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On the Threshold to a new electoral law: The Bundesverfassungsgericht's Decision on Electoral Thresholds

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In February, the German Federal Constitutional Court (Bundesverfassungsgericht) rejected a motion regarding electoral thresholds in EU electoral law, finally allowing for the necessary national approval of Council Decision 2018/994. This Decision intends to amend the European Electoral act and, according to Article 223 (1) TFEU, must be approved by all Member States. Up until now, the court had held that thresholds in European elections were not compatible with German constitutional law. However, a draft legislative act proposes that some Member States would be obliged to establish electoral thresholds for European elections. With this new judgement, the Bundesverfassungsgericht joins other European courts in finding thresholds to be compatible with national constitutional law.

This blog post aims to provide context for a decision that might very well change the composition of the European Parliament.

Previously on… electoral thresholds

In elections, citizens cast their votes in order to have their opinions represented in a parliament. In theory, representing every political view leads to a better democracy in which minority voices can gain much influence. However, fragmentation of a parliament can interfere with finding a consensus and thus hinder governability. By requiring a minimum percentage of votes a party must gain to be allocated a seat in a parliament, electoral thresholds seek to balance representation and governability. Approximately half of all Member States currently employ electoral thresholds in European parliamentary

elections. The threshold is 5 percent in nine states (Czechia, France, Croatia, Latvia, Lithuania, Hungary, Poland, Romania and Slovakia), 4 percent in Austria and Sweden, 3 percent in Greece and 1,8 percent in Cyprus. Fourteen Member States do not currently have minimum requirements for allocation of European Parliament seats.

Thresholds are common in German electoral law. On the federal level, a party must gain at least five percent of votes to be allocated a seat in the German Parliament, the Bundestag (§ 4 (2) no. 2 Bundeswahlgesetz). Similarly, in the first European elections, German parties had to pass a threshold of five percent and, later, of three percent (§ 2 (6) resp. (7) Europawahlgesetz [old version]). In 2011 and 2014, the Bundesverfassungsgericht ended this practice. While it has always held that the federal threshold is not only legal, but constitutionally mandated, the Court saw clear differences between the German Parliament and the European Parliament. Governability is extremely important for the Bundestag, which is responsible for electing the Bundeskanzler (chancellor) and where the governing parties hold much power. However, on a European level, the European Parliament is not as involved in the governing and does not require a stable majority. Although the Commission President is elected by the Parliament (Article 17 (7) of the Treaty on European Union [TEU]), and the College of Commissioners can be removed by a parliamentary motion of censure (Article 17 (8) TEU), the Commission does not need continuous support from the Parliament in order to govern. For example, in the second reading during the ordinary legislative procedure, an act can pass without a parliamentary procedure when the Parliament either does not vote on a Council position or does not disapprove of the position with a majority vote (Article 294 (7) lit. a, b TFEU). Groups in the European Parliament differ from their national counterparts as well: the strongest groups do not form a 'government', Commissioners usually come from different political groups. Since the Parliament is so diverse in nationalities, languages, cultures, and political opinions, large groups provide a form of integration: internal debates often happen so that groups can speak with one united voice when it comes to plenary debates. Fragmentation is therefore, according to the Bundesverfassungsgericht, not as daunting on the European level as it is in the German Bundestag.

Other Member States' Courts have also ruled on their respective electoral thresholds. The Czech Constitutional Court also argued that national parliaments and the European Parliament are different by nature and can not be held to the same standards (para. 70). However, a stable majority in the European Parliament is elemental to the functioning of the European Union (paras. 71, 72). It concluded that the European electoral threshold required by Czech law was in line with the Czech constitution. The Italian Constitutional Court also held that thresholds were compatible with the Italian Constitution as they are 'typical manifestations of the discretion of a legislator that wishes to avoid fragmented political representation, and to promote governability'. The French Conseil Constitutionnel

also ruled the electoral threshold to be in line with the French Constitution. It based its judgement on two pursued objectives: the favouring of 'main currents of ideas and opinions expressed in France being represented in the European Parliament' and the avoiding of fragmentation.

Why did the Court have to decide again?

European elections are governed by national electoral laws. A framework for these national laws is the European Electoral Act from 1976, which is drawn up by the European Parliament and adopted by the Council (Article 223 (1) of the Treaty on the Functioning of the European Union [TFEU]). In 2018, the Council voted to amend the Electoral Act and introduce electoral thresholds. According to the second paragraph of Article 3 of the Council Decision 2018/994, Member States may set thresholds of up to five percent. Constituencies comprising more than 35 seats are obliged to set a threshold of at least two percent. Only three Member States are currently allocated more than 60 seats: France, Italy and Germany. Since French and Italian electoral law already employ thresholds, this new rule would only affect Germany. In order for this Decision to come into effect though, the procedure of Article 223 (1) TFEU must be followed: Member States have to approve of the amendment 'in accordance with their respective constitutional requirements'.

German constitutional law mandates that the national legislative bodies (Bundestag and Bundesrat) approve of the law with a two-thirds majority (Art. 23 (1) 3, Article 79 (2) of the Grundgesetz). Both decisions were reached in 2023. However, the Bundespräsident (head of state) has to sign the decision for them to come into full effect. Until this happens, the Council Decision has not been approved and the Electoral Act can not be amended.

The Court's decision

German satire party Die Partei currently holds two seats in the European Parliament, having won a share of 2.4 percent of German votes in the last European elections. Their two Members of Parliament, one of which joined the Greens/EFA group, tried to stop the Electoral Act from coming into effect by calling upon the Bundesverfassungsgericht. They argued that, as previously decided by the Court, thresholds on the European level were unconstitutional. Substantively, they stated that thresholds infringe on the right to equal opportunities for minority parties and weaken democracy (para. 29).

However, the German Constitutional Court has longstanding jurisprudence on their competence ruling on national measures in the scope of EU law and has developed three tests. The Court only tests whether an EU act is ultra vires or whether the German

constitution is affected at its core (Identitätskontrolle). It does not test Union law in light of national fundamental rights as long as EU fundamental rights provide a comparable level of protection (Solange II). The petitioners argued that the Council Decision was ultra vires and that it violated the constitutional identity. The Court found that the petitioners had not substantiated this claim enough. German approval of the electoral law amendment does not confer new competences to the European level, since Article 223 TFEU already exists. Therefore, the amendment does not overstep competences and is not ultra vires (paras. 93 f.). It also did not follow the petitioners' claim that German democracy, and therefore the German constitution, were infringed. The EU holds itself to democratic standards. Though the EU's interpretation of democracy might differ from the German interpretation, democracy as a constitutional standard is not affected at its core when modifications are made (para. 101 f.). EU legislative bodies are awarded a prerogative to assess and shape electoral law (paras. 121 f.).

In a departure from past decisions, the Bundesverfassungsgericht now sees the danger of a deepening rift in political views, resulting in more fragmentation of the Parliament (para. 17). It now argues that a stable majority in the Parliament is essential to its important responsibilities as a legislative body equal to the Council, in the creation of a Commission and the budget power. Since the two biggest groups in the parliament no longer hold an absolute majority in the Parliament, finding this majority proves to be more challenging (para. 123). Additionally, the groups' ability to integrate different views is limited. Preventing a more fragmented and heterogeneous Parliament is therefore a legitimate objective.

The Court therefore rejected Die Partei's motion. As a result, the German approval of the European Electoral Act amendment can now come into force.

Outlook

Will electoral thresholds be applied in the upcoming 2024 elections? No. The European elections in June will still be governed by the national electoral laws that have been in effect for the past few months. Additionally, Germany was only one of two Member States still pending approval: Spain has yet to approve of the amendment. Mandatory thresholds could eventually be applied in the 2029 elections.

However, maybe future elections will be held in accordance with very different laws. For quite some time, forces inside the European Parliament have pushed for a European Electoral Regulation that would be applicable in every Member State without national legal implementation. These drafts have often included proposals for transnational lists or pan-

European constituencies. So far, these proposals have always failed to win over the approval of national governments in the Council.

It seems more likely that national legislation will adapt and that we will see fewer minority parties in the European Parliament. Let us hope that stopping fragmentation in the European Parliament will be a mirror of a less divided, less extreme European society.