Breaking with Lisbon: The German Federal Constitutional Court's New Approach to EU Democracy and Responsibility for Integration

Analysis in light of Cases 2 BvE 6/23 and 2 BvR 994/23, Decision on Threshold for European Parliament Elections of 6 February 2024

Andreas Knecht*

*Max Planck Institute for Comparative Public Law and International Law, Germany
Email: knecht@mpil.de

Introduction: reorienting German limits on EU integration

The German Federal Constitutional Court (the Court) has shaped the course of EU integration primarily through the imposition of constitutional limits. Drawing on the German principle of democracy, it has developed the doctrines of *ultra vires* and identity review to assert the boundaries of EU competences and integration.[1] This has positioned the Court as a gatekeeper of EU integration.[2] In exercising this role, while affirming Germany's openness to EU law

[1]Illustrating this right to democracy *see* I. Feichtner, 'The German Constitutional Court's PSPP Judgment: Impediment and Impetus for the Democratization of Europe', 21 *German Law Journal* (2020) p. 1090. For an overview also for the limits placed by other courts *see* S. Theil, 'What Red Lines, If Any, Do the Lisbon Judgments of European Constitutional Courts Draw for Future EU Integration?', 15 *German Law Journal* (2014) p. 599.

[2]Also using the term gatekeeper, *see* R. Lhotta and J. Ketelhut, 'Bundesverfassungsgericht und Europäische Integration', in R.C. van Ooyen and M.H.W. Möllers (eds.), *Das Bundesverfassungsgericht im politischen System* (VS Verlag für Sozialwissenschaften 2006) p. 465.

European Constitutional Law Review, page 1 of 26, 2025

doi:10.1017/S1574019625100862

(*Europarechtsfreundlichkeit*),[3] the Court's reasoning has often conveyed a cautious, and at times critical, tone toward the EU and especially the European Parliament.[4] In the absence of a European demos, the Court has placed the Bundestag and other national parliaments at the centre of democratic legitimation, which has left only a marginalised role for the European Parliament.[5]

This article argues that the Court's 2024 ruling upholding a 2% electoral threshold for European Parliament elections marks a notable shift in the Court's stance.[6] In this ruling, the Court dismissed a complaint brought by a small German party against the national law transposing the Direct Elections Act 2018.[7] Although the outcome was expected, given the measure's basis in EU law, the Court's reasoning departs in key respects from its earlier case law.

A comparison of the 2024 ruling with the Court's prior case law on electoral thresholds and the *Lisbon* and *Maastricht* judgments illustrates how the Court's reasoning breaks with two key aspects of its *Lisbon* judgment.[8] First, the Court aligns itself with the dual legitimation structure set out by the Treaties.[9] Previously, it has rejected this model, grounding the democratic legitimacy of the EU solely in the peoples of the member states rather than Union citizens.[10] This normative change, I argue, in turn leads the Court to a re-evaluation of how it sees the European Parliament's role and functions. Second, the Court reconceives the responsibility for integration: rather than merely constraining

[3]For a comprehensive analysis *see* D. Knop, *Völker- und Europarechtsfreundlichkeit als Verfassungsgrundsätze* (Mohr Siebeck 2013) p. 260-341.

[4]C. Schönberger, 'Das Bundesverfassungsgericht und die Fünf-Prozent-Klausel bei der Wahl zum Europäischen Parlament', 67 *JuristenZeitung* (2012) p. 80 at p. 86, even using the word polemic.

[5]M. Nettesheim, 'Art. 1 EUV Gründung der Europäischen Union', in E. Grabitz et al. (eds.), *Das Recht der Europäischen Union*, 82nd edn. (C.H. Beck 2024) para. 82; C. Tomuschat, 'The Ruling of the German Constitutional Court on the Treaty of Lisbon', 10 *German Law Journal* (2009) p. 1259 at p. 1261. Arguing against this claim, *see* M. Gerhardt, 'Europäisches Parlament und Bundesverfassungsgericht', 32 *Neue Zeitschrift für Verwaltungsrecht* (2013) p. 53.

[6]BVerfG 6 February 2024, 2 BvE 6/23, 2 BvR 994/23, *Threshold IV* decision.

[7]Council Decision (EU, Euratom) 2018/994 of 13 July 2018 amending the Act concerning the election of the members of the European Parliament by direct universal suffrage, annexed to Council Decision 76/787/ECSC, EEC, Euratom of 20 September 1976.

[8]BVerfG 12 October 1993, BVerfGE 89, 155, *Maastricht* judgment; BVerfG 30 June 2009, BVerfGE 123, 267, *Lisbon* judgment.

[9]Art. 10 TEU outlines that one strand emanates from Union citizens, represented in the European Parliament, while the other originates from the peoples of the member states, represented in the Council.

[10]Describing this view of the Court in the past *see* D. Halberstam and C. Möllers, 'The German Constitutional Court says "Ja zu Deutschland!"', 10 *German Law Journal* (2009) p. 1241. Understanding the Court's position as state-centred has been by far the predominant reading by scholars.

integration, it now includes an obligation to support the effective functioning of Union institutions.

At the same time, the ruling maintains continuity in review standards and reaffirms the Court's role as guardian of the principle of democracy.[11] While the doctrine remains largely unchanged, the Court adopts a more constructive tone toward EU institutions and law.[12] This may indicate an even more integration-friendly stance at the Court in the future.

The Court and the saga of electoral thresholds for European Parliament elections

The 2024 ruling is the Court's fourth ruling on electoral thresholds for the European Parliament.[13] While the Court had previously struck down similar measures in 2011 and 2014,[14] this time it upheld a 2% threshold – one introduced by Union law.

Earlier jurisprudence on electoral thresholds for European Parliament elections

In all these cases, the Court assessed whether such thresholds were compatible with the principle of equal suffrage. Under German constitutional law,[15] this principle requires not only that every vote carries the same nominal weight but also an equal chance to influence the election results. Electoral thresholds, by design, interfere with this principle by excluding votes cast for parties that fall short of the threshold.[16] This interference can be justified by 'a special, factually legitimised, compelling reason',[17] for instance the objective of the election to create a functioning representative organ,[18] as – for the Court – an election also aims at creating an organ that possesses the practical capacity to fulfil its constitutional functions. This resonates with what is often described as one of the 'lessons of Weimar': the concern that excessive party fragmentation can paralyse

[11] *Threshold IV* decision, paras. 89, 90 and paras. 105, 106.

[12] Stressing this friendliness in comparison to prior judgments, *see* C.D. Classen, 'Frieden mit Europa?', 59 *Europarecht* (2024) p. 322.

[13] First, BVerfG 22 May 1979, BverfGE 51, 222; second, BverfG 9 November 2011, BverfGE 129, 300, *Threshold II* decision; third, BverfG 26 February 2014, BverfGE 135, 259, *Threshold III* decision.

[14] For 5% and 3% thresholds, respectively.

[15] Within the meaning of Art. 3(1) Grundgesetz because Art. 38 (1) Grundgesetz only applies to elections of the Bundestag. This applies only in a system of proportional representation.

[16] *Threshold III* decision, paras. 46-51.

[17] Press release of *Threshold II* decision; comparable *Threshold III* decision, paras. 53, 54.

[18] *Threshold II* decision, para. 88.

parliamentary decision-making.[19] The Court's acceptance of functionality as a compelling justification might be understood as, at least indirectly, drawing from this historical experience.

In 2011 and 2014, the Court applied strict scrutiny and granted the German legislature only a limited margin of appreciation.[20] It held that a threshold was only permissible if there was a sufficiently probable risk to the effective functioning of the European Parliament.[21] To assess this, it examined the Parliament's voting procedures, committee structures, and internal organisation. In both cases, the Court emphasised the European Parliament's limited institutional weight compared to national parliaments, particularly given its lack of full legislative initiative and limited role in forming a government.[22] This, in the Court's view, weakened the argument that a threshold was necessary to preserve effective parliamentary function. As a result, the Court struck down the thresholds in both cases as unconstitutional.

The 2024 case: a threshold originating in EU law

As a consequence of these rulings, Germany, alongside Spain, was the only member state with more than 35 seats in the European Parliament and no electoral threshold. In total, 15 of the 27 member states had introduced formal thresholds, while smaller states operate under *de facto* thresholds due to their limited seat allocations.[23] In response to this legal fragmentation, the Direct Elections Act 2018 sought to partially harmonise electoral rules by introducing a

[19] U. Sieberer, 'Lehren aus Weimar? Die erste Geschäftsordnung des Deutschen Bundestages von 1951 zwischen Kontinuität und Reform', 47 *Zeitschrift für Parlamentsfragen* (2016) p. 3 at p. 7.

[20] *Threshold II* decision, paras. 87, 91; B. Grzeszick, 'Weil nicht sein kann, was nicht sein darf: Aufhebung der 3 %-Sperrklausel im Europawahlrecht durch das BverfG und dessen Sicht auf das Europäische Parlament', 33 *Neue Zeitschrift für Verwaltungsrecht* (2014) p. 537 at p. 539. This limited margin of discretion was one of the leading considerations of the dissenting opinion by judges di Fabio and Mellinghoff in the *Threshold II* decision, para. 156.

[21] *Threshold II* decision, paras. 92, 96; *Threshold III* decision, para. 54. By requiring such a probable threat, the Court's case law diverges from other approaches. For instance, the Czech Constitutional Court in 2015 accepted on an abstract level the need for effective decision making as a sufficient justification of a threshold; *see* H. Smekal and L. Vyhnánek, 'Equal Voting Power under Scrutiny: Czech Constitutional Court on the 5% Threshold in the 2014 European Parliament Elections', 12 *EuConst* (2016) p. 148 at p. 154.

[22] This is detailed below as part of the Court's state-centred approach to EU democracy. *See*, for a critical analysis, T. Felten, 'Durfte das Bundesverfassungsgericht die Drei-Prozent-Hürde bei der Europawahl überprüfen?', 49 *Europarecht* (2014) p. 298.

[23] This is not exclusive to smaller member states. It also applies in instances where a member state is divided into multiple constituencies. This is the case, for instance, in Belgium, France and others: Smekal and Vyhnánek, *supra* n. 21, p. 152.

https://doi.org/10.1017/S1574019625100862 Published online by Cambridge University Press

mandatory 2% threshold for member states with more than 35 seats.[24] The aim was to reduce fragmentation in the European Parliament, thereby safeguarding its functionality.[25]

Because the Act was adopted under the special legislative procedure in Article 223(1) TFEU, it required ratification by all member states in accordance with their respective constitutional procedures. In summer 2023, both the Bundestag and Bundesrat approved the measure.[26] Following established German practice, however, the Federal President withheld promulgation after Die Partei lodged a constitutional challenge before the Court.[27] Die Partei[28] is a small German party that would have been excluded from the European Parliament had the threshold already applied in the previous election.[29]

Drawing directly on the Court's earlier jurisprudence, Die Partei argued that the 2% threshold lacked a compelling functional justification, given the institutional particularities of the European Parliament.[30] The Court, however, unanimously dismissed the claim as inadmissible.[31] In line with established jurisprudence, the Court applies only limited constitutional review when Germany participates in EU integration or the adoption of a legal act of the EU.[32] In such cases, the Court examines only whether the act constitutes an *ultra vires*

[24]Art. 223(1) TFEU even allows the Union to set up a uniform procedure. However, as the Union has not yet made full use of this competence, the electoral process remains to a large extent governed by national law.

[25]Between 2015 and 2019 the European Parliament comprised nearly 200 national parties: *Threshold IV* decision, para. 16. This telos is stated in Resolution on the Reform of the Electoral Law of the European Union, 2015/2035(INL), 27 November 2017, O.J. 2017 C 366, 7 at AI. 7.

[26]The Bundesrat is Germany's second chamber.

[27]*See Threshold IV* decision, paras. 26, 73.

[28]Die Partei is a satirical German party. The party filed an application in an *Organstreit* proceeding, while its party leader additionally filed a constitutional complaint.

[29]The parties PdF, ÖDP and Familie, which each received 0.6% of the vote, and parties Tierschutzpartei (1.4%) and Die Partei (1.9%), would not have been represented had the threshold already been in place at the last election: European Parliament, *National results* (16 July 2024), https://results.elections.europa.eu/en/national-results/germany/2024-2029/, visited 18 October 2025.

[30]The arguments of Die Partei are similar to the Court's prior ruling: for the arguments *cf* in particular *Threshold IV* decision, paras. 40-41. In addition, Die Partei relied on the right to equal opportunities for political parties. As these two grounds follow the same legal analysis in principle, this article only touches on the principle of equal suffrage.

[31]By doing so, it removed the second-to-last obstacle to the entry into force of the Direct Elections Act 2018. Only Spain's approval remains pending: European Parliamentary Research Service, Council Decision (EU) 2018/994 modifying the 1976 European Electoral Act: Ratification status (PE 769 488, February 2025), https://www.europarl.europa.eu/RegData/etudes/ATAG/2025/769488/EPRS_ATA(2025)769488_EN.pdf, visited 18 October 2025.

[32]*Threshold IV* decision, paras. 79, 87, 102.

measure, requiring a manifest overreach of EU competences,[33] or it violates Germany's constitutional identity.[34] Because the Direct Elections Act 2018 is a Union legal act that Germany sought to ratify, this limited standard of review applied. As a result, the 2024 ruling involved a much narrower scope of review than the Court had applied in its 2011 and 2014 threshold decisions.

In the Court's view, neither constitutional limit was breached, as expected.[35] The Treaties expressly grant the EU the competence to unify electoral law for European Parliament elections. Prescribing a 2% threshold falls squarely within this competence and hence does not constitute an *ultra vires* measure.[36] On identity review, the Court found that even the mere possibility[37] of a violation of constitutional identity 'remained unclear'.[38] In the case at hand, a violation of the core of the principle of democracy would have been needed. The Court granted the EU legislature a broad margin of appreciation.[39] In light of the limited scope of the identity review, the Court only assessed whether the EU legislature balanced the competing interests with each other.[40] This contrasts with a limited margin of appreciation for the German legislature in past rulings. In 2011 and 2014, it stressed that as electoral role has an impact on political competition, strict scrutiny is required.[41] This application shows an integration-friendly use of its control powers.

That the threshold originated in EU law put the ruling in a fundamentally different legal context from the earlier threshold cases. Nevertheless, the Court engaged with familiar questions: the institutional role of the European Parliament, its working conditions, and its democratic legitimacy. It is this reasoning, rather than the result, that warrants closer examination and enables a meaningful comparison with the Court's prior case law, as it returns to many of the same evaluative criteria. The ensuing sections juxtapose this novel reasoning

[33] *See* BVerfG 23 July 2024, 2 BvR 557/19, para. 55.

[34] Art. 79(3) Grundgesetz states: 'Amendments to this Basic Law affecting the division of the Federation into Länder, their participation in principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.'

[35] M. Ruffert, 'Sperrklauseln bei der Europawahl - Die EU kann für die Europawahl eine 2 %-Sperrklausel einführen', 64 *Juristische Schulung* (2024) p. 473 at p. 475.

[36] Art. 223(1) TFEU. The Court also assessed whether the principle of subsidiarity was violated. It questioned whether this principle applies in this case and highlighted that the member states are protected by the special legislative procedure, which requires their approval.

[37] The standard necessary for the admissibility of a case under German constitutional procedural law.

[38] Press release of *Threshold IV* decision.

[39] *Threshold IV* decision, para. 104.

[40] *Threshold IV* decision, paras. 121-125.

[41] *Threshold II* decision, para. 91. In the past, the limited margin of appreciation for the German legislature constituted a point of disagreement within the Court, as shown by the dissenting opinion by judges di Fabio and Mellinghoff: *Threshold II* decision, para. 156.

https://doi.org/10.1017/S1574019625100862 Published online by Cambridge University Press

with prior decisions to elaborate on shifts in the Court's approach to EU democracy, as well as the doctrine of responsibility for integration.

The Court's new approach to EU democracy

The first divergence from the *Lisbon* judgment lies in the Court's approach to EU democracy. Previously the Court rejected the dual legitimation structure set out by the Lisbon Treaty and insisted that the EU's legitimacy stemmed solely from the peoples of the member states.[42] In the 2024 ruling, without discussion or objection, it follows the Treaty's envisioned structure. This silent shift carries normative weight: the European Parliament becomes a representation of Union citizens and with that the Court moves closer to the Treaty's vision of the EU as a polity grounded in both national and supranational legitimacy.

While this might seem like a simple omission by the Court, it carries weight for the Court's jurisprudence; a jurisprudence in which EU integration is assessed as a potential threat to the principle of democracy.[43] Although it does not change the Court's standards of review, the different normative underpinning can shape the Court's assessment. In the 2024 ruling, the Court's posture and tone toward the Union appear friendlier and, so I argue, it prompted a reassessment of the European Parliament's role. To understand the weight of the Court's silent shift in 2024, it is necessary to recall how central the principle of democracy had been to the Court's earlier assessment of EU integration.

The Court's state-centred approach to EU democracy: from Maastricht via Lisbon to 2014

In the *Maastricht* judgment in 1993, the Court placed democracy at the heart of its approach to examining the Maastricht Treaty and EU integration. Procedurally, it introduced the concept of a justiciable right to democracy, allowing individuals to challenge EU measures that might erode the Bundestag's powers[44] – a procedural gateway that continues to shape the Court's involvement in EU integration to this day.[45]

[42] *Cf* for this dominant reading of the Court's decision Halberstam and Möllers, *supra* n. 10, p. 1241.

[43] Feichtner, *supra* n. 1, p. 1092 sees these judgments as a way to control EU integration 'in the name of popular sovereignty'.

[44] Art. 38 Grundgesetz; *Maastricht* judgment, para. 77. *See generally* for this procedural gateway R. Lehner, 'Die "Integrationsverfassungsbeschwerde" nach Art. 38 Abs. 1 S. 1 GG: prozessuale und materiell-rechtliche Folgefragen zu einer objektiven Verfassungswahrungsbeschwerde', 52 *Der Staat* (2013) p. 535.

[45] Recently L. Märtin and R. Weber, 'Von Regeln und Ausnahmen: Die rechtliche Konstruktion europäischer Schulden', *Zeitschrift für Gesetzgebung* (2025) p. 125 describing it as '*prozessuale Entgrenzung*'.

The decision also turned substantively on the principle of democracy. For the Court, an immutable element of the democratic principle is that the exercise of state authority must derive from the people of the state (*Staatsvolk*), and those who wield this authority must remain fundamentally accountable to the people.[46] The people, which the international academic discourse often refers to as the demos, constitutes the foundation of democracy. Parliament, as the institutional representation of this demos,[47] serves as the primary source of democratic legitimation within what the Court implicitly embraces as a form of '*Volksdemokratie*'.[48] Crucially, this concept of the demos rests on certain pre-legal conditions, including what the Court describes as a 'continuous free debate between opposing social forces, interests and ideas', facilitated by political parties, associations, the press, and other mediating institutions.[49]

Applying this understanding to the EU, the Court has held that in absence of a European demos,[50] democratic legitimacy is provided first and foremost by national peoples through their national parliaments.[51] This view mirrored the institutional structure of the Union at the time: Union citizenship was only just being introduced, and the European Parliament still formally represented the peoples of the member states.[52] Hence, the European Parliament could only provide a supporting legitimacy. However, the Court expressly showed its openness for the legitimation strand via the European Parliament to gain importance over time.[53] In its 2024 decision, it seems that the European Parliament – and with it this strand of legitimation – has now gained greater importance in the Court's view. At the time of the *Maastricht* judgment, however, this legitimation structure led the Court to conclude that the principle of democracy set substantive limits to further integration and the transfer of powers to the Union.[54] Those limits, it held, were not breached by the Maastricht Treaty. Notwithstanding the welcomed result of allowing EU integration to proceed, the

[46] *Maastricht* judgment, para. 92.

[47] *See*, understanding the Court in that sense, Halberstam and Möllers, *supra* n. 10, p. 1247; J.H.H. Weiler, 'Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision', 1 *European Law Journal* (1995) p. 219 at p. 228.

[48] For the term '*Volksdemokratie' see generally* B. Bryde, 'Die bundesrepublikanische Volksdemokratie als Irrweg der Demokratietheorie', 5 *Staatswissenschaften und Staatspraxis* (1994) p. 305.

[49] *Maastricht* judgment, paras. 98, 99. Quotations from the Maastricht judgment are based on M. Herdegen, 'Maastricht and the German Constitutional Court: Constitutional Restraints for an "Ever Closer Union"', 31 *Common Market Law Review* (1994) p. 235.

[50] *Maastricht* judgment, para. 108.

[51] Ibid., para. 97.

[52] Art. 17 TEC; Art. 189 TEC.

[53] *Maastricht* judgment, para. 100.

[54] Ibid., para. 101.

conception of democracy drew sharp criticism. Most notably, Weiler argued that the Court's reasoning relied on 'tired old ideas of an ethno-culturally homogeneous Volk ... as the exclusive basis for democratic authority'.[55]

This state-centred vision of EU democracy remained largely intact throughout the 1990s and early 2000s. The Lisbon Treaty disrupted this understanding by introducing a new conceptual model based on dual legitimation structure:[56] one strand emanates from Union citizens, represented in the European Parliament, while the other originates from the peoples of the member states, represented in the Council.[57]

For the European Parliament, this has constituted a conceptual shift. It no longer represented the peoples of the member states but Union citizens as such. While the electorate remained unchanged,[58] this was no mere semantic shift. Normatively, the subject of democratic legitimation shifted, challenging the Court's perception of EU democracy as depending primarily on the member states' peoples.

The Court rejected this pivot in its *Lisbon* judgment when it assessed the Lisbon Treaty in 2009. With some nuances, it mainly reaffirmed its state-centred approach to democratic legitimacy articulated in the *Maastricht* ruling.[59] The

[55]Weiler, *supra* n. 47, p. 223. Arguing against the necessity of homogeneity for a functioning state and democracy *see generally* G. Lübbe-Wolff, 'Homogenes Volk - über Homogenitätspostulate und Integration', 27 *Zeitschrift für Ausländerrecht und Ausländerpolitik* (2007) p. 121.

[56]*See* A. von Bogdandy, *The Emergence of European Society through Public Law* (Oxford University Press 2024) p. 138; D. Grimm, 'The Democratic Costs of Constitutionalisation: The European Case', 21 *European Law Journal* (2015) p. 460 at p. 473. Scholars have elaborated on the fundamentals of this structure, *see generally* e.g. K. Lenaerts and J.A. Gutiérrez-Fons, 'Epilogue on EU Citizenship: Hopes and Fears', in D. Kochenov (ed.), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press 2017) p. 751.

[57]Art. 10(2) TEU: 'Citizens are directly represented at Union level in the European Parliament. Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens.' *See* J. von Achenbach, *Demokratische Gesetzgebung in der Europäischen Union - Theorie und Praxis der dualen Legitimationsstruktur europäischer Hoheitsgewalt* (Springer 2014) p. 409.

[58]Even before the Lisbon Treaty, Union citizens residing in another member state already had the right to vote and stand for election: Art. 19(2) TEC, now Art. 22(2) TFEU.

[59]At least in most parts of the ruling the Court follows a state-centred approach: A. von Bogdandy, 'Prinzipien der Rechtsfortbildung im europäischen Rechtsraum - Überlegungen zum Lissabon-Urteil des BVerfG', 63 *Neue Juristische Wochenschrift* (2010) p. 1 at p. 2; M. Kottmann and C. Wohlfahrt, 'Der gespaltene Wächter? - Demokratie, Verfassungsidentität und Integrationsverantwortung im Lissabon-Urteil', 69 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2009) p. 443 at p. 444. Wallrabenstein, now judge at the Court, highlighted that any potential signs of alternative approaches were consistently retracted by the Court in the subsequent paragraphs of its rulings: A. Wallrabenstein, 'Zwischen "Volksdemokratie" und menschenrechtlichem Demokratieverständnis: Zur Zukunftsfähigkeit "der Demokratietheorie" des

Court again emphasised the importance of the *people* as a collective singular.[60] As in the *Maastricht* judgment, such a people, for the Court, presupposes pre-legal conditions for public opinion formation – conditions the Court found lacking at the European level.[61] In a key passage, which is conspicuously absent from the 2024 decision, the Court stated:

> [C]ontrary to the claim that Article 10 (1) of the TEU seems to make according to its wording, the European Parliament is not a representative body of a *sovereign European people*. This is reflected in the fact that, as the representative of the peoples in the respective national contingents of Members of the European Parliament, it is not designed to represent the citizens of the Union as an *undifferentiated unit* according to *the principle of electoral equality*.[62]

This assertion had two key consequences within the Court's approach, in which a 'parliament is the organ representing the people':[63] first, rejecting the representational claim of the Treaties diminished the status of the European Parliament. The European Parliament, then, continued to provide only a supplementary strand of legitimation,[64] even though its significance had increased with the Lisbon Treaty.[65] Second, the Bundestag, 'as the representative body of the German people' and other national parliaments remained 'at the centre of a democratic system' of the EU.[66] This logic has formed the underpinning of much

Bundesverfassungsgerichts', in S. Rixen (ed.), *Die Wiedergewinnung des Menschen als demokratisches Projekt; Band 1: Neue Demokratietheorie als Bedingung demokratischer Grundrechtskonkretisierung in der Biopolitik* (Mohr Siebeck 2015) p. 21. Describing this approach normatively more neutral as monism, *see* B.F. Assenbrunner, *Europäische Demokratie und nationalstaatlicher Partikularismus* (Nomos 2012) p. 142; M.Tischendorf, *Theorie und Wirklichkeit der Integrationsverantwortung deutscher Verfassungsorgane* (Mohr Siebeck 2017) p. 47-51.

[60] *Lisbon* judgment, para. 270 and para. 212: 'In a democracy, the decision of the people is at the centre of the formation and assertion of political power'. For the Court, the principle of democracy requires that decisions binding on citizens 'must be based on the freely formed will of the majority of the people'.

[61] Ibid., paras. 250, 251.

[62] Ibid., para. 280 (emphasis added). Lübbe-Wolff, former judge of the Second Senate, challenges whether the principle of degressive proportionality weakens the legitimation of the European Parliament: G. Lübbe-Wolff, 'Die Zukunft der europäischen Verfassung. Fragen und Einwände zu Dieter Grimms Sicht auf Legitimation und Finalität der Europäischen Union', in U. Davy and G. Lübbe-Wolff (eds.), *Verfassung: Geschichte, Gegenwart, Zukunft* (Nomos 2018) p. 129 at p. 142-144.

[63] *Lisbon* judgment, para. 254. Halberstam and Möllers, *supra* n. 10, p. 1247.

[64] *Lisbon* judgment, para. 271.

[65] The European Parliament was for instance strengthened by an expansion of rights in the legislative process, the right to elect the president of the Commission.

[66] *Lisbon* judgment, para. 277.

https://doi.org/10.1017/S1574019625100862 Published online by Cambridge University Press

of the later, at times critical, engagement of the Court with EU integration through the lens of the principle of democracy. If national parliaments constitute the democratic core of the EU, far-reaching EU competences and their expanding exercise can become a potential threat to democracy.

While the representational claim of the Treaties and the European Parliament's representativeness have rightly been questioned,[67] the Court's forceful rejection of it has nonetheless been remarkable. It has shown the importance of this mainly state-centred understanding of democracy for the Court. To uphold this position, it has rejected the wording of the Treaties,[68] agreed to also by the German government, and in doing so has at least marginalised, if not partially delegitimised, the European Parliament.[69]

This marginalisation of the European Parliament came to the fore in the Court's 2011 and 2014 decisions on electoral thresholds for the European Parliament. In its 2011 judgment, the Court reaffirmed the view expressed in the *Lisbon* judgment, stating that the European Parliament 'remains – despite the Treaty of Lisbon and its increased emphasis on Union citizenship – a representation of the peoples who are contractually united'.[70] This conceptual basis set the tone for the Court's sceptical description of the European Parliament's role and functions, which primarily focused on its deficiencies.

In both rulings it struck down a nationally enacted threshold for European Parliament elections using comparable reasoning.[71] Both times it ruled that '[u] nder the current legal and factual conditions, the serious interference with the principles of equal suffrage and of equal opportunities for political parties … cannot be justified'.[72] It rejected the justification by examining the organ's specific tasks and the conditions under which it operates.[73] In this, it consistently

[67] *See especially* on representativeness Grimm, *supra* n. 56, p. 472.

[68] H. Blanke and S. Mangiameli, 'Article 14 [The European Parliament]', in H. Blanke and S. Mangiameli (eds.), *The Treaty on European Union (TEU): A Commentary* (Springer 2013), para. 56 state: 'devalues the wording of the Treaty'.

[69] Grzeszick, *supra* n. 20, p. 539; Nettesheim, *supra* n. 5, para. 82; C. Tomuschat, 'The Ruling of the German Constitutional Court on the Treaty of Lisbon', 10 *German Law Journal* (2009) p. 1259 at p. 1261. Arguing against this claim M. Gerhardt, 'Europäisches Parlament und Bundesverfassungsgericht', 32 *Neue Zeitschrift für Verwaltungsrecht* (2013) p. 53.

[70] Author's translation of *Threshold II* decision, para. 81; similar to the *Lisbon* judgment, para. 279: 'a supranational representative body that – although it now particularly emphasises EU citizenship – continues to represent the different peoples bound to one another by the Treaties'. All quotations of the *Threshold II* decision are the author's own translations.

[71] The difference, of course, was that in 2011 a 5% threshold was challenged and in 2014 a 3% threshold.

[72] Headnote of *Threshold II* and *III* decisions.

[73] *Threshold II d*ecision, para. 88; *Threshold III* decision, para. 54.

https://doi.org/10.1017/S1574019625100862 Published online by Cambridge University Press

measured the European Parliament against national parliamentary standards, above all the Bundestag.[74]

This comparison has highlighted the European Parliament's weaknesses. The Court underlined in its 2011 decision that the 'European Parliament does not elect a *Union government* that would be dependent on its continued support' and that EU '*legislation* [is not] dependent on a stable majority in the European Parliament'.[75] These observations have rested on the broader idea, which was not directly expressed by the Court, that the EU can operate to a certain extent even without a fully functioning Parliament. This can rightly be seen as a weakness of the European Parliament, as the Commission requires the European Parliament's support only at the start of the term[76] and the Council can still enact legislation, even if the European Parliament is deadlocked.[77] Even when the Court in the 2014 decision outlined in the beginning that the Parliament was continuously strengthened and a co-legislator, it concluded that there was no significant change since 2011.[78] The Court was not alone in pointing to these weaknesses.[79]

At the same time, the Court's reasoning was not entirely dismissive. It acknowledged integrative elements such as the role of political groups, which have allowed the European Parliament to be functional even when faced with diverse opinions.[80] While this shows a more nuanced institutional view than is sometimes acknowledged, the overall impression has remained one of scepticism toward the dual legitimation structure set out in the Lisbon Treaty and the European Parliament. For some, the 2011 judgment especially reflected more broadly a distorted relationship between the Court's Second Senate and EU integration.[81] Against this background, the Court's 2024 decision warrants closer attention both in how it continues with that legacy and for the ways in which it begins to diverge from it.

[74] *See* Schönberger, *supra* n. 4, p. 84.

[75] *Threshold II d*ecision, para. 119 (emphasis added).

[76] Art. 17(7) TEU. The Commission then remains in power until a motion of censure – which requires a two-thirds majority of votes cast – is passed: Art. 17(8) TEU and Art. 234(2) TFEU.

[77] As under the ordinary legislative procedure, an act can pass in the second reading if the European Parliament does not reject the Council's proposal: Art. 294(7) TFEU; *Threshold II* decision, para. 122. Using in German the term *Ratsgesetzgebung ohne Parlament see* Schönberger, *supra* n. 4, p. 84.

[78] *Threshold III* decision, para. 4 and paras. 66-69.

[79] *See*, for this criticism of the European Parliament, J. Hoffmann and A. Tappert, 'Ohne Hürden? Europawahlen 2014', 33 *Neue Zeitschrift für Verwaltungsrecht* (2014) p. 630 at p. 630, pointing out that the European Parliament does not elect a government, lacks a general right to initiate legislation, and cannot determine the EU's budget independently.

[80] *Threshold II* decision, paras. 102-111; *Threshold III* decision, para. 82.

[81] Schönberger, *supra* n. 4.

From state-centred to dualistic: the Court's new approach

The above-mentioned shift to accepting the Lisbon Treaty's dual legitimation structure and the re-evaluation of the role of the European Parliament occurs in a case where the outcome itself was unsurprising. Due to the EU nature of the Direct Elections Act and the following limitation to *ultra vires* and identity review,[82] the Court examined in particular whether the 2% threshold infringed the inalienable core of the democratic principle under the Basic Law.[83] These review standards mark the continuity in the ruling. Notwithstanding this continuity in the Court's policing of the limits of EU integration, a shift in the Court's approach to democracy at the EU level is observable. This shift becomes visible through the omission of its earlier dictum contesting the representational claim of Article 10 TEU and a strikingly different description of the European Parliament.

The Court in 2024 refers without qualification to the Lisbon Treaty's vision of EU democracy – the dual legitimation structure.[84] Unlike its stance since the *Lisbon* judgment, the Court does not contest this structure. While the Court offers no elaboration, its silence alone is conspicuous. It occurs in a case where, given the limited review standard, the Court could have arguably referred to its earlier jurisprudence without altering the outcome. In earlier rulings, as shown above, the Court reaffirmed its state-centred model in particular by contesting the representational claim of Article 10 TEU. Against this background, the omission is unlikely to be inadvertent. In my reading, it signals a meaningful shift in how the Court conceptualises EU democracy, even though the Court does not make that shift explicit and leaves it unexplained. If the Court no longer contests the claim that the European Parliament represents Union citizens, its prior logic leaves only two options: either it now assumes the existence of a European demos, or it has abandoned the requirement that a parliament must represent one unified people. Given the Court's repeated rejection of a European demos and its continued application of review standards grounded in German sovereignty,[85] it seems more likely that it has relaxed this conceptual prerequisite.

[82] *Threshold IV* decision, paras. 84-87.

[83] Ibid., para. 105.

[84] Ibid., para. 108: 'Citizens are directly represented in the European Parliament (*cf* Article 10 para. 2 subpara. 1 TEU), and they are represented in the European Council or the Council of the European Union by their directly or indirectly elected governments at national level (*cf* Article 10 para. 2 subpara. 2 TEU). Institutionally, this establishes two strands of democratic legitimisation that interact and support each other.' Quotations from the *Threshold IV* decision (apart from the press release) are the author's own translations.

[85] *See*, for this grounding of the review standards, von Bogdandy, *supra* n. 59, p. 3.

While, due to the general lack of elaboration of this omission, the doctrinal implications can hardly be deduced yet, the Court's description of the European Parliament illustrates how this shift can practically change the Court's assessment. The Court no longer emphasises the institutional limitations of the European Parliament but instead depicts the European Parliament as a decisive actor within the EU's structure.[86] It appears that, grounded in its renewed democratic legitimation, the European Parliament is now treated as a *true* parliament in the Court's view.

This becomes clear from the outset of the decision. The decision opens by stating that '[t]he position of the European Parliament as an institution of the European Union has been continuously strengthened in the past'.[87] The decision continues in this vein, describing the European Parliament as decisive, underscoring the Parliament's co-legislative as well as budgetary functions and its role in shaping the Commission.[88]

These remarks not only contrast with but directly revise earlier assessments. First, the Court refrains from mentioning that EU legislation can pass without a majority in the European Parliament. Second, to support its changed position[89] on the European Parliament's influence in the selection of the Commission, the Court points to the lead candidate (*Spitzenkandidaten*) process,[90] a development which the Court already expected in its 2014 decision.[91] Third, the Court revises its assessment of the necessity of majority formation. Whereas the Court

[86] *See also* J. Grundmann and J. Mittrop, 'Ein stabiles Parlament (auch) für Europa: Das Bundesverfassungsgericht billigt die deutsche Zustimmung zur europäischen Sperrklausel', *Verfassungsblog*, 5 March 2024, https://verfassungsblog.de/ein-stabiles-parlament-auch-fur-europa/, visited 18 October 2025.

[87] *Threshold IV* decision, para. 2. This was already stated in the 2014 decision: *Threshold III* decision, para. 4.

[88] *Threshold IV* decision, para. 123: 'With regard to the composition of the Commission, the European Parliament has significant creative powers. It is involved in the legislation of the European Union as an equal co-legislator alongside the Council, as well as in the exercise of budgetary powers. The effective fulfilment of these tasks requires the formation of majorities capable of taking action'.

[89] Previously it stated in *Threshold II* decision, at para. 119, that the European Parliament 'does not elect a Union government that would be dependent on its continued support'.

[90] *Threshold IV* decision, paras. 15, 123. *See*, for the importance of the lead candidate process, G. Sydow, '"In Deutschland gewählte" statt "deutsche" Abgeordnete: verfassungstheoretische Implikationen aktueller Entwicklungen des Wahlrechts für das Europäische Parlament', 79(8) *JuristenZeitung* (2024) p. 313 at p. 317; against a democratic necessity to make the lead candidates presidents of the Commission *see* M. Steinbeis, 'The Bursting of a Constitutional Bubble', *Verfassungsblog*, 6 July 2019, https://verfassungsblog.de/the-bursting-of-a-constitutional-bubble/, visited 18 October 2025.

[91] *Threshold III* decision, paras. 70, 73. The *Spitzenkandidaten* process is an informal political process based on Art. 17(7) TEU, according to which the European Council is to 'take into account the elections to the European Parliament'.

previously underlined the absence of the necessity for a stable majority and opposition within the European Parliament as a detriment,[92] the Court now adopts what was earlier the minority position:[93] it highlights the practical necessity of majority formation within the European Parliament, especially in its interactions with other EU institutions, e.g. in the trilogue process. The trilogue necessitates majority formation, as the European Parliament's mandate for these negotiations typically seeks broad support through a *double filtering* system.[94] Trilogues have long been a vital component of the EU's legislative procedure.[95] Therefore, the Court could have made the same argument in earlier decisions. The fact that similar arguments about trilogues and the legislative procedure could have been made in earlier cases suggests that the shift in framing and evaluative tone in the 2024 decision cannot be attributed solely to institutional developments in the European Parliament over the past decade. The European Parliament's different assessment is at least partially attributable to its new conceptual framing.

With these considerations, the case suggests a meaningful evolution in the Court's tone and posture toward the European Parliament and EU democracy more broadly. The Court appears more willing to embed the European Parliament into its democratic framework rather than keeping it at the margins. This shift may result in greater deference when reviewing future EU acts, given the enhanced democratic legitimacy at the Union level. Whether the case marks such a conceptual recalibration, as this article argues, or merely constitutes a pragmatic response to an uncontroversial complaint remains open and to be seen in future cases. The ruling may simply reflect strategic reasoning, offering just enough justification to persuade the public and the complainants of the inadmissibility of the challenge.

While this development needs to be further examined in subsequent rulings, it is clear from the 2024 ruling alone that the Court does not break with its overall jurisprudence on constitutional limits for EU integration. The Court reaffirmed its established approaches to *ultra vires* and identity review without any doctrinal elaboration or adjustment.[96] In addition, most importantly, the Court upholds its longstanding principle that supranational public authorities must meet essential

[92]A. Voßkuhle, 'Opposition im Europäischen Parlament', in U. Becker et al. (eds.), *Verfassung und Verwaltung in Europa - Festschrift für Jürgen Schwarze zum 70 Geburtstag* (Nomos 2014) p. 283.

[93]*Threshold II* decision, para. 160.

[94]In this system the negotiation mandate must be supported both by a majority within the negotiator's political group and by a majority of the members of the responsible committee: von Bogdandy, *supra* n. 56, p. 151, with reference to G. Rugge, *Trilogues The Democratic Secret of European Legislation* (Cambridge University Press 2025).

[95]Highlighting this practice, *see* Schönberger, *supra* n. 4, p. 84.

[96]*Threshold IV* decision, paras. 89, 90.

democratic standards. This requirement remains subject to the Court's review, regardless of how the EU's institutional structure develops.[97]

Upholding these review standards and accepting the dual legitimation structure might seem contradictory at first. *Ultra vires* and identity review are doctrinally anchored in German sovereignty.[98] At the same time, the Court no longer contests the representational claim of Article 10 TEU. These elements can, however, be reconciled if one accepts, as Hilbert has argued, that a subject of democratic legitimacy need not be a sovereign.[99] Choosing such a theoretical underpinning allows the Court on the one hand to further ground its review in German sovereignty and on the other to refrain from opposing the dual legitimation structure. The Court's unchanged application of its review standards in its 2024 decision may be read as tacitly affirming this view, most clearly formulated by Hilbert.

Responsibility for integration in a positive sense

The second break with *Lisbon* lies in the Court's invocation of the doctrine of responsibility for integration (*Integrationsverantwortung*). For the first time, the Second Senate frames this doctrine not as a constitutional limit but as an obligation to support EU integration. It uses this doctrine to justify a duty on Germany to help maintain the European Parliament's ability to function – a reinterpretation that echoes academic accounts of the doctrine's positive sense.[100]

The doctrine of the responsibility for integration was developed by the Second Senate in its *Lisbon* judgment. In this judgment as described above, the Court assessed EU integration through the lens of the principle of democracy under the Basic Law. As an additional safeguard of the principle of democracy, it has held that German constitutional organs are responsible for monitoring the integration process and ensuring integration stays within the limits set by the Basic Law.[101] This responsibility for integration includes that if 'a mismatch arises between the type and scope of the exercised sovereign powers and the level of democratic legitimation', the German institutions 'need to take steps to bring about change and, in extreme circumstances, even refuse to further participate in the European

[97]Ibid., paras. 105, 106.

[98]Von Bogdandy, *supra* n. 59, p. 3.

[99]P. Hilbert, *Die Informationsfunktion von Parlamenten* (Mohr Siebeck 2022) p. 282-283.

[100]Also viewing this decision as invoking the doctrine in a positive sense, *see* U. Hufeld, 'Einheit und Vielfalt im Europawahlrecht: Die Wahl des Europäischen Parlaments zwischen europäischem und mitgliedstaatlichem Recht', 60 *Europarecht* (2025) p. 139.

[101]F.C. Mayer and M. Wendel, 'Die verfassungsrechtlichen Grundlagen des Europarechts', in A. Hatje and P. Müller-Graff (eds.), *Enzyklopädie Europarecht - Band 1: Europäisches Organisations- und Verfassungsrecht*, 2nd edn. (Nomos 2014) p. 181 at p. 227, para. 147.

Union'.[102] In this context, the responsibility for integration served to constrain integration rather than to promote it.[103]

However, scholars have long argued that the doctrine also contains an enabling dimension.[104] In its positive sense, it refers to Germany's constitutional mandate to contribute constructively to the development of the EU and to support the success of the integration project.[105]

Against this background, the Court's use of the doctrine in the 2024 ruling is striking. The Court now states: 'The member states are thus *jointly responsible for maintaining the European Parliament's ability to function*. For … Germany, this also follows from the *responsibility for integration*.'[106] This signals a subtle but important reframing of the doctrine: the Second Senate no longer presents the responsibility for integration solely as safeguarding the constitutional limits of integration. Instead, it frames this responsibility as also including a duty to support the effective functioning of Union institutions, reflecting Germany's state objective to contribute to the EU's development.[107]

This marks the first time the Second Senate has invoked the responsibility for integration in such a positive sense.[108] By contrast, in its 2011 decision, the majority rejected such a responsibility on Germany's part for the European Parliament as a whole, reasoning that it was not readily to be expected that other member states would abandon existing thresholds if Germany were to do so.[109]

[102]*Lisbon* judgment, para. 264. *See* for the *Integrationsverantwortung* overall *Lisbon* judgment, paras. 236-243.

[103]H. Aust, 'Zweierlei Integrationsverantwortung - Zur Begründung und Tragweite eines verfassungsrechtlichen Schlüsselbegriffs in der Rechtsprechung der beiden Senate des Bundesverfassungsgerichts', 47 *Europäische Grundrechte Zeitschrift* (2020) p. 410 at p. 415 in reference to decisions of the Second Senate; Tischendorf, *supra* n. 59, p. 304.

[104]A. Voßkuhle, 'Integration durch Recht - Der Beitrag des Bundesverfassungsgerichts', 71 *JuristenZeitung* (2016) p. 161 at p. 165. Scholars outline varying dimensions of this doctrine: M. Nettesheim, '»Integrationsverantwortung« – Verfassungsrechtliche Verklammerung politischer Räume', in M. Pechstein (ed.), *Integrationsverantwortung* (Nomos 2012) p. 9 outlines in German *eine Schutzdimension und eine fordernde Dimension*. Tischendorf, *supra* n. 59, p. 81 distinguishes *eine gestaltende und überwachende Funktion*. Others highlight a reactive and proactive use: *see generally* L. von Danwitz, 'Die proaktive Wahrnehmung der Integrationsverantwortung', *Die öffentliche Verwaltung* (2022) p. 494.

[105]*See generally* H.A. Wolff, 'Das Bundesverfassungsgericht als Hüter der Integrationsverantwortung', in M. Pechstein (ed.), *Integrationsverantwortung* (Nomos 2012) p. 151.

[106]*Threshold IV* decision, para. 126 (emphasis added). *See also* Classen, *supra* n. 12, p. 327.

[107]*See* for this state objective *Lisbon* judgment, para. 261 and Art. 23(1) Grundgesetz.

[108]In the past one can of course outline decisions in which the Court supported the achievement of the state objective of integration: *see* H.A. Wolff, 'Das Bundesverfassungsgericht als Hüter der Integrationsverantwortung', in Pechstein, *supra* n. 104, p. 151 at p. 151-153. However, the Court in these decisions did not invoke the responsibility for integration.

[109]*Threshold II* decision, para. 99.

The dissenting judges, however, had already adopted a broader understanding of the responsibility for integration.[110] They also formulated what has since been referred to as the electoral categorical imperative: the idea that each member state should design its electoral law in a way that could serve as a model for the Union as a whole. By endorsing this principle,[111] the Court in 2024 implicitly affirms that decisions affecting the election of the European Parliament must be assessed with a view to the Union's collective order. If one generalises this insight beyond elections, it may suggest that the Court acknowledges that the reference point for decisions affecting the whole EU is the EU legal space.[112]

The fact that it is the Second Senate that now invokes the responsibility for integration in a constructive sense is particularly significant.[113] This Senate is primarily responsible for adjudicating EU-related constitutional complaints, including cases 'where the interpretation and application of … primary European law [is] of considerable importance'[114] as well as constitutional complaints regarding electoral law.[115]

In its *Right to be Forgotten II decision*, the First Senate in 2019 invoked the doctrine in a positive sense.[116] In this decision, the First Senate has ruled that when a provision is fully determined by EU law, it reviews the measure against EU fundamental rights.[117] It framed this review as part of its responsibility for integration, asserting that it participates in the exercise of competences transferred to the EU.[118] When the Second Senate needed to answer a similar question in its decision in *European Arrest Warrant III*, it followed the First Senate in general;

[110] *See*, for a similar statement to that in the 2024 decision, the dissenting opinions by judges di Fabio and Mellinghoff to the *Threshold II* decision, para. 157.

[111] *Threshold IV* decision, para. 126 referencing dissenting opinions by judges di Fabio and Mellinghoff to the *Threshold II* decision as well as by judge Müller to the *Threshold III* decision. It reads: 'Each Member State is encouraged to design the requirements for the structures of electoral law in such a way that they can also serve as a guiding principle for the election of the entire European Parliament'.

[112] Already recognising this necessity, *see* von Bogdandy, *supra* n. 59, p. 12.

[113] The Court has 16 judges, divided into two senates of eight.

[114] BVerfG (Plenum) 15 November 1993, Beschluss gemäß § 14 Abs. 4 BVerfGG, BGBl I 1993, 2492; A.II.1. lit a).

[115] G. Ulsamer, '§ 14 - Zuständigkeit der Senate', in B. Schmidt-Bleibtreu et al. (eds.), *Bundesverfassungsgerichtsgesetz*, 63rd edn. (C.H. Beck 2023) paras. 16, 18. For example, the decisions *Solange I*, *Solange II*, *Maastricht*, *Bannanenmarkt*, *Lisbon*, *OMT*, *PSPP*, *European Arrest Warrant III* as well as *NextGenerationEU* are all decisions of the Second Senate.

[116] BVerfG 6 November 2019, BVerfGE 152, 216, *Right to be Forgotten II decision*: C.D. Classen, 'Über das Ziel hinausgeschossen?', 56 *Europarecht* (2021) p. 92 at p. 97.

[117] *See* L.D. Spieker, 'Framing and Managing Constitutional Identity Conflicts: How to Stabilize the Modus Vivendi between the Court of Justice and National Constitutional Courts', 57 *Common Market Law Review* (2020) p. 361 at p. 390.

[118] Aust, *supra* n. 103, p. 414.

however, it did not link its reasoning to the responsibility for integration.[119] The 2024 decision now closes this gap and repositions the Second Senate within this evolving jurisprudence.

Beyond the doctrine of responsibility for integration itself, the reinterpretation illustrates two broader dynamics. First, just as the Court now accepts the dual legitimation structure, it also reconsiders key elements of the *Lisbon* judgment. This underlines how the *Lisbon* judgment, once central to the Court's integration jurisprudence, seemingly begins to lose at least part of its authority for the current composition of the Court. Second, the new position on the responsibility for integration had previously been voiced only by a minority; it now commands the support of the majority. This change from minority to majority, already observed above, can be linked to the changes in the composition of the Second Senate, which is outlined below.

Looking ahead, the consequences of this reinterpretation of the responsibility for integration may prove to be far-reaching. The stronger focus on the state objective to contribute to the EU's development could function as a counterweight to the Court's emphasis on constitutional limits of integration. In practical terms, it could shape how German constitutional organs behave: no longer guided solely by the need to restrain integration but also guided by a duty to ensure the functioning of the EU's institutional system.

Contextualising the decision: the Court's changing posture

The comparison highlighted two points on which the 2024 ruling breaks with the *Lisbon* judgment despite applying the same constitutional review standards. This final section sets the 2024 decision in broader context. It argues that the ruling may form part of a larger trajectory following the *NextGenerationEU (NGEU)* decision[120] in which the Court, while continuing with its standards, adopts a more deferential and constructive posture toward the EU. Two developments may help to understand this evolution: changes in the composition of the Court's Second Senate; and external factors.

[119] A. Brade and M. Gentzsch, 'Das Konzept der Integrationsverantwortung', *Die öffentliche Verwaltung* (2021) p. 327 at p. 329; M. Ruffert, 'Europarecht und Verfassungsrecht: Unionsrechtliche Grundrechtsprüfung durch das BVerfG', 61 *Juristische Schulung* (2021) p. 374 at p. 376.

[120] BVerfG 6 December 2022, BVerfGE 164, 193, *NextGenerationEU* decision.

A forming trajectory?

The 2024 decision overall is marked by an EU-friendly tone, a more restrained application of constitutional review standards,[121] and the absence of even implicit criticism of the Union.[122] It also grants rather broad discretion to the EU legislature.[123] Taken together, these features suggest a more deferential posture than in previous rulings.

Scholars have analysed how strictly the Court has applied its *ultra vires* and identity review doctrines in recent years. In the *Honeywell* decision in 2010, the Court adopted a moderate and EU-conscious approach, setting a seemingly high bar for finding an *ultra vires* act.[124] The Court found this high bar crossed in the *PSPP* judgment, which was marked by its harsh tone[125] and a detailed analysis in which it substituted its own proportionality assessment for that of the European Court of Justice.[126] However, in the *NextGenerationEU* judgment in 2022, where the Court found that the NextGenerationEU programme was neither *ultra vires* nor a violation of German constitutional identity, the Court returned to a more deferential mode, aligning its posture more closely with *Honeywell*.[127] The dissenting judge in the *NextGenerationEU* decision, Müller, even saw this as a retraction of the *ultra vires* review.[128]

[121]Classen, *supra* n. 12, p. 324 points out that for its understanding of the eternity clause the Court cites three domestic cases that interpret the eternity clause narrowly in internal contexts, which differs from prior EU law cases of the Court.

[122]Classen, *supra* n. 12, p. 327 states that this decision refrains from EU-critical views in the subtext.

[123]*Threshold IV* decision, paras. 104, 121-125.

[124]BVerfG 6 July 2010, BVerfGE 126, 286, *Honeywell* decision. Also understanding *Honeywell* as limited to 'constitutional essentials', *see* O. Gerstenberg, 'The Uncertain Structure of Process Review in the EU: Beyond the Debate on the CJEU's Weiss Ruling and the German Federal Constitutional Court's PSPP Ruling', 3 *Jus Cogens* (2021) p. 279 at p. 289. *See generally* for the more EU-friendly stance in the *Honeywell and NextGenerationEU* decisions G. Anagnostaras, 'Acquitted on the Benefit of Doubt … but not Proven Innocent! The Judgment of the German Federal Constitutional Court on the Next Generation EU Program', 25 *German Law Journal* (2025) p. 578.

[125]U. Haltern, 'Ultra-vires-Kontrolle im Dienst europäischer Demokratie', *Neue Zeitschrift für Verwaltungsrecht* (2020) p. 817 at p. 821 sees this language as a consequence of *Honeywell.*

[126]*See* for an analysis J. Basedow et al., 'European Integration: Quo Vadis? A Critical Commentary on the PSPP Judgment of the German Federal Constitutional Court of 5 May 2020', 19 *International Journal of Constitutional Law* (2021) p. 188 particularly at p. 198.

[127]P. Hilpold, 'Next Generation EU und die "Einnahmensouveränität": Das EU-Eigenmittelsystem vor dem BVerfG', 34 *Europäische Zeitschrift für Wirtschaftsrecht* (2023) p. 169 at p. 173. *See generally* Anagnostaras, *supra* n. 124; M. Ruffert, 'Europarecht und Verfassungsrecht: NextGenerationEU', 63 *Juristische Schulung* (2023) p. 277 at p. 280.

[128]Dissenting opinion of judge Müller to the *NextGenerationEU* decision, para. 1.

The 2024 ruling appears to continue this evolving, though still uncertain, trajectory.[129] Review intensity appears to have peaked with *PSPP* and has since moderated again. If sustained, this change in tone could influence how the Court applies existing doctrines in practice, fostering a more integration-friendly constitutional jurisprudence without formally altering its legal standards. The next section explores whether changes in the composition of the Second Senate, along with broader political or institutional dynamics, may help explain this development and whether this potential trajectory is likely to solidify.

New faces, new perspectives: the Second Senate's recomposition

A key contextual factor behind the Court's evolving tone may lie in the changing composition of its Second Senate. The professional backgrounds and legal philosophies of judges can shape the Court's approach to EU law.[130] Judges of the Federal Constitutional Court are elected by the Bundestag and Bundesrat by a two-thirds majority, with each body appointing eight judges. To secure this majority, parties strike a cross-party agreement. Currently, the CDU/CSU and SPD propose six judges each, while the Green party (Grüne) and the liberals (FDP) propose two judges each.[131]

This article focuses on the Second Senate because it is responsible for most EU-related cases. In recent years, the Second Senate has undergone significant changes, with influential judges on EU law departing and more EU-friendly judges joining. The timeline chart shows the composition of the Second Senate over time, highlighting the judges' terms, during which the Court made key decisions on EU law.

In 2020, the term of then-President Voßkuhle, the last judge involved in the *Lisbon* judgment, ended. Besides Voßkuhle, the influential departing voices were Huber and Müller. Huber was considered the main architect of the Second Senate's EU-critical jurisprudence[133] and a sharp critic of the Lisbon

[129]Observing such a development inevitably involves uncertainty, as the Court's approach depends on the specifics of each case and only reveals itself through close analysis. Since this article cannot offer a full case-by-case study, it relies on the assessments of others. *See* Anagnostaras, *supra* n. 124, p. 592, describing the *PSPP* decision as the apex.

[130]*See also*, hinting at this, Classen, *supra* n. 12, p. 329.

[131]A. Voßkuhle, 'Art. 94 GG', in P.M. Huber and A. Voßkuhle (eds.), *Grundgesetz*, 8th edn. (C.H. Beck 2024) para. 14. Historically, the conservatives (CDU/CSU) and the social democrats (SPD) each proposed eight judges.

[133]W. Janisch, 'Bundesverfassungsgericht - Ein Personalwechsel, der Konsequenzen haben kann', *Süddeutsche Zeitung*, 20 April 2023, https://www.sueddeutsche.de/politik/bundesverfassungsgericht-justiz-richterwahl-europa-wahlrecht-klimaschutz-1.5811274, visited 18 October 2025.

https://doi.org/10.1017/S1574019625100862 Published online by Cambridge University Press

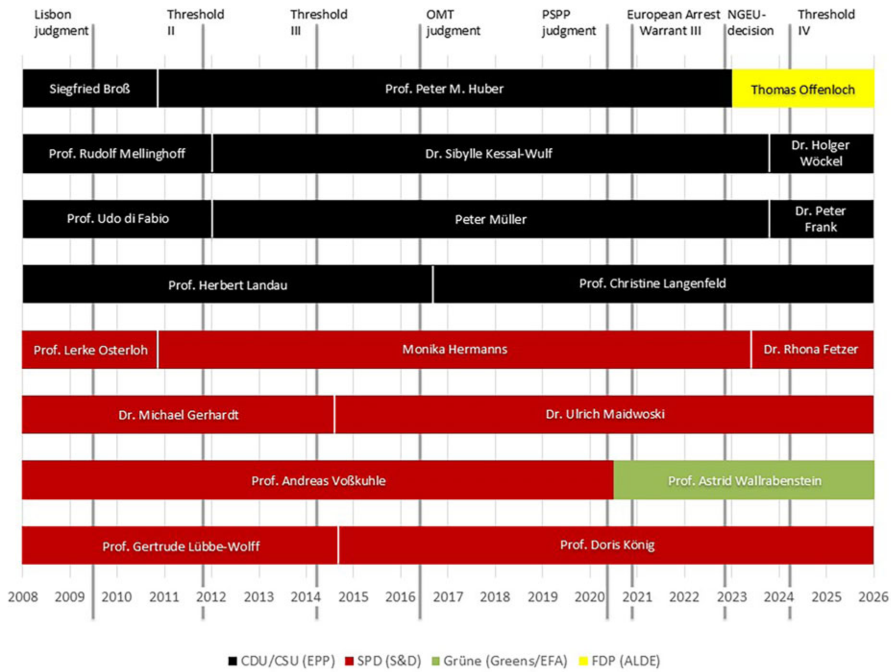

Figure 1. Composition of the Second Senate of the German Federal Constitutional Court[132]

Treaty.[134] He asked whether the Maastricht Treaty was a coup d'etat.[135] While he answered in the negative, he argued that the eternity clause of the Basic Law prohibits democratic legitimation through the European Parliament.[136] Müller even dissented in the abovementioned *NextGenerationEU* decision, in which the Court conducted a more lenient and EU-friendly *ultra vires* review.[137] In his dissenting opinion, Müller

[132]The chart provides a general overview to facilitate understanding of the timeframe and decisions. However, it has some limitations: the dates of changes in composition and decisions are shown only approximately, and the chart does not indicate instances where certain judges did not participate in specific decisions during their term. As Emmenegger and Kaufhold took office in October 2025, they are not shown in the figure.

[134]R. Müller, 'Verfassungsrichter Peter Huber - Der Umtriebige', *Frankfurter Allgemeine Zeitung*, 12 July 2013, https://www.faz.net/aktuell/politik/portraets-personalien/verfassungsrichter-peter-huber-der-umtriebige-12218286.html, visited 18 October 2025.

[135]This was the title of his inaugural lecture in Jena: P.M. Huber, *Maastricht - ein Staatsstreich?* (Boorberg 1993).

[136]*See*, for this understanding of his lecture, J. Wieland, 'Review of Maastricht - Ein Staatsstreich? by P.M. Huber', 33 *Der Staat* (1994) p. 133 at p. 133 stating: 'die Vermittlung demokratischer Legitimation durch das Europäische Parlament … ausschließe'.

[137]Anagnostaras, *supra* n. 124, p. 13; *see also* Ruffert, *supra* n. 127, p. 280.

https://doi.org/10.1017/S1574019625100862 Published online by Cambridge University Press

argued that the majority opinion 'signals a retreat from the substance of ultra vires review', which he cannot join.[138] For non-German readers, it is noteworthy that dissenting opinions are the exception at the Court.[139]

The Second Senate now consists of judges König, Maidowski, Langenfeld, Wallrabenstein, Fetzer, Offenloch, Frank, and Wöckel.[140] For König, Maidowski, Langenfeld, and Wallrabenstein, it can be deduced from their previous work that they have generally a more open sentiment when it comes to EU law.

König, vice president of the Court, wrote her habilitation on the transfer of competences in the European integration process.[141] A review of her work noted that she 'advocates for an open system that allows Germany to continue actively participating in the integration process'. The reviewer also summarised that '[f]or democracy in Europe, there is the possibility of expanding the rights of the European Parliament and recognizing a community of political will and values instead of a concept of democracy focused on a national people'.[142] This reflects a theoretical understanding different from that of the Court at that time.

Together with König, Langenfeld and Maidowski wrote a dissenting opinion in a case concerning the establishment of a Unified Patent Court. These three are the only judges from that case who remain on the Court today, and their dissent reflected a more integration-friendly stance than the majority. In that decision, the majority introduced a new form of constitutional review (the so called *formelle Übertragungskontrolle*), which examines whether the formal requirements for transferring sovereign powers to the EU, such as the two-thirds majority, have been properly met. If not, the transfer is deemed invalid, and any EU act based on it 'constitute[s] an ultra vires act and violate[s] the principle of the sovereignty of the people'.[143]

The dissenting judges warned that granting individuals the right to challenge integration steps on procedural grounds 'could, if not prevent, at least significantly delay further steps towards deeper integration'.[144] While Giegerich also criticised this dissenting opinion, he noted that '[i]ts efforts to limit the role of the [Court]

[138]Dissenting opinion by judge Müller to *NextGenerationEU* decision, para. 1.

[139]M.K. Klatt, *Das Sondervotum beim Bundesverfassungsgericht* (Mohr Siebeck 2023) p. 96-105.

[140]Dr Fetzer, Mr Offenloch, Dr Frank, and Dr Wöckel started their term in 2023.

[141]D. König, *Die Übertragung von Hoheitsrechten im Rahmen des europäischen Integrationsprozesses - Anwendungsbereich und Schranken des Art. 23 des Grundgesetzes* (Duncker & Humblot 2000).

[142]Author's translation of M. Zuleeg, 'Review of Die Übertragung von Hoheitsrechten im Rahmen des europäischen Integrationsprozesses by Doris König', 56 *JuristenZeitung* (2001) p. 563 at p. 563. This refers to König, *supra* n. 141, p. 591 ff.

[143]BVerfG 13 February 2020, 2 BvR 739/17, *Unified Patent Court* decision, para. 133.

[144]Dissenting opinion by judges König, Langenfeld and Maidowski to the *Unified Patent Court* decision, para. 20.

https://doi.org/10.1017/S1574019625100862 Published online by Cambridge University Press

as a constraining factor in the European integration process are commendable'.[145] Hence, this dissenting opinion can be seen as reflecting a more EU-friendly stance. The more recent addition to the Court, Wallrabenstein, stated in an interview after her election that, from a purely political standpoint, she sees herself as a European.[146]

After Voßkuhle left the Court, observers speculated that the majority within the Senate on EU integration matters might shift.[147] Recent rulings suggest a more EU-friendly majority in the Second Senate. Whether this will endure depends on the judges who succeeded König and Maidowski, whose terms ended in 2025. After an unusually publicly contested appointment process,[148] Emmenegger and Kaufhold were elected by the Bundestag in late September 2025 and took office in October.[149]

External dynamics: criticism and integration

This recomposition is only one potential factor. The observed changes in the ruling might not originate from internal dynamics but from external ones. As the Court does not operate in isolation, it is reasonable to expect that it would respond to criticism of its past decisions, consider the ongoing process of EU integration, and be aware of the broader effects of its rulings.

As discussed above, the Court's decisions on thresholds for European Parliament elections have faced criticism. The Court's rulings on the *ultra vires* and identity review have received EU-wide attention, and also praise, which the Court probably did not aim for. The Polish PiS and the Hungarian government welcomed the *PSPP* ruling.[150] In addition, scholars scolded the Court for its 'undiplomatic language' failing 'to engage in constructive dialogue with the EU Courts',[151] with some even suggesting that these rulings might fuel concerns of

[145] T. Giegerich, 'BVerfG verzögert europäische Patentreform', 31 *Europäische Zeitschrift für Wirtschaftsrecht* (2020) p. 560 at p. 562.

[146] K. Schuller, 'Bundesverfassungsgericht – New Kids in Karlsruhe', *Frankfurter Allgemeine Zeitung*, 21 July 2020, https://www.faz.net/aktuell/politik/inland/bundesverfassungsgericht-new-kids-in-karlsruhe-16824393.html, visited 18 October 2025.

[147] Ibid.

[148] The way the debate was conducted even prompted many scholars to sign an open letter: 'Stellungnahme zur Causa "Frauke Brosius-Gersdorf"', *Verfassungsblog*, 14 July 2025, https://verfassungsblog.de/stellungnahme-zur-causa-frauke-brosius-gersdorf/, visited 18 October 2025.

[149] S. Ködel, 'Bundestag wählt drei neue Richter für das Bundesverfassungsgericht', *Die Zeit*, 25 September 2025, https://www.zeit.de/politik/deutschland/2025-09/drei-richterinnen-und-richter-fuer-bundesverfassungsgericht-bestaetigt, visited 18 October 2025.

[150] Z. Wanat and L. Bayer, 'EU Top Court's Authority Challenged by Poland and Hungary', *Politi*co, 13 May 2020, https://www.politico.eu/article/ecj-authority-challenged-by-poland-and-hungary/, visited 18 October 2025.

[151] Basedow et al., *supra* n. 126, at p. 190.

https://doi.org/10.1017/S1574019625100862 Published online by Cambridge University Press

German legal hegemony.[152] The European Commission even initiated an infringement proceeding in response to the *PSPP* ruling.

Several commentators considered that in the following *NextGenerationEU* decision, where the Court found that the *NextGenerationEU* programme was neither *ultra vires* nor a violation of German constitutional identity, the Court sought to avoid the complications that arose from the *PSPP* judgment.[153] In this light, the changing tone towards EU democracy might be a response to this criticism and potential consequences for Germany rather than a change of heart of the Court. The 2024 ruling may reflect a continuation of this cautious strategy.

If the Court had decided differently, it would have blocked the entry into force of rules agreed upon unanimously by the Council, supported by an absolute majority within the European Parliament, and approved by 25 out of 27 member states.[154] Overturning a decision with such broad support would have isolated Germany alongside Spain on this issue and positioned the Court as a constraining factor in the integration process.

A turning point?

Given the context, the decision can be seen both as a pragmatic ruling and as a turning point, driven by a new majority within the Second Senate. While only time will tell, the reasoning behind the decision, in my view, cannot be explained solely by legal pragmatism. If the primary goal was simply to approve the 2% threshold and avoid another infringement proceeding, the Court could have offered a different reasoning. The same outcome could have been achieved by merely emphasising the legal standard of review. The Court could have maintained its state-centred approach, continued to highlight the weaknesses of the European Parliament, and avoided relying on the responsibility for integration. For example, Giegerich already held after the 2014 decision that a threshold based on EU law should be valid.[155] Thus, adhering to the same approach as in the past would have been possible without changing the result.

[152] *See* S. Cassese's critique on how these rulings might represent a 'German dog leash' on European institutions, discussed in A. von Bogdandy, 'German Legal Hegemony?', *Verfassungsblog*, 5 October 2020, https://verfassungsblog.de/german-legal-hegemony/, visited 18 October 2025.

[153] Anagnostaras, *supra* n. 124, p. 18; Hilpold, *supra* n. 127, p. 174, 175.

[154] Anagnostaras, *supra* n. 124, p. 13 outlined that in the *NextGenerationEU* case, it was practically impossible for the Court to rule differently.

[155] T. Giegerich, 'Bringt das EU-Recht den Europawahlen in Deutschland die 5%-Klausel zurück?', *Verfassungsblog*, 7 June 2018, https://verfassungsblog.de/bringt-das-eu-recht-den-europawahlen-in-deutschland-die-5-klausel-zurueck/, visited 18 October 2025.

The Court and the EU: becoming friends?

This article demonstrates that the Court's decision on the 2% threshold, though seemingly procedural, marks a shift in its approach to EU democracy. By moving away from a state-centred approach to democratic legitimacy and embracing the dual legitimation structure of the Lisbon Treaty, the Court now acknowledges the European Parliament as a fully legitimate component of the Union's democratic structure. This marks a departure from previous rulings that tended to marginalise the European Parliament.

Overall, this decision can be understood as part of an increasingly EU-friendly stance of the Court after the *PSPP* ruling, driven by a new majority in the Second Senate. While the Court maintains its legal standards for *ultra vires* and identity reviews, its interpretation of established doctrines such as the responsibility for integration and the application of standards has become more open to EU integration, continuing the trajectory set by the *NextGenerationEU* decision.

Although this shift could be viewed as pragmatic, the change in reasoning suggests a deeper shift in the Court's perspective on EU law. Future decisions, particularly those involving upcoming electoral reforms,[156] including proposals such as transnational lists, a higher threshold, and gender balance will likely clarify whether this EU-friendly approach will continue to shape the Court's jurisprudence.

Acknowledgements. For their invaluable suggestions and comments, I thank the participants of the *Dienstagsrunde*, in particular Armin von Bogdandy, Philipp Sauter, and Laurids Hempel. I further thank the reviewers and editors for their constructive comments. All remaining errors are my own.

Funding Statement. Open access funding provided by Max Planck Society.

Andreas Knecht is a Research Fellow and PhD candidate at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg.

[156] European Parliament, legislative resolution on the proposal for a Council Regulation on the election of the members of the European Parliament by direct universal suffrage, 3 May 2022, 2020/2220(INL), O.J. 2022 C 465, 171.

https://doi.org/10.1017/S1574019625100862 Published online by Cambridge University Press