



## The Lisbon Treaty: ratification issues in Ireland, Germany, Poland and Czech Republic

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This Note looks at ratification of the Lisbon Treaty in Ireland, Germany, the Czech Republic and Poland. It updates Standard Note 4943, “The Lisbon Treaty: the final four”, 20 January 2009, and SN 4921, “The Lisbon Treaty: the European Council and prospects for Irish ratification”, 18 December 2008.

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**1 Ireland**

**1.1 “Legal guarantees” in exchange for “seeking ratification”**

The Irish Government was asked to report to the European Council in mid-October 2008 on its plans with regard to the Lisbon Treaty, which was rejected in a referendum on 12 June 2008 by 53.4% to 46.6%. The Foreign Minister, Micheal Martin, expected to have a clear roadmap by December 2008, based on discussions with the then French EU Presidency.

An agreement in the form of declarations was reached at the European Council summit on 11-12 December 2008, by which, in return for “legal guarantees” to remedy those matters of concern to the Irish electorate, the Irish Government would “seek ratification” of the Lisbon Treaty by the end of the Commission term, with a view to implementation of the Treaty in 2010.

The concessions included a guarantee in the form of a “decision” that will be taken “in accordance with the necessary legal procedures” that each Member State will keep a commissioner. There was also a pledge that the EU would not impose rules on Ireland

concerning taxation, "ethical issues" (e.g. abortion, euthanasia and gay marriages) or interfere with its traditional neutrality.

The European Council Presidency Conclusions state:

1. The European Council re-affirms that the Treaty of Lisbon is considered necessary in order to help the enlarged Union to function more efficiently, more democratically and more effectively including in international affairs. With a view to enabling the Treaty to enter into force by the end of 2009, the European Council, while respecting the aims and objectives of the Treaties, has defined the following path.

2. On the composition of the Commission, the European Council recalls that the Treaties currently in force require that the number of Commissioners be reduced in 2009. The European Council agrees that provided the Treaty of Lisbon enters into force, a decision will be taken, in accordance with the necessary legal procedures, to the effect that the Commission shall continue to include one national of each Member State.

3. The European Council has carefully noted the other concerns of the Irish people presented by the Taoiseach as set out in Annex 1 relating to taxation policy, family, social and ethical issues, and Common Security and Defence Policy (CSDP) with regard to Ireland's traditional policy of neutrality. The European Council agrees that, provided Ireland makes the commitment in paragraph 4, all of the concerns set out in the said statement shall be addressed to the mutual satisfaction of Ireland and the other Member States.

The necessary legal guarantees will be given on the following three points:

- nothing in the Treaty of Lisbon makes any change of any kind, for any Member State, to the extent or operation of the Union's competences in relation to taxation;
- the Treaty of Lisbon does not prejudice the security and defence policy of Member States, including Ireland's traditional policy of neutrality, and the obligations of most other Member States;
- a guarantee that the provisions of the Irish Constitution in relation to the right to life, education and the family are not in any way affected by the fact that the Treaty of Lisbon attributes legal status to the EU Charter of Fundamental Rights or by the justice and home affairs provisions of the said Treaty.

In addition, the high importance attached to the issues, including workers' rights, set out in paragraph (d) of Annex 1 will be confirmed.

4. In the light of the above commitments by the European Council, and conditional on the satisfactory completion of the detailed follow-on work by mid-2009 and on presumption of their satisfactory implementation, the Irish Government is committed to seeking ratification of the Treaty of Lisbon by the end of the term of the current Commission.<sup>1</sup>

The Taoiseach, Brian Cowen, was reported as saying:

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<sup>1</sup> EU Presidency Conclusions, 11-12 December 2008, at [http://www.consilium.europa.eu/ueDocs/cms\\_Data/docs/pressData/en/ec/104692.pdf](http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/104692.pdf)

On the basis of the agreement today, and on condition of our being able to satisfactory put guarantees in place ... I would be prepared to return to the public to put to them a new package and to seek their approval of it".<sup>2</sup>

Mr Cowen was "convinced that we are on the right path. [...] The views of the Irish people are being respected".<sup>3</sup> He also stressed that there was still "a lot of detailed work to be carried out in the months ahead" to clarify how exactly Ireland would get its guarantees, but he was hopeful that Irish citizens would eventually be satisfied with the outcome of the negotiations and support the Lisbon Treaty.

The former EP President, Pat Cox, pointed out in the *Irish Times* that the concession on Commissioners was one of principle rather than one of substance:

A key concession is the European Council's unanimous agreement to allow each member state to nominate a commissioner in perpetuity. This concession does not require a change to the Lisbon Treaty, which already provides the European Council with the right to decide the number of commissioners, subject to unanimity.<sup>4</sup>

The Lisbon Treaty would not be altered by the Commissioner concession, as it already provides for Member States to decide unanimously on a different arrangement from the one set out. One important dissenter from this opinion is the Czech President, Vaclav Klaus, who has yet to decide whether to endorse the Treaty or not (see below).

## 1.2 June 2009 European Council 'Decision'

At the June 2009 European Council Heads of State and Government agreed to a 'Decision' on the Irish concessions to be incorporated into a protocol and ratified alongside the next EU accession treaty (assumed to be Croatia). Gordon Brown insisted on 23 June that the protocol offered "clarification"; would in no way alter the relationship between the EU and its Member States, would be specific to Irish concerns; that its status would be no different from the UK protocols to Lisbon and that it would be subject to ratification in the British Parliament.<sup>5</sup>

The Liberal MEP, Andrew Duff, had told the *Irish Times* in April 2009 that "Adding this protocol to the Croatian accession treaty would leave the treaty wide open to attack in the courts".<sup>6</sup> The report continued:

He added that rules in the EU treaties governing accession treaties only allow issues pertaining to a state's accession to be dealt with.

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<sup>2</sup> *EUObserver* 12 December 2008 <http://euobserver.com/9/27295/?rk=1>

<sup>3</sup> *Ibid*

<sup>4</sup> *Irish Times* 12 December 2008 at <http://www.irishtimes.com/newspaper/opinion/2008/12/12/1228864714775.html?via=rel>. The basis for this assertion is Article 17(5) of the amended Treaty on European Union (TEU), which states: "As from 1 November 2014, the Commission shall consist of a number of a number of members, including its President and the High Representative of the Union for Foreign Affairs and Security Policy, corresponding to two thirds of the number of Member States, unless the European Council, acting unanimously, decides to alter this number".

<sup>5</sup> HC Deb 23 June 2009 c 662 at <http://www.publications.parliament.uk/pa/cm200809/cmhansrd/cm090623/debtext/90623-0004.htm>

<sup>6</sup> *Irishtimes.com* 2 April 2009 at <http://www.irishtimes.com/newspaper/world/2009/0402/1224243854498.html>

Mr Duff said the procedures to allow for a general revision of the European treaties were different and the insertion of an Irish protocol into the EU treaties may have to wait for a new EU reform treaty to be drawn up and ratified.

He cited the example of Denmark, which had to wait five years before the guarantees and opt-outs it received after its No vote against the Maastricht treaty in 1992 were embedded in the EU treaties. The Danish guarantees were finally embedded in the EU treaties by means of the Amsterdam Treaty.

Brien Cowen had proposed the protocol solution in April 2009, telling the Dail that the

guarantees promised in December must be legally robust in order to reassure the public about the treaty. While I respect the fact that other member states do not wish to re-ratify the Lisbon treaty, I made it clear that, for my part, the legal guarantees will have to be attached to the EU treaties at the next possible opportunity.<sup>7</sup>

The following blog initiated by Stanley Crossick on 5 April 2009 commented on Andrew Duff's view of the legality of the proposed protocol:

#### [Can Irish protocol be added to Croatian Accession Agreement?](#)

[...]

Denmark's guarantees and opt-outs, promised after the first referendum on the Maastricht Treaty in 1992, were only legally implemented by the Amsterdam Treaty. But Croatia is expected to join the EU in 2010-11 and the idea is to add a protocol to the Treaty of Accession.

The question arises, however, whether it is legally possible to add to an accession treaty an Irish-specific protocol containing such legal guarantees, or whether only issues pertaining to a state's accession may be dealt with. *"Adding this protocol to the Croatian accession treaty would leave the treaty wide open to attack in the courts."* says Andrew Duff MEP.

If an accession treaty is not used, the legal implementation would have to await a new EU treaty to be drawn up and ratified. The 'Irish Protocol' could, of course, be ratified by the Member States at the same time as, but separate from, the Croatian Treaty of Accession. In either case, ratification is not guaranteed. [...]

The objection raised is fascinating for lawyers but may not have any political or practical relevance. The procedure adopted by the institutions and Member States can only be invalid if (a) a case is brought before the European Court of Justice (ECJ) and (b) the Court strikes down the procedure.

There are precedents of the institutions and the Member States living with legally unsatisfactory situations. Provisions of the original treaties – notably those relating to qualified majority voting – were not implemented, not least, but not entirely, because of the Luxembourg Compromise. In some cases, they were re-enacted in the Single European Act, as if they were new. Despite extensive criticism on legal grounds the issue was never tested.

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<sup>7</sup> 1 April 2009 at <http://debates.oireachtas.ie/DDebate.aspx?F=DAL20090401.xml&Node=H7#H7>

And this is what is most likely to happen with the Irish protocol. There is unlikely to be anyone with locus standi who would challenge in the ECJ non-compliance with Community law.

Even were someone with locus standi willing to bring a case, it is unlikely that the ECJ would strike the provisions down.<sup>8</sup>

Professor Steve Peers of the University of Essex responded as follows to the Duff comments and the Crossick blog on 7 April 2009:

The position of the ECJ is not quite the end of the issue - because doubts about the legality of the process might lead to reluctance to ratify the treaty in national parliaments, or challenges before national courts to the legality of ratification of the treaty, cf the 1980s case that started the whole saga of Irish referenda off in the first place. There is also the point that there are two different legal bases for accession treaties and Treaty amendments (Arts 48 and 49 TEU), which entail different decision-making processes to some extent. I think the best solution is to draw up a single treaty based on those two legal bases, which encompasses both a Treaty amendment and an accession treaty simultaneously.

Other responses were:

[H de Waele, Radboud University Nijmegen](#) 2009/04/07

As a lawyer, I think the statement of Mr Duff, which has inspired this post, might in itself be somewhat off the mark. Apparently he has said that “adding this protocol to the Croatian accession treaty would leave the treaty wide open to attack in the courts.” I wonder whether this is really the case. If the right honourable gentlemen is referring to a case raised before any national courts, it appears unlikely that they would be able to decide what is proper to be included in an accession treaty or not. There is no legal reason why a protocol pertaining to a different matter could not be annexed to the treatise that generally deals with the conditions of Croatia’s accession. If Mr. Duff is however thinking about a case imitated before the EU Courts in Luxembourg, there is the precedent of the Roujansky v. Council cases seems applicable (T-584/93 and C-253/94P). In these cases, the EU Courts stated that an action for annulment (ex Article 230 of the EC Treaty) cannot be staged against an EU (amendment) Treaty. The same will undoubtedly apply to challenges against accession treaties. So, if natural and legal persons have no possibility for a legal challenge, this still leaves Member States and EU institutions as possible applicants - but indeed, it would seem most strange of any of them would be attacking a treaty and protocol in court where they had an important role to play in its negotiation process. If they do not like the outcome, they can just decide not to ratify it. In sum then, as said, Mr. Duff’s remarks seem slightly erroneous from a legal point of view.

Comment by [Steve Peers](#) 2009/04/15

I agree that no legal challenge before the EU courts against such a Protocol would be admissible, but I still think there is a possibility of a legal challenge in the national courts by some individual aggrieved by European Union integration in general - cf the challenges we have seen several times in the UK, Ireland,

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<sup>8</sup> Blogactiv (Stanley Crossick) at <http://crossick.blogactiv.eu/2009/04/05/can-irish-protocol-be-added-to-croatian-accession-agreement/#comment-2790>

Germany, the Czech Republic and constitutional court proceedings also in Spain and France (I may have missed some).

The legal point is that it would NOT be possible simply to attach a protocol dealing with anything at all to the accession treaty with Croatia, because accession treaties have a particular 'legal base' with a specific decision-making procedure (Article 49 TEU). But a measure amending the TEC/TEU needs the 'legal base' of a Treaty amendment (Article 48 TEU), which entails a different decision-making procedure in some respects from accession treaties. Also in some Member States it may be arguable that a different national ratification process would be applicable for accession treaties as compared to Treaty amendments. The only solution is to use the double legal base of Arts 48 and 49 TEU at the same time, and to combine all the features of the decision-making applicable to the two different legal bases.

[Stanley Crossick](#) 2009/04/15

I do not think that doubts about the legality of the process would lead to reluctance to ratify the treaty in national parliaments or challenges before national courts to the legality of ratification of the treaty, but accept that it is a possibility. The two different legal bases for accession treaties and Treaty amendments (Arts 49 and 48 TEU respectively) could be used but Andrew Duff fears that the use of Article 49 would bring into play the requirement for an intergovernmental conference (IGC), with all that entails.

H de Waele:

I agree that an attack in national courts or the ECJ is unlikely. I too cannot imagine a Member State or EU institution applying.

[JL](#) | 2009/04/17

With respect, these exchanges miss the point. The Danish opt-outs document, a Decision of the HOSG meeting within the EC, as you will be aware, was registered with the UN some months subsequent to its agreement in Edinburgh as an international treaty and therefore theoretically justiciable in international law. The contents were subsequently enshrined (a major political error) by way of a protocol to the Amsterdam Treaty. The texts changed the relationship that Denmark had with the EU but did not alter any existing treaty texts. No amendment was involved. The same approach will, ipso facto, have to be followed in the case of Ireland as any attempt to draft a protocol to the Lisbon Treaty would ineluctably lead to re-ratification in all Member States, exactly the situation confronting other Member States in the case of Maastricht.

The accession treaties for Romania and Bulgaria, incidentally, contain a chapter dealing with institutional changes and refer to the now defunct Constitutional Treaty.

One of the "legal guarantees" mentioned in the conclusions of the December 2008 European Council, that relating to taxation, is not even Ireland specific.

The Irish situation is identical in institutional terms to that of Denmark after the first failed Maastricht vote. As the Danes were looking for real opt-outs (EMU, defence and home affairs) and, insofar as can be judged, the Irish are not, the legal problem is of considerably less significance and the instigation of a debate about the requirement for a protocol an error, first on the part of the

Irish government and second for Sarkozy in giving it credence in his subsequent press conference.

There is no mention of it in the formal conclusions of the European Council.

Steve Peers 2009/05/05

There is no need for a 'protocol to the Lisbon Treaty' to deal with the Irish situation - as it is perfectly possible to add a protocol to the treaties by means of a separate legal process, after the Lisbon Treaty is in force. This is obviously what is being contemplated. So the issue of re-ratification of Lisbon would not arise.

Re the Danish deal at the 1992 summit, the mixture of public international law and EU law which this entailed was always highly problematic legally, and the Danes rightly addressed it properly in the Treaty of Amsterdam - they could have lost their referendum otherwise.

And anyone who thinks that there is no prospect of a national legal challenge to an Irish Protocol that is at all legally questionable is underestimating Eurosceptics and overlooking their use of national courts throughout many years of Treaty revision.

### **1.3 The legal status and timing of the Lisbon 'Decision'**

In an exchange in the House of Lords on 1 July, the Minister for Europe, Glenys Kinnock, confirmed the UK view that Ireland would be voting on the same text of the Lisbon Treaty a second time around. She said:

Those guarantees do not change the Lisbon treaty; the European Council conclusions are very clear on them. The Lisbon treaty, as debated and decided by our Parliament, will not be changed and, on the basis of these guarantees, Ireland will proceed to have a second referendum in October. [...] Nothing in the treaty will change and nothing in the guarantees will change the treaty as your Lordships agreed it.<sup>9</sup>

Asked about the legal status of the Irish guarantees, Glenys Kinnock confirmed that they will not be legally-binding until they are written into the EU Treaties as a protocol after the Irish referendum.

... what we have in the guarantees will become binding in international law when the guarantees are translated into a protocol at the time of the next accession, which presumably will be when Croatia or Iceland comes in. Before that protocol can be ratified by the UK, Parliament must pass a Bill. As I said, Parliament will rightly have the final say.<sup>10</sup>

Giving evidence to the European Scrutiny Committee (ESC) on 2 July, the Foreign Secretary, David Miliband, reiterated that "Every head of state agrees that these guarantees

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<sup>9</sup> HC Deb 1 July 2009 c 219 at <http://www.publications.parliament.uk/pa/ld200809/ldhansrd/text/90701-0001.htm#09070164000464>

<sup>10</sup> Ibid c 217

do not change the Treaty".<sup>11</sup> However, he appeared to contradict the Europe Minister when he said:

[...] I think that binding international law, legally binding, as I described it to the FAC in the meeting we had there, is right because this is an agreement between the states, it will be lodged at the UN in the way that international treaties are, and that is the sense in which it is legally binding. It does not change the Lisbon Treaty as it affects the UK. It does not require ratification to have legal effect, and that is the reason that I think the Irish proposed that we proceed in this way, first of all to a decision and then to an appending of it to the protocol. I think that is the legal explanation. I am confident however that is not the last word on the matter because I know that there are others on this Committee who have a lot of interest in this.

The ESC pursued a line of questioning about the legality and timing of the proposed Decision and Protocol, including the matter of ratification in the UK. Below is the relevant exchange from the uncorrected evidence:

**Q29 Chairman:** [...] Foreign Secretary [...] can I just say to you that the statement of the Council's conclusions was that the decision gave legal guarantees that meet the Irish concerns and, quote, "is legally binding from the date the Lisbon Treaty enters into force" and I believe you have repeated that. My understanding is that under section 1 subsection 2 of the European Communities Act 1972 it cannot have legal effect until it is incorporated by national legislation. My understanding and my recall is that the Danish protocol became a protocol, and in fact, I quote Baroness Kinnock of Holyhead [...**Q30**] of 1 July 2009 saying that it becomes binding in international law when the guarantees are translated into a protocol at the time of the next accession, not when the Lisbon Treaty is ratified. So we have a contradiction here.

David Miliband: No, no, I am sorry, Chairman, there is not a contradiction. It is legally binding because of the decision that was taken. A decision is legally binding in international law. It is an agreement between states. There is no argument about that. It is deposited at the UN. It can be adduced by international courts as they try to seek interpretation of the Lisbon Treaty. The decision does not change the Lisbon Treaty; it provides clarification, which we had already provided to our own satisfaction in this Parliament but which the Irish wanted further clarification about. The Danish example: the decision remained legally binding as a decision for seven years before it was appended to the 1999 Treaty. The quotation from the European Communities Act does not obviate or negate the fact that a decision of the European Council is legally binding in international law.

**Q31 Mr Clappison:** I think that is in accord with the advice which we have been given. It is in accord with international law but, of course, international law is not the same as EU law and it leaves open the question of the justiciability of the decision. I think you agree, do you not, Secretary of State, that this decision is justiciable in the EU under EU law and by the European Court of Justice?

David Miliband: I think there is a discussion about the European Court of Justice. There is also the International Court in The Hague, which may eventually have---

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<sup>11</sup> ESC Uncorrected evidence, 2 July 2009 at <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmeuleg/uc761/uc76102.htm>

**Q32 Mr Clappison:** No, let us just stick with the European Court of Justice.

David Miliband: I want to give you a full answer because it would be wrong to mislead. In respect of the European Court of Justice, if there were a case concerning, for example, abortion in front of the European Court of Justice and the European Court of Justice was in any doubt at all about whether or not the Lisbon Treaty interfered with Irish rules and law on abortion, they could happily turn to this decision for further legally binding clarification, and underlining 12 times, that Irish laws on abortion are Irish laws on abortion and are not interfered with by the Lisbon Treaty. That is the extent to which this might be of use to the ECJ.

**Q33 Mr Clappison:** There are a number of things jumbled up there, if I may say, Secretary of State. You spoke of interpretation of it being legally binding. It is the decision of the European Court of Justice which is legally binding. The decision is not legally binding on the European Court of Justice, is it? It may look at it for interpretation but it is not legally binding upon it. That is the reason why you are going to have a protocol later on, at some uncertain time.

David Miliband: I do not accept the second half of what you said because the job of the ECJ is to interpret the treaties. That is the point. It is not the question that the ECJ is somehow legally binding. The ECJ is there to interpret the law, and European law is set in ways that you know extremely well. In our view, the Treaty of Lisbon is absolutely clear on matters of tax and defence and abortion/right to life. The decision gives further legal force in that respect without changing the Lisbon Treaty one jot that came through the British Parliament, and I think you would agree this is a decision of the European Council - a decision as opposed to simply a conclusion - and a decision of the European Council is an agreement between states and is therefore legally binding.

**Q34 Mr Cash:** [...] Far more important, however, is the fact that, in the light of an exchange I had, as it happens, with the Prime Minister on 23 June on the European Council statement, the fact is that this decision, which was taken at Edinburgh, was a matter which at that time, in 1992 - and I do remember it really quite well as I was leading the rebellion at that time. I think you will find this very important - at least, I hope you will. At that time the House of Commons was in a position to deal with the question which arose during the passage of the Maastricht Bill - in other words, a completely different situation, because this is emphatically not the case now. So how on earth could you not agree that the European Council decision of 18 June must now be re-ratified and then implemented in Parliament with a new Bill? They are completely different circumstances from what you described.

David Miliband: For a very simple reason: paragraph 5 of the presidency conclusion says as follows. "...the Heads of State or Government have declared that: (i) this Decision gives legal guarantee that certain matters of concern to the Irish people will be unaffected by the entry into force of the Treaty of Lisbon; (ii) its content is fully compatible with the Treaty of Lisbon and will not necessitate any re-ratification of that Treaty; (iii) the Decision is legally binding and will take effect on the date of entry into force of the Treaty of Lisbon; (iv) they will, at the time of the conclusion of the next accession Treaty, set out the provisions of the annexed Decision in a Protocol to be attached, in accordance with their respective constitutional requirements... (v) the Protocol will in no way alter the relationship between the EU and its member states. The sole purpose of the protocol---

**Q35 Mr Cash:** That is their assertion.

David Miliband: Hang on. Let me finish before we get on to your assertion. "The sole purpose of the Protocol will be to give full treaty status to the clarification set out in the decision to meet the concerns of the Irish people. Its status will be no different to the similar clarifications in protocols obtained by other member states. The Protocol will clarify but not change either the content or the application of the treaty." Then when you turn to the text of the decision itself, which of course takes a different place in the conclusions; it is not included in the main conclusions, precisely to draw attention to the fact that a decision is different from a conclusion; it is in annex one---

**Q36 Chairman:** Before Mr Cash comes back, can I ask you a question that most people looking at this process will be asking. If in fact this is a legally binding decision without the need for ratification, because you have said it does not need ratifying, why do you want to incorporate it into a protocol? Why would you want to do that at some unknown date in the future? To people looking at it, this sounds like a stitch-up to get round the fact that if we do not give Ireland something that is not in the Lisbon Treaty at this moment, which we ratified - it was not there when this Parliament discussed and ratified it, and I supported that ratification and spoke a number of times on that basis - if it is not in that treaty, why do we have to have a protocol? Is it because this is basically a political stitch-up---

David Miliband: No, I reject that.

**Q37 Chairman:** ---to get round the Irish people's concerns that those things are not in the Lisbon Treaty that we were asked to ratify as a Parliament? Can you not see why people are suspicious?

David Miliband: No, I cannot. They can only be suspicious if they do not have the facts about what has happened, because the allegation one from you - not necessarily that you believe but that you are putting on behalf of those who might believe it - is that this is to get round the Irish decision, but the Irish are going to have a referendum. There is no getting round the Irish decision. The Irish Government have decided to put to the Irish people a further question on the Lisbon Treaty. So no-one can get round the Irish people, and it is important to say that because when I came back to the House after the Irish referendum vote last year, people said, "Aha! You are going to find a way to ratify the Lisbon Treaty without the Irish people agreeing to it." There is no obfuscation and no going through the back door - nothing like that. The Irish people will have to do it. That is point one. Point two: the Irish Government asked for this to be in a protocol and, as we described in the pre-Council discussions we had, there were two ways of giving legal force to the legal guarantees that had been asked for in the December European Council, and they asked for it and we did not object to it once the text of the protocol decision had become clear. Then, thirdly, and critically, this decision and this protocol in no way in terms change one jot of the Lisbon Treaty as it affects Britain and as was passed by this Parliament. There are quotes in all of the areas from Ministers as this went through the House explaining why tax was not affected, why defence was not affected either and the rights of neutral and other countries would be respected, and non-NATO countries; I remember those debates and therefore it is very important to have on the record that the Lisbon Treaty that was passed by this Parliament as it affects the UK in the range of ways that we have discussed is unaffected by this decision. What is more, the heads of state

of 27 European countries have said the same, and they are absolutely clear that no re-ratification is necessitated.

**Q38 Mr Borrow:** We know about the decision but there can be no guarantee that a protocol would be ratified.

David Miliband: Good point.

**Q39 Mr Borrow:** We do not know whether there is going to be an accession treaty, we do not know whether the member states' parliaments will vote for it, and therefore, from an Irish perspective, they have got a decision; that is what they have in their hand and that is what they can say to their people in a referendum, but they cannot take the protocol and the ratification of the protocol and say we are definitely going to get that.

David Miliband: Right.

Mr Borrow: So from an Irish perspective, what does having that protocol actually give them extra that they do not have already with the decision, because there is no guarantee that they will get the ratification of the protocol?

**Q40 Chairman:** It seems a fair point. It requires ... unanimity of all countries for a protocol.

David Miliband: It is a good point but that is why it is important that the decision has legal force. That is why the fact that this is a decision, not a conclusion, is important, because the Taoiseach can go to the people of Ireland say, "We have got a decision which is legally binding in international law. It is an agreement between states."

**Q41 Mr Cash:** You have made some very significant remarks. I may disagree with them but they are significant and they are on the record. I believe, frankly, Foreign Secretary, this whole operation for a long time has, as the Chairman has suggested, had the characteristic of stitch-up and cover-up but I would rather get down to the actual nitty-gritty here because it affects all the member states. What I would simply like to refer you to is what the Minister for Europe in the House of Lords, in the other place, stated yesterday at column 219. I have it here in case you would like me to hand it to you. I have it marked up because I think it is important that you should have a look at this. It has a ring round it and it has a couple of crosses. (Same handed) The Minister said yesterday, and I am quoting exactly what she said, "Everything in the guarantees has been agreed by the Parliament of this country" - she means the Irish guarantees - I repeat, "Everything in the guarantees has been agreed by the Parliament of this country." Does the Foreign Secretary agree with her or will he admit that this simply is not true?

David Miliband: I would like to know why you think it is not true.

**Q42 Mr Cash:** For the simple reason that we certainly have not agreed in this Parliament to the Irish guarantees.

David Miliband: No, Bill, really. You read out a quote which said, "I am surprised that some Members are not aware that everything in the guarantees has been agreed" and then you said, "Aha! Tell me that we agreed the guarantees." Of course, the point that Glenys Kinnock made, which you dropped from your second quotation, was everything *in* the guarantees. The guarantees are about tax, defence and abortion.

**Q43 Mr Cash:** You know perfectly well, Foreign Secretary, that the Irish protocol of 1992 has been, as I said to the Prime Minister---

David Miliband: Danish you mean?

**Q44 Mr Cash:** No, I am talking about the Irish protocol - has been greatly extended. There is a whole sheet of things that have been added in and that affects all the member states, so we are dealing... It seems to me that perhaps you have not been given a briefing on this point.

David Miliband: No. Let us be absolutely clear. The allegation you made is that somehow---

**Q45 Mr Cash:** It is a greatly extended Irish protocol which affects all the member states, therefore there is a need for ratification of this treaty, implementation by a new Bill in this House. How can you deny that?

David Miliband: For the very simple reason that every European country agrees that this decision does not change the Lisbon Treaty. Secondly, if you go through the debates that we had in this House on the Lisbon Treaty and look at what was said about tax and about defence and about abortion - I stand to be corrected but I have a feeling that you challenged me at various points to say "Isn't this just a ramp to the end of British sovereignty over our taxation policies?" and I said, "No," and that is what has been reconfirmed by the Irish decision.

Mr Cash: I am sorry to have to say, Foreign Secretary, I think that you are in a very serious muddle over the legal situation here, and I am afraid to say I would have to add - finally, because I think we have to leave it at this point because you cannot answer my questions - that there seems to be no limit - and I am not making personal accusations - to the general deceit which has covered this, and I believe we have to have a referendum as the only means, as 88% of the British people want one.

Chairman: I do not think "deceit" is an appropriate word.

**Q46 Mr Cash:** I shall withdraw the word "deceit". Shall I call it chicanery?

David Miliband: Can I say, Chairman, that Mr Cash made a series of allegations but ended up repeating his political view, which is sincerely held---

**Q47 Mr Cash:** My legal and political view.

David Miliband: I listened to you so you should listen to me, with respect. He made an allegation that somehow something had been said in the other place last night that was not true. That is not true.

**Q48 Mr Cash:** It is true.

David Miliband: No, I am sorry. It is not true. What you first of all alleged related to the substance of the guarantees, and then you tried to corner this into the question of whether or not the guarantees had been previously discussed in the Parliament.

**Q49 Mr Cash:** Agreed.

David Miliband: Secondly, you then went on to a series of allegations relating to the possibility that this decision, and subsequently the protocol, would be a

ramp for all sorts of new powers with some parallel that you drew with 1992. There is absolutely no evidence of that. Then when you had been beaten back on both of those two things, you resorted to personal/governmental abuse that restated your position that the European Union is a deceit on the people of Europe, which is your view but the fact that it is your view does not make it correct.

Mr Cash: The manner in which this has been conducted---

Chairman: Mr Cash, Mr Cash.

**Q50 Mr Clappison:** Just briefly to follow on from that, you mentioned the defence debate on the Treaty of Lisbon, which I took part in, as you may remember, or attempted to take part in. We had very little time in those debates to debate defence. Defence was hardly reached because of the way in which the Government organised the debate. I put that as a preamble. The question I want to ask you is the same question on this. When is it that we will have the opportunity to have a debate and a vote in this House on the Irish guarantees?

David Miliband: I do not know how many times I have repeated it here, and I do not know how many times it has been read by people, but there is absolutely no doubt about it: at the time of the next accession treaty the protocol will be appended.

Chairman: At the time of the next accession treaty. That is a very precise answer.

**Q51 Mr Clappison:** That could be, you said, seven years. It is an uncertain time---

David Miliband: No, I said seven years in respect of the Danish experience of the Nineties.

Mr Clappison: Yes, I know, but you gave that as an example, Secretary of State. It could be seven years, some uncertain time in the future, before we will have the opportunity of a debate and vote in this House of Commons.

Chairman: I think we all know in this Committee, since we were in fact discussing Croatia within half an hour of this, that this is something that is pending in the next two or three years at the latest. I think we have actually come to the point where we have explored this in some detail, we have put on the record our concerns and you, Foreign Secretary, have put on the record your explanations. We have put on the record also our understanding of what went on in the other place on the same question, and I think we all understand that eventually this will come down to the choice of the Irish people whether they think these guarantees are correct, and then it will come down some time in the future to whether 27 countries do in fact ratify the protocol to make it what is called, I think the word is, giving it "full treaty status", and we will look forward, obviously, to these things being worked out in the fullness of time. We have not taken as much of your time but I think we have explored it in some detail and I hope we have illuminated the subject for the public who are interested in it. Thank you for coming along, and thank you to your colleagues also.<sup>12</sup>

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<sup>12</sup> 2 July 2009 at <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmeuleg/uc761/uc76102.htm>

## 1.4 The Irish constitutional process

The second *Twenty-Eighth Amendment of the Constitution (Treaty of Lisbon) Bill 2009* was published on 6 July 2009, debated and passed in the Dáil and Seanad on 8 and 9 July respectively. The target date for entry into force is 1 November 2009, so presidential endorsement is envisaged shortly after the October referendum if the result is positive.

The passage of the Bill with links to texts and debates was as follows:

Twenty-Eighth Amendment of the Constitution (Treaty of Lisbon) Bill 2009

Bill Number 49 of 2009

Sponsored by Minister for Foreign Affairs

Bill entitled an Act to amend the Constitution

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Dáil Éireann

First Stage Presented 02/07/2009

Order for Second Stage DDMMYY

*English version:*

 [Twenty-Eighth Amendment of the Constitution \(Treaty of Lisbon\) Bill 2009 as initiated \(in PDF format\)](#)

 [Twenty-Eighth Amendment of the Constitution \(Treaty of Lisbon\) Bill 2009 Explanatory Memorandum \(in PDF format\)](#)

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Second Stage

[08/07/2009](#) An Dara Chéim / Second Stage

[08/07/2009](#) An Dara Chéim (Atógáil) / Second Stage (Resumed)

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Committee Stage

[08/07/2009](#) Céim an Choiste agus na Chéimeanna a bheidh Fágtha / Committee Stage and Remaining Stages

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Report and Final Stages

 [Twenty-Eighth Amendment of the Constitution \(Treaty of Lisbon\) Bill 2009 as passed by Dáil Éireann](#)

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[Seanad Éireann](#)

## Second Stage

[09/07/2009](#) An Dara Chéim / Second Stage

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## Committee Stage

[09/07/2009](#) Céim an Choiste agus na Chéimeanna a bheidh Fágtha / Committee Stage and Remaining Stages<sup>13</sup>

The 28th Constitutional Amendment Bill remains a Bill until converted into an Act by a positive referendum result. On the next parliamentary sitting day following a positive referendum, which will be Tuesday 6 October 2009, the Bill will go through the final stages in the Dáil, and on the following day, 7 October, in the Senate. Presidential signature will probably follow on Thursday 8 October or even earlier if there is an early signature motion (unlikely). The Senate rose in mid-July so there will be no further progress on the bill until the assent of the people is obtained.

Entry into force is achieved upon signature by the President. The formal deposit of the instrument of ratification is made upon signature with a note to the Department of Foreign Affairs, which then deposits it in Rome. If the second referendum is positive, Ireland's instrument of ratification will refer to both the Treaty and the Decision. Both of these will be registered with the United Nations under Article 102 of the UN Charter.<sup>14</sup>

## 1.5 Campaigns

### *Pro-Lisbon*

Following the announcement of the referendum date, the Irish Government launched a website, "The EU matters", to explain what the EU has done for Ireland.<sup>15</sup> The Department of Foreign Affairs also launched a Lisbon Treaty site, setting out how the Government believes Irish concerns have been met by the new concessions.<sup>16</sup> The Government's campaign has been supported by prominent civil society figures, high profile businessmen, political commentators and sports stars, who have come together in the "We Belong" club.

The Green Party, which opposed Lisbon in the last referendum, narrowly agreed to back the Treaty at its convention in mid-July.<sup>17</sup>

The Irish Business and Employers' Confederation (IBEC) believes the Irish concessions represent a "new deal" for Ireland. The IBEC Director of EU and International Affairs, Brendan Butler, said "The decision is as an important first step in providing a basis for securing the ratification of the Lisbon Treaty in the autumn".<sup>18</sup> The news release continued:

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<sup>13</sup> <http://www.oireachtas.ie/viewdoc.asp?DocID=12385&&CatID=59>

<sup>14</sup> Article 102 provides that all international agreements to which UN Member States are party should be registered with the UN Secretariat after their entry into force.

<sup>15</sup> <http://www.eumatters.ie/>

<sup>16</sup> <http://www.lisbontreaty.ie/>

<sup>17</sup> See *Guardian.co.uk* 19 July 2009 at <http://www.guardian.co.uk/world/2009/jul/19/ireland-lisbon-treaty-green-party>

<sup>18</sup> IBEC newsroom, 19 June 2009 at <http://www.ibec.ie/IBEC/Press/PressPublicationsdoclib3.nsf/vPages/Newsroom~ibec-welcomes-lisbon-treaty-guarantees-19-06-2009?OpenDocument>

"The Treaty's successful ratification is more important now than ever. The outcome of the next referendum will define Ireland's future relationship with Europe, and therefore with the world at large. A positive result is vital to ensure Ireland remains a constructive and dynamic partner in Europe. That is where our interests lie and where our future rests.

"At a time of great uncertainty our focus in Ireland must be to strengthen the economy and protect jobs. The Irish rejection 12 months ago has left a question mark hanging over our relationship with the EU. It has had a detrimental effect on business relationships abroad and has weakened the hand of those we rely on to defend and promote our interests in Brussels.

"In the run up to the next referendum IBEC will energetically back the campaign to ensure that Ireland remains at the very centre of EU decision-making. This is where we have succeeded in the past and remains the only viable route to protect the national interest in the years ahead." [...]

"A yes vote is an essential step on the road to economic recovery and will send a very positive signal to European and international investors"...<sup>19</sup>

On 3 August 2009 Brendan Butler is reported as saying "the Irish legal guarantees and assurances secured in respect of the Lisbon Treaty represent a 'new deal' for Irish voters".<sup>20</sup>

Pat Cox, the former MEP and campaign director of Ireland for Europe, is reported as saying:

Ireland is a very different place today to what it was a year ago. The financial crisis has rocked our confidence. We are reeling from a series of body blows over the last 12 months. There is no room for complacency. [...]

There are those on the No side who will seek to exploit our present uncertainty to encourage the Irish people to vote against our own interests and reject the Treaty. [...] We do not plan to let them succeed.<sup>21</sup>

The Ireland for Europe campaign, which has the support of a number of high-profile public figures, has a website promoting a yes-vote in October<sup>22</sup> because "Ireland's EU future is kept in Irish hands. Ireland's position as a committed and engaged Member State is fully affirmed. It is a message to the wider world that we are certain about where we stand".<sup>23</sup>

Recent opinion polls appear to favour a yes-vote, helped by the decline in popularity of the anti-Lisbon Libertas group at the EP elections.<sup>24</sup>

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<sup>19</sup> IBEC 19 June 2009

<sup>20</sup> IBEC newsroom 3 August 2009 at <http://www.ibec.ie/IBEC/Press/PressPublicationsdoelib3.nsf/vPages/Newsroom~lisbon-treaty---a-'new-deal'-for-irish-voters-03-08-2009?OpenDocument>

<sup>21</sup> *Daily Telegraph* online 26 July 2009 at <http://www.telegraph.co.uk/news/worldnews/europe/eu/5913219/Czech-president-refers-Lisbon-Treaty-to-court.html>

<sup>22</sup> <http://irelandforeurope.ie/index.html>

<sup>23</sup> <http://irelandforeurope.ie/get-the-facts/>

<sup>24</sup> See polls 20 April 2009, *EurActiv* at <http://www.euractiv.com/en/future-eu/irish-support-lisbon-treaty-rise/article-181412>; 18 May 2009, *Irish Times* at <http://www.irishtimes.com/newspaper/ireland/2009/0518/1224246810409.html>; *Irish Times* 1 June 2009 at <http://www.irishtimes.com/newspaper/frontpage/2009/0601/1224247818463.html>

## **Anti-Lisbon**

The demise of Libertas in the EP elections and the pledge of its leader, Declan Ganley, not to lead another no-campaign, leave Sinn Féin the only high-profile anti-Lisbon voice. According to the Sinn Féin (SF) leader, Gerry Adams, the party is calling for a renegotiation of the Lisbon Treaty. He believes the Irish concessions are just “add-ons” with no legally binding power on other Member States, which do not change the Treaty in relation to Ireland. Mr Adams also pointed to the length of time it had taken to draw up the new Treaty and maintained it was out-of-date.<sup>25</sup> At a meeting of the party’s *ard chomhairle* on 10 August SF formally backed a no-vote and announced the launch of its campaign.

### **1.6 Campaign guidelines**

On 5 August the Broadcasting Commission of Ireland (BCI) announced new commercial, community, institutional and temporary broadcasting guidelines (they do not mention the internet) on the allocation of air time to the different sides in the run-up to the referendum. A BCI press release summarised the changes as follows:

Firstly, the guidelines clarify that there is no requirement to allocate an absolute equality of airtime to opposing sides of the Referendum debate during **editorial coverage**. The guidelines require broadcasters to ensure that the proportion of airtime allocated to opposing sides must be fair to all interests and undertaken in a transparent manner. Secondly, the guidelines clarify the requirement to ensure that the total time allocated to **political party broadcasts** will result in equal airtime being afforded to parties that support the Referendum proposals and those that oppose them. While broadcasters are under no obligation to carry political party broadcasts, those that do must comply with the guidelines.

In line with BCI policy, a moratorium on coverage of the Referendum will come into effect from 12.01am on the morning of the 1st October until close of polls on 2nd October. During this period broadcast output must not include material which relates directly to the content of the Treaty of Lisbon and/or the constitutional amendments associated with the Treaty. This includes material pertaining to the merits or de-merits of the Treaty and/or the constitutional amendments.<sup>26</sup>

## **2 Germany**

On 24 April 2008 the *Bundestag* (the Lower House) voted by a two-thirds majority to ratify Lisbon (515 votes in favour; 58 against and 1 abstention) and on 23 May 2008 the German *Bundesrat* (the Upper House, composed of representatives from the 16 states or *Länder*) ratified the Treaty with a large majority. Only the Berlin representative voted against Lisbon in the *Bundesrat*.

Criticism of the perceived centralising tendency of the EU had been expressed by the former German President, Roman Herzog, and Lüder Gerken, the Director of the Centre for European Policy (CER), who wrote in 2007:

In the world of politics, of course, the reason for this centralisation is that politicians and civil servants at EU-level have striven for more influence. Also,

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<sup>25</sup> *Breakingnews.ie* 6 August 2009 at <http://www.breakingnews.ie/ireland/adams-no-uturn-on-lisbon-treaty-opposition-421512.html>

<sup>26</sup> [http://www.bci.ie/news\\_information/press233.html](http://www.bci.ie/news_information/press233.html). The full text of the guidelines is available at [http://www.bci.ie/documents/ref\\_guide\\_09\\_eng.pdf](http://www.bci.ie/documents/ref_guide_09_eng.pdf).

Brussels is frequently used as a backdoor for introducing legislation that a national ministry fears would meet too much resistance at home. And then there is the phenomenon in which member states' representatives in the Council of Ministers frequently bundle together totally unrelated projects and forge alliances to make up a voting majority.<sup>27</sup>

The authors called for four changes to be made to legitimise EU decision-making:

- a “listing of competences to clearly differentiate between EU competences and those of the member states”;
- the introduction at EU level of the “so-called discontinuity principle”, which would mean “the automatic expiry of prospective legislation if it has not been adopted within a legislative period, so that the procedure has again to begin from scratch in the new legislative period”;
- “EU member states need to be given the right through the European Council to withdraw competency for a particular area of policy from European level and restore it to the national level”
- The establishment of an independent Court for Competence Issues to stop “The increasing centralisation of powers in the EU through legal practice that is determined by the European Court of Justice”. The new Court “would operate in parallel to the European Court of Justice and deal solely with questions of distinguishing between competences that belong at European level and those that are properly at member state level”.<sup>28</sup>

These initiatives were not included in the Lisbon Treaty, although there is a basic outline of different competences in the new Treaty and the provision that the EU may reduce its areas of action as well as add to them.

## 2.1 Legal challenges

Formal ratification of Lisbon has been delayed by two legal challenges: one instigated by *Die Linke* (the left-wing coalition of the PDS and WASG, which is represented in the Berlin Government), and the other by Peter Gauweiler, a centre-right politician from the Christian Social Union (CSU, a junior partner in the Grand Coalition). He was represented by Albrecht Schachtschneider, a professor of law at the University of Nuremberg-Erlangen.<sup>29</sup> The Federal President, Horst Köhler, who signed the law following parliamentary ratification in 2008, withheld his signature from the instrument of ratification pending the outcome of the Constitutional Court ruling on the Gauweiler/Linke complaints.

Mr Gauweiler's challenge, submitted on 24 May 2008, concerned the compatibility of giving more powers to the EU with Germany's democratic principles. It was based on the legal opinion of Dr Dietrich Murswiek, a professor of law at the University of Freiberg, and

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<sup>27</sup> *Europe's World* Summer 2007 Lüder Gerken and Philippe Herzog “We must cure Brussels of its centralising fever” at <http://www.europesworld.org/NewEnglish/Home/Article/tabid/191/ArticleType/articleview/ArticleID/20401/Default.aspx>

<sup>28</sup> Ibid. See also “[Comment] Stop the European Court of Justice”, Roman Herzog and Lüder, *EUObserver*, 10 September 2008 at <http://euobserver.com/9/26714>.

<sup>29</sup> Schachtschneider had helped with earlier appeals to the Court in 1992 (Maastricht) and 2005 (EU Constitution).

maintained that Lisbon is substantially the same as the defunct EU Constitution; that it creates a de facto federal state with its own source of authority; that it deprives German citizens of their fundamental political rights by weakening their representation in the German Bundestag and that amended Article 48(6) allows the EU to change its rules without permission from national parliaments. Gauweiler suggested the German Parliament is losing its constitutional powers as decisions it takes can subsequently be overturned at the EU level if the European Commission proposes a law on a similar issue. In a written submission to the Court, he gave a hypothetical example of how the EU could undermine the German Parliament: a German environment minister wants to ban a particular light bulb but the Parliament decides against this. The minister could, with the support of other Member State governments, ask the European Commission to take forward the initiative, which could be adopted at EU level and then become law in Germany in spite of having been rejected by the German Parliament.

The *Linke* challenge was announced on 27 June 2008 after the Irish no-vote. The applicant, Diether Dehm, maintained that Lisbon would infringe the rights of parliamentarians and undermine German democracy by giving too much power to the European Council at the expense of national parliaments and the European Parliament.

A third complaint was lodged with the Constitutional Court in January 2009. A case brought by Markus Kerber, a lawyer, Dieter Spethmann, a former chief executive of Thyssen, Franz Ludwig Graf Stauffenberg, a former MEP, and Joachim Starbatty, an economist, argued that Lisbon

strengthens the current practice of dismembering the divisions of powers and mixing of competences. ... We argue that it is increasingly difficult to define the “European interest” in an EU of 27, where, because of diffuse interests, the weight of the central principal agent, in this case in Brussels, automatically grows.<sup>30</sup>

## 2.2 Previous Court rulings

The German Parliament’s involvement in EU decision-making has been examined before by the Constitutional Court. On 29 May 1974 the Court decided, in what has become known as the “Solange” (as long as/on condition that) judgment, that the European Community lacked a parliament legitimised by direct democratic means and that it – the Court - reserved the right to review the compatibility of secondary EC law with the fundamental rights guaranteed by the German Constitution, the Basic Law.

On 22 October 1986, in the so-called “Solange II” judgment, the Court ended the review but retained the right to use it as a last resort if needed.

On 12 October 1993 the Court ruled on the *Treaty on European Union* (the Maastricht Treaty), emphasising the central role of the *Bundestag* within the EU institutional system. The Court stated that “it is first and foremost the national peoples of the Member States who, through their national parliaments, have to provide democratic legitimacy” and that “functions and powers of substantial importance must remain for the German Bundestag”.

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<sup>30</sup> See EUObserver 27 January 2009 and Deutsche Welle 2 February 2009 at <http://www.dw-world.de/dw/article/0,,4014145,00.html> and

### 2.3 The Constitutional Court ruling

On 10 February 2009 the German Constitutional Court in Karlsruhe began a two-day hearing to consider the complaints. Two senior government ministers, Foreign Minister and Vice Chancellor Frank-Walter Steinmeier and Interior Minister Wolfgang Schäuble, argued the Government's case. The substantive question was whether the Lisbon Treaty eroded the German Parliament's powers of participation in EU decision-making.

According to media reports on the hearing the debate centred on whether the EU should be allowed increased powers in criminal law, which would affect "core issues" of German legislative authority.<sup>31</sup> The *EUObserver* reported that "In all, four of the eight judges questioned the Lisbon Treaty".

Frank Walter Steinmeier argued that the Treaty was not anti-democratic because "National parliaments would in the future be completely involved in the European law-making process".<sup>32</sup> Wolfgang Schäuble maintained that "The treaty does not encroach upon Germany's sovereignty" and that under Lisbon the Member States would "remain 'masters of the Treaties'".<sup>33</sup>

On 30 June the Constitutional Court ruled on the compatibility of the Lisbon Treaty with the German Constitution. The decision was summarised in a Court press release as follows:

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

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<sup>31</sup> *EUObserver* 11 February 2009 at <http://euobserver.com/9/27586/?rk=1>

<sup>32</sup> This is not true, although national parliaments will have a new power through the early warning mechanism to ask the Commission to reconsider a proposal.

<sup>33</sup> Reported in *EUObserver* 10 February 2009 at <http://euobserver.com/9/27583/?rk=1>

of a federal state, i.e. is analogous to that of a state. In contrast, the internal decision-making and appointment procedures remain predominantly committed to the pattern of an international organisation, i.e. are analogous to international law; as before, the structure of the European Union essentially follows the principle of the equality of states.

As long as, consequently, no uniform European people, as the subject of legitimisation, can express its majority will in a politically effective manner that takes due account of equality in the context of the foundation of a European federal state, the peoples of the European Union, which are constituted in their Member States, remain the decisive holders of public authority, including Union authority. In Germany, accession to a European federal state would require the creation of a new constitution, which would go along with the declared waiver of the sovereign statehood safeguarded by the Basic Law. There is no such act here. The European Union continues to constitute a union of rule (Herrschaftsverband) founded on international law, a union which is permanently supported by the intention of the sovereign Member States.

The primary responsibility for integration is in the hands of the national constitutional bodies which act on behalf of the peoples. With increasing competences and further independence of the institutions of the Union, safeguards that keep up with this development are necessary in order to preserve the fundamental principle of conferral exercised in a restricted and controlled manner by the Member States. With progressing integration, fields of action which are essential for the development of the Member States' democratic opinion-formation must be retained. In particular, it must be guaranteed that the responsibility for integration can be exercised by the state bodies of representation of the peoples.

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

The peoples of the Member States are the holders of the constituent power. The Basic Law does not permit the special bodies of the legislative, executive and judicial power to dispose of the essential elements of the constitution, i.e. of the constitutional identity (Article 23.1 sentence 3, Article 79.3 GG). The constitutional identity is an inalienable element of the democratic self-determination of a people. To ensure the effectiveness of the right to vote and to preserve democratic self-determination, it is necessary for the Federal Constitutional Court to watch, within the boundaries of its competences, over the Community or Union authority's not violating the constitutional identity by its

acts and not evidently transgressing the competences conferred on it. The transfer of competences, which has been increased once again by the Treaty of Lisbon, and the independence of decision-making procedures therefore require an effective ultra vires review and an identity review of instruments of European origin in the area of application of the Federal Republic of Germany.

## 2. The standard of review

a) The Act Approving the Treaty of Lisbon is measured by the Federal Constitutional Court against the standard of the right to vote. As a right that is equivalent to fundamental right, a violation of the right to vote can be challenged by a constitutional complaint (Article 38.1 sentence 1 in conjunction with Article 93.1 no. 4a GG). The right to vote specifies the right to democratic self-determination, to free and equal participation in the state authority exercised in Germany and to compliance with the principle of democracy including the respect of the constituent power of the people. The review of a violation of the right to vote also comprises encroachments on the principles which are codified in Article 79.3 of the Basic Law as the identity of the constitution. The citizens' right to determine, in equality and freedom, public authority affecting them with regard to persons and subject-matters through elections and other votes is anchored in human dignity and is the fundamental element of the principle of democracy.

The principle of democracy is not amenable to weighing with other legal interests. Amendments of the Basic Law affecting the principles laid down in Article 1 and Article 20 of the Basic Law shall be inadmissible (Article 79.3 of the Basic Law). The so-called eternity guarantee takes the disposal of the identity of the free constitutional order even out of the hands of the constitution-amending legislature. The constituent power has not granted the representatives and bodies of the people a mandate to change the constitutional principles which are fundamental pursuant to Article 79.3 GG.

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

c) The authorisation to transfer sovereign powers to the European Union pursuant to Article 23.1 GG is, however, granted under the condition that the sovereign statehood of a constitutional state is maintained on the basis of a responsible integration programme according to the principle of conferral and respecting the Member States' constitutional identity, and that at the same time the Federal Republic of Germany does not lose its ability to politically and

socially shape the living conditions on its own responsibility. Article 23.1 GG and the Preamble do not say anything about the final character of the political organisation of Europe. With its Article 23, the Basic Law grants powers to participate and develop a European Union which is designed as an association of sovereign national states (Staatenverbund). The concept of Verbund covers a close long-term association of states which remain sovereign, an association which exercises public authority on the basis of a treaty, whose fundamental order is, however, subject to the disposal of the Member States alone and in which the peoples of their Member States, i.e. the citizens of the states, remain the subjects of democratic legitimisation. The European Union must comply with democratic principles as regards its nature and extent and also as regards its own organisational and procedural elaboration (Article 23.1, Article 20.1 and 20.2 in conjunction with Article 79.3 of the Basic Law). This means firstly that European integration may not result in the system of democratic rule in Germany being undermined. This does not mean that a number of sovereign powers which can be determined from the outset or specific types of sovereign powers must remain in the hands of the state. European unification on the basis of a union of sovereign states under the Treaties may, however, not be realised in such a way that the Member States do not retain sufficient room for the political formation of the economic, cultural and social circumstances of life.

This applies in particular to areas which shape the citizens' circumstances of life, in particular the private space of their own responsibility and of political and social security, which is protected by the fundamental rights, and to political decisions that particularly depend on previous understanding as regards culture, history and language and which unfold in discourses in the space of a political public that is organised by party politics and Parliament. To the extent that in these areas, which are of particular importance for democracy, a transfer of sovereign powers is permitted at all, a narrow interpretation is required. This concerns in particular the administration of criminal law, the civil and the military monopoly on the use of force, fundamental fiscal decisions on revenue and expenditure, the shaping of the circumstances of life by social policy and important decisions on cultural issues such as the school and education system, the provisions governing the media, and dealing with religious communities.

d) The Basic Law does not grant the German state bodies powers to transfer sovereign powers in such a way that their exercise can independently establish other competences for the European Union. It prohibits the transfer of competence to decide on its own competence (Kompetenz-Kompetenz). The principle of conferral is therefore not only a principle of European law (Article 5.1 of the Treaty on European Union ; Article 5.1 sentence 1 and 5.12 of the Treaty on European Union in its version of the Treaty of Lisbon ), but, just like the European Union's obligation to respect the Member States' national identity (Article 6.3 TEU; Article 4.2 sentence 1 TEU Lisbon), it takes up constitutional principles from the Member States. The integration programme of the European Union must therefore be sufficiently precise.

To the extent that the Member States elaborate the law laid down in the Treaties in such a way that, with the principle of conferral fundamentally continuing to apply, an amendment of the law laid down in the Treaties can be brought about without a ratification procedure, a special responsibility is incumbent on the legislative bodies, apart from the Federal Government, as regards participation, which, in Germany, must, on the national level, comply with the requirements under Article 23.1 of the Basic Law (responsibility for integration). The act approving a treaty amending a European Treaty and the

national accompanying laws must therefore be such that European integration continues to take place according to the principle of conferral without the possibility for the European Union of taking possession of Kompetenz-Kompetenz or to violate the Member States' constitutional identity which is not amenable to integration, in this case, that of the Basic Law. For borderline cases of what is still constitutionally admissible, the German legislature must, if necessary, make arrangements with its laws that accompany approval to ensure that the responsibility for integration of the legislative bodies can sufficiently develop.

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

### 3. The subsumption

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

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

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

bb) With the entry into force of the Treaty of Lisbon, the Federal Republic of Germany will remain a sovereign state. In particular, the substance of German state authority is protected. The distribution of the European Union's competences, and their delimitation from those of the Member States, takes place according to the principle of conferral and according to other mechanisms of protection, in particular according to provisions concerning the exercise of competences. The transfer of sovereign powers to the European Union, which is thus performed in a controlled and responsible manner, is not

called into question by individual provisions of the Treaty of Lisbon. This applies first of all to the simplified amendment procedure (see in particular Article 48.6 TEU Lisbon). The “approval” of the Federal Republic of Germany in simplified revision procedures requires a law within the meaning of Article 23.1 sentence 2 of the Basic Law as a *lex specialis* with regard to Article 59.2.

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

dd) A law within the meaning of Article 23.1 sentence 2 of the Basic Law is not required to the extent that special bridging clauses are restricted to areas which are already sufficiently determined by the Treaty of Lisbon, and which do not provide for a right for national Parliaments to make known their opposition. Also in these cases, however, it is incumbent on the Bundestag and, to the extent that the legislative competences of the Länder are affected, on the Bundesrat, to comply with their responsibility for integration in another suitable manner. The veto right in the Council may not be waived without the participation of the competent legislative bodies even as regards subject-matters which have already been factually determined in the Treaties. The representative of the German government in the European Council or in the Council may therefore only consent to an amendment of primary legislation through the application of one of the special bridging clauses on behalf of the Federal Republic of Germany if the German Bundestag and, to the extent that this is required by the provisions on legislation, the Bundesrat, have approved this decision within a period yet to be determined, which takes the purpose of Article 48.7(3) TEU Lisbon as an orientation.

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

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

Treaties themselves or in Declaration no. 17 annexed to the Final Act of the Treaty of Lisbon.

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

- Due to the fact that democratic self-determination is affected in an especially sensitive manner by provisions of criminal law and law of criminal procedure, the corresponding foundations of competence in the Treaties must be interpreted strictly - on no account extensively -, and their use requires particular justification.

- The use of the dynamic blanket authorisation pursuant to Article 83.1(3) TFEU to extend the list of particularly serious crimes with a cross-border dimension "on the basis of developments in crime" is factually tantamount to an extension of the competences of the European Union and is therefore subject to the requirement of the enactment of a specific statute under Article 23.1 sentence 2 GG.

- In the area of judicial cooperation in criminal matters, particular requirements must additionally be placed on the provisions which accord a Member State special rights in the legislative procedure (Article 82.3, Article 83.3 TFEU: so-called emergency brake procedure). From the perspective of German constitutional law, the necessary measure of democratic legitimisation via the national parliaments can only be safeguarded by the German representative in the Council exercising the Member State's rights set out in Article 82.3 and Article 83.3 TFEU only on the instruction of the Bundestag and, to the extent that this is required by the provisions on legislation, of the Bundesrat.

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

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

c) In contrast, the Act Extending and Strengthening the Rights of the Bundestag and the Bundesrat in European Union Matters infringes Article 38.1 in conjunction with Article 23.1 of the Basic Law insofar as rights of participation of the German Bundestag and the Bundesrat have not been elaborated to the constitutionally required extent. If the Member States elaborate the European law laid down in the Treaties on the basis of the principle of conferral in such a way that an amendment of the Treaty law can be brought about solely or decisively by the institutions of the European Union - albeit under the requirement of unanimity in the Council -, a special responsibility is incumbent on the national constitutional bodies in the context of participation. In Germany, this responsibility for integration must on the national level comply with the constitutional requirements made in particular under Article 23.1 GG.<sup>34</sup>

## 2.4 Reaction to the ruling

Several German press headlines summed up the ruling as “Yes, but...”, (“Ja, aber...”). Chancellor Angela Merkel, who faces a general election in September, is reported to have welcomed the decision, saying it was “a good day for the Lisbon Treaty.”<sup>35</sup> She told journalists that the treaty had “passed another important hurdle” and that she was happy that Berlin’s ruling grand coalition (conservatives and Social Democrats) had been able to agree on a rewording of the law on the rights of the parliament. At a press conference on 30 June the Chancellor said it would be implemented in the current legislative period.<sup>36</sup> *EUBusiness* reported:

“The important message of the day is that the Lisbon Treaty has cleared another significant hurdle. I am very pleased about that,” Merkel told reporters in Berlin after the judgement.

Foreign Minister Frank-Walter Steinmeier said: “I am sure that the treaty will be ratified this year.”

[...]The foreign minister of Sweden, which is due to take the EU helm on Wednesday, also said he was unconcerned about the decision.

“There is no major dissent on the political scene in Germany on this particular issue,” Carl Bildt told journalists.

France’s new secretary of state for foreign affairs, Pierre Lellouche, on his first official visit to Berlin, told reporters he saw a “real consensus on the German side” and that he had “received assurances that Germany will be ready by early September” to ratify the treaty.<sup>37</sup>

Diether Dehm, for *Die Linke*, stated:

“The decision of the German constitutional court on the Lisbon Treaty was a great success for DIE LINKE and EU-citizens. The German parliament retains the right to decide upon military interventions as opposed to as set out in the

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<sup>34</sup> Press release no. 72/2009 of 30 June 2009 Judgment of 30 June 2009 at <http://www.bundesverfassungsgericht.de/en/press/bvg09-072en.html>

<sup>35</sup> *EUObserver* 10 February 2009

<sup>36</sup> *Bloomberg.com* 30 June 2009 at <http://www.bloomberg.com/apps/news?pid=20601110&sid=a4vodTGzOJiQ>

<sup>37</sup> 30 June 2009 at <http://www.eubusiness.com/news-eu/1246350722.96/>

treaty. The welfare state and the German basic law can not be undermined on the basis that the treaty has nothing to offer in that regard.<sup>38</sup>

Peter Gauweiler, in an interview with the German weekly *Der Spiegel* on 1 July 2009, spoke about the new role that will be required of the Bundestag:

The Bundestag is once again being empowered to do exactly what it -- as a legislative body -- was created to do. Karlsruhe has now decided in favor of something that is completely different than the nodding-through procedure that we've used for EU affairs up until now -- and sometimes things were added on in silence.<sup>39</sup>

According to *Der Spiegel* on 6 July the Christian Social Union (CSU, the CDU's sister party) thought the ruling could open the door to more national parliamentary influence over the EU:

[...] the politicians from Bavaria decided to follow up their success with a new set of demands. They want the Lisbon Treaty to be ratified only under condition that the new EU law would only be valid in Germany "in accordance with the decision by the German Constitutional Court." They are now demanding a solution that gives "maximum" parliamentary influence over future EU policy. .<sup>40</sup>

In mid-July the CSU asked that major "EU decisions, including the admission of new members, be put to referendums; suggested that the next European Commission should not include an enlargement commissioner; and called for the introduction of a system of 'integration control' by the Constitutional Court".<sup>41</sup>

The European Commission President, José Manuel Barroso, was reported as saying the ruling raised "very important and sensitive issues in terms of the competence of the European Union and other competences, namely on the understanding of the principle of subsidiarity" and that it was "extremely important" for the way Member States "understand respect for community law".<sup>42</sup>

The *Spiegel* also thought the Court ruling had fundamentally changed Germany's relationship with the EU in a way which went "beyond the dreams of Gauweiler and his friends":

Now that the court in Karlsruhe has spelled out Germany's role in European unification, this heralds the end of a policy of increasing integration. According to the judges, Germany's future lies not in "a united Europe" -- but rather in Germany. In the future, the most powerful EU partner will also be the most difficult one, even if -- despite Gauweiler's legal challenge -- it ends up unconditionally ratifying the Lisbon Treaty.

This would be true even without the conditions proposed by the CSU. The German Constitutional Court has found its own unique way of effectively putting the brakes on European policy.<sup>43</sup>

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<sup>38</sup> Press statement 10 July 2009 at <http://www.people.ie/contreaty/linke1.pdf>

<sup>39</sup> *Der Spiegel online* 1 July 2009 at <http://www.spiegel.de/international/europe/0,1518,633702,00.html>

<sup>40</sup> *Der Spiegel online*, 6 July 2009, Thomas Darnstadt, Dietmar Hipp, Rene Pfister, translated from German by Paul Cohen, at <http://www.spiegel.de/international/germany/0,1518,634506,00.html>

<sup>41</sup> *Economist* 25 July 2009

<sup>42</sup> *EUObserver* 15 July 2009 at <http://euobserver.com/9/28462/?rk=1>

<sup>43</sup> *Der Spiegel* 6 July 2009

The article also cites the view of a constitutional law professor, Frank Schorkopf, who thought the ruling would allow the Constitutional Court "greater flexibility and sensitivity", but would also place great future demands on the judges because "the court has thus taken on the responsibility of fulfilling this monitoring function".<sup>44</sup> In so doing, according to *Der Spiegel*,

the German Constitutional Court has essentially declared itself the highest supervisory body in conflicts between Germany and the EU, and thus explicitly placed itself above the European Court of Justice (ECJ).

This borders on a declaration of war on the European Court, which sees itself as the only authority capable of ruling on the validity and applicability of EU law. The judges in Karlsruhe have authoritatively decided that they have won the conflict of competence which has been brewing for years between the two top courts.

Admittedly, the court has included a complicatedly worded supplementary declaration on the Lisbon Treaty that reaffirms the supremacy of the ECJ's judicial authority. But the judges in Karlsruhe did the same thing with this document as they did with a wide range of contentious issues in the Lisbon Treaty text: They interpreted it in a way that makes it compatible with their view of the distribution of power within the EU as an "association of sovereign national states." The judicial supremacy is only valid within the boundaries defined by the court in Karlsruhe, and the Lisbon Treaty is only compatible with the German constitution within the confines of the Karlsruhe interpretation.

The "identity" of the German constitutional order may not be damaged by Brussels. Identity takes priority over integration.<sup>45</sup>

In a third section the article concludes:

[...] by more strongly tying the Germans to the political body in Brussels, the court has limited the highhandedness of the German government, which has all too often pushed through political goals that were difficult to achieve back home by going behind the back or against the will of the Bundestag.<sup>46</sup>

The Danish eurosceptic former MEP, Jens-Peter Bonde, commented:

The Court judgement modifies the most important principle of the primacy of European law. Member States are said to be the "masters of the Treaties." In the Court's view the EU institutions have no powers of their own. They can only administer delegated competences in prescribed areas. European law is stated to be ultimately based on and limited by the accession law of each Member State.

The German Court implicitly invites any citizen, political party or business firm in Germany to take court cases before the German Constitutional Court if they find that a piece of proposed EU law is outside those delegated competences. Then it is the German Court that will decide - not the EU Court.

This is a rejection of Art. 344 of the Treaty on the Functioning of the European Union, which provides that Member States undertake not to submit a dispute

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<sup>44</sup> *Der Spiegel* 6 July 2009

<sup>45</sup> <http://www.spiegel.de/international/germany/0,1518,634506-2,00.html>

<sup>46</sup> <http://www.spiegel.de/international/germany/0,1518,634506-3,00.html>

concerning the interpretation or application of the Treaties to any method of settlement other than the European Court of Justice.

The Karlsruhe Court also insists that there must be important areas of law-making and decision-taking left to the EU Member States. This is an invitation to politicians everywhere to ask their governments what competences are left with the Member States after the adoption of the Lisbon Treaty.[...]

The most striking element in the judgement is that the Court implies the need for the involvement of National Parliaments in all aspects of EU law-making. They refer to democracy as being a principle common to all the EU Member States. The involvement of National Parliaments in EU law-making is therefore a necessity. If not, the principle of democracy will have been fundamentally breached.<sup>47</sup>

Bonde makes the point that “The verdict applies only to Germany, of course. But it has significant implications for all Member States, including those which have already approved and ratified the Lisbon Treaty”.<sup>48</sup>

The German *Länder* have reacted to the Court ruling by demanding new rights. The *EUObserver* reported in July:

The country's regions (Länder) have said they want a say on EU decisions. Wolfgang Reinhart, head of the Europe committee in the senate and leader of a working group on the regions, told the *Sueddeutsche* newspaper:

"We do not want the government to carry on doing what it wants in those areas where, according to the constitution, we have core competences."

He also suggested that it should have more say in EU decisions on family policy, criminal law and internal security when regional interests are affected, noting that if the new law following the court judgement is not watertight then others will also try and bring a case before the court.<sup>49</sup>

Writing in the *German Law Journal* Matthias Niedobitek<sup>50</sup> noted:

From a European law standpoint it is doubtful whether the involvement of the parliament in the formation of the government's will as requested by the Court's judgment, be it by way of an act or "in another suitable manner,"<sup>[4]</sup> is in conformity with the Treaty of Lisbon. First, the Treaty itself provides for the participation of the national parliaments.<sup>[5]</sup> In the case of the simplified revision procedure ("bridging clause") of the new Treaty on European Union (TEU), a national parliament can make known its opposition within six months of the date of notification of an envisaged revision.<sup>[6]</sup> The Court says that "this is not a sufficient equivalent to the requirement of ratification; therefore the approval by the representative of the German government always requires a law within the meaning of Article 23 (1)[2], and if necessary [3] of the Basic Law."<sup>[7]</sup> However, the procedure as laid down in the TEU cannot be construed as imposing only a minimum requirement.<sup>[8]</sup> It clearly specifies the role of national parliaments within the simplified revision procedure and limits their involvement. Consequently, national parliaments can no longer be understood

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<sup>47</sup> *EUObserver* 24 July 2009 at <http://euobserver.com/9/28469/?rk=1>

<sup>48</sup> *Ibid*

<sup>49</sup> *EUObserver* 13 July 2009 at <http://euobserver.com/9/28449/?rk=1>

<sup>50</sup> Professor of European Integration, Institute for European Studies, Chemnitz University of Technology.

as mere national institutions but must also be construed as institutions of the Union, with rights and duties.<sup>[9]</sup>

Second, and more generally, the required involvement of the German parliament in the adoption of Union acts can conflict with the necessary “responsiveness to the needs of European integration” (*Europatauglichkeit*) of the German federal state.<sup>[10]</sup> In particular, Article 203 EC Treaty is based on the assumption that the Member States’ governments are sufficiently capable of acting on the Union level.

All in all, the judgment is characterized by mistrust towards the federal organs, the federal government in particular,<sup>[11]</sup> and by the attempt to consolidate the competence of final review on the Federal Constitutional Court itself.<sup>[12]<sup>51</sup></sup>

#### Footnotes:

[4] See Lisbon Case, BVerfG, cases 2 BvE 2/08 and others from 30 June 2009, para. 320, available at [http://www.bundesverfassungsgericht.de/entscheidungen/es20090630\\_2bve000208en.html](http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html).

[5] Treaty on European Union as amended by the Treaty of Lisbon of 13 December 2007 [hereinafter TEU], art. 12.

[6] See id. at art. 48 para. 7.

[7] Lisbon Case, BVerfG, cases 2 BvE 2/08 and others from 30 June 2009, para. 319, available at [http://www.bundesverfassungsgericht.de/entscheidungen/es20090630\\_2bve000208en.html](http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html).

[8] See TEU, supra note 5, at art. 48, para. 7.

[9] See TEU, supra note 5, at art. 12.

[10] See Matthias Niedobitek, Zur “Europatauglichkeit” des deutschen Bundesstaates nach der Föderalismusreform, in *Europäische Forschungsperspektiven—Elemente einer Europawissenschaft* 201 (Peter Jurczek & Matthias Niedobitek eds., 2008).

[11] Lisbon Case, BVerfG, cases 2 BvE 2/08 and others from 30 June 2009, paras. 318, 320, available at [http://www.bundesverfassungsgericht.de/entscheidungen/es20090630\\_2bve000208en.html](http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html).

[12] Id. at para. 241.

Having considered the different strands to the Court’s ruling, Niedobitek concludes:

Now it remains to be seen whether or not a new Act Extending and Strengthening the Rights of the *Bundestag* and the *Bundesrat* in European Union Matters, once adopted, will be brought before the Court. But before the adoption of that Act, the federal government must grapple with the claim of the Christian Social Union that the government, acting within the Council, should be bound more strictly to parliamentary votes.<sup>[58]</sup>

Lastly, many other uncertainties remain: the referendum in Ireland on 2 October 2009, the subsequent ratifications by Poland, the Czech Republic, and, not to forget, the United Kingdom.<sup>[59]</sup> The force of the Treaty of Lisbon is still an open question.<sup>52</sup>

#### Footnotes

[58] *Frankfurter Allgemeine Zeitung* (Frankfurt am Main) July 16, 2009, at 1.

[59] *Frankfurter Allgemeine Zeitung* (Frankfurt am Main) July 1, 2009, at 2.

## 2.5 Prospects for German ratification

The German Government has halted the ratification process until it can put in place the legislation needed to strengthen the role of Germany’s legislative institutions in implementing EU law. The *Bundestag* now has to amend the accompanying law to add far-reaching monitoring rights if the EU’s competences are extended under the Lisbon Treaty. The

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<sup>51</sup> No. 8 (1 August 2009) - Special Edition “The Lisbon Case of 30 June 2009 – A Comment from the European Law Perspective”, at <http://www.germanlawjournal.com/article.php?id=1160>

<sup>52</sup> Ibid

Constitutional Court will have to ensure that these monitoring rights are appropriately applied.

The timetable for adopting new legislation is set out as follows:

Berlin is aiming to get the process fully wrapped up with the law in place before Ireland votes for a second time on the Lisbon Treaty, expected to be on 2 October, and before the German parliament is dissolved for the general elections on 27 September.

An extraordinary session of the parliament has been called for 26 August where MPs are supposed to have the first reading of the new draft law. The second and third reading is expected to take place on 8 September while the upper house (Bundesrat) is to approve the law on 18 September.<sup>53</sup>

The same report looks at party divisions that are already evident:

The CSU party has formulated 14 guidelines on how to strengthen the German parliament's influence over EU legislation. The party's support is needed to reach a two-thirds majority in parliament to have the Lisbon deal approved, in reality giving the CSU a veto power.

Representatives of the German regions are also to get involved in Monday's talks, but it is no secret that in the end a deal must be reached between chancellor Angela Merkel from the CDU party, the Social Democrat foreign minister Frank-Walter Steinmeier and the Bavarian minister-president Horst Seehofer from the CSU.

At the regional level, Hessian Europe minister Hahn representing the liberal FDP party has said Hessen would only approve the package provided the regions' influence on EU law-making is "fully" secure.<sup>54</sup>

### **3 The Czech Republic**

#### **3.1 Political developments**

The Czech Republic, holder of the EU Presidency in the first half of 2009, was the last EU Member State to hold a parliamentary vote on the Lisbon Treaty. This was largely because of divisions among the ruling Civic Democrats led by the former Prime Minister, Mirek Topolánek, and a political battle over a planned US missile defence base, which the opposition Social Democrats did not support. At the beginning of 2009 public opinion was in favour of ratifying, according to a poll published on 28 January. The *EUObserver* reported:

The number of those in favour of the treaty has grown among followers of all political parties and reached 64 percent – an increase of 19 percent compared to October ....<sup>55</sup>

The Lower House of Parliament approved the Lisbon Treaty on 18 February 2009,<sup>56</sup> but Mirek Topolánek said in March that US President Barack Obama's decision to put on hold US plans to construct a missile shield and radar base in the Czech Republic effectively blocked Czech ratification of Lisbon. The Czech Senate was reported to have said it could

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<sup>53</sup> *EUObserver* 3 August 2009 at <http://euobserver.com/18/28517>

<sup>54</sup> <http://euobserver.com/18/28517>

<sup>55</sup> STEM polling agency, *EUObserver* 29 January 2009 at <http://euobserver.com/9/27496/?rk=1>

<sup>56</sup> By 125 deputies in favour to 61 against out of 197 deputies present.

not approve the Treaty without the ratification of the US radar system agreement, which was part of the anti-missile shield supported by the previous Bush administration. However, the Upper House finally approved the Lisbon Treaty on 6 May 2009.<sup>57</sup>

### 3.2 Opposition from President Klaus

The President's signature is still required to complete the process. President Vaclav Klaus insists that the concessions to Ireland, particularly the retention of one Commissioner per Member State, will change the Lisbon Treaty, a view contested by the Prime Minister, Jan Fischer, and he is still hesitating over ratification. Klaus told Czech radio on 20 June 2009:

"I will certainly not rush," said Klaus to the station. "I will certainly wait until after all those things about which I have talked about -which include a constitutional complaint by our senators - happen. The Irish have not voted again. Poland has not signed the Lisbon Treaty, and Germany has not signed the Lisbon Treaty. So I am not the last Mohican who is fighting against all," he said.

Klaus believes the treaty would wipe out the role of nation states and lead to an over-centralization of Europe.<sup>58</sup>

President Klaus has also called on the Czech Parliament to ratify the Irish concessions, which some regard as tactical procrastination. The *Financial Times* commented:

The worst fear of EU leaders is that Mr Klaus delays signing the treaty for so long that a strongly Eurosceptic Conservative party replaces the UK's Labour government and holds a referendum on Lisbon, resulting in a No vote that would kill it for ever.<sup>59</sup>

*Český rozhlas* reported on the German Court ruling on 2 July stating that the "clarification" had not satisfied the Czech President, who dismissed the verdict as "predictable".

The clarification, however, has not satisfied the Czech president Václav Klaus, one of the treaty's biggest opponents. Writing in a column for *Mladá fronta Dnes* newspaper on Thursday, he dismissed the verdict as predictable. More important, he wrote, was that the real question was this:

Do we – the citizens of Europe – want greater integration or do we not? Do we want more and more power at a European level or not? Do we want more centralisation in Europe, or not? All this, writes the Czech president, is contained in the European Constitution, now known as the Lisbon Treaty, and fundamental debate over these questions should continue.<sup>60</sup>

Prime Minister Fischer was optimistic about the German Court ruling, stating:

I see today's decision of the German Constitutional Court as an important positive step towards the ratification of the Lisbon Treaty and towards institutional stability of the European Union. The statement of the German

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<sup>57</sup> By 54 votes to 20.

<sup>58</sup> DW-World-DE, 24 June 2009 at <http://www.dw-world.de/dw/article/0,,4420626,00.html>. See also *Ceske Noviny* 20 June 2009 at <http://www.ceskenoviny.cz/news/zpravy/guarantees-for-ireland-change-lisbon-treaty-czech-president/383761>

<sup>59</sup> 18 June 2009 at [http://www.ft.com/cms/s/0/3b1ca6e2-5c2e-11de-aea3-00144feabdc0.html?ncllick\\_check=1](http://www.ft.com/cms/s/0/3b1ca6e2-5c2e-11de-aea3-00144feabdc0.html?ncllick_check=1)

<sup>60</sup> Radio Prague at <http://www.radio.cz/en/article/117918>

Constitutional Court that the Lisbon Treaty as such does not contradict the German Constitution can be considered of crucial importance.<sup>61</sup>

### 3.3 Legal challenge

In July President Klaus and a group of 17 anti-Lisbon Senators from the Civic Democrat (ODS), Social Democrat (CSSD), Christian Democrat (KDU-CSL) and TOP 09 groups announced they would ask the Constitutional Court to examine the Treaty for a second time<sup>62</sup> on compatibility with the Czech Constitution, this time looking beyond the six articles examined in 2008 to the Treaty as a whole. The chairman of the Senate Foreign Committee, Jiri Dienstbier (Social Democrats, CSSD), thought the further submission was in “contempt of democracy and lawmakers” and called on the Senators to lodge the complaint immediately or not at all.<sup>63</sup> The timing of the submission is unclear. *Ceskenoviny* reported in July:

The treaty's critics from among ODS senators want to lodge their complaint with the US in the first half of August at the earliest, but one of them, Jaroslav Kubera, said they might do it only in late August or early September.<sup>64</sup>

*Ceskenoviny* reported:

Former Czech Constitutional Court judge Vojtech Cepl some time ago said that if he were to deal with the senators' planned complaint, he would right [*sic*] reject it as unsubstantiated because the court had already discussed the treaty's compatibility with the Czech constitution last November.<sup>65</sup>

Klaus reportedly wants to be the last in the EU to sign the document, which means he will not sign it until after a positive second referendum in Ireland and until the Polish President has signed.

## 4 Poland

Both Houses of the Polish Parliament approved the Treaty in 2008 and in January 2009 the Sejm (Lower House) passed a resolution by 256 to 147 calling for a speedy signing of the Lisbon Treaty by President Lech Kaczyński.

However, President Kaczyński has made his signature of the Treaty conditional upon both the outcome of the German Constitutional Court consideration and the Irish referendum. At home he has also argued that the Act of Competences (which regulates competences in EU affairs) needs to be amended.

An *Economist* article on the “awkward squad” described the alliance between the Czech and Polish Presidents over the signing of Lisbon:

Mr Kaczynski's opposition to Lisbon is about posturing not principle. He says publicly that he is merely waiting for the second Irish referendum before signing. Given that he helped to negotiate the treaty on Poland's behalf, it

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<sup>61</sup> Czech Presidency press statement 30 June 2009 at <http://www.eu2009.cz/en/news-and-documents/press-releases/press-statement-of-prime-minister-jan-fischer-on-the-ruling-of-german-constitutional-court--26634/>

<sup>62</sup> The Court cleared the Treaty in November 2008. See [http://www.ceskenoviny.cz/news/index\\_view.php?id=346294](http://www.ceskenoviny.cz/news/index_view.php?id=346294) for President Klaus's speech to the Court.

<sup>63</sup> *Ceskenoviny* 23 July 2009 at [http://www.ceskenoviny.cz/tema/zpravy/czech-mps-complaint-against-lisbon-contempt-of-democracy-senator/389415&id\\_seznam=5811](http://www.ceskenoviny.cz/tema/zpravy/czech-mps-complaint-against-lisbon-contempt-of-democracy-senator/389415&id_seznam=5811)

<sup>64</sup> *Ceskenoviny* 24 July 2009 at <http://www.ceskenoviny.cz/zpravy/czech-senators-urge-ods-to-challenge-lisbon-now-or-never/389622>

<sup>65</sup> *Ceskenoviny* 10 July 2009 at [http://www.ceskenoviny.cz/tema/zpravy/czech-senators-to-challenge-lisbon-treaty-again-in-two-weeks/387407&id\\_seznam=5811](http://www.ceskenoviny.cz/tema/zpravy/czech-senators-to-challenge-lisbon-treaty-again-in-two-weeks/387407&id_seznam=5811)

would be hard for him to demonise it as Mr Klaus does. Indeed, Mr Kaczynski, who worries about waxing Russian influence and a waning American presence, has described the EU as “a great thing”.

The real reason for the Polish president’s delay is a desire to annoy the government led by Donald Tusk’s Civic Platform party. Mr Tusk defeated the government led by Law and Justice, headed by the president’s twin, Jaroslaw Kaczynski, in 2007. Mr Tusk’s emollient, pro-EU stance contrasts sharply with the Kaczynskis’ abrasive style. A delay over Lisbon also allows the president to grandstand on the EU’s “moral relativism” (meaning the incompatibility of its views of human rights with Polish social mores on homosexuality and the like).

Mr Klaus says he will get around to Lisbon only once everyone else has endorsed it. He will probably sign, but through gritted teeth. He would like a loose free-trade zone instead of what he sees as a nascent superstate. Unlike Mr Kaczynski, he is no Atlanticist; he gets on quite well with Russia. Also unlike Mr Kaczynski, he has the excuse that, though Lisbon passed the Czech parliament in May, it faces a court challenge by politicians from the Civic Democratic party that Mr Klaus once led.<sup>66</sup>

On 2 July the Polish *Gazeta Wyborcza* reported that President Kaczyński had been awarded an honorary doctorate from the Catholic University of Lublin with particular recognition “for his ‘right position on the contents of the Lisbon Treaty’”.<sup>67</sup>

Of the four countries yet to ratify the Lisbon Treaty, the pressure is largely on Ireland. Germany will be in a position to ratify once the necessary law has been adopted – although it remains to be seen whether this law would survive a challenge at the ECJ. The Polish and the Czech Presidents have made their signatures dependent on a positive vote in the Irish referendum, which cannot be guaranteed. *A Financial Times Brussels blog* commented:

Other things being equal, both men would probably find it impossible to resist the pressure to sign Lisbon, if Irish voters were to say Yes to the treaty in October. But other things are not equal. Klaus and Kaczynski are looking at events in London and asking themselves how long it will be before Brown’s government is out of office and replaced by a Conservative government that sees eye to eye with them on Lisbon.

Given the near-certainty that the Tories will win the next election, Klaus and Kaczynski have every incentive to sit tight and not sign the treaty. Then the Tories will come to power and hold a referendum in which British voters will (so everyone assumes) reject Lisbon. Hey, presto! Lisbon is well and truly dead.

This is the real nightmare of EU leaders - not the expected low turnout in the European Parliament elections.<sup>68</sup>

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<sup>66</sup> *Economist.com* 23 July 2009 at [http://www.economist.com/world/europe/displaystory.cfm?story\\_id=14098451](http://www.economist.com/world/europe/displaystory.cfm?story_id=14098451)

<sup>67</sup> [http://wyborcza.pl/1,98817,6780791,Honorary\\_Degree\\_for\\_Opposing\\_the\\_Lisbon\\_Treaty.html](http://wyborcza.pl/1,98817,6780791,Honorary_Degree_for_Opposing_the_Lisbon_Treaty.html)

<sup>68</sup> 7 June 2009 at <http://blogs.ft.com/brusselsblog/2009/06/brits-not-irish-loom-as-threat-to-the-eus-lisbon-treaty/>