Common Market Law Review **46**: 1023–1033, 2009.

EDITORIAL COMMENTS

Karlsruhe has spoken: "Yes" to the Lisbon Treaty, but ...

Good news from Karlsruhe? On 30 June 2009, the *Bundesverfassungsgericht* (*BVerfG*) handed down its judgment – which has been long and eagerly awaited – concerning the conformity of the Lisbon Treaty[1] with the German Constitution (*Grundgesetz*; "GG"; Basic Law).[2] The Court has, in principle, given a "green light" for the ratification of the Treaty by the Federal Republic of Germany; however, it set forth as a prerequisite that the accompanying Act Extending and Strengthening the Rights of the *Bundestag* and *Bundesrat* in European Union Matters must be fundamentally revamped so as to strengthen the role of the legislature with regard to the simplified Treaty revision procedure, the general and special "bridging clauses" (authorizing the Council to move from voting by unanimity to qualified majority), and some other important issues. It is to be expected that this judgment will enhance the readiness of the competent authorities of the Czech Republic and of Poland to finalize the ratification process as well. With a hopefully positive Irish vote in October 2009, the way may then be finally paved for the Lisbon Treaty to enter into effect some time in 2010. The "green light" from Karlsruhe is certainly good news for the necessary institutional reforms provided for by the Lisbon Treaty. However, it comes at a price.

This *Editorial* is not the place to go into an in-depth analysis of the judgment[3] – which, in some parts, reads more like an academic paper. The doctrinal presentation of the arguments and the intense discussion of the theoretical underpinnings are, however, at least to some degree, due to the kind of constitutional arguments brought forward by the various complainants. The latter had pleaded, *inter alia,* that the constitutionally guaranteed right of a German citizen to vote for the *Bundestag* (Art. 38 GG) would be *de facto* undermined by the large-scale transfer of competences to the European Union, the far-reaching enablement of the European institutions to exercise powers, and the

1. Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 Dec. 2007, O.J. 2007, C 306/1; consolidated version in O.J. 2008, C 115/1; for an analysis see Dougan, "The Treaty of Lisbon 2007", 45 CML Rev. (2008), 617.

2. BVerfG, 2 BvE 2/08 of June 30, 2009, 62 NJW (2009), 2267. For an unofficial English translation see www.bundesverfassungsgericht.de. The citations in this Editorial have been taken from this translation (sometimes slightly improved).

3. The Decision will be annotated by Thym in this *Review* in a forthcoming issue.

concomitant uncertainty as to the intended integration programme. The complainants argued, moreover, that the Lisbon Treaty would lead to a *de facto* sell-out of competences, leaving the State of Germany as a mere shell, deprived of its sovereignty, with a European Union exercising its powers in an institutional setting that, on the whole, still lacks (they claim) a convincing democratic legitimization based on the principle of equality of votes and voters.

The judgment therefore needed to deal with these fundamental issues in a way that would not amount to a mere *judicial fiat* but enlighten the constitutional dialogue in Germany and within the European Union as well. Moreover, the *BVerfG* has once more taken the opportunity to explain, in the tradition of its earlier *Brunner* judgment,[4] the constitutional underpinnings of Germany's participation in European integration, the relationship between German constitutional law and European Union law, and the limits that are set by the Basic Law, in its present state, to any further transfer of competences to the Union. Last but not least, the *BVerfG* was eager to (re-)define its role *vis-à-vis* the European Court of Justice as a guardian of those State competences that have *not* yet been transferred to the European Union (and, perhaps, as a matter of German constitutional law may not be transferred at all).

The judgment

In the following, some of the fundamental issues and interesting points that are discussed in the *Lisbon* judgment will be highlighted.

1. The judgment follows the *Brunner* judgment in more than one respect.[5] Most prominently, the concept of the European Union as an association (confederation) of (sovereign) States (*Staatenverbund*) is not only stressed again (paras. 229, 233, 272, 287), but it is added that the present design of the Basic Law does not allow Germany to join a federal European State (*Bundesstaat*) (para 228); such a transition – which would amount to an irrevocable transfer

4. BVerfG 12 Oct. 1993, E 89, 155, (1994) C.M.L.R. 57 (unofficial translation). This judgment dealt with the constitutionality of the Treaty of Maastricht. See e.g. Shaw, *Law of the European Union*, 2nd ed. (Houndmills, 1996), p. 64 ("The German Challenge to European Constitutionalism"); Hartley, *The Foundations of European Community Law*, 6th ed. (OUP, 2007), pp. 244.

5. In passing, it should be mentioned that the (much criticized) reference to the "people" as basis for democratic legitimization in the *Brunner* judgment has lost its somewhat ethnic (*völkisch*) flavour in the *Lisbon* judgment, where the *BVerfG*, in headnote No. 1, states that "the peoples of their Member States, *i.e. the citizens of the states*, remain the subject of democratic legitimization." Moreover, the concept of State "sovereignty" is directly based on the notion of democratic participation of the citizens in the decision-making process of a State; at the same time, openness to integration into European and international structures as set forth by the German Basic Law *is* not regarded as contravening such a notion of sovereignty.

of sovereignty – is said to be reserved to "the directly declared will of the German people alone" (para 228), probably by setting up a new constitution.

The basic provision of the *Grundgesetz* which expressly deals with Germany's participation in the European Union (Art. 23 GG) is interpreted by the *BVerfG* as only empowering the competent bodies to take part in a European *Staatenverbund* based on a concept of conferred powers (paras. 231-233, 272). The Court emphasizes, as it did before, the right of any Member State to withdraw (also unilaterally) from the European Union as an association of States, founded on the principle of reversible self-commitment (para 233), with the Member States still being the "masters of the Treaty" (paras. 231, 235). In such an association of States, there is no room for a *Kompetenz-Kompetenz*[6] of the Union – unlike in a *Bundesstaat.* European authority is conceived as a fundamental order *derived* from the authority of the Member States (paras. 231, 232, 271). The *BVerfG* takes great pains to get this point clear (para 233), as it had done before in its *Brunner* judgment.[7]

2. The *principle of limited conferral* of competences (paras. 300-303) is not only regarded as a principle of European Union law, but also as a fundamental principle of German constitutional law: Article 23 GG is interpreted to provide a basis for neither a general and unlimited conferral of competences to the Union (paras. 328-329), nor any other kind of "blanket" empowerment (para 236).[8] To that extent, there seems to be no conflict between European Union law and German constitutional law, as long as the respective provisions of the Treaty of Lisbon are not interpreted in an extensive fashion. As a matter of German constitutional law, Union law is binding in Germany only insofar as the relevant powers are transferred to the Union. And to what extent powers may be transferred depends on an interpretation of the German Constitution: this is the basis for the *ultra vires* review by the *BVerfG* (as already announced in the *Brunner* judgment[9]): the Court stresses the point that all organs of the Union, including the European Court of Justice (para 338), must stay within the limits of the competences conferred to them.

It follows from the concept of conferred powers that the contention of an *absolute* (unrestricted) primacy of Union law has to be considered as constitutionally objectionable (para 331). Primacy as an unwritten principle of European Union law has to be understood in a more restrictive fashion on the basis of and within the limits of the powers conferred to the Union. The basis for the application of European Union law and its primacy in Germany will only lie in

6. A transfer of competence to the Union to decide on its own competence.
7. See already BVerfG E 89, 155, 189-190.
8. BVerfG E 89, 89, 155, 187.
9. BVerfG E 89, 155, 188.

the order to apply Union law contained in the Act Approving the Treaty of Lisbon (para 343). However, this is nothing really new.[10]

3. The "eternity guarantee" clause of the Basic Law (Art. 79(3) GG, read in conjunction with Art. 20(3) GG[11]), is interpreted by the *BVerfG* to mean that the "democratic principle" to which reference is made demands that the Federal Republic stays a "sovereign" State. In this context, "sovereignty" is not understood in some old-fashioned 19th century way, but conceived of in the light of principles of democratic decision making (para 223); "Sovereignty" is shorthand for democratic legitimization. The democratic principle presupposes that the State is entrusted with substantial competences, with its citizens having effective influence on important social and political issues,[12] rooted in its culture and tradition.

Accordingly, the Federal Republic is hindered from conferring competences on the Union to such an extent that the core of sovereign statehood as conceived by Article 79(3) GG is endangered. The protection of the inviolable content of the Basic Law's constitutional identity (para 240) demands that a substantial scope of action for central areas remains with the Federal Republic. The *BVerfG* argues that Germany as a Member State has "to retain sufficient space for the political formation of the economic, cultural and social circumstances of life" (para 249). The judgment gives a relatively concrete and detailed description of such core competences (paras. 253 et seq.), relating to citizenship, the monopoly of the use of force, revenue and expenditure, education and family law, social policy, and the protection of fundamental rights, including matters of criminal law and procedure. Powers to be left to the State should "include cultural issues such as the disposition of language, the shaping of circumstances concerning the family and education, the ordering of freedom of opinion, of the press and of association" (para 249).

To be sure, the Union may be (and has been) attributed competences in these fields as well (paras. 256, 259) but, as the *BVerfG* is keen to point out, the inviolable core of powers has to stay with the Federal Republic, and the extent to which competences are delegated to the Union is made dependent on the

10. See e.g. BVerfG E 89, 155, 190; BVerfG E 73, 339, 374.

11. The so-called eternity guarantee provides that structural principles of the Basic Law, such as democracy, the rule of law, the principle of the social State, the republic, the federal structure, and the very substance of fundamental rights, are not amenable to any constitutional amendments (cf. para 217 of the Decision).

12. See for a description of the present EU system Wyatt & Dashwood's *European Union Law*, 5th ed. (London, 2006), No. 4-002, at p. 82-83: "… it is a central feature of the EU system that the constituent entities of the Union retain the quality of states, in both the legal and the political senses. Thus, the continuing status of EU Members as full subjects of public international law is unquestioned; and, for their own peoples, they remain the principal focus of collective loyalty and the principal forum of democratic political activity."

application of the principle of subsidiarity, which works as a constitutionally built-in brake on the transfer of powers in these areas. Competences may be conferred in these fields to the Union, but only in a highly restrictive fashion. (Of course, how much is "too much" will be the problem …). Subsidiarity may for instance demand that the Union only addresses crossborder matters (para 251), and the *BVerfG* makes a great effort to argue this, and also why a particularly restrictive approach has to be followed in the field of criminal law and criminal procedure (paras. 355-358).

4. The "eternity guarantee" clause of the Basic Law is, moreover, attributed the meaning that Germany may become a member of a European federal State (*Bundestaat*) only under a double condition: on the one hand, elections to a European Parliament should be based on truly democratic principles, based on the equality of voting rights ("one man one vote") (para 279), and, on the other hand, the integration of Germany into a federal State requires a legitimization by the directly declared will of the German people alone (para 228). As for the existing Basic Law, it seems to be characterized by two somewhat contradictory principles: on the one hand "the principle of openness towards European law" (para 225), which grants the legislature the power to engage in a far-reaching transfer of sovereign powers to the Union (para 226), and on the other hand the non-transferable identity of the Constitution, which is not amenable to integration, with the consequence that any future conferral of powers to the Union will have to be scrutinized as to whether the substance of State powers (as described under 3.) is touched upon. The Court clearly puts up a "stop" signal: in the future, the integration progamme may not transgress the boundaries of what might constitute a European State within the meaning of international law.

5. Dealing with its own role, the *BVerfG* stresses its duty under the German Constitution to check any obviously unconstitutional conferral of powers, to review adherence to the integration programme by the European institutions (para 334),[13] and to preserve what is described as the "non-transferrable identity of the constitution" (para 235), in other words the inviolable core of sovereignty (see para 240). In the tradition of the *Brunner* judgment, the *BVerfG* underlines its constitutional obligation to carry out an *ultra vires* review (para 240) with regard to the limited conferral of competences on the basis of Article 23 GG, and it adds the notion of what may be called an *identity* review (since it concerns the inviolable core content of the Basic Law's constitutional iden-

13. The *BVerfG* (at para 334) derives its review competence from "the continuing sovereignty of the people which is anchored in the Member States and from the circumstance that the States remain the masters of the Treaties …" From this it follows "… that the Member States may not be deprived of the right to review adherence to the integration programme."

tity) as a check in order to safeguard the core of sovereignty, leaving sufficient room for essential areas to be shaped by the political process in the Federal Republic (paras. 240, 248-250).[14] The *BVerfG* is at pains to stress that as integration progresses, this "*identity* review" may become more and more important (para 240).

At the same time, the *BVerfG* underlines the German Constitution's openness towards European law (para 225), and towards the fact that independent decision making at the level of the European Union necessarily implies independent opinion-formation by the Union institutions (para 238). Notions like *effet utile*, *acquis communautaire*, and *implied powers* (para 237) have to be accepted also in a system of conferred competences, but, nevertheless, the mandatory principle of (limited) conferral is meant to set limits on any interpretation of the powers delegated to the Union in a sense which would amount to an extension of powers (para 238).

Moreover, the Basic Law's mandate for European integration (Art. 23 GG) calls for a restrictive use of the review powers by the *BVerfG*: given the threat to the uniformity of the Union's legal order that may ensue from different applicability decisions of (constitutional) courts of the Member States (para 337), the *BVerfG* will restrict its *ultra vires* review to cases in which the principle of conferred powers is "obviously" (para 240) or "evidently" (para 339) transgressed;[15] and the *identity* review will result in inapplicability of Union law only in "exceptional" cases, and "under special and narrow conditions" (para 340). Most importantly, the *BVerfG* will stick to its *Solange* jurisprudence: only where "legal protection cannot be obtained at the Union level" (para 240) will the Court apply its *ultra vires* and *identity review.* As both – the principle of limited conferral and the protection of the core identity of the Member States (para 240) – are principles enshrined in the Lisbon Treaty as well, the European Court of Justice seems to be invited to give both notions a serious meaning.

6. In a somewhat unusual manner (and possibly to avoid a "no" to the Lisbon Treaty from a majority of the members of the 2nd Senate, which was the formation which took the decision) the *BVerfG* takes the opportunity to define some guiding posts for the interpretation of some provisions of the Lisbon Treaty. Neither Article 2 TEU Lisbon nor Article 311.1 TFEU may be interpreted to provide the European Union with the competence to decide on its own com-

14. It should be mentioned that the *BVerfG* (at para 241) openly suggests the introduction of an additional procedure for such *ultra vires* review and identity review in the German procedural system. The identity review had in fact already been mentioned, but more in passing, in the *Brunner* judgment: BVerfG E 89, 155, 172.

15. An *ultra vires* case may also be present if the ECJ interprets Union competences in an extensive fashion (para 338).

petence (*Kompetenz-Kompetenz*; paras. 332, 322). The Treaty of Lisbon must be strictly and narrowly interpreted as regards competences in the field of criminal law and criminal procedure (para 358), given that both subjects are considered to belong to the core constitutional identity of the State (para 355). Some harmonization may take place (para 357), but it will need a "particular justification". It will have to be related to and restricted to the formation of an international criminal justice system for certain serious crimes, and with a European dimension, primarily concerning activities with a transborder dimension (paras. 357, 359).

With regard to Article 83(2) TFEU, which allows for what the BVErfG calls an "annex competence" for criminal law in the field of policies that have already been the object of harmonization, the judgment classifies this empowerment as "a serious extension" of the competence for the administration of criminal law, as it is of "threatening boundlessness" (paras. 361-362). This provision may only be saved *vis-à-vis* its unconstitutionality under the Basic Law if the wording (of Art. 83(2) 1st sentence TFEU) is taken *seriously*: i.e. this harmonization of criminal law must be *essential* in order to ensure the effective implementation of a Union policy.[16] Such a standard is also deemed to be applicable with regard to the existence of an (unwritten) annex competence for criminal law as already accepted by the case law of the Court of Justice.[17]

7. As a matter of German constitutional law, the judgment holds that the Act Extending and Strengthening the Rights of the *Bundestag* and the *Bundesrat* in European Matters infringes the Basic Law insofar as the participation of these two bodies in matters of European integration does not go far enough. The judgment underlines the importance of democratic legitimization in the further process of integration, and therefore calls for a strengthening of the role of the legislature (*Bundestag* and *Bundesrat* respectively) with regard to important decisions taken within the Council. The above-mentioned Act will have to be amended to guarantee this strengthened participation of the legislature. The most important features will have to be the following:

16. The *BVerfG* adds: "Only if it is demonstrably established that a serious deficit as regards enforcement actually exists and that it can only be remedied by the threat of a sanction, does this exceptional constituent element exist and may the annex competence for legislation in criminal law be deemed conferred" (para 362).

17. Case C-176/03, *Commission* v. *Council*, [2005] ECR I-7879; Case C-440/05, *Commission* v. *Council*, [2007] ECR I-9097. It is to be noted that in both judgments the ECJ – against the strong and outspoken opposition of the Member States – assumed an implicit annex competence of the Community to legislate in the field of criminal law relating to acts of environmental policy (Art. 175 EC) and sea traffic (Art. 80(2) EC).

An approving vote by the German representative in the Council with regard to amendments of the Treaty in the simplified procedure as well as amendments to the Treaties in specified cases will need an *ex ante* approval by the legislative bodies on the basis of a two-thirds majority in both chambers (Art. 23(1) 3rd sentence GG). The same applies to the bridging procedures with regard to replacing unanimity by qualified majority voting in the Council.

The reformulated Article 352 TFEU (ex Art. 308 EC), being broadly extended to (nearly) all policies defined in the Treaty, meets with heavy constitutional objections, as the provision comes close to a blanket empowerment (para 328). The provision is "saved" from a "no" to the Lisbon Treaty by requiring again that the German representative in the Council may declare formal approval only *after* an Approving Act based on Article 23 GG (as required for a Treaty amendment) has been passed by the competent legislative bodies. (paras. 328, 417).

Most strikingly, with regard to Article 43(2) TEU Lisbon, empowering missions with military means, the German representative in the Council will be regarded as obliged to deny approval to any draft decision which would violate or bypass the constitutionally prescribed necessity of parliamentary approval of any defence action (para 388). Moreover, with regard to common defence, the Federal Republic has to be regarded as constitutionally prohibited from taking part in any Treaty amendment procedure that is aimed to abolish the principle of unanimity in favour of qualified majority voting (para 391).

Some preliminary comments

1. Large parts of the judgment do not come as a surprise; they merely follow the path taken by the *Brunner* judgment in 1993. The *BVerfG* gives a clear reading of its view of European Union law as a "derived fundamental order" (para 231). With its emphasis on the *ultra vires* review as a constitutionally required task, the *BVerfG* again sends a strong message to the European institutions and the European Court of Justice to be much more vigilant on the issue of conferred competences;[18] this message is of great importance, because any extensive reading of Union competences creates the danger of bypassing

18. To give one example: In the Art. 234 EC procedure, the ECJ stresses the obligation of national courts to interpret national law in conformity with European directives without ever dealing with the underlying issue (*Vorfrage*) whether the relevant directive itself remains within the limits of competences transferred to the Union. This may, for sure, be the result of the European procedural law as it stands, but at the same time may lead to the awkward result that the ECJ may hand down numerous judgments on a Community act which, if it lacks a valid competence basis, should be regarded as void. Given the fact that as a matter of interpreting secondary Community law the *purpose* of the relevant instrument has also to be derived from its compe-

the Treaty amendment process. It is to be expected that this message will be heard by the constitutional courts of other Member States; it is to be hoped that the European Court of Justice will be more sensitive to questions of competence and subsidiarity than in the past. And as long as the *BVerfG* (and other constitutional courts) follow a *Solange* approach also in the future, the Court of Justice will remain the primarily responsible arbiter in the game.

2. As for the so-called *identity* review, the message goes to all European institutions to use their powers, conferred on the Union, in a way that leaves the Member States (or at least the Federal Republic) enough room to breathe; that is to say: actively and autonomously decide on important questions with a social, cultural and political dimension. This approach will probably meet with some approval in a number of Member States. However, it is submitted that this approach, if followed by the constitutional courts of other Member States, may uncover divergent national views as to what amounts to the identity of the relevant Member State. This might lead to competence clashes in an unforeseen dimension. It becomes all the more important that such an *identity* review should be handled with care and in a restrained fashion.

3. In more than one way, the judgment's "*yes*" to the Lisbon Treaty reads like a "yes, *but* …." The Lisbon Treaty is regarded as being in conformity with the Basic Law, *but* only if a number of provisions are read in a certain, restricted, fashion. The Treaty does not yet touch on the identity of Germany as a sovereign State, *but* the integration programme will have to respect this identity in the future. At the same time, the judgment gives the impression that a compromise between two opposing views within the deciding *Senate* had to be reached in order to deliver an unanimous judgment (at least with regard to the result). The principle of *Europarechtsfreundlichkeit*[19] of the Basic Law is set against the notion of maintaining the sovereign statehood of a constitutional State (paras. 225, 226). An "independent opinion-formation" by the institutions of the Union (para 237) – including the development of such notions as the *acquis communautaire*, the implied powers doctrine and the principle of *effet utile* – is accepted; but at the same time the constructive force of these notions may not go too far (para 238). Those parts of the judgment that deal with the core of the "constitutional identity" of the German State are far from clear as to how far this core is effectively protected against Union action. The *BVerfG* states that, given the Basic Law's openness towards European integration, there is no way to determine a certain number or type of powers that must remain in the hands of the State; the Court has therefore to admit that the conferral of competences

tence basis, it is hard to understand why and how a concrete control of the competence basis could be evaded in Art. 234 EC proceedings.

19. Translated as "openness towards European law".

may even reach "into the traditional core areas of the State's area of competence" (para 248) – with the power over currency matters already transferred to the Union. Much is left for future clarification.

4. A critical reading of the judgment may easily detect some apparent weaknesses: despite its fuzziness, the concept of an association of States as the basis of the European Union has been reinforced. The somewhat (theoretical) *a priori* antagonism between *Bundestaat* and *Staatenverbund – tertium non datur* – appears to be used as an instrument to categorize the limits of European integration. Why the European enterprise may not be classified as an organization *sui generis* – and therefore a *tertium* – remains an unanswered question.

5. As to the core of the "constitutional identity" of the Federal Republic, the judgment derives relatively concrete results from its interpretation of the "eternity guarantee" of Article 79(3) GG. However, it is hard to detect exactly *how* the Court arrives at its conclusions in its enterprise to circumscribe the "essential areas" (para 249) which have to be reserved for State action. What are the underlying constitutional principles on which the analysis is based? How may the summary of core areas in the judgment be distinguished from an *ad hoc* description that could also be developed in a different fashion?[20] The (uninitiated) reader may easily get the impression that the *BVerfG* simply sorted out those areas as a *refugium* for the constitutional identity of the German State that have not been heavily touched by Community law as yet. *Judicial fiat* with regard to the interpretation of the "eternity guarantee" clause appears to present a fundamental problem. Who guards the guardians?

6. The Court's analysis of the democratic deficit still existing within the European Union seems a bit one-sided. True, it has to be admitted that the representation in the European Parliament still is and will remain based on a representation of the peoples of the Member States, and not on the principle of electoral equality of all voters in Europe. However, with its strong emphasis on the "one man one vote" principle, the judgment appears to set out a strongly dogmatic "German" approach (based on the German constitution; Art. 28(1), 38(1) GG).[21] Is it really inconceivable to build into a system of democratic representation some sort of minority protection without infringing fundamen-

20. The Court mentions family law as bearing a strong connection to the cultural roots and values of every State (para 260); but why not the law of inheritance? Moreover, family law has undergone dramatic changes in most Member States in the last hundred years, which probably have more to do with consequences of the development of modern society than with deep-rooted traditions in the relevant Member State.

21. See BVerfG E 79, 161, 166; BVerfG E 322, 337; BVerfG E 85, 148, 157; BverfG, 48 NJW 2216 (1995). For a short comment on the principle of equal voting rights in German constitutional law see Jarrass and Pieroth, *Grundgesetz für die Bundesrepublik Deutschland – Kommentar*, 9th ed. (Munich , 2007), Art. 38 para 6.

tal principles of democratic legitimization? One gets the impression that the *BVerfG* is still not ready to accept the European Parliament's role as a truly democratically legitimized institution. At this point, the judgment seems to be unnecessarily inflexible – more a treatise text on constitutional law than a judgment.

7. Finally, the Court's plea to strengthen the role of the *Bundestag* and *Bundesrat* in the process of taking decisions of great importance (such as Treaty amendments in the simplified procedure) seems to reflect a basic and probably valid concern with the democratic legitimization of the European integration programme. However, strengthening democratic participation in the European decision-making process in the Council comes at a price: the need to reach an *ex ante* approval by the *Bundestag* and *Bundesrat* with binding force for the German representative in the Council will make the decision making in the Council a much more cumbersome process – and all the more so, if the other 26 Member States should follow suit. One may wonder whether decisions about empowering missions with military means could be taken at all within a reasonable time span and in an effective manner.