

Electoral thresholds in European elections Developments in Germany

SUMMARY

The procedure for elections to the European Parliament (EP) features only a limited set of principles common to all Member States (MS). There is no 'harmonisation' of electoral thresholds, but MS may establish thresholds of no more than 5%.

In November 2012, the European Parliament adopted a resolution *inter alia* calling on MS to establish electoral thresholds, to ensure Parliament is able to function effectively.

In Germany, in 2013 the threshold applicable to European elections was reduced from 5% to 3%. The German Constitutional Court had declared the previous electoral threshold unconstitutional. It argued that the functions of the EP – and in particular the fact that it does not need to sustain an EU government by means of stable majorities – do not justify the restriction of the principles of equal suffrage and of equal opportunities for political parties.

This 3% threshold was also challenged before the German Constitutional Court. It has now declared this unconstitutional too so that no electoral threshold will apply to the 2014 European elections in Germany. The Court refused the argument that the political link between Parliament and Commission to be established with the election of the Commission President after the European election will result in stronger government-parliament dynamics and in a competition between government and opposition parties. It pointed in this regard to the uncertainty of the agreement to be achieved with the Member States.

Calls have been voiced to establish a 'European' electoral threshold, taking into account the participation of different national parties within European political groups, to avoid further fragmentation of Parliament.

This briefing updates the version published in July 2013, to take account of the February 2014 judgment of the Constitutional Court.



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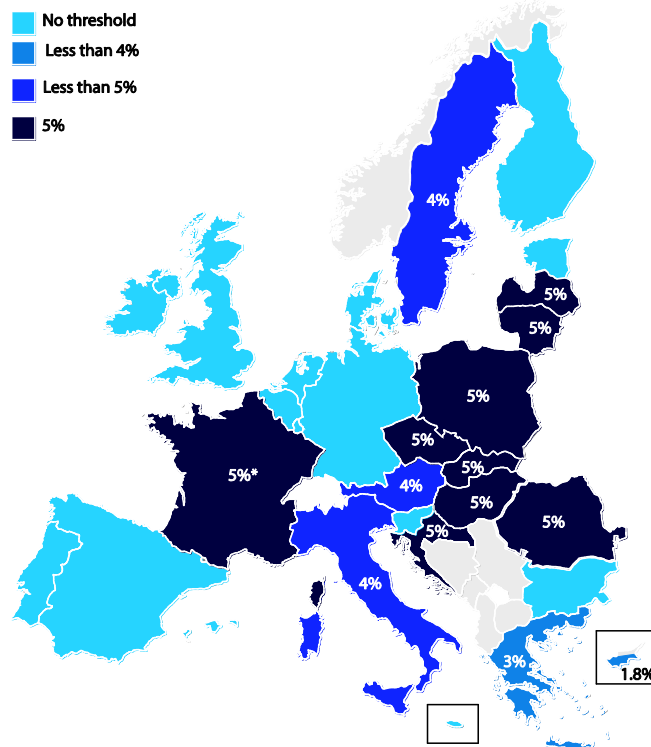
Thresholds in European elections

Diverging national rules

Despite the possibility, under [Article 223\(1\) TFEU](#), of introducing a uniform electoral procedure, elections to the EP remain to a great extent governed by national rules. EU law establishes only some basic common principles. These include proportional representation, arrangements for voting and standing as candidates by EU citizens in an MS other than that of their nationality, double candidacies, etc. ([1976 Direct Elections Act](#) as amended in 2002, [Directive 93/109/EC](#) and [Directive 2013/1/EU](#)).

According to the 1976 Act, MS may (but are not obliged to) set a minimum threshold for the allocation of seats, which may not exceed 5 per cent of votes cast at national level (Article 3). Of the 28 MS,¹ 15 have established an [electoral threshold](#) for the allocations of seats in the EP. The thresholds mostly vary between 3% and 5%.

Figure 1 - MS electoral thresholds for EP elections



* For each constituency

Data source: Instituto Europeo de Derecho, 2010.

For many MS, formal electoral thresholds in the European elections are irrelevant due to their limited number of seats in the EP. In practice, in those MS, to be allocated a seat, party lists often need to achieve an even higher percentage of the votes cast than the formal threshold ("natural threshold"). Conversely, electoral thresholds are more significant in MS with higher numbers of seats in Parliament.

Electoral thresholds are [said](#) to improve the functioning of elected assemblies by facilitating the formation of stable majorities. Moreover, limiting the number of political actors enables citizens to better understand the positions of the political parties represented in parliament, and thus make a more informed choice when voting.

The European Parliament's position

In its [resolution of 22 November 2012](#), the EP called on MS to introduce in their electoral laws appropriate and proportionate minimum thresholds for the European elections, in order to "safeguard the functionality of Parliament". The resolution appeals to the need for "reliable majorities in Parliament for the stability of the Union's legislative procedures". It invokes the changing relationship between Parliament and the Commission, due to the new modalities for electing the Commission President introduced by the Lisbon Treaty ([Article 17\(7\) TFEU](#)).

The 2011 judgment of the Bundesverfassungsgericht

The judgment

The Bundesverfassungsgericht (BVerfG), Germany's Constitutional Court, examined the lawfulness of the 2009 European elections in Germany. It [held](#), in 2011, that the 5% electoral threshold established by the German [European Elections Act](#) (Art. 2(7)) is in breach of the constitutional principles of equal suffrage and equal opportunities for the political parties, and declared the threshold void.

According to the Court, the **principle of equal suffrage** requires *inter alia* that every vote has the same influence on the composition of a representative body. Conversely, votes cast for political parties not reaching the threshold are unsuccessful. The Court stressed that, as a consequence, in the 2009 European elections, 10% of the votes cast in Germany (2.8 million) remained unconsidered.

The **equal opportunities principle** means that political parties that have received votes also participate in the allocation of parliamentary seats. Seven German political parties could not participate in the allocation of seats in the 2009 European elections due to the 5% threshold.

The Court held that electoral thresholds can indeed be justified by the need for **operability** of a parliament. However, in the view of the Court, the entry of more parties to the EP would not jeopardise its functioning and stability. The Court noted that more than 160 national political parties are represented in the EP, integrated to a great extent in Parliament's political groups. The **political groups** have, according to the Court, often integrated new political parties, despite the broad spectrum of political views among them. Moreover, the Court stated that the EP political groups have proved their ability to reach political agreements and thus also majority decisions, so that it does not expect the entry of more political parties into the EP to obstruct the stability of the political process.

In a judgment of 1979, the Court had approved the 5% threshold for the European elections as necessary to avoid any excessive party fragmentation in the EP preventing MEPs from reaching majority agreements. Some commentators criticised the Court for not clarifying the change in circumstances which led to the 2011 decision.⁵

The Court also pointed out that the EP does not – distinct from the Bundestag – elect a government. Nor does the European Commission depend on the support of a stable parliamentary majority. In the Court's view, the fact that within the ordinary legislative procedure a legislative act can be adopted in second reading even if Parliament has not taken a decision on Council's first-reading position (Art. 294(7)(a) TFEU) shows that legislating does not necessarily depend on Parliament's majority-supported approval.

The Court rejected the applicant's claim to re-allocate the 99 German seats in the EP as resulting from the 2009 European elections or to repeat the elections in order not to disrupt the work of Parliament.

Reactions

Many academics² and political actors welcomed the Court's judgment for its strengthening of the democratic principle, by defending an "[arithmetic electoral equality](#)" and by fostering political competition. Some argued that small parties will be able to shape their political profile through their representatives in the EP, and might then have the chance to enter the political stage in German federal or state elections.³

The judgment, adopted by a slim five to three majority of the justices, has been widely criticised however. It has been argued that the Court disregarded the EP's increasing political responsibility, while accepting its possible inoperability.⁴ Some argued that MS with a large number of seats should contribute to avoiding Parliament's fragmentation, and pointed to the fact that most of the bigger MS have established a threshold. In this context many suggest that abolishing the threshold in Germany could be followed in other MS.

Scholars have also stressed that the EP, with its large number of MEPs, different cultures, nationalities and political ideologies, needs to avoid further fragmentation. This is to retain the ability to achieve rapidly the majorities required under the ordinary legislative procedure.⁶

The 2013 European Elections Act

On 13 June 2013, the Bundestag [adopted](#) a modification to the European Elections Act to comply with the 2011 judgment of the Bundesverfassungsgericht. The [draft Act](#) was submitted by a large majority of the groups in the Bundestag. The new [Act](#) lowered the previous 5% threshold to 3%. [Some](#) argued however that in its 2011 judgment the Court opposed any thresholds in the European elections. In this case the 3% threshold would be unconstitutional too.

Conversely, the supporters of the new Act submitted that circumstances have changed since the 2011 judgment, and point to the [EP resolution](#) of 22 November 2012 where Parliament pleads for the need to ensure its functionality by means of electoral thresholds.

[Experts](#) also cite the new linkage between Parliament and the Commission, making Parliament's operability even more important. They point here to the new modalities for the election of the Commission President, applying for the first time in the 2014 elections. The Lisbon Treaty provides that the EP elects the Commission President, based on a proposal from the European Council taking into account the elections to the EP ([Article 17\(7\) TEU](#)).

Moreover, in its [resolution](#) of 22 November 2012, the EP called on the European political parties to [nominate candidates](#) for the Commission Presidency. This call, accompanied by more detailed arrangements, was repeated in a second [resolution](#) adopted on 4 July 2013.

These developments are seen by [commentators](#) as proof of the stronger politicisation of an increasingly antagonistic relationship between Parliament and Commission.

Before the Act could be signed into law by the German Federal President, a [complaint](#) was lodged against it before the Constitutional Court. A total of 19 political parties and associations and four private persons challenged the 3% threshold before the Court.

No threshold after the 2014 ruling

The judgment

On 26 February 2014, the BVerfG [declared](#), again by a 5 to 2 majority, the 3% threshold unconstitutional. It largely repeated the reasoning of its 2011 verdict and refused to acknowledge that there have been factual or legal changes since then.

In particular the Court refused to assess as a new circumstance the need of the EP to build stable majorities differently than in 2011 due to the political link to be established with the European Commission after the election of the Commission President. The Court affirmed that this new balance in powers is still merely the aspiration of the European Parliament and concluded that there is no clarity on whether the Member States will agree to proceed according to Parliament's resolution, i.e. to propose as a candidate for the Commission Presidency one of the candidates nominated by the European political parties.

The Court argued that the "push for democratisation" sought by establishing a political link between Parliament and Commission is in fact not called into question by prohibiting electoral thresholds. Instead this would contribute to the democratic process by facilitating the participation of small political parties, which might make notable contributions to the restructuring of the EU architecture.

In this context, the Court rejected the argument that the new Treaty arrangements for the election of the President of the European Commission, as well as the nomination of candidates by the European political parties will, whilst leading to greater politicisation of the EU decision-making process, make it more difficult to form the necessary majority by strengthening the divisions between different political groups within the Parliament. According to the Court, it cannot be ruled out that in order to elect the Commission President, the Parliament's two largest political groups will have to reach an agreement which might even deepen their cooperation. Moreover, stronger antagonism among the political ideologies in Parliament could, according to the Court, result in greater internal cohesion in the political groups.

The Court confirmed that it does not regard as proven that abolishing the electoral threshold would lead to the entry of many small parties into the EP, and eventually to its fragmentation and inoperability. It admitted that, at the 2009 European election, without any threshold a further seven German political parties, on top of the six which did gain seats, would have been represented in the European Parliament. On the other hand, according to the Court, greater political competition could lead in future elections to voters voting more strategically, thus avoiding more parties being represented in the Parliament.

The Court clarified that a threshold might be justified in the future if circumstances changed so that a stable parliamentary majority is necessary to elect and sustain a European government, and an impairment of Parliament's functionality is foreseeable.

Dissenting opinion

Justice Müller criticised, in his dissenting opinion, the BVerfG accepting the risk of an impairment of Parliament's functioning through the entry of a large number of small parties. He argued that the EP is a Parliament *sui generis* with certain differences to national parliaments, particularly as regards the need to build stable majorities. However, these differences would not justify, according to him, a different assessment of the need for effective functioning. He also pointed to the fact that almost all Member States have either formally established an electoral threshold or have a "natural" (*de facto*) threshold for the distribution of seats.

Proposals for a European electoral threshold

It has been proposed to 'harmonise' MS' electoral laws regarding electoral thresholds in European elections. [Studies](#) emphasise however the differences in constitutional and electoral traditions of the MS, which make agreement on many elements of the electoral procedure difficult.

In view of the diverging national electoral rules on thresholds, some propose an EU-wide threshold. It envisages that only political parties that receive 3% of the votes in at least a quarter of MS (through their affiliate parties) should be allocated seats in Parliament. This proposal draws on the requirements to be fulfilled before [European parties](#) qualify for funding.⁷

Another [approach](#) discussed is a threshold at national level combined with an 'opening clause' at EU level. This means that a political party can overcome a national threshold if a party of the same European political family has already passed the threshold in another MS. The supporters of this idea argue that in this way the fragmentation of the EP into too many groups would be avoided while the integrating effect of the European elections would be strengthened.⁸

Further reading

[The European elections: EU legislation, national provisions and civic participation](#) / European Parliament Policy Department C Citizens' rights and constitutional affairs, PE 493.047, Brussels: European Parliament, 2014.

[Electoral Systems: a comparative introduction](#) / DM Farell, 2011.

Endnotes

¹ In Croatia, a 5% threshold has been [established](#) for elections to the European Parliament.

² See e.g. [Wahlrechtliche Sperrklauseln und die Aufgabe einer Volksvertretung](#) / M Morlok and H Kühn, JuS 2012, p. 385; [Was aus dem Urteil des Bundesverfassungsgerichts zum 5-Prozent-Klausel bei Europawahlen folgt](#) / H von Arnim, DÖV 2012, p. 224.

³ [Verfassungswidrigkeit der Fünf-Prozent-Sperrklausel im Europawahlrecht](#) / S Rossner, NVwZ 2012, p. 22.

⁴ See e.g. dissenting opinion of justices Di Fabio and Mellinshof, [Judgment](#) of the Bundesverfassungsgericht of 9.11.2011.

⁵ Das Bundesverfassungsgericht und die Fünf-Prozent-Klausel bei der Wahl zum Europäischen Parlament / C Schöneberger, Juristenzeitung (JZ) 2012, p. 80.

⁶ [Demokratie und Wahlen im europäischen Verbund der Parlamente - zum Urteil des BVerfG über Sperrklauseln bei Wahlen zum Europäischen Parlament](#) / B Grszesick, EuR 47 (2012), p. 666.

⁷ [What if Europe held an election and no one cared?](#) / D Schleicher, Harvard International Law Journal Vol. 52, 2011, pp. 109, 116.

⁸ The Bündnis 90/Die Grünen group in the Bundestag took up this proposal and suggested for the German European Elections Act that political parties declare before the elections whether they belong to a European political party. The proposal was however rejected.

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