

## spotlight europe

# 2009/08 – September 2009

# Europe begins at home

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The European policy of the forthcoming German government is bound to change, partly as a result of the new institutional framework. On the one hand there is the ruling of the German Constitutional Court. And on the other hand it will become necessary to play by the EU's new rules of the game. Can Germany continue to support the trend to more European integration and, more importantly, will it have a desire to do so?

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Whoever becomes the next Chancellor of Germany will have to get used to new rules of the game in the area of European policy. They have been determined in two different ways. On the one hand the ruling of the [German Constitutional Court](#) on the Treaty of Lisbon redistributes the tasks assigned to various German institutions. And on the other hand the Treaty itself-if, that is, the Irish give their assent to it on 02 October, for otherwise there will be a need for crisis management for years to come-will change the distribution of power in Brussels, partly on account of the creation of new posts ranging from the permanent President of the European Council to the EU foreign policy representative, and, more importantly, on account of the enhancement of the rights of EU parliaments and citizens.

### The Ruling in Karlsruhe – Criticism and Praise

The Karlsruhe ruling on 30 June 2009 led to fierce disputes in Germany and elsewhere among those who sought to elucidate its meaning. Writing in the weekly newspaper "Die Zeit," former foreign minister Joschka Fischer criticized the fact that it placed "national constraints" on European integration. "Karlsruhe simply does not like the EU's progress towards deeper integration," writes Fischer. The Second Senate of the Constitutional Court "had attacked the phantasmagoric vision of a European 'federal state' merely in order to lend

**The ruling of the Constitutional Court from the point of view of the media**

 **Der Spiegel - 06 July 2009** 

"The judges concluded that Germany's future won't be the United States of Europe – but: Germany. The biggest EU partner will also be the most difficult in the future."

 **Financial Times Deutschland - 13 July 2009** 

"The eurosceptical tone of the reasons for the judgement provides an intellectual justification for the widespread prejudice of the German elite that Europe has gained in power and size too fast."

 **Le Monde - 17 July 2009** 

"In fact the judges have set the final point of European integration. [...] It was a real pleasure for the court to enumerate all fields of policy in which the member states should retain the final say. [...] This means the end of the aim of an 'ever closer union' which was postulated by the Treaties of Rome in 1957."

 **The Economist - 23 July 2009** 

"In effect, the court said that the EU is not democratic enough to support more integration and told Germany, the biggest EU member, to hit the pause button."

 **ABC - 30 June 2009** 

"The ruling shows once again that Germany is not the European locomotive but just an ordinary country which [...] reluctantly accepts further steps of integration."

 **Gazeta Wyborcza - 03 July 2009** 

"The German Bundestag starts coming closer to the Danish Folketing which cooperates in a very transparent and close way with the government in European affairs. But in Denmark this is a question of culture. Even the tax declaration can be looked at by everyone in the Internet. Why should there be a difference in European policy matters?"

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legitimacy to its view that in future European integration policy would not be formulated in Berlin by democratically legitimated bodies, that is, the German government, the German Parliament and the Federal Council, but by the court in Karlsruhe."

In the *Süddeutsche Zeitung* Alfred Grosser, the doyen of French experts on Germany, commented: "The German Constitutional Court exists and issues its rulings in an atmosphere in which it fears that it will have to defer to the European Court of Justice." Without mentioning any names, he cites French eurosceptics who can now say with a vengeance: "The

Germans were never serious about Europe after all."

In the *Frankfurter Allgemeine Zeitung* Carl Otto Lenz, for many years a member of parliament and subsequently advocate general at the European Court of Justice in Luxembourg, criticized both the letter and the spirit of the Karlsruhe ruling. "The Basic Law never employs the term 'sovereign,' whereas the German Constitutional Court uses it thirty-three times." Lenz is also of the opinion that the highest German court is arrogating to itself a political role: "The current state of affairs is deemed to be the end of the chapter, the development of the law is taken out of the hands of the elected bodies, in the name of democracy. The message is thus far and no farther."

To be sure, the Karlsruhe ruling was also greeted with approval. On the one hand, of course, because the court declared that ratifying the Treaty of Lisbon was consonant with the constitution. And on the other hand because, as Herbert Prantl pointed out in the *Süddeutsche Zeitung*, this was a "great moment for Europe." "This ruling does not seek to find fault with Europe, it does not harp on about its deficits, but spells out how Europe can be improved in a positive way." Prantl praised the outcome: "The members of parliament will have to think far more about Europe than they have in the past. In other words, Europe will become a domestic policy issue. (...) The ruling condemns the German Parliament to more democracy."

More democracy is also what Burkhard Hirsch, a former deputy speaker of the German Parliament, expects to see. "If the court makes certain that the parliamentary majority and the German government have to respect the Basic Law, then that is not democracy shaped by the judiciary, but urgently needed protection for the constitution," Hirsch writes in the *Frankfurter Allgemeine Zeitung*. "It is also not true that a government's 'hands are bound' if

it is tied to the decisions of the parliament. I thought that a parliamentary government was always bound to abide by the decisions of the parliament. That is what it says in the Basic Law.”

## II

### New Distribution of Power in Germany's European Policy

In future the German Parliament and the Federal Council will be in a position (according to the Karlsruhe court it will in fact be their duty) to determine the way the German government votes in Brussels when the issue is an amendment to an EU treaty, the voting regulations, or an extension of responsibilities. In essence the new law makes use of the so-called bridging clause in the Treaty of Lisbon. The European Council, that is, the body which represents the 27 EU governments, can decide unanimously that henceforth the majority principle will be used in certain policy areas. In order to give its assent to this procedure the German government will in future need to secure the approval of the Bundestag, and on top of this, where state rights are affected, of the Bundesrat (Federal Council).

This is only an (admittedly central) example of what in future awaits every Chancellor on the European level. The new rules of the game as stipulated by Karlsruhe will at any rate have two consequences. On the one hand the German government will find European policy (more) complicated. On the other hand, debates in the Bundestag and the Bundesrat will be Europeanized. This will continue to be the case as long as the European Union is neither a federal state nor a confederation, but a political entity of a unique kind. It remains to be seen what the participants will make of all this, whether efficiency and transparency will suffer, whether the democratic debate will become more passionate and to the point, and whether, indeed, Germany

becomes more European, or Europe more German.

Be that as it may, every Chancellor will have to bear in mind another consequence of the Karlsruhe ruling. The hitherto latent conflict between the German Constitutional Court and the European Court of Justice can become a crisis and shift to the level of open hostility at any time. Thomas Oppermann, an expert on European law in Tübingen, believes that “a war” between Karlsruhe and Luxembourg is in the offing. Writing in the *Frankfurter Allgemeine Zeitung* his Berlin colleague Christian Calliess voiced the opinion that the ruling meant that Brussels and Berlin were already “under the complete supervision of Karlsruhe.” “It would cover not only the EU and the European Court of Justice, but the whole of Germany’s future European policy. There are good reasons why the German Constitutional Court has asked the German Parliament to assume responsibility for integration, but in fact this would be largely a non-event, for the upshot would be a monopoly in the hands of Karlsruhe.”

## III

### On the Way to a republic run by judges?

Inasmuch as the judges of the Constitutional Court give themselves the right to have the final word in all questions pertaining to the EU, they fit rather neatly into the role which former constitutional judge and German president Roman Herzog advocated in an essay a year ago. His motto is “Stop the European Court of Justice.” And for this purpose “the establishment of an independent court for competence questions over which the ECJ has no jurisdiction is urgently needed.” This highest of all courts is now being created in Karlsruhe as a result of its comprehensive control proviso. For many reasons such a proviso seems to be rather

questionable, and not all of them are connected with Europe.

Martin Nettesheim, the Tübingen expert on constitutional law, quite rightly believes that there is a claim to absolute validity at work here “which contradicts the constitutional notion of good competing arguments.” Robert Leicht believes that the explanation of the ruling signifies a fundamental change of direction which reaches out far beyond the intellectual confines of the court. The hard centre of the Karlsruhe message as Leicht sees it is “We want a German Europe—at least for all the forthcoming stages in its development.” “For everything else there will be a German veto, which in practice we ourselves can overcome only by adopting a new constitution.”

However, until the German people decide in favour of the revolutionary adoption of a new constitution, the German judges have it in their power to defuse the looming democratic and perhaps even European crises. To this end the judges, before issuing a ruling on European questions would merely ask for a prior opinion from the European Court of Justice in the framework of a reference for a preliminary ruling. Other high and supreme courts, including German ones, have long since availed themselves of this possibility.

### “Sovereignty and democracy are not inseparable twins.”

The Luxembourg arguments will have been considered if an open confrontation with far-reaching political consequences is to be avoided. But European law expert Calliess is sceptical whether the Karlsruhe judges are still prepared to do this in view of the fact that the ruling on the Treaty of Lisbon “does not mention ‘the cooperative relationship with the ECJ’ emphasized by the Maastricht ruling, which is certainly not accidental.”

The forthcoming German government must be prepared for the fact that such a conflict will occur in the very near future. Two important cases which have a bearing on European law and European policy—EU data retention and the Honeywell/Mangold dispute—are due to be dealt with shortly by the highest German court. The rulings will demonstrate Karlsruhe’s view of the limits of the ECJ’s powers.

## IV

### Redefining sovereignty

Sovereignty, borders, identity—these key words in the explanation of the Karlsruhe ruling are actually concepts of states and nations in the 19th and 20th centuries when Europe still ruled half of the world. The judges of the German Constitutional Court write, speak and think in terms of these concepts in an innocent kind of way, and do not for a moment think about the fact that the individual states of Europe can only safeguard and defend their self-determination and sovereignty in the maelstrom of the 21st century by acting together, that is, in European terms. Brussels is not a threat; it is the saviour of all that remains of the fantasy idea of “sovereignty.” Thus it was quite right to say that the judges had a romantic approach to reality.

Furthermore, sovereignty and democracy are certainly not the inseparable twins which the Karlsruhe ruling makes them out to be. Tsarist Russia and the French and German empires wished to dazzle others as sovereign states in the 19th-century concert of powers, but certainly did not want to become democratic in the process.

The explanation of the ruling of the Constitutional Court states correctly that “Institutions and procedures will also be reformed by the Treaty of Lisbon.” The European Parliament will have more rights; there will be the newly created office of a permanent President of the

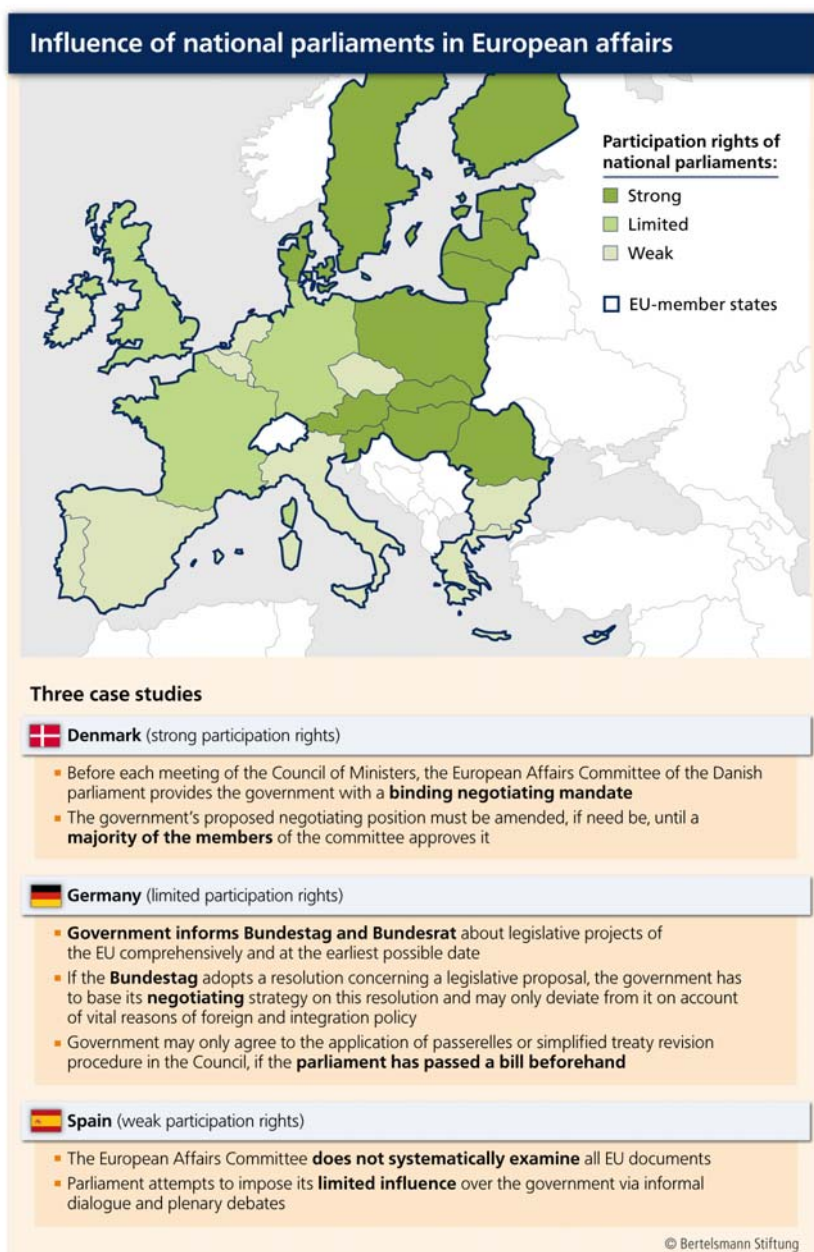


European Council; the “High Representative of the Union for Foreign Affairs and Security Policy” will combine in one person the tasks (and jobs) of the EU Commission and the High Representative (who is attached to the Council of Ministers). In the Council voting on the basis of qualified majorities will become the rule, and those who no longer wish to be members can leave the EU. Eurojust and Europol will receive new rights in the area of criminal prosecution. And the treaty will enable EU citizens to approach Brussels directly with the help of a qualified petition.

In short, here again the forthcoming German government will have to get used to new rules. Such innovations may actually seem less dramatic than the ruling of the Constitutional Court, especially since every minister and every Chancellor will in fact be dealing with familiar institutions, the Parliament, the Commission, and the Council. Furthermore, in the course of the transition from the (abortive) constitutional treaty to the Treaty of Lisbon all the symbols such as the anthem, flag and motto which would have given the European Union the flavour of a federal state (at least that is how the British and Dutch saw it, who clamoured to have them removed) were expunged from the text.

Thus for a long time to come the Union will clearly continue to be an entity which cannot be described with the help of terms such as confederation, federal state or nation-state. The reformed EU will certainly be more political and more visible. Some fear that it will also be more dominant. And for this reason it will more than ever become a force to be reckoned with which politicians in EU capitals will utilize, but also fear.

The heads of state and government already had a foretaste of this in the summer. The Council’s attempt to secure a second



period of office for the President of the Commission, José Manuel Barroso, was unsuccessful because it did not receive the assent of the newly elected European Parliament. In this a political opposition group consisting of Socialists, Liberals, Greens and Ultra-leftists played a role, as did the legal question of whether the next President of the Commission, after his appointment by the Council, should be elected by the Parliament on the basis of a simple majority (which is the provision contained in the Treaty of Nice) or an absolute majority (which is the provision contained in the Treaty of Lisbon).

## V

## What is on the agenda in Brussels?

The new European Parliament has been elected and has got down to work. It is a moot point whether the new President of the Commission should be chosen in the autumn on the basis of the old treaties or whether the EU should wait until the Treaty of Lisbon can enter into force after the Irish referendum and the completion of the German, Czech and Polish ratification procedures.

This would mean that for all new appointments there would be a waiting period until the year 2010, an interim interval which in the world economic crisis is a luxury Europe simply cannot afford. On top of this the EU in the immediate future faces a series of important debates and decisions. At the end of September the G 20 group is meeting in Pittsburgh in order to create a stable and sensible framework for banks and the finance industry. The results will subsequently have to be incorporated into European law.

In December decisions will be made in Copenhagen on global climate policy and the continuation of the so-called Kyoto process. In this area the EU believes that it has a leading role to play. In the first

semester under the Spanish presidency of the Council the EU will decide to continue with the Lisbon process, and with regard to the labour market, growth, the knowledge society and the social community embark on a (hopefully) ambitious social sustainability project. Next year the debate on the framework budget for 2013 to 2020 will start to heat up. On what should the EU spend its money in order to ensure its survival in the future, how much should it spend, and who should get it? Whatever happens, the EU sustainability strategy will certainly have to be revised.

So there is no dearth of topics when it comes to improving the EU as it competes with other centres of power in the world. There are also plenty of topics for the Commission in Brussels to get its teeth into, since it will have to come up with ideas for these debates and decisions. There are also plenty of topics for the European Parliament, which in the recent past has demonstrated, for example, with regard to the Reach chemical substances directive, that it is capable of finding solutions to difficult questions. Finally, there is plenty of work for the forthcoming President of the European Council who in all these areas is supposed to mediate and broker compromises between the 27 governments.

And there is a plethora of tasks waiting for the next German government, for the largest economy in the EU, whether it likes it or not, exercises a decisive influence on the way things happen. When it comes to the climate-friendly automotive industry of the future, to infrastructure or budgetary issues, people will look not only towards Brussels, but also to Berlin.

In a paradoxical kind of way the increased integration introduced by the Treaty of Lisbon will change nothing. The fact that the EU, after two decades of institutional debates, has finally and for the foreseeable future attained to an internal balance is the precise reason why content-specific

dossiers and what Barroso has called the “Europe of results” have now moved into the limelight. This is a state of affairs to which, and in the light of the Karlsruhe ruling, not only the German government will have to adapt, but also the German Parliament and the Federal Council. There will be a completely unwonted and unfamiliar Europeanization of German politics. To be sure, not in the way envisaged by the euphoric individuals who used to greet every step towards greater integration as the beginning of the end of the nation-state. In the enlarged EU this species started to become rather rare quite a long time ago. In 2006 former Belgian Prime Minister Guy Verhofstadt was the last prominent politician to give enthusiastic support to the idea of “The United States of Europe” (the title of his book). He remained a voice crying in the wilderness to whom few people were prepared to listen.

What we shall see is a Europeanization of German politics from within, that is, a Europeanization of German domestic policy in regard to material decisions in very different areas ranging from agriculture to the environment and from foreign policy to justice. The parliaments can no longer avoid all this by consigning the issues concerned to a European committee.

Thus the debates will become more controversial, which is not a bad thing. But does that mean they will be on a higher level? Will they explain Europe in a more comprehensible and appropriate manner than on so many occasions in the past? And does it mean that German politicians will immediately be more European?

## VI

### European personnel required in Germany

We should perhaps ask the question differently. Do the parties have the right

personnel for this transformational challenge? In the parliaments at any rate the tone nowadays is set by the domestic policy budget specialists and legal experts. Foreign policy experts are few and far between in all of the parties, which in fact attach little importance to preparing their up-and-coming members to deal with European or even global challenges. If a young politician wishes to get ahead, it is most unlikely that he will become a European affairs specialist. It remains to be seen what consequences this will have in the immediate future for the Europeanized work in both chambers.

### “Europe of results is once again in the limelight.”

In the past a quite different personnel debate used to flare up at the beginning of every new coalition in Germany. Does the government need a powerful Minister for Europe in the Chancellor’s Office? A sensible question, and a head-on attack on the Ministry for Foreign Affairs and its incumbent, the Vice-Chancellor and Minister for Foreign Affairs. In the final analysis every Chancellor since Helmut Kohl has preferred to leave the question unanswered for the sake of peace and quiet. However, it should be asked and scrutinized once again after the elections. In factual terms the answer after the Karlsruhe ruling and in the era of the Treaty of Lisbon is obvious. If German politics is going to become Europeanized in such a far-reaching way, then it needs a Minister for Europe even if it has been the German custom to assign greater importance to coalition logic than to functional logic.

Hitherto German parties and German governments concurred that Europe is in the national interest, indeed, that Germany’s national interest and Europe are one. Doubts about this have arisen as a result of the Karlsruhe ruling. Alfred Grosser is sceptical, and so is the British Liberal and MEP Andrew Duff. “One can only imagine how Angela Merkel will take

to being hobbled in the European Council by her judges and MPs back home.” However, that would be a high price for the Europeanization of German policymak-

ing which has now begun. It would have to be paid by Germany and the European Union, and would be to the detriment of both of them.

#### For Further Reading:

[Andrew Duff: Lisbon’s high-wire act moves to Germany. Financial Times, 26.08.2009](#)

[Joschka Fischer: Ein nationaler Riegel. Die Zeit 29/2009, p. 3](#)

Alfred Grosser: Deutschland auf dem Sonderweg. Süddeutsche Zeitung, 11.07.2009, p. 2

Roman Herzog/Luder Gerken: Stoppt den Europäischen Gerichtshof. Frankfurter Allgemeine Zeitung, 08.09.2008, p. 8

Burkhard Hirsch: Das unentziehbare Recht des Verfassungsgerichts. Frankfurter Allgemeine Zeitung, 27.08.2009, p. 34

[Robert Leicht: Nur noch ein deutsches Europa. Der Tagesspiegel, 06.07.2009](#)

Carl Otto Lenz: Ausbrechender Rechtsakt. Frankfurter Allgemeine Zeitung, 08.08.2009, p. 7

[Petra Pinzler: Wo geht es hier zum Europaminister?, Die Zeit, 30. Juli 2009, Nr. 31](#)

Heribert Prantl: Europäische Sternstunde. Süddeutsche Zeitung, 01.07.2009, p. 4

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