the approval of ordinary EU Treaties, that is, by two-thirds majorities in both chambers (according to Article 23 of the Basic Law).

I. Consistency with EU Law

Overall, the *Lisbon Case* may be considered conservative but not unlawful, meaning that it is not incompatible with either existing or envisaged EU treaty law. It is each member state’s constitutional prerogative to regulate domestic procedures by which the government must seek prior support for its negotiations in the Council. Both before and after the Treaty of Lisbon, EU treaty law provides that the “Council shall consist of a representative of each Member State at ministerial level, who may commit the government of the Member State in question and cast its vote,”¹⁰ adding that “the way in which national Parliaments scrutinise their governments in relation to the activities of the Union is a matter for the particular constitutional organisation and practice of each Member State.”¹¹ To put it simply: the Council as an institution is not concerned with its members’ “home front.” Conversely, of course, this also means that a minister’s vote in principle remains valid even if he or she ignored the will of the national parliament. Such a “rogue” minister might face a vote of no-confidence as soon as he or she returns home,

⁵ Lisbon Treaty art. 31(3). See TFEU art. 153, 192, 312, 333, 308.

⁶ See TFEU art. 352.

⁷ See TFEU art. 48, 82, 83.

⁸ Lisbon Treaty art. 83(3).

⁹ See TFEU art. 86.

¹⁰ Lisbon Treaty art. 16(2).

¹¹ First recital in the Preamble to the protocol on the role of national parliaments in the EU (originally inserted in the Treaty of Amsterdam and largely reproduced under the Treaty of Lisbon). Protocol on the Role of National Parliaments in the European Union (Treaty of Amsterdam), First Recital, 16 Dec. 2004, 2004 O.J. (C 310) 204.

but the Council decision as such stays in force. The German *Lisbon Case* may establish an exception to that rule: since the Constitutional Court treats certain types of decisions to constitute treaty amendments, it may rule that Germany is not bound by such decisions or the secondary law adopted on that basis if the German legislature had been side-stepped. It already gave a similar warning with respect to *ultra vires* decisions under Article 308 EC in its *Maastricht Case*. For the rest, Germany remains free to condition its participation in the Council by domestic constraints. Other member states do that too, as will be discussed shortly.

II. A Conservative Judgment

Still, the ruling in the *Lisbon Case* remains a conservative one; its interpretation of the contested clauses of the Treaty of Lisbon are highly restrictive. It appears that no other member state went as far as prescribing formal, even bicameral parliamentary ratification for the application of the *passerelle* clause, let alone the flexibility clause. The Czech Constitutional Court did not, concluding instead that the transfer of competences was sufficiently specific and in any event reviewable by the Constitutional Court itself.¹² The Dutch Council of State, in its advisory opinion on the Treaty of Lisbon, did not raise any fundamental objections on that point either.¹³ The French Constitutional Council demanded that the French Constitution be amended so as to accommodate those provisions of the Treaty of Lisbon that (potentially) confer new powers on the EU, including the various *passerelles*;¹⁴ but this was with a view to a single ratification of the clauses in question, not for the authorization of their application in each individual case in the future. In the literature, the *passerelle*, as it had already been included in the Constitutional Treaty, was not considered to be too problematic either.¹⁵ The reason was that a future application of the general *passerelle* would already be covered by the original ratification, in the sense of being legitimized in advance, and that it did contain a veto right for national parliaments.

¹² Nález Ústavního soudu čj. 19 / 2008 / Sbírka nálezů a usnesení Ústavního soudu. Pl. US 19/08, Nov. 26, 2008, available at http://angl.concourt.cz/angl_verze/doc/pl-19-08.php.

¹³ Opinion of 15 February 2008, published in *Kamerstukken II* 2007/08, 31 384 (R 1850), no. 4.

¹⁴ CC, decision no. 2007-560DC, 20 December 2007, available at: http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/a2007560dc.pdf.

¹⁵ See e.g., BRUNO DE WITTE, THE NATIONAL CONSTITUTIONAL DIMENSION OF EUROPEAN TREATY REVISION – EVOLUTION AND RECENT DEBATES (2004); Volkmar Götz, *Kompetenzverteilung und Kompetenzkontrolle in der Europäischen Union*, in DER VERFASSUNGSENTWURF DES EUROPÄISCHEN KONVENTS (Jürgen Schwarze ed., 2004).

In the run-up to the drafting of the Constitutional Treaty, the Treaty of Lisbon's ill-fated predecessor, it had been a prominent idea to insert a certain degree of flexibility into future Treaty amendments.¹⁶ The usual procedure involving the ratification of amendment treaties in all member states, the number of which keeps growing, has proven to be a cumbersome and crisis-prone affair, especially when referenda are held. Flexibility would mean reserving that procedure only for grand institutional overhauls and to apply a lighter procedure for more routine updates. At least as far as Germany is concerned, the Constitutional Court has put an early end to that flexibility by insisting on full bicameral ratification for each decision regarding the use of the flexibility clause and *passerelle*-type procedures.

What is striking, though not always unwarranted, is the level of mistrust the German Court displays with regard to the institutions, both European and domestic, that are involved in the relevant treaty procedures. The European Parliament finds itself at the receiving end of particularly sharp criticism. It should be recalled that the *passerelle* requires the assent of the European Parliament; the same holds true for the application of the flexibility clause under the Treaty of Lisbon, whereas the "old" Article 308 EC merely required the European Parliament's consultation. Nevertheless the Court, after declaring the European Parliament to be ill-equipped to solve the Union's democratic deficit in more general terms, holds that national legislative ratification is indispensable. This means that the European Parliament is trusted neither to act as a check on the European Council (arguably it does stand to win from expanded EU competences) nor, and this is in fact rather more painful, to democratically legitimize the use of the relevant clauses through its consent.

Yet it is not just the European Parliament that is met with mistrust. The Council itself is evidently not trusted to stay *intra vires*. The German government is not trusted to veto possible power-grabs in the Council (the relevant clauses require unanimity and thus can be vetoed by single member states). The German Constitutional Court also does not risk relying on the European Court of Justice to annul *ultra vires* decisions. But most crucially, and this may be somewhat counter-intuitive, the Court does not have too much confidence in the German legislature either. More specifically, it does not trust the regular day-to-day parliamentary oversight over German EU policy. If it did, it might have left it to the *Bundestag* and the *Bundesrat* to exercise political scrutiny over the German government and its intention to support potentially controversial Council decisions. Instead, the Court prefers such decisions to be ratified in a formal and positive expression of consent, bicameral or otherwise, and, thus, to be scheduled for full consideration and debate. This is no guarantee that the decisions will actually be hotly debated and attract public attention, especially if the mainstream parties are in agreement with each other to rubber-stamp them and not to politicize the issue. But at least an opportunity for such

¹⁶ Jean Luc Dehaene, Foreword to EUROPEAN CONSTITUTIONALISM BEYOND LISBON (Jan Wouters, Luc Verhey & Philipp Kiiver eds., 2009).

conscious debate is created. The far-left, which was one of the applicants in the *Lisbon Case*, may be counted on to challenge the Government in the plenary. Things might turn complicated if the opposition in the *Bundestag*, the national parliament proper, also controls the *Bundesrat* (Federal Council of States), whose assent is also needed for most of the decisions concerned. Thus, it is now up to the political players to decide what to make of the enhanced prerogatives enjoyed by the national legislature.

C. National Parliamentary Clearance Procedures: A Comparative View

The German Constitutional Court commands the respect of the political institutions in Germany, the largest EU Member State. The Court's intellectual authority is recognized beyond German borders, as not only scholars but also other constitutional courts cite its judgments.¹⁷ Nevertheless, it would be wrong to assume that the world revolves around Karlsruhe, or that the German constitutional judges are the keepers of the legal orthodoxy for the whole of Europe. Just because the German Court considers certain types of decisions to require legislative approval on par with regular treaty amendments, this does not mean that this is the only correct interpretation of the Treaty of Lisbon. It is absolutely legitimate to consider future strategic decisions pursuant to the contested clauses to be covered, and therefore legitimized, by the initial ratification. That, after all, is the whole point of the flexibility clause and the *passerelle*. At the same time, Germany would not be the only Member State to constrain its Council representative by domestic clearance procedures. It is time to take a comparative view of the other member states, their national parliaments, and the way they make their ministers' vote in the Council dependent on prior parliamentary involvement.

I. National Parliaments in the EU: Five Dimensions of Comparison

I have suggested distinguishing national parliaments and their involvement in EU affairs along five different dimensions.¹⁸ The five variables include (1) at which time scrutiny is triggered (*ex ante*, before the EU decision is adopted, or *ex post*, when the government is held to account afterwards); (2) the relative centralization of scrutiny (whether the European Affairs Committee or the sectoral committees, like agriculture or economic affairs, take the lead); (3) the methods of government influence (whether ministers receive a negotiating mandate, whether parliament sifts incoming EU documents and passes an occasional resolution, whether influencing is rather informal, whether a scrutiny reserve bars ministers from agreeing to EU measures pending domestic scrutiny); (4) the legal basis

¹⁷ Most recently, the Czech Constitutional Court referred to German case-law in its judgment on the constitutionality of the Treaty of Lisbon. Czech Constitutional Court, Pl. US 19/08, Nov. 26, 2008, available at http://angl.concourt.cz/angl_verze/doc/pl-19-08.php.

¹⁸ PHILIPP KIVER, THE NATIONAL PARLIAMENTS IN THE EUROPEAN UNION - A CRITICAL VIEW ON EU CONSTITUTION-BUILDING 43 (2006); the relevant comparative chapter is available at ssrn.com/abstract=1426078.

for parliamentary scrutiny (constitutional, statutory or conventional); and (5) the relative “strength” of national parliaments at European scrutiny (strong, moderate, weak) as identified by political science. Relative “strength” depends on a number of historical, cultural and institutional factors, including the salience of EU membership and the nature of pre-existing domestic government-parliament relations. One may crudely summarize that the farther north from the Mediterranean one moves, the sharper parliamentary scrutiny of EU matters tends to be.¹⁹

The placement of a parliament on the five dimensions is sometimes but not always correlated, and appearances are often deceiving. Thus, a parliament whose heavyweight European Affairs Committee issues *ex ante* mandates to ministers—the classical Danish model—tends to be on the “strong” end of the scale. However, scrutiny under such centralization of European affairs in a European Affairs Committee is weaker than it could be, as specialist input from sectoral committees is largely missing. Briefing ministers on Fridays before Council meetings means that most decisive deals have already been struck in Brussels and that the national parliament is too late to make a difference. Even in Denmark mandates are first orally outlined by the ministers themselves, with a view to tacit approval; they are not imposed by force on a reluctant cabinet. Committee meetings taking place behind closed doors may ensure parliamentary oversight and the confidentiality of bargaining but not necessarily democratic transparency. More generally, it is helpful to bear two things in mind when assessing government-parliament relations. First, it is acceptable, from a point of view of constitutional law, to see parliament and the cabinet as two separate institutions, but in the reality of Western parliamentary democracies, the cabinet is supported by a loyal majority in parliament (Denmark is exceptional for constantly having minority cabinets). Thus, the views of the cabinet and of the parliament, in the sense of the majority in at least the lower chamber, tend to coincide. Second, it is tempting, but not always accurate, to see parliamentarians as policy-makers who take the initiative;²⁰ in reality, parliamentarians are much better suited to ask questions, and publicly scrutinize the government than to come up with answers of their own. As a result, we should not see procedures of parliamentary approval as a brake on decision-making because a stable majority cabinet is not likely to be thwarted in the plenary or in a committee. These procedures instead seem tailored to create an opportunity for the opposition to make its voice heard and to trigger debate, forcing the government to explain its choices.²¹

¹⁹ See Tapio Raunio, *Holding Governments Accountable in European Affairs: Explaining Cross-National Variation*, 11 J. LEGIS. STUD. 319 (2005).

²⁰ See also Katrin Auel, *Democratic Accountability and National Parliaments: Redefining the Impact of Parliamentary Scrutiny in EU Affairs*, 13 EUR. L.J. 487 (2007).

²¹ See also Ronald Holzhaacker, *The Power of Opposition Parliamentary Party Groups in European Scrutiny*, in *THE EUROPEANISATION OF PARLIAMENTARY DEMOCRACY* 126 (Katrin Auel and Arthur Benz eds., 2006).

II. Germany Post Lisbon: Where Does it Stand?

Traditionally, the German *Bundestag* finds itself qualified as a systematic scrutinizer that sifts through incoming documents, notably draft EU proposals, and which occasionally makes its voice heard. The committee system follows a coordination model: the European Affairs Committee coordinates and assists the sectoral committees in their scrutiny. The legal basis for parliamentary involvement in EU matters is laid down in the Basic Law and additional statutes (although in a comparative perspective the constitutional basis does not say much: parliamentary oversight in EU matters is constitutionally enshrined in Greece, too, whereas the Danish routine is almost entirely customary). An assessment of the *Bundesrat* is more complicated since it is manifestly un-parliamentary in nature: it comprises sub-national governments and is thus an inter-executive body with a legislative function comparable to the EU Council. It is always wise to note that when one speaks of a strengthening of “national parliaments,” this may lead to a (perhaps unintentional) empowerment of less representative legislative chambers as well. Be that as it may, in comparative rankings Germany is usually qualified as ‘moderate’ in its parliamentary scrutiny of European affairs.²²

Does the *Lisbon Case* now boost Germany to the top ranks of national parliamentary strength? Yes and no. The answer is “yes” when one considers that, for the most prominent treaty clauses under consideration, the German Constitutional Court insists on statutory approval with bicameral consent and, as the case may be, with elevated majorities as they apply to constitutional amendments. This goes beyond the existing level of procedural constraint as it applies, for instance, in the Netherlands, where certain Third-Pillar decisions require the consent from both chambers of the national parliament and where a scrutiny reserve applies to bar a minister from agreeing to such measures in the Council prematurely.²³ First, in the Dutch case, approval is given via an ordinary resolution adopted by simple majority, not by statute, let alone by super-majority. Second, the scrutiny reserve is lifted and the minister is free to proceed after fifteen days if, by then, parliament has not indicated that its approval will be required. The German Constitutional Court, however, explicitly ruled out tacit consent procedures. Third, ministerial approval in the Council in violation of the scrutiny reserve or parliament’s preferences will not render the EU decision itself invalid in the Netherlands, and the sanction will be purely political in nature; in Germany this may be different since, unlike the Netherlands, it has a Constitutional Court that considers the decisions in question to come down to treaty amendments and will certainly not hesitate to declare EU decisions adopted under unlawfully arrogated powers to have no effect in Germany.

²² See Raunio, *supra* note 19, with references.

²³ TFEU art. 81.

At the same time, we should not forget that the *Lisbon Case* concerns only very few, very extraordinary procedures. As in *Maastricht Case*, the Court reminds the national legislature that national parliamentary involvement in the EU is not limited to the ratification of Treaties every few years, and that day-to-day scrutiny of EU matters remains essential. However, it does not impose parliamentary clearance for *all* EU decisions across the board. The Christian Social Union, the Christian Democrats' Bavarian sister party, demanded such an expansion of oversight for both *Bundestag* and *Bundesrat*, but it is important to note that the point has been raised in the middle of a federal election campaign. Either way, if the requirements flowing from the *Lisbon Case* are implemented while the rest of scrutiny activity remains the same, there will still be a host of EU member states whose parliamentary oversight is much more intensive than Germany's, leaving Germany in the 'moderate' camp. After all, there is no reason to assume that the cultural factors and the tactical incentives of political parties, which all influence the intensity of EU scrutiny, have suddenly changed. As a matter of comparison, one should point out the UK, where a scrutiny reserve applies in principle to all EU decisions. Denmark, Sweden, Finland and Austria have provisions or conventions permitting parliament to summon ministers to discuss negotiating mandates before each Council meeting (although Austrian practice is more lenient than the law suggests). Still, it is noteworthy that, as far as the flexibility clause is concerned, the German representative in the Council will be procedurally more constrained than his or her Nordic counterparts since they only have a unicameral parliament to deal with and tacit political consensus suffices on the home front. If the German opposition wins enough regional elections so as to gain a blocking minority or even a majority in the *Bundesrat*, and if the application of, for example, the flexibility clause were to become a matter for disagreement, politicization and public debate, then—if these two conditions are fulfilled—Germany might be forced to veto the procedure in the Council. We should remember that an opposition party does not even need to secure regional premierships in order to vote against a measure in the *Bundesrat*: it is enough if it merely joins a coalition at regional level, so that in case of disagreement with the other coalition partner the State government will abstain in the *Bundesrat* and thereby withhold consent to the draft measure. In that scenario, the *Lisbon Case* would have meant a genuine brake on European integration. Otherwise, the judgment may raise awareness and Euro-consciousness among parliamentarians and perhaps even their colleagues from other member states. For if the German Constitutional Court finds the relevant Lisbon procedures so worrying, there really might be something to it. And, in fact, enhanced awareness is probably all the Court wanted and all it could possibly achieve: the decisions may still be supported by majorities in the national legislature, but at least approval will take place in public view.

D. Conclusion

The ruling of the German Constitutional Court in the *Lisbon Case* is not incompatible with EU treaty law. It remains a national constitutional prerogative to impose certain clearance mechanisms before a national minister is allowed to vote “yes” in Brussels. Several other EU member states go much further than Germany now does, in that they tie their ministers to scrutiny reserves and make them subject to parliamentary negotiating mandates on *all* EU decisions, not just the rare and relatively momentous ones that the *Lisbon Case* covers. Nevertheless, the imposition of prior, usually bicameral consent with possibly elevated majorities for the application of the *passerelle* clause, other similar clauses and especially the flexibility clause makes the judgment a rather conservative and restrictive one. The partially enhanced flexibility of treaty reform as envisaged under the Treaty of Lisbon became, in the case of Germany, a thing of the past before it even entered into force. What about the other member states? It is perfectly acceptable to consider future applications of the *passerelle* and the flexibility clause as being covered by the original instrument of ratification: the Czech Constitutional Court and the French Constitutional Council have interpreted the Treaty of Lisbon in this way. Increased flexibility is then part of the approved package. Perhaps the German judgment, and the extreme safeguards on which it insists, will draw the attention of national parliamentarians across Europe to the contested clauses and remind them to monitor their governments when they participate in EU decision-making. That is what they are supposed to do already. The German Constitutional Court has put a number of red flags on the Treaty of Lisbon; perhaps these flags will be seen outside Germany, too.