

## CASE NOTE: GERMANY

CASE CITATION:

**2 BvC 3/07, 2 BvC 4/07**

NAME AND LEVEL OF COURT:

**Bundesverfassungsgericht Second Senate  
(Federal Constitutional Court of Germany)**

DATE OF DECISION: **3 March 2009**

MEMBERS OF THE COURT: **Voßkuhle Vice President, and judges Broß, Osterloh, Di Fabio, Mellinshoff, Lübke-Wolff, Gerhardt, Landau**

The judgment is available in German at:  
[http://www.bundesverfassungsgericht.de/entscheidungen/cs20090303\\_2bvco00307.html](http://www.bundesverfassungsgericht.de/entscheidungen/cs20090303_2bvco00307.html)

A press release in English, Press release no. 19/2009 of 3 March 2009, is available at <http://www.bverfg.de/en/press/bvg09-019en.html>

### *Unconstitutional use of electronic voting machines*

#### **Facts**

The Federal Constitutional Court of Germany gave a judgment on 3 March 2009 which defines the primary requirements relating to electronic voting. The court rendered its judgment on two complaints concerning the scrutiny of the 16th German *Bundestag* election of 2005. These complaints were directed against the use of computer-controlled voting machines within the election at hand. The use of these machines is permitted under German law by Sec. 35 of the Federal Electoral Act (*Bundeswahlgesetz – BWG*). The court decided that the present function of the voting machines and their use violates the principle of the public nature of elections (Article 38 in conjunction with Article 20.1 and 20.2 of the Basic Law of the Federal Republic of Germany (*Grundgesetz – GG*), which prescribes that all essential steps of an election are subject to the possibility of public scrutiny unless other constitutional interests justify an exception.

#### **Commentary**

The court decided that due to the wide-reaching effect of possible errors of the voting machines or of deliberate electoral fraud, special precautions are necessary in order to safeguard the principle of the public nature of elections. For this reason, voting machines have to enable citizens to examine the essential steps of the voting procedure and of the determination of the result in a reliable way and without

any special IT knowledge. This decision means that this requirement must also be met by any electronic voting system, irrespective of the mode of use (with or without voting machines) in order to be in accordance with the Basic Law.

Furthermore, in the case at hand, the court found that the calculation process that was carried out in the voting machines, and the fact that the voting results were noted down merely by means of a summarising printout, did not correspond to the principle of the public nature of elections. According to the judgment of this Constitutional Court decision, electronic voting machines should enable a reliable examination and provide an insight into the accuracy of the voting result. An example to resolve such a problem would for an electronic voting machine, for instance, in which the votes are recorded in more than one way, other than the electronic storage of the machine, thus enabling a complementary examination by the voter, the electoral bodies or the general public. It goes without saying that printing the ballots is only one possible way of implementing this prerequisite.

The court also pointed out that the right of citizens to examine the voting procedure and the voting result cannot be replaced by a public authority which examines sample machines in the context of their engineering type and issues a license permitting their use for elections. The trust in the accuracy of an appraisal and an auditing procedure of a public authority cannot be a substitute for the trust in the voting procedure. The court did not go into the question of how a trust mechanism on complex IT based procedures can be generated.

The court concluded that the Federal Voting Machines Ordinance ((*Bundeswahlgeräteverordnung - BWahlGV*) vom 3. September 1975 (*Bundesgesetzblatt I Seite 2459*) (in der Fassung der Verordnung zur Änderung der *Bundeswahlgeräteverordnung* und der *Europawahlordnung* vom 20. April 1999 (*Bundesgesetzblatt I Seite 749*)) (Federal Voting Machines Ordinance - *BWahlGV*) dated September 3,

1975 (Federal Law Gazette I page 2459) as amended by Council Regulation amending Regulation Equipment Federal Election and the European Regulations from April 20, 1999 (Federal Law Gazette I, page 749)) is unconstitutional, because it does not ensure that only voting machines which meet the above mentioned constitutional requirements are permitted and used. However, because of the lack of any indications that the voting machines malfunctioned or could have been manipulated and in order to protect the continued existence of the elected parliament, the court decided that this decision does not result in the dissolution of the Bundestag.

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*Zoi Opitz-Talidou previously worked at the institute headed by Professor Dr. Roßnagel for the project 'voteremote'. The aim of the project was to develop a legal framework for secure remote online election procedures. Dr. Opitz-Talidou now works as a legal administrator at the international Law firm Nörr Stiefhofer Lutz in Munich.*

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