Germany's slow implementation of the 2018 EU electoral reform and unease over electoral thresholds

On 15 June and 7 July 2023, the German Federal Parliament approved the 2018 reform of the EU rules on elections to the European Parliament, and that approval is now awaiting promulgation before it takes effect. Enacting the reform requires the approval of all EU Member States. All but two – Cyprus and Spain – have given their approval. Cyprus is preparing to finalise its approval procedure, but Spain has not yet launched its. Once all Member States have given their approval and the EU reform law becomes binding, those with constituencies of more than 35 seats must set therein a threshold of 2-5 % – but only as of the second set of European elections after the law has entered into force. The German Federal Parliament’s lower house (Bundestag) rejected a proposal to set the threshold at 2 %, raising questions about Germany’s ultimate choice.

State of play
The currently applicable European Electoral Act of 1976, as amended in 2002 (in force 2004), lays down common rules for the election of the Members of the European Parliament, yet grants Member States latitude in implementation. Among other things, it stipulates that elections must be free and secret, and limits electoral thresholds to no more than 5 %. Pending Member States’ approval in line with their constitutional rules (ratification), the 2018 EU electoral reform (Council Decision 2018/994) would set a minimum threshold of 2-5 % for constituencies of more than 35 seats; impose a deadline for submitting candidacies of at least 3 weeks prior to elections; invite Member States to provide for modern and distance voting options; and invite Member States to allow contenders to denote their European political affiliation through a logo on ballot papers. Overall, the reform seeks to further ‘Europeanise’ elections, boost voter turnout and ensure the functioning of the European Parliament.

In Germany, the ratification process rekindled political and legal debates over the constitutionality of thresholds and the need for a two-thirds majority for approving an electoral reform mandating a threshold (see discussion summary). Ultimately, both houses voted in favour with a two-thirds majority, thereby fulfilling the more onerous requirements related to modifying EU Treaty rules and similar regulations in a way that would amend or supplement the German Constitution, or empower the EU to do so (see definition-related controversy). Back in October 2022, the Christian Democratic Union (CDU) tabled a proposal for an implementation act with a minimum threshold of 2 %, which all other parties in the Bundestag rejected when ratifying the EU electoral reform. Case law and academic opinions suggest that, in principle, setting the minimum threshold at 2 % as of the second set of European Parliament elections following the EU reform’s entry into force would ensure maximum legal certainty. This (contentious) conclusion derives from reading German case law on self-imposed electoral thresholds in consideration of the primacy of EU law and Germany’s duty to participate in the development of the EU (‘duty to integrate’).

Limits on self-imposed electoral thresholds absent an EU mandate
In two landmark decisions of 2011 and 2014, the German Federal Constitutional Court (GFCC) found the self-imposed electoral thresholds of 5 % and 3 % for European Parliament elections – neither being then binding under EU law – unconstitutional, for violating the principles of equal suffrage and equal opportunities for political parties. The former requires that, in general, the vote of each person entitled to vote has the same weight and legal chance of success (Article 3(1) of the Basic Law). The latter requires that parties or groups of voters and their candidates have the same opportunities in the electoral process and distribution of seats (Articles 21(1) and 3(1) of the Basic Law).

The GFCC argued that self-imposed thresholds interfere with both principles and therefore require special justification, such as maintaining the proper functioning of the European Parliament. Theoretically, in the absence of thresholds, the entry of a large number of small parties and voters’ associations in the European Parliament could seriously impair its ability to act and function. However, supporters of the threshold were unable to show convincingly that Parliament’s functioning was at serious risk. The GFCC, on the contrary, held that political groups helped maintain Parliament’s functioning by integrating additional parties and
streamlining political views. Moreover, it considered that parties cooperated and reached decisions within a reasonable time. It observed that, unlike the Bundestag, the European Parliament does not elect a government that depends on the Parliament’s continuous support. Additionally, the GFCC found no common or firm belief among EU legislators that thresholds were necessary. It included the caveat that changed factual circumstances may justify self-imposing a threshold, even if not mandated by EU law.

**Limits on implementing the 2018 threshold range as mandated by EU law**

Using a valid EU legal basis for the implementation act

Considering the GFCC’s critical stance on thresholds, a threshold that can withstand legal challenges would preferably have a legal basis in EU law. When EU law sets a compulsory threshold, this, in principle, takes precedence over the German constitutional norms, and limits the GFCC’s power of review given the primacy of EU law and Germany's duty to integrate. However, grounds for legal challenges against the German ratification remain. Despite the primacy of EU law, the GFCC reserved itself the right to review for possible violations of: i) the principle of conferral; ii) the indispensable principles covered by the eternity clause; and iii) German fundamental rights, should the EU cease to safeguard an essentially equivalent level of protection. Most experts and researchers consider that the prospects for such legal challenges are slim.

At European and EU level, qualified applicants could argue that there is a violation of direct universal suffrage and electoral rights as laid down in Article 39(2) of the EU Charter of Fundamental Rights (CFR) in conjunction with Article 14 Treaty on European Union and in Article 3 of Protocol No 1 to the European Convention on Human Rights. Patrick Breyer MEP asked two parliamentary questions seeking the view of the Commission and the Council on the compatibility of the 2018 Council Decision with the CFR. A first legal assessment casts serious doubts on the prospects of such challenges, but the question remains open.

Complying with strict constitutional norms where the EU grants latitude in implementation

In principle, the German legislator is obliged to comply with EU law and set aside any conflicting national provisions. Where EU law grants Germany space for manoeuvre, the constitutional norms are not relaxed and the legislator must exercise its margin of appreciation in compliance with these norms. Since Council Decision 2018/994 only prescribes the upper and lower bounds of the threshold range, the German legislator must exercise its remaining discretion in accordance with strict constitutional norms. The GFCC only ruled on a self-imposed threshold as low as 3% and explicitly mentioned that the factual circumstances linked to its judgments may change. Proponents of a threshold exceeding 2% could support their argument with a shift in circumstances, especially by claiming that there has been an increase in fragmentation over the period between 2014 and 2023 (considering the increase in the number of parties represented in the European Parliament: 205 versus ‘more than 160’ and in the number of non-affiliated MEPs: 47 versus 32). Additionally, in 2015 the European Parliament itself considered electoral thresholds ‘to be important for safeguarding the functioning of the European Parliament’, and voted in favour of Council Decision 2018/994. However, seen on their own, these factors are not sufficient to substantiate a loss of functionality and may not be able to justify a threshold above 2%. Group affiliations fluctuate substantially over the European Parliament’s term and MEPs often cooperate with each other despite being unaffiliated or affiliated to a small party. The minimum threshold of 2% may well suffice to promote integration and cooperation. Ultimately, what the legislator will decide and what the prospects of potential legal action are is difficult to predict, because the 2014 GFCC judgment was adopted by a close vote of 5:3 and because six of the eight judges who adopted it have since left. Arguably, this rationale also applies to the temporal application of a threshold. Since the EU electoral reform envisages that a threshold is mandatory as of the second set of elections to the European Parliament after its entry into force, self-imposing a threshold or authorising one at an earlier date may be unconstitutional as criticised with regard to the CDU proposal.

**Outlook: 2022 Parliament proposal for a minimum threshold of 3.5%**

In May 2022, the European Parliament narrowly adopted a proposal for a new electoral law with a threshold of at least 3.5% for constituencies of more than 60 seats. In the Council, preliminary comments and a March 2023 survey revealed that Member States are critical of the proposal, including the 3.5% threshold.