Headnotes

to the judgment of the Second Senate of 26 February 2014

– 2 BvE 2/13 et al. –

– 2 BvR 2220/13 et al. –

1. **Under the current legal and factual conditions, the serious interference with the principles of equal suffrage and of equal opportunities for political parties that the three percent threshold in the law governing German elections to the European Parliament entails cannot be justified (following Decisions of the Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 129, 300).**

2. **A different assessment under constitutional law may be called for if conditions change materially. There is nothing to prevent the legislature from also making allowances for specifically foreseeable future developments in the course of its task of observing and assessing present-day conditions; but these conditions can be accorded decisive importance only if a reliable prognosis of future developments on the basis of sufficiently sound factual evidence is already possible.**

FEDERAL CONSTITUTIONAL COURT

– 2 BvE 2/13 –

– 2 BvE 5/13 –

– 2 BvE 6/13 –

– 2 BvE 7/13 –

– 2 BvE 8/13 –

– 2 BvE 9/13 –

– 2 BvE 10/13 –

– 2 BvE 12/13 –

– 2 BvR 2220/13 –

– 2 BvR 2221/13 –

– 2 BvR 2238/13 –

Pronounced

on

26 February 2014

Mr Kunert

as Registrar of the Court Registry

I N THE NAME OF THE PEOPLE

In the proceedings

I. on the application to declare

that in the resolution of 13 June 2013 adopting Art. 1 number 2 letter d of the Fifth Act Amending the European Elections Act (*Fünftes Gesetz zur Änderung des Europawahlgesetzes*) (*Bundestag* Document, *Bundestagsdrucksache* – BTDrucks 17/13705 and 17/13935), the respondent violated the applicant's rights under Art. 21 section 1 sentence 1 in conjunction with Art. 3 section 1 of the Basic Law (*Grundgesetz* – GG)

Applicant: The National Democratic Party of Germany (*Nationaldemokratische Partei Deutschlands* – NPD), represented by its current

Party Chairman Udo Pastörs,
Seelenbinderstrasse 42, 12555 Berlin

– authorised representative: Rechtsanwalt Dipl.-Jur. Peter Richter LL.M.,

Birkenstrasse 5, 66121 Saarbrücken –

Respondent: The German *Bundestag*,
represented by its President
Prof. Dr. Norbert Lammert,
Platz der Republik 1, 11011 Berlin

– authorised representative: Prof. Dr. Christofer Lenz,
Börsenplatz 1, 70174 Stuttgart -

– 2 BvE 2/13 – ,

II. on the application to declare

that the resolution of the German Bundestag on the draft for the Fifth Act Amending the European Elections Act of 4 June 2013 (BTDrucks 17/13705) in the form of the recommendation for a resolution of 12 June 2013 (BTDrucks 17/13935), in its Art. 1 number 2 letter d of the draft for a Fifth Act Amending the European Elections Act, violates the Basic Law, specifically Art. 21 section 1 and Art. 3 section 1 GG, and violates the applicant's rights under Art. 21 section 1 and Art. 3 section 1 GG

Applicant: Federal Association of the FREEDOM Civil Rights Party
(*Bundesverband der Bürgerrechtspartei DIE FREIHEIT*),
represented by its Federal Chairman René Stadtkewitz,
Romain-Rolland-Strasse 137, 13089 Berlin

– authorised representatives:

PWB Rechtsanwälte,
Löbdergraben 11 a, 07743 Jena –

Respondent: The German *Bundestag*,
represented by its President
Prof. Dr. Norbert Lammert,
Platz der Republik 1, 11011 Berlin

– authorised representative: Prof. Dr. Christofer Lenz,
Börsenplatz 1, 70174 Stuttgart -

– 2 BvE 5/13 – ,

III. on the application to declare

that the Act of 13 June 2013 (BTDrucks 17/13935), insofar as it excludes parties from representation in the European Parliament if they receive less than 3 percent of the votes cast (the "Three Percent Clause" – "*3%-Klausel*"), is unconstitutional and void

Applicant: 1. Starting Now … Democracy by Plebiscite
(*Ab jetzt …Demokratie durch Volksabstimmung*),
Gneisenaustrasse 52c, 53721 Siegburg,
represented by its Federal Chairman
Dr. Helmut Fleck,

2. Grey Panthers Alliance (AGP)
(*Allianz Graue Panther* – AGP),
Rheinstrasse 29, 57638 Neitersen,
represented by its Second Chairman
Dr. med. Erhard Römer,
Buchrainstrasse 47, 60599 Frankfurt am Main,

3. The 21/RRP Alliance
(*Bündnis 21/RRP*),
Mendelssohnstrasse 2, 86368 Gersthofen,
represented by its Federal Managing Director (Committee Member)
Wolfgang Kurtenbach,
Arndtstrasse 3, 71636 Ludwigsburg,

4. The German Conservative Party
(*Deutsche Konservative Partei*),
Scharnweberstrasse 100, 13405 Berlin,
represented by its Federal Chairman Dieter Jochim,
Zeppelinstrasse 110, 13583 Berlin,

5. German Future (DZ)
(*Deutsche Zukunft – DZ*),
Brand 24, 79677 Schönau,
represented by its First Chairman Joachim Widera, Hauptstrasse 12, 79618 Rheinfelden,

6. DSLP – The Citizens' Party
(*DSLP – Die Bürgerpartei*),
Beim Roten Haus 3, 72401 Haigerloch,
represented by its Federal Chairman
Thomas Mosmann,
Postfach 02, 72394 Haigerloch,

7. The Family Party of Germany
(*Familien-Partei Deutschlands*),
Blankenburger Strasse 129/141, 13256 Berlin,
represented by its Deputy Federal Chairman
Dipl.-Volksw. Heinrich Oldenburg,
Otto-Wels-Strasse 9, 32429 Minden,

8. Free Voters of Germany
(*Freie Wähler Deutschland – FWD*),
Dahlwitzer Strasse 2, 12623 Berlin,
represented by its Federal Chairman
Hans-Jürgen Malirs and its Deputy Federal Chairman, Dr. Horst Schulz,

– authorised representative:

Rechtsanwalt Michael Tittel,
Charlottenstrasse 3, 12683 Berlin –

9. GREY PANTHERS of Germany
(*GRAUE PANTHER Deutschland*),
Alboinstrasse 123, 12105 Berlin,
represented by its First Chairman
Hans E. Ohnmacht,

10. The Party for Franconia
(*Partei für Franken*),
Waldstrasse 55, 91154 Roth,
represented by its First Chairman
Robert Gattenlöhner,

Respondent: The German *Bundestag*,
represented by its President
Prof. Dr. Norbert Lammert,
Platz der Republik 1, 11011 Berlin

– authorised representative: Prof. Dr. Christofer Lenz,
Börsenplatz 1, 70174 Stuttgart -

– 2 BvE 6/13 – ,

IV. on the application to declare

that the respondent violated the applicant's rights under Art. 21 section 1 of the Basic Law by its resolution to adopt the Fifth Act Amending the European Elections Act on 13 June 2013

Applicant: The PIRATES Party of Germany
(*PIRATEN-Partei Deutschland*),
represented by its Federal Executive Board,
represented in turn by its Chairman Thorsten Wirth,
Pflugstrasse 9a, 10115 Berlin

Intervening Party: The Party for Labour, Rule of Law, Animal Protection, Promotion of Elites and Grassroots Democracy Initiatives (The PARTY)
(*Partei für Arbeit, Rechtsstaat, Tierschutz, Elitenförderung und basisdemokratische Initiative* – Die PARTEI),
represented by its Federal Executive Board,
represented in turn by its Chairman Martin Sonneborn,
Kopischstrasse 10, 10965 Berlin

– authorised representative:

Rechtsanwalt Dipl.-Jur. Tim Werner,

Windhorststrasse 62, 65929 Frankfurt am Main –

Respondent: The German *Bundestag*,
represented by its President
Prof. Dr. Norbert Lammert,
Platz der Republik 1, 11011 Berlin

– authorised representative: Prof. Dr. Christofer Lenz,
Börsenplatz 1, 70174 Stuttgart -

– 2 BvE 7/13 – ,

V. on the application to declare

that by participating in the legislative procedure for introducing the three percent clause in German elections to the European Parliament (§ 2 section 7 of the European Elections Act, *Europawahlgesetz*, – EuWG) in the version of the Fifth Act Amending the European Elections Act of 7 October 2013 (Federal Law Gazette, *Bundesgesetzblatt* – BGBl I p. 3749), the respondent violated the rights of applicants nos. 1 and 2 to equal opportunities, and to declare pursuant to § 67 of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* – BVerfGG) that the adoption of § 2 section 7 EuWG violates Art. 21 section 1 and Art. 3 section 1 of the Basic Law

and to find pursuant to § 95 section 1 BVerfGG that the adoption of § 2 section 7 EuWG violates Art. 3 section 1 in conjunction with Art. 38 section 1 sentence 1 of the Basic Law

Applicants: 1. Federal Association of INDEPENDENT VOTERS
(*Bundesvereinigung FREIE WÄHLER*),
Mühlenstrasse 1, 27777 Ganderkesee,
represented by its Federal Chairman Hubert Aiwanger,
Rahstorf 25, 84056 Rottenburg
and Treasurer Christa Hudyma,
Brüggerweg 20, 59964 Medebach

2. The Ecological-Democratic Party
(*Ökologisch-Demokratische Partei – ÖDP*),
Pommergasse 1, 97070 Würzburg,
represented by its Federal Chairman
Sebastian Frankenberger,
Milchgasse 3, 94032 Passau
and its Deputy Federal Chairman
Karl Heinz Jobst, Gestütring 15, 85435 Erding

– authorised representative:

Prof. Dr. Hans Herbert von Arnim,
Im Oberkämmerer 26, 67346 Speyer –

Respondent: 1. The German *Bundestag*,
represented by its President
Prof. Dr. Norbert Lammert,
Platz der Republik 1, 11011 Berlin,

– authorised representative: Prof. Dr. Christofer Lenz,
Börsenplatz 1, 70174 Stuttgart -

2. The German *Bundesrat*,
represented by its President Stephan Weil,
Leipziger Strasse 3-4, 10117 Berlin,

3. The President of the Federal Republic of Germany,
Office of the Federal President,
Spreeweg 1, 10557 Berlin

– 2 BvE 8/13 – ,

VI. on the application to declare

that § 2 section 7 of the European Elections Act in the version of 7 October 2013 (BGBl I p. 3749) violates the applicant's fundamental rights under Art. 3 section 1 and Art. 21 section 1 of the Basic Law

Applicant: The REPUBLICANS
(*Die REPUBLIKANER*),
represented by their managing Deputy Federal Chairman
Johann Gärtner,
Münchner Str. 4, 86438 Kissing

– authorised representative:

Rechtsanwalt Dr. med. Rolf Schlierer,
Kernerstrasse 2 A, 70182 Stuttgart –

– 2 BvE 9/13 – ,

VII. on the application to declare

that the respondent violated the applicant's rights under Art. 21 section 1 of the Basic Law in conjunction with Art. 3 section 1 of the Basic Law, by adopting the Fifth Act Amending the European Elections Act of 7 October 2013 in the version that entered into force on 10 October 2013 (BGBl I p. 3749), which in § 2 section 7 excludes parties that received less than three percent of the votes cast from being represented in the European Parliament (three percent threshold clause)

Applicant: UP – Party for Employment, Environment and Family,

UP – Christians for Germany
(*AUF – Partei für Arbeit, Umwelt und Familie,*
AUF – Christen für Deutschland),
represented by its Federal Executive Board,
represented in turn by its Federal Chairman Dieter Burr,
Im Neuenbühl 7, 71287 Weissach

– authorised representative:

Rechtsanwältin Martina Döbrich,
Vogelsbergstrasse 11, 66693 Mettlach –

Respondent: The German *Bundestag*,
represented by its President
Prof. Dr. Norbert Lammert,
Platz der Republik 1, 11011 Berlin

– authorised representative: Prof. Dr. Christofer Lenz,
Börsenplatz 1, 70174 Stuttgart -

– 2 BvE 10/13 – ,

VIII. on the application to declare

that the Fifth Act Amending the European Elections Act in the version of the recommendation for a resolution from the Committee on Internal Affairs in *Bundestag* Document 17/13935, adopted by the *Bundestag* on 13 June 2013, and then adopted by the *Bundesrat* (BGBl I p. 3749), is incompatible with the Basic Law

Applicant: The German Democratic Party
(*deutsche demokratische partei – ddp*),
represented by its Chairman Thorsten Sandvoss,
Oberer Markt 15, 92281 Königstein

Respondent: 1. The German *Bundestag*,
represented by its President
Prof. Dr. Norbert Lammert,
Platz der Republik 1, 11011 Berlin,

– authorised representative: Prof. Dr. Christofer Lenz,
Börsenplatz 1, 70174 Stuttgart -

2. The *Bundesrat*,
represented by its President Stephan Weil,
Leipziger Strasse 3-4, 10117 Berlin

– 2 BvE 12/13 – ,

IX. on the constitutional complaint

1. of Mr A … ,

2. of Mr F …

– authorised representative:

Prof. Dr. Hans Herbert von Arnim,
Im Oberkämmerer 26, 67346 Speyer –

against the three percent clause in German elections to the European Parliament
under the Fifth Act Amending the European Elections Act
of 7 October 2013 (BGBl I p. 3749),
published in the Federal Law Gazette on 9 October 2013

– 2 BvR 2220/13 – ,

X. on the constitutional complaint

of Mr Matthias C … ,

and a further 1098 complainants

– authorised representative:

Prof. Dr. Matthias Rossi,
Richard-Wagner-Strasse 16, 86199 Augsburg –

against the provision under § 2 section 7 EuWG
in its version that entered into force on 10 October 2013

– 2 BvR 2221/13 – ,

XI. on the constitutional complaint

of Mr B … ,
and a further 23 complainants

– authorised representative:

Rechtsanwalt Dipl.-Jur. Peter Richter, LL.M.,
Birkenstrasse 5, 66121 Saarbrücken –

against Art. 1 number 2 letter d of the Fifth Act Amending the European Elections Act of 7 October 2013 (BGBl I p. 3749)

and Application for financial aid

– 2 BvR 2238/13 –

the Federal Constitutional Court – Second Senate –

with the participation of Justices

President Vosskuhle ,

Lübbe-Wolff,

Gerhardt,

Landau,

Huber,

Hermanns,

Müller,

on the basis of the oral hearing of 18 December 2013 has decided by

Judgment

as follows:

1. **The proceedings are combined for a joint decision.**

2. **§ 2 section 7 of the Act on the Election of Members of the European Parliament from the Federal Republic of Germany (*Europawahlgesetz* – EuWG) in its version that entered into force on 10 October 2013 (BGBl Part I page 3749) violates the complainants' fundamental right under Art. 3 section 1 of the Basic Law and is therefore void.**

3. **The application of applicants nos. 2, 3, 4, 5, 6, 7 and 9 in proceedings 2 BvE 6/13 initiating *Organstreit* proceedings *[dispute between constitutional organs]* is dismissed as inadmissible. The applications in proceedings 2 BvE 8/13 and 2 BvE 12/13 are dismissed as inadmissible insofar as they are directed against the *Bundesrat* and the Federal President.**

   By the resolution adopting Article 1 number 2 letter d of the Fifth Act Amending the European Elections Act, which entered into force on 10 October 2013 (BGBl Part I page 3749), the German *Bundestag* violated the rights to equal opportunities under Article 21 section 1 of the Basic Law of the applicants in proceedings 2 BvE 2/13, 2 BvE 5/13, 2 BvE 7/13, 2 BvE 8/13, 2 BvE 9/13, 2 BvE 10/13, 2 BvE 12/13, the intervening party in proceedings 2 BvE 7/13 and applicants nos. 1, 8 and 10 in proceedings 2 BvE 6/13.

4. **The Federal Republic of Germany must reimburse the complainants' for their necessary expenses.**

Reasons:

A.

[…] 1

I.

[Excerpt from the Court's press release no. 14/2014 of 26 February 2014]

The *Organstreit* proceedings *[proceedings relating to disputes between constitutional organs]* and the constitutional complaints challenge § 2 section 7 of the European Elections Act (*Europawahlgesetz* – EuWG), which provides for a three percent electoral threshold for elections to the European Parliament. This provision was inserted by the Fifth Act Amending the European Elections Act of 7 October 2013 (BGBl I p.

3749). In European law, the so-called Direct Elections Act requires that the members of the European Parliament be elected in each Member State under the system of proportional representation. Subject to the other provisions of that Act, the electoral procedure is governed in each Member State by its national provisions. With a judgment of 9 November 2011 (Decisions of the Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 129, 300), the Federal Constitutional Court declared the five percent electoral threshold, which applied to the 2009 European elections, incompatible with Art. 3 section 1 and Art. 21 section 1 GG and therefore void.

[End of excerpt]

[…] 2-15

II.

1. The applicants and complainants argue that § 2 sec. 7 EuWG is unconstitutional […]. 16

[…] 17-19

2. a) The applications in the *Organstreit* proceedings and the constitutional complaints were served on the Federal President, the German *Bundestag*, the German *Bundesrat* and the Federal Government, as well as to the Federal Ministry of the Interior and the Federal Ministry of Justice, all German *Land [federal state]* governments, and the federal representations (*Bundesverbände*) of the parties represented in the German *Bundestag* and the European Parliament, and other German parties that are represented in at least one *Landtag [federal state Parliament]* or that are entitled to partial financing from the state (§ 18 sec. 4 sentence 1 of the Act on Political Parties – *Gesetz über die politischen Parteien,* PartG). The European Parliament, the European Commission and the Council of Europe were likewise given the opportunity to submit statements. Only the German *Bundestag* submitted a statement. 20

[…] 21-29

3. At the oral hearing of 18 December 2013, the applicants and complainants, as well as the German *Bundestag*, provided further details and supplemented their arguments. The Federal Constitutional Court heard Prof. em. Dr. Dr. h.c. Beate Kohler, Prof. Dr. Andreas Maurer, Prof. Dr. Hermann Schmitt and Prof. Dr. Thomas Poguntke as expert third parties (§ 27a BVerfGG). Furthermore, the President of the European Parliament, Martin Schulz, and Members of the European Parliament Elmar Brok, Reinhard Bütikofer and Klaus-Heiner Lehne, expressed their views. 30

B.

The application by applicants nos. 2, 3, 4, 5, 6, 7 and 9 in *Organstreit* proceedings 2 BvE 6/13 is inadmissible. The applications in proceedings 2 BvE 8/13 and 2 BvE 12/13 are inadmissible insofar as they are directed against the *Bundesrat* and the 31

Federal President. The application of the other applicants in proceedings 2 BvE 6/13 and the applications in the other *Organstreit* proceedings are admissible insofar as they are directed against the German *Bundestag*, as are the constitutional complaints. The intervention in proceedings 2 BvE 7/13 is admissible under § 65 sect. 1 BVerfGG (cf. BVerfGE 120, 82 <100-101>).

I.

The representatives who initiated *Organstreit* proceedings 2 BvE 6/13 for applicants nos. 2, 3, 4, 5, 6, 7, and 9 had not been duly appointed under the applicants' charters or by their executive boards, and therefore could not validly initiate proceedings. The initiation of a constitutional dispute by a political party is normally part of the management duties of a party's executive board (cf. BVerfGE 24, 300 <331>). […] 32

[…] 33

II.

Insofar as the applications in proceedings 2 BvE 8/13 and 2 BvE 12/13 are directed against the *Bundesrat* and the Federal President, standing has not been adequately demonstrated. 34

In *Organstreit* proceedings, applicants have standing under § 64 sentence 1 BVerfGG if they establish *prima facie* that they and the respondent are directly involved in a constitutional legal relationship, and that with the challenged measure or omission, the respondent has violated or directly threatened the applicant's constitutional rights and responsibilities resulting from that relationship (cf., for details, Federal Constitutional Court, Order of the Second Senate of 17 September 2013 – 2 BvR 2436/10, 2 BvE 6/08 –, Neue Zeitschrift für Verwaltungsrecht – NVwZ 2013, p. 1468, paras. 160 et seq.). Such *prima facie evidence* is missing here. The applicants have not shown that there is a possibility that their rights were violated by the participation of the *Bundesrat* and the Federal President in the legislative process. 35

C.

Insofar as the applications in the *Organstreit* proceedings are admissible, they meet with success, as do the constitutional complaints. The threshold clause that excludes parties and political associations having received less than 3 percent of the valid votes from being awarded seats, and thus at the same time deprives the votes cast for these parties and associations of their electoral significance, violates the principles of equal suffrage and of equal opportunities for political parties. 36

I.

The Federal Constitutional Court set the standards for constitutional review of the justification for interfering with equal suffrage and political parties' equal opportunities in its judgment of 9 November 2011, by continuing its jurisprudence (cf. BVerfGE 120, 82 <102 et seq. with further references>) on the five percent threshold clause in the 37

law governing elections to the European Parliament (cf. BVerfGE 129, 300 <317 et seq.>), and reconfirmed them in a judgment of 25 July 2012 concerning another context (cf. BVerfGE 131, 316 <336 et seq.>). This standard of review must also be applied here. Introducing a three percent threshold clause, after the five percent threshold clause had been declared void, was not objectionable on the mere grounds of violating the prohibition on repeating an identical provision *(Verbot der Normwiederholung)* or the principle of good-faith cooperation between organs (*Organtreue*) (1.). Contrary to the arguments of the German *Bundestag*, the constitutional standard of review is not restricted by binding requirements of European Union law (2.). The standards established in the decision of 9 November 2011 are transferable to the three percent threshold clause in the law governing elections to the European Parliament, and must also be applied in reviewing its justification (3.).

1. The binding effect of the judgment of 9 November 2011 pursuant to § 31 sec. 1 BVerfGG did not prohibit the legislature from replacing the five percent threshold clause that had been voided with the challenged three percent threshold clause. […] The lower minimum threshold does not constitute a mere repetition of an identical provision. A three percent threshold clause may have effects different from a five percent threshold clause and therefore calls for a separate assessment on the merits. It is true that considerations in the judgment of 9 November 2011 strongly imply that, in the light of Art. 3 sec. 1 and Art. 21 sec. 1 GG, threshold clauses of any kind cannot be valid in German law governing elections to the European Parliament under the given circumstances. Nevertheless, that fact does not relieve this Court of the duty to re-examine the changed legislative situation as such and in view of the assertion that circumstances have changed. 38

Nor does the principle of good-faith cooperation between state organs limit the legislature'sleeway to design laws. Contrary to some applicants' arguments, the legislature did not deliberately disregard the Federal Constitutional Court's decision on the five percent threshold clause; rather, it acted only after having considered the judgment of 9 November 2011 and therefore did not violate its constitutional duty to act with due consideration for other constitutional organs (*verfassungsrechtliche Rücksichtnahmepflicht*) (on this point cf. BVerfGE 90, 286 <337>). […] 39

2. The European Elections Act is a German federal law, and as such must be measured against the Basic Law and its principles of equal suffrage and equal opportunities for political parties. Contrary to the opinion of the German *Bundestag* – which was argued in these proceedings for the first time – the constitutional review of the threshold clause in § 2 sec. 7 EuWG is not restricted by binding requirements of European law (cf. BVerfGE 129, 300 <317>). 40

a) Under Art. 8 sec. 1 of the Direct Elections Act, electoral procedure in the Member States is governed by national provisions, subject to the requirements of European Union law and the provisions of the Direct Elections Act itself. Accordingly, the Direct Elections Act provides only a legal framework for the adoption of national electoral 41

law, which, however, is itself subject to the constitutional obligations of each Member State (cf. BVerfGE 129, 300 <317>). It does not follow from the wording of the Direct Elections Act that the option of setting a minimum threshold of up to 5 percent of the votes cast, which is provided by European Union law under Art. 3 of the Direct Elections Act, at the same time implies that such a threshold is constitutionally permissible pursuant to the laws of the Member State concerned. Nor is there any other evidence for such an interpretation; rather, everything argues for understanding this provision as the wording would suggest.

In particular, the legislative history of the new version of the Direct Elections Act clearly argues against the interpretation proposed by the German *Bundestag*. […] 42

[This history shows that] the provision's purpose is not to empower the legislature of a Member State to establish a threshold of this amount, with a simultaneous exemption from the requirements of its national constitutional law. Rather, it limits the Member States' legislative leeway in contrast to the original version of the Direct Elections Act with respect to the maximum permissible amount of a threshold […] and thus complies with the Member States' obligation stemming from the re-enactment of the Act to comply with the principle of proportional representation, which is laid down in Art. 1 sec. 1 and Art. 8 sec. 2 of the Direct Elections Act. 43

b) Accordingly, there is clearly no need for a reference to the Court of Justice of the European Union under Art. 267 TFEU (cf. ECJ, judgment of 6 October 1982 – C.I.L.F.I.T. – Case 283/81, ECR 1982, p. 3415, para. 16 et seq.). The wording of all (equally authoritative) original versions, according to which the Member states "may" (and specifically not "shall") set a minimum threshold not to exceed 5 percent of votes cast at the national level […], is unequivocal and not subject to interpretive doubt. 44

3. The standards underlying the judgment of 9 November 2011 (a)) also apply in the present proceedings (b)). 45

a) aa) The principle of equal suffrage, which in the case of the election of the German members of the European Parliament results from Art. 3 sec. 1 GG in its manifestation as requirement of formal electoral equality (cf. BVerfGE 51, 222 <234-235>), safeguards the equality of citizens that is presupposed by the principle of democracy (cf. BVerfGE 41, 399 <413>; 51, 222 <234>; 85, 148 <157-158>; 99, 1 <13>) and constitutes one of the principal foundations of the constitutional order (cf. BVerfGE 6, 84 <91>; 11, 351 <360>). It requires – to the extent possible – that all persons entitled to vote be able to exercise the right to vote and the right to stand for elections in a formally equal way, and must be understood as a guarantee of strict and formal equality (cf. BVerfGE 51, 222 <234>; 78, 350 <357-358>; 82, 322 <337>; 85, 264 <315>). For the Elections Act it follows from the principle of equal suffrage that the vote of each person entitled to vote must, as a rule, count the same and have the same legal chance of success. All voters are to have the same influence on the results of the election through the vote they cast (BVerfGE 129, 300 <317-318>). 46

In proportional representation, the principle of equal suffrage furthermore requires that each voter also have the same influence on the composition of the representation that is to be elected by his or her vote (cf. BVerfGE 16, 130 <139>; 95, 335 <353>). It is the objective of the system of proportional representation that all parties be represented in the elected organ in a proportion that approximates the number of votes as closely as possible. Under proportional representation, equality of counted value (*Stimmwertgleichheit*) is conjoined with equality of effective value (*Zählwertgleichheit*) (cf. BVerfGE 120, 82 <103>; 129, 300 <318>). 47

bb) Since European law (Art. 1 sec. 1 of the Direct Elections Act) prescribes proportional representation, as further detailed by § 2 sec. 1 EuWG, the German legislature is under a duty, in drafting the European Elections Act, to ensure that, in general, there is both equality of the counted value and equality of the effective value of the voters' votes (BVerfGE 129, 300 <318>; on equality of effective value most recently cf. BVerfGE 131, 316 <338>) in elections of the German members of the European Parliament. 48

cc) The degressively proportional distribution of seats to the Member States under Art. 14 sec. 2 subsection 1 sentence 3 of the EU Treaties as amended by the Treaty of Lisbon neither requires nor justifies curtailments of the electoral principle of equality of the effective value of votes among participants in elections for the German contingent of Members of the European Parliament (cf. BVerfGE 123, 267 <371 et seq.>; 129, 300 <318-319>). 49

dd) The principle of equal opportunities for political parties, which follows from Art. 21 sec. 1 GG, and the right to equal opportunities (Art. 3 sec. 1 GG), which, to secure democratically equal opportunities in the electoral competition, must also apply to other political associations within the meaning of § 8 sec. 1 EuWG, require that, as such, every party, every group of voters, and their candidates be given the same opportunities throughout the entire electoral process, and thus equal opportunities in the distribution of seats. The political parties' right to equal opportunities is closely associated with the principles of generality and equality of suffrage, which are decisively influenced by the principle of democracy. For that reason, in this sphere – precisely as with the equal treatment of voters guaranteed by the principles of generality and equality of suffrage – equality must be understood in a strict and formal sense. Therefore, particularly narrow limits apply to the exercise of discretion by public authority if it interferes with political competition in a way that may alter the political parties' opportunities (BVerfGE 120, 82 <105>; 129, 300 <319>). 50

ee) The three percent threshold clause in § 2 sec. 7 EuWG results in unequal weighting of voters' votes; at the same time, the threshold clause interferes with the political parties' right to equal opportunities. Therefore – in principle, just like a five percent threshold clause (on this point cf. BVerfGE 129, 300 <319-320>) – this threshold clause is in need of justification. 51

ff) There is a close relationship between the principle of equal suffrage and the prin- 52

ciple of equal opportunites for political parties. The constitutional justification of restrictions follows the same standards for both (cf. BVerfGE 82, 322 <338>; 95, 408 <417>; 111, 54 <105>; 124, 1 <20>; 129, 300 <320>).

(1) The principle of equal suffrage, like the principle of equal opportunities for political parties, is not subject to an absolute ban on differentiation. However, it follows from the formal nature of the principles of equal suffrage and equal opportunities for parties that in designing electoral law, the legislature only has little leeway for differentiation. In general, a strict standard *[strenger Maßstab]* applies to the review of whether deviations from the principle of equal suffrage are justified (cf. BVerfGE 120, 82 <106>; 129, 300 <320>). Such deviations must always be justified by a specific reason that is based on factual considerations (*sachlich legitimierter Grund*), and which in the past has been referred to as 'compelling' (cf. BVerfGE 6, 84 <92>; 51, 222 <236>; 95, 408 <418>; 129, 300 <320>). This does not mean that a differentiation must be shown to be constitutionally required. Rather, differentiations in electoral law may also be justified by reasons legitimised by the Constitution and weighty enough to counterbalance the principle of equal suffrage (cf. BVerfGE 1, 208 <248>; 6, 84 <92>; 95, 408 <418>; 129, 300 <320>; 130, 212 <227-228>). 53

This particularly encompasses the objectives of elections. Such objectives include safeguarding the nature of elections as an integrative factor in the process of policy formulation by the people (BVerfGE 95, 408 <418>) and, thereby, ensuring that the representative organ to be elected is able to function properly (cf. BVerfGE 1, 208 <247-248>; 4, 31 <40>; 6, 84 <92 et seq.>; 51, 222 <236>; 82, 322 <338>; 95, 408 <418>; 120, 82 <111>; 129, 300 <320-321>). Having a large number of small parties and voters' associations in a representative organ can seriously impair the organ's ability to act. Elections have the objective not only of creating representative organs, but also of creating functioning representative organs (cf. BVerfGE 51, 222 <236>; 129, 300 <321>). The question of what is useful and necessary to ensure the ability to function, however, cannot be uniformly answered for all representative organs that are to be elected (cf. BVerfGE 120, 82 <111-112>; 129, 300 <321>), but instead must be assessed according to the specific functions of the individual organs (cf. BVerfGE 120, 82 <112>; 129, 300 <321>). It furthermore depends on the specific conditions under which that organ works, and which determine the probability that the organ's functioning is disrupted (cf. BVerfGE 129, 300 <323, 326 et seq.>). 54

(2) Provisions establishing differentiations must be suitable and necessary for pursuing their purposes. Consequently, the permissible scope of differentiations also depends on the degree to which they interfere with *equal* suffrage. Established *opinio juris* and legal practice may also be taken into account (BVerfGE 1, 208 <249>; 95, 408 <418>; 120, 82 <107>; 129, 300 <321>). However, the legislature cannot base its assessment and evaluation on abstract, hypothetical cases, but must focus on political reality (cf. BVerfGE 120, 82 <107>; 129, 300 <321>). The principles of equal suffrage and of equal opportunities for political parties are violated if the legislature, in adopting the provision, pursues an objective that may not be pursued in designing 55

electoral law, or if the provision is not suitable and necessary to achieve the objectives of the election concerned (cf. BVerfGE 120, 82 <107>; 129, 300 <321>).

(3) The legislature must review any provision of electoral law that affects electoral equality and political parties' equal opportunities, and must amend it if the constitutional justification of that provision is called into question by new developments, such as a change in fact or law with regard to circumstances that the legislature had based its decision on or because the norm has proven not to have the effects predicted at the time of its adoption (cf. BVerfGE 73, 40 <94>; 82, 322 <338-339>; 107, 286 <294-295>; 120, 82 <108>; 129, 300 <321-322>). For thresholds in proportional representation, this means that no evaluation of a threshold's compatibility with the principle of equal suffrage and of political parties' equal opportunities can be abstract or final. A provision of electoral law may be justified for one representative organ at one time, but not for another organ or at another time (cf. BVerfGE 1, 208 <259>; 82, 322 <338>; 120, 82 <108>; 129, 300 <322>). 56

Therefore, a threshold clause that is considered permissible at one time cannot be treated as constitutionally unobjectionable for all time. A different assessment under constitutional law may be called for if conditions change materially. If the legislature, in the field of electoral law, is confronted with circumstances that have changed materially, it must take due account of the change. Decisions to retain, to repeal or to (re)introduce threshold clauses can solely be based on the conditions at the relevant time (cf. BVerfGE 120, 82 <108>; 129, 300 <322>). There is nothing to prevent the legislature from also making allowances for specifically foreseeable future developments in the course of its task of observing and assessing present-day conditions; but these conditions can be accorded decisive importance only if a reliable prognosis of future developments on the basis of sufficiently sound factual evidence is already possible. 57

Contrary to one opinion advanced in the present proceedings, it does not follow from this court's jurisprudence that in light of a change in circumstances the legislature would not be able to reintroduce a threshold that once existed but was later repealed, whether in the same amount or in a different one that is constitutionally unobjectionable – in particular one that ensures the political parties' ability to participate in policy formulation under Art. 21 sec. 1 GG. Where appropriate, the legislature can also enact other measures to safeguard the functioning of the representative organ to be elected. This aspect is significant for the assessment under constitutional law of the law governing elections to the European Parliament primarily because if relevant impairments to the functions of the European Parliament caused by the absence of a threshold clause become apparent, the German Bundestag is able to amend the German law on European elections as necessary – contrary to what might be the case in the event of an impairment of its own ability to function (cf. BVerfGE 129, 300 <324>). 58

gg) In the context of equal suffrage, the legislature only has very limited leeway for differentiations (cf. BVerfGE 95, 408 <417-418>; 129, 300 <322>). It is true that the 59

Federal Constitutional Court must not assume the legislature's task of determining all factual and legal aspects that are relevant for a review, and weighing them against one another (cf. BVerfGE 120, 82 <113>), nor can it set its own assessments of adequacy of purpose in place of the legislature's assessments (cf. BVerfGE 51, 222 <238>). However, in provisions that affect the conditions for political competition, the parliamentary majority in a sense acts in its own interests, and particularly in designing electoral legislation there is the risk that a current parliamentary majority may be guided not by considerations of the common good, but by the aim of preserving its own power. Therefore, electoral law is subject to strict oversight by the Federal Constitutional Court (*strikte verfassungsrechtliche Kontrolle*) (cf. BVerfGE 120, 82 <105>; 129, 300 <322-323>; 130, 212 <229>).

The establishment of a threshold clause is based on the legislature's assessment of the probability that splinter parties will win seats, the anticipated resulting disruptions of the representative organ's functioning, and the impact of such disruptions on the ability of the parliament to perform its duties. In making this prognosis, the legislature cannot simply point to a purely theoretical possibility of the representative organ's ability to function being impaired in order to justify such an interference (cf. BVerfGE 120, 82 <113 et seq.>; 129, 300 <323>). If the legislature were entirely at liberty to decide which level of probability should be applied in deciding on disruptions of parliament's functioning, it would be impossible for the courts to oversee the legislature's prognosis-based decisions, including those decisions' factual bases (cf. BVerfGE 129, 300 <323>). 60

Against this backdrop, at least the general and abstract contention that eliminating the three percent threshold clause will make it easier for smaller parties and voter associations to win seats in representative organs, and thus impede those organs' ability to make decisions, cannot justify interfering with the principles of equal suffrage and equal opportunities. Consequently, merely "facilitating" or "simplifying" decision-making is not sufficient. The three percent threshold clause can be justified only if an impairment of the representative organs' ability to function is to be expected with some probability because of circumstances that already exist or of which a reliable prognosis is already possible (cf. BVerfGE 120, 82 <114>; 129, 300 <323>). 61

b) Neither the testimony of experts before the Committee on Internal Affairs of the German *Bundestag* nor the present proceedings have brought to light any aspects that could provide a reason to define the constitutional standard for assessing electoral threshold clauses any differently from this court's established jurisprudence. Insofar as the submitted objections do not intrinsically concern the application of law – such as the reference to the less intense interference of a three percent threshold clause as compared to the rejected five percent clause – they are directed primarily at reducing the requirements for the justification of electoral thresholds and at scaling back the intensity of oversight by the Federal Constitutional Court. Essentially in line with the separate opinion of Justices Di Fabio and Mellinghoff to the judgment of 9 November 2011 (BVerfGE 129, 300 <346 et seq.>), it was suggested to solve the 62

dilemma of distinguishing which cases constitute acceptable difficulties in forming a majority when there are a large number of representatives of small parties in parliament, and which cases represent impairments of parliament's functioning that are no longer acceptable and therefore justify threshold clauses, by leaving this distinction to the legislature to a greater degree than was allowed by this court's jurisprudence.

However, this Senate adheres firmly to the standard of review already described. […] 63

The Senate also cannot concur with the suggestion that oversight by the Federal Constitutional Court should be scaled back by according the legislature broad leeway for making prognoses (*Prognosespielräume*). Strict oversight by the Federal Constitutional Court is indispensable, not least of all because electoral legislation concerns the fundamental conditions for political competition (cf. already BVerfGE 129, 300 <322-323>). 64

II.

By these standards, the three percent threshold clause (§ 2 sec. 7 EuWG) is incompatible with Art. 3 sec. 1 and Art. 21 sec. 1 GG. The factual and legal circumstances decisive for an assessment have not changed substantially since the judgment of 9 November 2011 (1.). The developments referred to to justify the threshold clause are still at a very early stage and their effects cannot be foreseen; therefore, they presently do not warrant the conclusion that there is some probability that the European Parliament's ability to function would be impaired without a threshold clause (2.). The fact that the three percent threshold clause interferes less with equal suffrage and the parties' equal opportunities than the previous five percent threshold clause does not suffice to justify the challenged provision (3.). 65

1. In the judgment of 9 November 2011, this Senate found that the factual and legal circumstances that existed during the 2009 European elections, and that continued to exist, did not provide sufficient reasons to justify the serious interference with the principles of equal suffrage and of equal opportunities for political parties that was presented by the five percent threshold clause (cf. BVerfGE 129, 300 <324 et seq.>). There has been no significant change in the factual and legal circumstances since then. 66

a) There is still no threshold clause under Union law on the basis of Art. 223 sec. 1 TFEU. Therefore, as it does not exist at Union level where it would have been most effective and contrary to what counsel for the German *Bundestag* implied, there is no common European belief that threshold clauses or equivalent provisions are necessary. Correspondingly, there is also no intention of amending the Direct Elections Act in order to oblige the Member States to introduce certain minimum thresholds for the distribution of seats. The European Parliament's resolution of 22 November 2012 does not call for a change in the legal basis for European elections at Union level. Rather, that resolution limits itself to a legally non-binding appeal to the Member 67

States to set suitable and appropriate minimum thresholds for the distribution of seats. Moreover, according to the unanimous opinion of the experts questioned about that topic at the oral hearing, the Member States' provisions for European elections have hitherto exclusively remained true to the Member States' respective traditions – a fact that, according to those experts, also does not make the adoption of a uniform procedure for European elections very likely.

b) Nor have there been any material changes in the facts during the current electoral term. The increase in the European Parliament's workload with regard to legislative tasks, as argued at the oral hearing, may well take on importance for the question of a structural impairment of that body's ability to function as soon as the European Parliament is strechted to the limits of its capacity due to a large number of representatives of small parties and associations who are unwilling to cooperate. But nothing sufficiently specific has been submitted in that respect. 68

At present, there is no evidence of any specific efforts by other Member States to eliminate obstacles to small parties' access to the European Parliament (for their relevance to the assessment of national threshold clauses under constitutional law cf. BVerfGE 129, 300 <325-326>). Nor did the explanations by the representatives of the European Parliament at the oral hearing on the reasons for the resolution of 22 November 2012 provide any specific indication that other Member States might find themselves induced to amend their national electoral laws in response to the elimination of the threshold clause in Germany. 69

2. The three percent threshold clause cannot be justified by expected political and institutional developments or any associated changes in the functional conditions of the European Parliament during the next electoral term. 70

a) As shown by its reasoning, the draft of the Fifth Act Amending the European Elections Act is based on the assumption that the development initiated by the European Parliament's resolution of 22 November 2012, concerning the election of the Commission President from among a group of top candidates nominated by the European parties in the 2014 European elections, would lead to a clearer antagonistic differentiation between the government and the opposition in the European Union. Allegedly, this new development, not yet specifically foreseeable at the time of this Senate's judgment of 9 November 2011 and supposedly entailing increasing politicisation of the European Parliament, would impede the necessary formation of majorities; in addition, supposedly, there would be a specific risk that the Parliament's functioning were impaired that needed to be prevented by a suitable and appropriate minimum threshold (cf. BTDrucks 17/13705 pp. 6-7). 71

The legislature correctly assumes that an antagonistic positioning of the government and the opposition at the European level might justify a threshold clause in the German laws governing elections to the European Parliament if factual and legal circumstances arise that are comparable to those at the national level, where the formation of a stable majority is needed for electing and continuously supporting a govern- 72

ment capable of acting (cf. – including on the situation that has existed to date in the institutional structure of the Union – BVerfGE 129, 300 <327, 335-336>). However, this development – sought politically – is still at a very early stage. It cannot be foreseen at present what actual impact the political dynamics that have been set in motion may have on the European Parliament's ability to function. Therefore, there is no basis for the legislature's prognosis that without the three percent electoral threshold, there is a risk of the European Parliament's functioning being impaired.

b) According to its resolution of 22 November 2012, the European Parliament, in concert with the Commission at the time, aims to reinforce the political legitimacy of both institutions, the elections for each of which are to be linked more directly to the voters' decision. To further this aim, the European political parties are to nominate candidates for the Presidency of the Commission. These candidates are supposed to play a leading role in the coming European election campaign particularly by presenting their programmes in all Member States of the European Union. However, no change is being sought in the treaty bases for the tasks and powers of European institutions (on the limits for further development of the institutional structure under the treaties as amended by the Treaty of Lisbon, cf. BVerfGE 123, 267 <372>; for details of the allocation of competences now in force, cf. BVerfGE 129, 300 <336 et seq.>). To that extent, it is also unclear how the political objective of strengthening the democratic decision-making process at the European level is to be implemented under existing Union law with regard to those aspects relevant for the question to be decided here. Nor has the discussion in the hearing shed light on the reasons why, for example, the Commission President might have to rely on the continuing support of a stable majority in the European Parliament (cf. Art. 234 sec. 2 TFEU). However, the issues associated with this problem may remain undecided. 73

c) Indeed, in light of the facts, it cannot even be specifically foreseen that the political development that has been initiated could, without a threshold clause in the German law governing elections to the European Parliament, lead to an impairment of the European Parliament's ability to function. 74

aa) Currently, one cannot even assess to what extent and with what effect on the activity and functioning of the newly elected European Parliament it will be possible to convince the representatives of the Member States in the European Council and the Council to agree with the position of the present Commission and European Parliament as expressed in the resolution of 22 November 2012. The scope of the changes that the resolution might entail in the political process within the European Parliament in the coming electoral term also remains a matter of speculation. For example, at the oral hearing, Member of the European Parliament Bütikofer stated that he expected that the newly initiated trend towards stronger antagonism and a sharper politicisation in the Parliament would not be completed within one legislative term, but would extend across multiple terms. 75

Insofar as the three percent threshold clause can supposedly be justified by the con- 76

sideration that the proposed “push for democratisation” should not be called into question by Germany’s accepting a fragmentation of the European Parliament, this argument not only falls short of the constitutional requirements that would justify interferences with equal suffrage and the political parties’ right to equal opportunites; it would also fail to do justice to the openness of the political process, which is essential for parliamentary debate in particular with regard to possible restructuring, and to which small political parties can make an important contribution (cf. BVerfGE 129, 300 <340>). For that reason, threshold clauses also cannot be justified by the consideration that only political parties capable of overcoming the threshold are sufficiently representative and would make a reliable contribution towards the legitimation of parliaments.

bb) Neither can it be proven that the formation of majorities in the European Parliament will be structurally compromised as a result of the intended politicisation. 77

(1) It cannot be ruled out that the cooperation between the two major political groups in the European Parliament that has been characteristic of parliamentary practice until now (cf. BVerfGE 129, 300 <330-331>) might no longer occur or might be significantly diminished in the future as a consequence of the nomination of (competing) top candidates from the parties, as was argued by representatives of the European Parliament at the oral hearing. But whether and to what extent this will be the case is uncertain; in any event, developments are also conceivable that would leave the European Parliament’s ability to function unimpaired. There may, for instance, be reasons to believe that in a number of cases the two major political groups, which regularly hold the absolute majority of seats between them (cf. BVerfGE 129, 300 <330>), will still be interested in cooperating, or indeed may even find it necessary to cooperate. Accordingly, it is not merely a remote possibility that a candidate for the office of Commission President might need support from the two major political groups in order to form a supportive parliamentary majority from among the parties represented in the European Parliament, and that the cooperation between the two major groups might be consolidated on the basis of negotiations conducted in this respect. In such an event, the number of members not attached to any political groups would not be of decisive importance. 78

(2) Furthermore, it cannot simply be assumed that the traditional practice of flexibly forming majorities in parliament (cf. BVerfGE 129, 300 <331>) would be significantly impeded by the election of new members from small parties. One cannot necessarily conclude that the pan-European families of parties from which the major political groups in the European Parliament are largely formed, and that therefore contribute significantly to the organ’s ability to function, would lose a significant degree of their ability to integrate as a result of the politicisation of the European Parliament. It is also possible that sharper political contrasts between the individual political groups may actually increase their internal cohesion. It is furthermore unclear whether a change in the perception of the European Parliament as a result of clearer party-political profiles might not induce voters more than before to vote strategically, and thus counter- 79

act an increase in the number of parties represented in the European Parliament.

(3) In view of such uncertainties, the possible number of eighty future parliamentarians unwilling to cooperate that was mentioned at the oral hearing cannot be predicted with the necessary probability. In any case, the remarks in question did not concern the expected number of non-attached members of Parliament from small parties with one or two delegates, but rather members from certain parties that are critical of the Union and that will presumably not fail in elections even with a threshold clause in place. It must also be taken into account that parties that may be a small splinter party at the national level may belong to, or at least be closely allied with, a family of parties that is well represented in the European Parliament, and that their members of Parliament may therefore not contribute at all to the fragmentation that is meant to be averted with threshold clauses. Therefore, there is a particularity with regard to the facts that, in the light of the pan-European integrative function of the European Parliament, results in specific objections with regard to the necessity of threshold clauses. 80

Insofar as it is argued in defence of the challenged threshold clause that it would be difficult to achieve qualified majorities in the European Parliament, it must furthermore be pointed out that the arrangement for qualified majorities in the Treaties is precisely intended to result in wide-spread support in the European Parliament, and allows for the fact, not least of all with an eye to the institutional equilibrium within the Union (Art. 13 TEU), that in the event of irreconcilable differences of opinion, the European Parliament will not be in a position where it can assert itself (cf. BVerfGE 129, 300 <332>). 81

(4) Finally, as to the integrating power of political groups, it is not apparent that in the coming electoral term, newly elected delegates from smaller parties might not be included from the outset in one of the established political groups, or – depending on the results of the elections in the other Member States –in a newly created parliamentary group. Even though the integrating power of the political groups in the European Parliament should not be overestimated, and in the course of an intensified politicisation a given group might become less willing to embrace members who act as competitors at the national level, the incentives to affiliate delegates to a political group are still considerable, so that one cannot automatically assume that there will be an intolerably high number of unattached Members (cf., already on this point, BVerfGE 129, 300 <327 et seq.>). However, one will have to closely watch what results from a possible election of members of Parliament from other parties that compete within the German political landscape. No sound assessments can currently be made on this issue either. Should there be any specific indications of undesirable developments, the legislature can counter them. 82

3. It is true that the three percent threshold clause interferes less intensely with equal suffrage and political parties' equal opportunities than did the previous five percent threshold clause. But it does not follow that the interference with equal suffrage associated with the three percent threshold clause is therefore negligible and re- 83

quires no justification. A seat in the European Parliament can be won with as little as about one percent of the votes cast, and, therefore, the threshold clause has practical effects. Since a threshold clause is not needed yet in the German law governing elections to the European Parliament – particularly with a view to both existing conditions and sufficiently reliable prognoses– and therefore there is no justification for its very existence, questions regarding the appropriateness of the three percent threshold are irrelevant.

III.

As the three percent threshold clause is unconstitutional, § 2 sec. 7 EuWG is declared void (§ 95 sec. 3 sentence 1 BVerfGG). At the same time, acting under § 67 sentence 1 and 2 BVerfGG, the Court holds that, by enacting this provision, the German Bundestag violated the the applicants' and the intervening party's right to equal opportunities of political parties (Art. 21 sec. 1 GG). 84

D.

[…] 85

E.

This decision was reached with 5 : 3 votes. 86

Vosskuhle Lübbe-Wolff Gerhardt

Landau Huber Hermanns

Müller Kessal-Wulf

Separate Opinion
of Justice Müller
to the Judgment of the Second Senate of 26 February 2014

- 2 BvE 2/13 -
- 2 BvE 5/13 -
- 2 BvE 6/13 -
- 2 BvE 7/13 -
- 2 BvE 8/13 -
- 2 BvE 9/13 -
- 2 BvE 10/13 -
- 2 BvE 12/13 -
- 2 BvR 2220/13 -
- 2 BvR 2221/13 -
- 2 BvR 2238/13 -

I regret that I am unable to concur in the decision. I believe the Senate sets excessively high requirements for finding an impairment of the European Parliament's ability to function as justification for an interference with the principles of equal suffrage and equal opportunities, and thus takes inadequate account of the legislature's mandate to design electoral law. This ultimately leads not only to a German *Sonderweg* (*special approach*) with regard to the election of the European Parliament, but also to an acceptance of the risk of impairing the European Parliament's ability to function, at least for the duration of one legislative term. I cannot perceive this as constitutionally required. 1

I.

1. I concur in the Senate's finding that the threshold clause under § 2 sec. 7 EuWG should be measured solely against the Basic Law and the principles of equal suffrage and equal opportunities for political parties that it contains. […] 2

2. I likewise concur in the Senate's finding that through the decision for a system of proportional representation in the election for the European Parliament, as prescribed under Art. 1 sec. 1 of the Direct Elections Act and implemented in § 2 sec. 1 EuWG, the legislature is, as a rule, obliged to ensure that voters' votes are equal not only in counted value but in effective value. […] 3

3. Finally, with the Senate, I assume that because of the strict and formal nature of the principles of equal suffrage and equal opportunities for parties, the legislature has only little leeway for differentiation, and that any such deviation must be justified by reasons recognised (*legitimiert*) under the Constitution and of such importance that they can counterbalance the principle of equal suffrage (cf. BVerfGE 1, 208 <248>; 6, 84 <92>; 95, 408 <418>; 129, 300 <320>; 130, 212 <227-228>). 4

In its established jurisprudence, this Senate has acknowledged that one such reason may be to safeguard the nature of elections as an integrating factor in the 5

process of the people's policy formulation (BVerfGE 95, 408 <418>), and, related thereto, to ensure the elected representative organ's ability to function (cf. BVerfGE 1, 208 <247-248>; 4, 31 <40>; 6, 84 <92 et seq.>; 51, 222 <236-237>; 82, 322 <338>; 95, 408 <418>; 120, 82 <111>; 129, 300 <320-321>). This jurisprudence also informs the present decision. When the Senate points out that in this respect the legislature is subject to strict oversight by the Federal Constitutional Court (cf. BVerfGE 120, 82 <106-107>; 129, 300 <322-323>; 130, 212 <229>), this oversight must not result in erasing the boundaries between the formulation of legislation and oversight by the Federal Constitutional Court. The Senate's decision takes inadequate account of this aspect.

II.

1. Designing electoral law pertains to the legislature. As part of that mandate […], the legislature has the duty of weighing the aims acknowledged recognised under the Constitution against the principle of equal suffrage (cf. BVerfGE 95, 408 <420>; 121, 266 <303>; 131, 316 <338>). It must therefore also balance the following concerns: parliament's ability to function, the desire for extensive integrative representation, and the principles of equal suffrage and of the political parties' right to equal opportunities (cf. BVerfGE 51, 222 <236>; 71, 81 <97>; 95, 408 <420>). The Federal Constitutional Court must respect the legislature's resulting leeway in designing law (*Gestaltungsspielraum*), and must only review whether the legislature has overstepped its limits (cf. BVerfGE 95, 408 <420>). The Federal Constitutional Court can therefore find a violation of the principle of equal suffrage only if a differentiating provision is aimed at achieving an aim that the legislature is not permitted to pursue in designing electoral law, or if the provision is not suitable to achieve its aim, or if it exceeds the bounds of what is necessary in order to achieve the aim (cf. BVerfGE 131, 316 <339> with further references). That also applies to the decision to use thresholds in the context of proportional representation. In this Senate's own opinion (cf. BVerfGE 120, 82 <113>; 129, 300 <323>), the decision whether a threshold is needed in order to ensure an elected representative organ's ability to function must be based on a prognosis of how probable it is that splinter parties will be elected, that ensuing functional disruptions are to be expected in the future, and of their importance for the fulfilment of the representative body's tasks. The legislature must make this prognosis-based decision as part of its task of designing electoral law. The Federal Constitutional Court has a task of oversight with regard to this prognosis-based decision; however, it is not competent to substitute the legislature's prognosis with its own. 6

2. By contrast, the Senate bases its decision concerning the determination of an impairment of the European Parliament's ability to function on an intensity of oversight that, in my opinion, does not adequately guarantee the necessary respect for the legislature's mandate of designing the law: 7

In respect of the prognosis-based decision required to justify a threshold, the Senate demands not only that the legislature not content itself with determining a purely theo- 8

retical possibility of an impairment of the elected representative organ's ability to function (cf. BVerfGE 120, 82 <113-114>; 129, 300 <323>). Rather, according to the Senate, the legislature is also not free to decide the degree of probability beyond which it may consider functional disruptions to occur (cf. BVerfGE 129, 300 <323>). A threshold can be justified only by an impairment of the representative organs' ability to function that is to be expected with some probability on the basis of current or reliably foreseeable future circumstances (cf. BVerfGE 120, 82 <114>; 129, 300 <323>).

Where the Senate requires that an impairment of the representative organs' ability to function must be foreseeable with "some probability" ("einige Wahrscheinlichkeit"), a considerable margin of assessment remains. Assessing this corridor between a purely theoretical possibility and the certain occurrence of an impairment of the ability to function is reserved to the legislature. If the legislature bases its decision on comprehensible factual circumstances, and, on that basis, tenably concludes that there may be an impairment of the institution's ability to function, the legislature exercises its mandate to design electoral law. But if the Court reserves the right to decide what degree of probability is required in order to assume that a representative organ's ability to function will be impaired, then, in view of the inevitable uncertainties of such prognoses, it can no longer be guaranteed that the Court keeps to the restriction to merely oversee the legislative decision. It is not for the Federal Constitutional Court to replace a tenable decision of the legislature with its own tenable decision. 9

3. Nor does anything else proceed from the Senate's opinion that the task of designing electoral law calls for strict oversight by the Federal Constitutional Court because, according to the Senate, when designing provisions affecting the conditions for political competition, the parliamentary majority in a sense acts in its own interests, and particularly in designing electoral legislation there is a risk that a current parliamentary majority may be guided not by considerations of the common good, but by the aim of preserving its own power (cf. BVerfGE 120, 82 <105>; 129, 300 <322-323>; 130, 212 <229>). Apart from the vagueness, and the resulting doubts as to the usefulness, of the concept of "acting in one's own interest" as a legal category (cf. Streit, Entscheidung in eigener Sache, 2006, pp. 20 et seq.; Lang, Gesetzgebung in eigener Sache, 2007, pp. 16 et seq.), the national members of Parliament involved in legislating on the elections for the European Parliament are not directly affected in their status as elected representatives. At most, one might conceive the possibility of an indirect effect with respect to the interests of the party to which a given member of Parliament belongs. In this respect, the potential effects of a threshold clause on the parties represented in the Parliament appear quite diverse. Given these factors, one cannot automatically assume that in deciding on the procedure for elections to the European Parliament, there is a structural deficit of oversight due to identical interests that must be compensated by intensified oversight by the Federal Constitutional Court (cf. Streit, loc. cit., pp. 203 et seq.). In any case, this can neither lead to a suspension of the legislative mandate to design law, nor to oversight by the Federal Constitutional Court that does not take adequate account of that mandate. 10

4. When the Senate points out that if the European Parliament's ability to function were to be impaired, the national legislature for elections could respond with corresponding corrections of electoral law, while this possibility does not exist for elections to the German *Bundestag* (cf. also BVerfGE 129, 300 <324>), and therefore aspects of taking precautions against an impairment of the ability to function should be left out of consideration in deciding whether to apply a threshold at the European level, I am unable to concur. The Senate does not take into account that a correction of electoral law can take effect no earlier than the subsequent electoral term, while in the current electoral term, such changes remain without effect. Accordingly, not taking precautions against an impairment of a representative organ's ability to function entails accepting the risk of impaired functioning or an inability to function for the duration of an electoral term. Taking this risk would be incompatible with safeguarding the nature of elections as an integrating factor in the people's policy formulation. […] 11

III.

Given these considerations, I do not believe that § 2 sec. 7 EuWG gives rise to any convincing constitutional concerns. The legislature's prognosis of an impairment of the European Parliament's ability to function in the absence of threshold clauses or equivalent provisions is not objectionable, nor do the requirements of suitability and necessity pose a problem with regard to the constitutionality of the provision. 12

1. The Senate's decision results in any threshold clause in elections for the European Parliament being unconstitutional. The assessment of § 2 sec. 7 EuWG under constitutional law must therefore begin with the question of whether one can assume that a Union-wide absence of threshold clauses and equivalent provisions would result in an impairment of the European Parliament's ability to function. It cannot be argued against this position that § 2 sec. 7 EuWG refers solely to the scope of application of the German Basic Law and is therefore of negligible importance for the European Parliament's composition and ability to function. Such an argument is countered by the fact that at present, with the exception of Spain, all Member States of the European Union have *de jure* or *de facto* thresholds, or equivalent provisions, the effects of which are at least equal to those under § 2 sec. 7 EuWG. If the constitutionality of § 2 sect. 7 EuWG were to be assessed solely on the basis of the actual effects this provision has on the composition and ability to function of the European Parliament as a whole, the assessment of this norm under constitutional law would be made dependent on the continued existence of similar provisions in other European states, which, by this Senate's standards and measured against German constitutional law, are unconstitutional. Moreover, it would not do justice to the Member States' joint responsibility (*Verantwortung zur gesamten Hand*) to preserve the European Parliament's ability to function, which urges all states to structure their electoral laws in such a way that those structures can at the same time serve as maxims for the election of the European Parliament as a whole (accord in BVerfGE 129, 300 <352, separate opinion>). 13

2. The legislature based its prognosis-based decision […] on sufficiently plausible factual circumstances. Contrary to the Senate's opinion, I believe that the legislature's decision meets the constitutional requirements. 14

a) It is obvious that no longer using threshold clauses and equivalent provisions would lead to further fragmentation of the European Parliament. Looking at the Federal Republic of Germany alone, the number of parties represented in the European Parliament would have increased by nine in the 2004 European elections, and by seven in the 2009 European elections. The fact that voting behaviour tends to become more and more volatile suggests at the least that one cannot expect this trend to weaken in the future. […] 15

b) The legislature's prognosis that further fragmentation of the European Parliament could not only impede but entirely prevent the formation of necessary majorities is not objectionable. 16

aa) The European Parliament and its political groups are already characterised by a significant degree of heterogeneity. For the current electoral term, a total of more than 160 parties is represented in the European Parliament. At the beginning of the term, the then 736 members formed seven political groups that have less internal cohesion than in national parliaments, although this varies from one group to another (cf. BVerfGE 129, 300 <329>). In addition, there are members of Parliament not attached to political groups, whose number has grown from 27 to 32 during the electoral term. 17

Given these facts, it is easily possible to understand the legislature's assumption that abandoning threshold clauses and equivalent provisions, with the resulting non-negligible increase in the number of parties with one or two representatives, would mean that necessary majorities could no longer be formed. It is inevitable that this prognosis entails some degree of uncertainty. But it is no less plausible than the comparable prognoses that refer to national parliaments, especially because the heterogeneity of national parliaments regularly does not surpass that of the European Parliament. […] Given this situation, the Federal Constitutional Court itself concluded, in its decision of 22 May 1979 (BVerfGE 51, 222), that a 5 percent threshold is justified to avoid impairing the ability to function, even though at that time the European Parliament had only 410 members from nine Member States, and had a considerably narrower range of competences. 18

bb) It is not objectionable under constitutional law that the legislature did not modify its prognosis on the basis of circumstances that, in the event that threshold clauses and equivalent provisions were abandoned, might prevent further fragmentation of the Parliament. 19

(1) Concerning the possibility of including newly elected members of Parliament from small parties in one of the established political groups (cf. BVerfGE 129, 300 <328-329>), Members of the European Parliament Brok and Bütikofer made it clear at the oral hearing that the existing political groups are unwilling to incorporate parties 20

that are in competition with them nationally. Expert Poguntke explained that smaller parties from Germany would probably not be incorporated into the existing political group structures. Therefore, one cannot predict to what extent the integrative power of the existing political groups would be able to counteract a further fragmentation of the Parliament; nor whether new political groups would form, which under Art. 30 of the European Parliament's Rules of Procedure is dependent on meeting substantial requirements (25 members from at least one-quarter of the Member States).

(2) The argument that parliamentary practice is characterised by the collaboration of the major political groups that together regularly represent an absolute majority of mandates (cf. BVerfGE 129, 300 <330>) is already countered by the fact that the continued existence of this absolute majority is not guaranteed. […] 21

(3) With regard to the flexible formation of a majority that has been practised up until now (cf. BVerfGE 129, 300 <331>), one cannot predict the effects of the process of personalising and politicising the European Parliament that is to be expected because of the nomination of party-list leaders in elections and the nomination of the candidate for President of the Commission that takes account of the results of the elections to the European Parliament under Art. 17 sec. 7 sub-sec. 1 TEU. 22

(4) Given these facts, it is up to the legislature, as part of its prognosis-based decision, to assess these circumstances and their effects with respect to fragmentation of the Parliament that might occur in the event that threshold clauses and equivalent provisions were eliminated. Not taking these aspects into account if it cannot be predicted to what degree they would counteract fragmentation of the Parliament is not objectionable under constitutional law. 23

c) The impairment of the European Parliament's ability to function is sufficiently important to justify an interference with the principles of equal suffrage and the parties' equal opportunities. 24

Granted, the European Parliament differs from the German *Bundestag* specifically in that forming a stable majority is not necessary in order to elect and continuously support a government capable of acting (cf. BVerfGE 129, 300 <335-336>). Nor has its activity thus far been characterised by antagonism between the government and opposition (cf. BVerfGE 129, 300 <331>). One cannot predict to what extent this aspect will change in the course of the intended process of personalising and politicising the European Parliament. But if one concludes on that basis that the idea of representative democracy in the European Parliament, as pursued by mandating proportional representation at the European level, is to be implemented unconditionally (cf. BVerfGE 129, 300 <336>), this may not – even in light of their formal character – lead to the principles of equal suffrage and the parties' equality of opportunities having absolute priority over safeguarding the nature of elections as an integrative factor in the process of the people's policy formulation. 25

The European Parliament is a parliament *sui generis*. The differences in tasks and 26

functions from the German Bundestag are (still) considerable, but they do not justify a fundamentally different assessment of the importance of ensuring its ability to function. A significant number of elective and legislative functions (*Kreations- und Legislativfunktionen*) have been conferred on the European Parliament (Art. 17 sec. 7 sub-sec. 1 sentence 2 and sub-sec. 3 TEU; Art. 289, Art. 294, Art. 314 TFEU). Even though adopting a legal act in the ordinary legislative procedure and preparing the annual budget does not necessarily require a majority vote of the Parliament (Art. 294 sec. 7 letter a alternative 2; Art. 314 sec. 4 letter b TFEU), the performance of the functions conferred on the Parliament by the Treaty presupposes the ability to form majorities capable of acting. It is only by this that the European Parliament can take due account of the voters' mandate and fulfil the duties assigned to it within the institutional structure. […]

3. I have no fundamental doubts that § 2 sec. 7 EuWG takes adequate account of the principles of suitability and necessity. 27

a) In this respect, the focus must be on the intensity of interference with the principles of equal suffrage and the parties' equal opportunities (BVerfGE 121, 266 <298>). Following the repeal of the former 5 percent threshold clause originally contained in § 2 section 7 EuWG by the Federal Constitutional Court's judgment of 9 November 2011 (BVerfGE 129, 300), the legislature decided on a 3 percent threshold clause. This ensures that the spectrum of political opinion will be reflected to a greater degree. It is true that this clause would have had the same threshold effect in the 2009 election for the European Parliament, because none of the parties not taken into account in the distribution of seats won more than 3 percent of the votes cast. But the situation already changes if the evaluation is based on the results of the *Bundestag* election of 2013, in which two parties won more than 3 percent of the votes cast, but less than 5 percent, and one party, with 2.2 percent of the votes cast, was not far from the 3 percent threshold. This illustrates that the interference with the principles of equal suffrage and the political parties' equal opportunities is considerably less intensive with a 3 percent threshold than with a 5 percent threshold. 28

b) By setting a 3 percent threshold, the legislature is acting within the leeway to design law to which it is generally entitled (cf. BVerfGE 51, 222 <249 et seq.>; 82, 322 <338>). I concur with the Senate in that the different provisions of the law governing elections to the European Parliament are an expression of the various traditions of the Member States. But this does not change the fact that these different provisions have on no account less impact than § 2 sec. 7 EuWG. Taking the *de facto* thresholds into account, one finds that with the exception of Spain, a share of at least 3 percent of the votes cast must be reached in all Member States in order to be allocated a seat in an election for the European Parliament. Given this situation, it is not objectionable that the legislature considered a 3 percent threshold suitable to ensure the European Parliament's ability to function. 29

c) The ability of a national legislature to correct law governing elections to the Euro- 30

pean Parliament cannot mitigate the need for the provision under § 2 sec. 7 EuWG (see II. 4. above). Such a correction can take effect only for the subsequent electoral term; thus, an impairment of the European Parliament's ability to function would have to be accepted for the current term. I am certain that this cannot be required under constitutional law. Instead, the legislature should be required to review § 2 sec. 7 EuWG, and if applicable to amend it, should its prognosis that a threshold clause is necessary in order to safeguard the European Parliament's ability to function be found to be wrong (cf. BVerfGE 120, 82 <108>; 129, 300 <321-322>; 131, 316 <339>).

Müller

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