Headnotes

to the judgment of the First Senate of 11 July 2017

- 1 BvR 1571/15 -
- 1 BvR 1588/15 -
- 1 BvR 2883/15 -
- 1 BvR 1043/16 -
- 1 BvR 1477/16 -

1. **The fundamental freedom under Art. 9(3) of the Basic Law (*Grundgesetz* – GG) protects all activities which are typical for labour associations, in particular the conclusion of collective agreements, their continued existence and application, as well as measures taken in labour disputes (*Arbeitskampfmaßnahmen*). The fundamental right does not, however, grant an absolute right to exploit, for one's own benefit, key positions in a company and the power based on these to obstruct a business for tariff-related purposes.**

2. **Art. 9(3) GG protects the existence of labour associations in general but does not guarantee a protection of the status quo of individual associations. State measures seeking to drive particular trade unions out of the collective bargaining process or to deprive particular trade unions of their basis of existence are incompatible with Art. 9(3) GG, and so are requirements demanding that trade unions have a particular profile.**

3. **Legal provisions that are covered by the scope of protection of Art. 9(3) GG and that are intended to establish and ensure the functioning of the system of autonomy of collective bargaining (*Tarifautonomie*) pursue a legitimate aim. To achieve this, the legislature can establish parity between the opposing parties of collective agreements; however, it can also adopt rules governing the relationship between parties of collective agreements that are on the same side in order to create the structural preconditions for a fair balance in collective negotiations also in that respect, and in order to ensure that collective agreements, which are presumed to be inherently correct, generate reasonable economic and working conditions.**

4. **With regard to the structural preconditions of autonomy of collective bargaining, the legislature has a prerogative of assessment and wide latitude. Difficulties arising only from the fact that several parties to a collective agreement operate on one side do not generally justify a limitation of the right to freedom of association.**

FEDERAL CONSTITUTIONAL COURT

- 1 BvR 1571/15 -

- 1 BvR 1588/15 -

- 1 BvR 2883/15 -

- 1 BvR 1043/16 -

- 1 BvR 1477/16 -

Pronounced

on 11 July 2017

Langendörfer
Tarifbeschäftigte

as Registrar of the

Court Registry

IN THE NAME OF THE PEOPLE

In the proceedings

on
the constitutional complaints

1. of the *Marburger Bund,* Registered Association of Employed and Civil Service Doctors, Federal Association (*Verband der angestellten und beamteten Ärztinnen und Ärzte Deutschlands e.V., Bundesverband*) represented by the executive board, the latter represented by the first chairman Rudolf Henke and the second chairman Dr. Andreas Botzlar, Reinhardtstraße 36, 10117 Berlin,

- authorised representative: Prof. Dr. Frank Schorkopf,

Ehrengard-Schramm-Weg 5, 37085 Göttingen -

against Art. 1 no. 1 and Art. 2 no. 2 and 3 of the Act on Uniformity of Collective Agreements (*Gesetz zur Tarifeinheit*) of 3 July 2015 (Federal Law Gazette, *Bundesgesetzblatt* – BGBl I p. 1130)

- 1 BvR 1571/15 -,

2. of the Registered Association Cockpit (*Vereinigung Cockpit e.V.*), represented by the executive board, the latter represented by the president Ilja Schulz, Unterschweinstiege 10, 60549 Frankfurt,

- authorised representatives: Rechtsanwälte Baum, Reiter & Collegen,
Benrather Schlossallee 101, 40597 Düsseldorf -

against § 4a(1) and (2) of the Act on Collective Agreements (*Tarifvertragsgesetz* – TVG) in the version of 3 July 2015 (BGBl I p.1130)

- 1 BvR 1588/15 -,

3. a) of the dbb Civil Servants Association and Collective Bargaining Union (*dbb beamtenbund und tarifunion – dbb*),
represented by the Federal Management,
the latter represented by the Federal Chairman Klaus Dauderstädt and the executive expert on collective bargaining (*Fachvorstand Tarifpolitik*), the Second Chairman Willi Russ, Friedrichstraße 169/170, 10117 Berlin,

b) of the Local Transport Union (*Nahverkehrsgewerkschaft* – NahVG),
represented by its Federal Chairman Axel Schad,
Longericher Straße 205, 50739 Köln,

c) of Mr R…,

- authorised representative: Prof. Dr. Wolfgang Däubler,
Geierweg 20, 72144 Dußlingen -

against the Act on Uniformity of Collective Agreements of 3 July 2015 (BGBl I p. 1130)

- 1 BvR 2883/15 -,

4. of the United Services Union (*Vereinte Dienstleistungsgewerkschaft ver.di*),
represented by the Federal Executive Board,
the latter represented by the Federal Chairman Frank Bsirske
as well as the Deputy Federal Chairperson Andrea Kocsis,
Paula-Thiede-Ufer 10, 10179 Berlin,

- authorised representatives: 1. Apl. Prof. Dr. Jens M. Schubert,
Paula-Thiede-Ufer 10, 10179 Berlin

2. Rechtsanwalt Prof. Dr. Henner Wolter,
Witzlebenstraße 31, 14057 Berlin -

against Article 1 number 1 of the Act on Uniformity of Collective Agreements (§ 4a TVG) of 3 July 2015 (BGBl I S.1130)

- 1 BvR 1043/16 -,

5. of the Independent Flight Attendant Organisation (*Unabhängige Flugbegleiter Organisation e.V.* – UFO),
represented by the Executive Board, the latter represented by the Chief Executive Officer Alexander Behrens and the Member of the Executive Board Christoph Drescher,
Farmstraße 118, 64546 Mörfelden-Walldorf,

- authorised representative: Prof. Dr. Matthias Jacobs,
c/o Bucerius Law School, Jungiusstraße 6,
20355 Hamburg -

against Art. 1 no. 1 of the Act on Uniformity of Collective Agreements (*Gesetz zur Tarifeinheit* – TEG) of 3 July 2015 (BGBl I p. 1130), specifically against § 4a(2) second sentence of the Act on Collective Agreements (*Tarifvertragsgesetz* – TVG)

- 1 BvR 1477/16 -

the Federal Constitutional Court – First Senate –

with the participation of Justices

Vice-President Kirchhof,

Eichberger,

Schluckebier,

Masing,

Paulus,

Baer,

Britz,

Ott

held on the basis of the oral hearing of 24 and 25 January 2017 by

Judgment

a s f o l l o w s :

1. **§ 4a of the Act on Collective Agreements (*Tarifvertragsgesetz*), in the version of the Act on Uniformity of Collective Agreements (*Gesetz zur Tarifeinheit*) of 3 July 2015 (Federal Law Gazette I page 1130), is incompatible with Article 9(3) of the Basic Law (*Grundgesetz*) to the extent that it lacks precautions ensuring that the interests of those professional groups whose collective agreement is supplanted pursuant to § 4a(2) second sentence of the Act on Collective Agreements are sufficiently taken into consideration in the supplanting collective agreement.**

2. **Otherwise, the Act on Uniformity of Collective Agreements is compatible with the Basic Law according to the reasons provided. Insofar, the constitutional complaints are rejected as unfounded.**

3. **Until it is recast, § 4a(2) second sentence of the Act on Collective Agreements continues to be applicable on the condition that a collective agreement can only be supplanted by a colliding collective agreement if it is demonstrated, in a plausible manner, that the trade union that organises the majority of employees in the company (*Mehrheitsgewerkschaft*) has seriously and effectively considered the interests of those professional groups whose collective agreement is supplanted, within its own collective agreement.**

4. **The Federal Republic of Germany must reimburse the complainants one third of their expenses in connection with the constitutional complaint proceedings.**

5. **The amount in dispute of the constitutional complaints is fixed at EUR 500,000 (in words: five hundred thousand Euros) each.**

R e a s o n s :

A.

With their constitutional complaints, trade unions that organise specific professions (*Berufsgruppengewerkschaften*), sectoral trade unions (*Branchengewerkschaften*), one umbrella organisation, and one union member challenge the Act on Uniformity of Collective Agreements of 3 July 2015 (*Tarifeinheitsgesetz*, BGBl I p. 1130). By this act, the legislature amended the Act on Collective Agreements (*Tarifvertragsgesetz* – TVG) and introduced specific procedural arrangements into the Act on Labour Courts (*Arbeitsgerichtsgesetz* – ArbGG). 1

[Excerpt from Press Release no. 57/2017 of 11 July 2017]

The Act on Uniformity of Collective Agreements regulates conflicts that arise if several collective agreements are applicable in one company (*Betrieb*). The Act prescribes that, in case of a collision, the collective agreement of the trade union which has fewer members in a company is supplanted and it provides for court proceedings

to determine which union organises the majority. Also, if the employer engages in collective bargaining, it has to inform the other trade unions with collective bargaining competence in the company and all unions have the right to present their tariff-related demands to the employer. The union whose collective agreement is supplanted in the company also has the right to adopt the collective agreement of the majority union (*Nachzeichnung*).

With their constitutional complaints, trade unions that organise specific professions (*Berufsgruppengewerkschaften*), sectoral trade unions, one umbrella organisation and one union member directly challenged the Act on Uniformity of Collective Agreements. They mainly claim that their right to freedom of association (*Koalitionsfreiheit*) (Art. 9(3) GG) has been violated.

[End of excerpt]

I.

[…] 2-4

II.

[…] 5-11

III.

[…] 12-13

2. § 4a TVG is the central provision of the Act [on Collective Agreements]. Subsection 1 of § 4a lists the objectives of the Act. The purpose is explained in the explanatory memorandum to the Federal Government's draft act: 14

> "The purpose is to prevent that a lack of solidarity among the workforce leads to a diminished protective function of the collective agreement for employees not holding adequate key positions in the company. If employees with special key positions in a company safeguard their interests separately this tends to result in an impairment of an effective collective representation of interests by the other employees who do not hold special key positions in the company." […] (*Bundestag* document, *Bundestagsdrucksache* – BTDrucks 18/4062, p. 9).

It is further stated that, if conflicting collective agreements do not reflect the value of different work performance compared with each other within the community of a company, but primarily reflect the respective key positions of different groups of employees in the operation of such company, this also impairs the distributive function of the collective agreement (BTDrucks 18/4062, p. 11 and 12). […] Furthermore, the competition between different collective agreements could jeopardize an overall compromise, which is, however, often necessary to secure jobs particularly in times of eco- 15

nomic crisis (loc. cit. p. 8). Colliding collective agreements also impair the collective agreement's function to maintain industrial peace, if internal distribution battles would occur, and if an employer who is already bound by one collective agreement would eventually have to face numerous additional demands by competing trade unions (loc. cit. p. 8).

3. a) § 4a(2) first sentence TVG clarifies that an employer can be bound by several collective agreements. § 4a(2) second sentence TVG stipulates the principle of uniformity of a collective agreement in one company. It only applies if the trade unions do not succeed in reaching an autonomous agreement themselves, resulting in colliding collective agreements. Such a collision occurs if collective agreements of different trade unions that are not identical in content, yet by which the employer is bound pursuant to § 3 TVG, do overlap in their scope of application. […] The issues regulated in such colliding collective agreements need not be identical; the provision also applies in case of a partial overlap (cf. BTDrucks 18/4062, p. 12 and 13). 16

A collision of collective agreements is solved in accordance with § 4a(2) second sentence TVG: the collective agreement concluded by the trade union which has fewer members in a company than the trade union with the majority of employed members is not applied "to the extent that the scope of application of the two collective agreement overlaps." However, the collective agreement of the trade union with fewer members in a company continues to be valid, which, in particular, requires the trade union to keep company peace yet does not provide claims to benefits once agreed upon […] 17

According to the Act on Uniformity of Collective Agreements, only the collective agreement of the trade union that organises the majority of employees in a company shall then be effective. […] 18

[…] 19

b) Pursuant to § 4a(4) TVG, a trade union that has concluded a colliding collective agreement can require the employer to subsequently adopt the legal provisions of the collective agreement concluded by a competing trade union. […] According to the legislature, it is not relevant whether and to what extent the collective agreement is in fact supplanted; instead, it is sufficient if a trade union could potentially suffer a disadvantage (loc. cit.). 20

[…] 21

c) Pursuant to § 4a(5) first sentence TVG, the employer is required to announce an intention to engage in collective bargaining adequately and in due time. […] 22

Other trade unions that have, according to their statutes, collective bargaining competence also have the right to be heard by the employer or the employers' association, pursuant to § 4a(5) second sentence TVG. […] 23

d) It can be determined in labour court proceedings pursuant to § 2a(1) no.6, § 99(1) 24

ArbGG, upon request of a party to a colliding collective agreement, which collective agreement applies in case of a collision. […]

4. The Act on Uniformity of Collective Agreements does not contain rules with regard to the right to industrial action. […] 25

IV.

1. The complainant in proceedings 1 BvR 1571/15, the *Marburger Bund*, is a registered association of employed and civil service doctors (*Verband der angestellten und beamteten Ärztinnen und Ärzte e.V.*), and a union that represents an interest group, namely health care and professional interests of employed and civil service doctors in Germany. It was founded in 1947 and had approximately 117,000 members in 2014. According to § 2(2) letter b of the statutes, its tasks comprise the regulation of working conditions of employed doctors by collective agreements or other agreements with employers and employers' associations. 26

For a long time, the Trade Union for German Employees (*Deutsche Angestellten Gewerkschaft* – DAG*)*, then as the United Services Union (*Vereinigte Dienstleisungsgewerkschaft* – ver.di), negotiated collective agreements on behalf of the Marburger Bund. However, the mandate to negotiate collective agreements was withdrawn from ver.di in the year 2005, because the professional group of doctors no longer felt adequately represented by that union. Since 2006, the Marburger Bund concludes its own collective agreements. […] 27

With the constitutional complaint the Marburger Bund challenges § 4a(1) and (2) second sentence TVG as well as § 58(3) and § 99 ArbGG and claims a violation of Art. 9(3) GG. 28

[…] 29-37

2. The complainant in proceedings 1 BvR 1588/15 is the Association of Commercial Pilots and Flight Engineers in Germany, Organisation Cockpit (*Verband für Verkehrsflugzeugführer und Flugingenieure in Deutschland, Vereinigung Cockpit e.V.*). It was founded in 1969, and seeks to, pursuant to the statutes, jointly represent all staff working in the cockpit. […] The joint collective bargaining that first existed with the DAG ended in the year 2000. Since that time, Cockpit negotiates its collective agreements independently. 38

With the constitutional complaint, Cockpit challenges § 4a(1) and (2) TVG; it claims that the other provisions serve to implement these rules. It claims that the provisions violate Art. 9(3) first sentence GG. 39

[…] 40-44

3. The complainants in proceedings 1 BvR 2883/15 are the dbb Civil Servants' Association and Collective Bargaining Union (*dbb beamtenbund und tarifunion* – dbb), the Local Transport Union (*Nahverkehrsgewerkschaft* – NahVG) and one of its mem- 45

bers.

As a top organisation within the meaning of § 2(2) TVG, the dbb is an alliance of trade unions and associations in the public service as well as in the private service sector in Germany. […] 46

The NahVG is an indirect member union of the dbb via the komba trade union. […] 47

The other complainant in proceedings 1 BvR 2883/15 is a member of the NahVG who works for a local transport company. 48

In their joint constitutional complaint, they primarily challenge § 4a TVG, § 2a(1) no. 6 and § 99 ArbGG as well as § 58(3) ArbGG which refers to § 4a TVG. In particular, the complainants claim a violation of Art. 9(3) GG and Art. 2(1) in conjunction with Art. 20(3) GG. 49

[…] 50-57

4. The complainant in proceedings 1 BvR 1043/16 is the United Services Union (*Vereinte Dienstleistungsgewerkschaft* – ver.di). According to its statutes, its organisational area comprises multiple sectors (*Branchen*), which is why it is called multi-sector union. […] Ver.di has concluded approximately 20,000 collective agreements at the level of the *Länder* and at the federal level, as company and regional collective agreements, which for the most part include all occupational groups employed in a company. 58

With the constitutional complaint, ver.di directly challenges § 4a TVG and claims a violation of Art. 9(3). 3 GG. 59

[…] 60-63

5. The complainant in proceedings 1 BvR 1477/16 is the Independent Flight Attendant Organisation (*Unabhängige Flugbegleiter Organisation* – UFO). It was founded in 1992 by flight attendants as a professional association and has the legal status of a registered association. […] In the year 2000, UFO engaged in collective negotiations with an airline company and thereby made the transition from a professional association to a trade union. […] 64

With the constitutional complaint, UFO challenges the provision on colliding collective agreements under § 4a(2) second sentence TVG and claims a violation of Art. 9(3) GG. 65

[…] 66-68

V.

The constitutional complaints of the *Marburger Bund* and *Cockpit* were combined with applications for a preliminary injunction requesting to suspend the Act on Uniformity of Collective Agreements until a decision is reached in the principal proceedings. The First Senate denied the applications by order of 6 October 2015 (Decisions of the 69

Federal Constitutional Court, *Entscheidungen des Bundesverfasssungsgerichts* – BVerfGE 140, 211).

VI.

The following entities submitted statements with regard to the constitutional complaints: the Federal Government; from the perspective of legal practice the President of the Federal Labour Court (*Bundesarbeitsgericht*), the Association of Labour Court Judges (*Bund der Richterinnen und Richter der Arbeitsgerichtsbarkeit* – BRA), the German Federal Bar Association (*Bundesrechtsanwaltskammer* – BRAK) and the Federal Association of Notaries (*Bundesnotarkammer*); on the employees' side the Federation of German Trade Unions (*Deutscher Gewerkschaftsbund – DGB*), the Railroad and Transport Union (*Eisenbahn- und Verkehrsgewerkschaft* – EVG) and the Association of Professional Academics and Executive Employees in the Chemical Industry (*Verband angestellter Akademiker und leitender Angestellter der chemischen Industrie* – VAA), on the employers' side the Federal Organisation of German Employers' Associations (*Bundesvereinigung der Deutschen Arbeitgeberverbände* – BDA) with the Air Traffic Employers Association (*Arbeitgeberverband Luftverkehr* – AGVL), the Organisation of Municipal Employers' Associations (*Vereinigung der kommunalen Arbeitgeberverbände* – VKA), the Federal German Private Clinics Association (*Bundesverband Deutscher Privatkliniken* – BDPK), the Employers and Economic Association of Mobility and Transport Service Providers (*Arbeitgeber- und Wirtschaftsverband der Mobilitäts- und Verkehrsdienstleister* – Agv MoVe) for the German Railroad Company (*Deutsche Bahn AG*), the German Railways Employers' Association (*Arbeitgeberverband Deutscher Eisenbahnen* – AGVDE) and from a science and research perspective the Institute for Economic and Social Sciences (*Wirtschafts- und Sozialwissenschaftliches Institut* – WSI). 70

[…] 71-103

VII.

B.[…] 104

The constitutional complaints are, for the most part, admissible. 105

I.

[…] 106

II.

[…] 107

III.

The complainants have standing to lodge a constitutional complaint. They substantiate their claim that the challenged provisions individually, presently and directly vio- 108

late them in their fundamental right under Art. 9(3) GG.

1. The complainants are directly affected by the challenged provision on colliding collective agreements stipulated in § 4a(2) TVG and its advance effects (*Vorwirkungen*). 109

Complainants are affected directly by a legal provision only if it interferes with their legal sphere without an additional executing act. If, either by legal requirement or according to actual state practice, the implementation of an act requires a special executing act that is influenced by the executing agency's intent, complainants must generally challenge this executing act and exhaust the existing legal remedies against it, before lodging a constitutional complaint (cf. BVerfGE 1, 97 <101 et seq.>; 109, 279 <306>; 133, 277 <312 para. 84>; established case-law). 110

This is not the case here. Although the provision on colliding collective agreements under § 4a(2) second sentence TVG has so far not been applied, it is suitable and intentionally designed to unfold its effects in advance. Thus, the provision produces legal consequences that are immediately noticeable (cf. BVerfGE 53, 366 <389>). A further executing act is not required in that respect (cf. BVerfGE 126, 112 <133>). Since the provisions aim at shifting the conditions of trade unions when they negotiate applicable collective agreements, the fact that [the complainants] are directly affected results from the necessity to make arrangements to adapt to this new legal situation; this has an immediate impact on the relationship between the parties involved (cf. BVerfGE 88, 384 <399 and 400>; 91, 294 <305>; 97, 157 <164>; established case-law). In any event, the application of § 4a(2) TVG is mandatory if the parties to the collective agreement fail to agree otherwise; from the complainants' perspective, the provision's application - as a framework for action - is thus certain in terms of its implications (cf. BVerfGE 50, 290 <321>). As a consequence, rules in collective agreements negotiated by the complaining trade unions themselves are supplanted in case of collision with a collective agreement of a trade union in a company with more members, meaning that an individual member of the trade union might be left without a collective agreement. This is what the complainants must prepare for already now. 111

2. The complainants themselves are also individually affected. […] 112

[…] 113-116

3. The complainants are presently affected by the challenged provisions. For this to be the case it is sufficient that a challenged provision is currently, and not only potentially, producing its effects (cf. BVerfGE 1, 97 <102>), and that it can be clearly foreseen that the provision will have an effect and what that effect will be (cf. BVerfGE 97, 157 <164>; 102, 197 <207>; 114, 258 <277>; 119, 181 <212>). This is the case here. […] The challenged provisions must often be considered within the tariff-related approach and policy already. 117

IV.

The constitutional complaints satisfy the principle of subsidiarity (cf. BVerfGE 123, 148 <172>; 134, 242 <285 para 150>; established case-law). 118

1. The act raises many statutory law questions that have not yet been clarified by regular courts, since a case of colliding collective agreements has so far been avoided. However, there is no reasonable way for the complaining trade unions and the trade unions' umbrella organisation to have the direct advance effects of the provisions clarified by regular courts. If a challenged provision - as is the case here - specifically influences the action of the complainants in advance and thus before a collective bargaining dispute, they cannot be referred to regular courts for legal protection prior to lodging a constitutional complaint (cf. BVerfGE 92, 365 <392 and 393>). 119

[…] 120-122

V.

[…] 123

C.

The constitutional complaints are, for the most part, unfounded. When interpreted and applied in the required manner, the provisions of the Act on Uniformity of Collective Agreements are for the most part compatible with Art. 9(3) GG. 124

I.

There are no objections insofar as the formal constitutionality of the Act on Uniformity of Collective Agreements is concerned. 125

[…] 126-127

II.

The challenged provisions meet the requirements of legal clarity and specificity. Even if they contain terms that need further specification and clarification, they are clearly open to such clarification by the regular courts. 128

III.

When interpreted and applied in the required manner, the challenged provisions are, for the most part, compatible with the fundamental right of trade unions and their members under Art. 9(3) GG. The scope of protection of Art. 9(3) GG (1 below 1) is impaired by the provisions (2 below). This is for the most part justified; to the extent that the challenged provisions prove to be unreasonable, the legislature is obliged to amend the provisions. (3 below). 129

1. The fundamental right enshrined in Art. 9(3) GG is, first and foremost, a funda- 130

mental freedom. It protects the individual freedom to establish associations that serve to promote economic and working conditions, and to jointly pursue this aim (cf. BVerfGE 92, 352 <393>), to stay away from these associations or to leave them (cf. BVerfGE 116, 202 <218>). In that regard, the parties involved should generally be able to make individual and self-determined decisions that are free from state influence. The fundamental right´s protection also extends to the right of associations themselves to pursue the objectives stipulated in Art. 9(3) GG, by specific activities which are typical for associations. Under Art. 9(3) GG, associations are generally free to choose the means they consider appropriate to achieve this objective (cf. BVerfGE 92, 365 <393 and 394>; 100, 271 <282>; 116, 202 <219>; established case-law).

a) The fundamental right protects all activities which are typical for associations. It covers, in particular, the autonomy of collective bargaining, which is the key element of options labour associations have to achieve their objectives. Negotiating collective agreements is an essential purpose of associations (cf. BVerfGE 116, 202 <219> with further references). The protection specifically extends to the conclusion of collective agreements (cf. BVerfGE 92, 365 <395>; 94, 268 <283>; 103, 293 <304 et seq.>). This includes the continuity and application of collective agreements that have been concluded. Also, measures of industrial action that are aimed at the conclusion of collective agreements, at least to the extent that they are necessary to ensure effective free collective bargaining, are protected under Art. 9(3) GG (cf. BVerfGE 84, 212 <224 and 225>; 88, 103 <114>; 92, 365 <393 and 394>). The fundamental right does not, however, grant an absolute right to exploit, for one’s own benefit, key positions in a company and the power based on these, to obstruct a business for tariff-related purposes. 131

b) Art. 9(3) GG also protects such associations in their continued existence (cf. BVerfGE 93, 352 <357>; 116, 202 <217>; established case-law). Protected activities include the recruitment of members by the associations themselves. This builds the foundation for the fulfilment of the tasks stipulated in Art. 9(3) GG. The associations also ensure their continued existence by recruiting new members (cf. BVerfGE 93, 352 <357 and 358> with further references). This does not, however, amount to a protection of the status quo of individual associations. Nonetheless, Art. 9(3) first sentence GG explicitly guarantees the right to freedom of association to every individual and to every occupation or profession. Therefore, state measures would be incompatible with Art. 9(3) GG if they were to specifically targeted at driving particular trade unions out of the collective bargaining process or at generally depriving particular trade unions, such as trade unions that organise specific professions, of their basis of existence. 132

c) Such associations are also protected with regard to their (tariff-related) approach and organisation; also, self-determination regarding their inner structure is an essential component of the right to freedom of association (cf. BVerfGE 92, 365 <403>; 93, 352 <357>; 100, 214 <223>). This includes the decision to focus on specific defining sectors or fields (cf. BVerfGE 92, 365 <408>) or on specific professions, since the 133

principle of freedom to establish a social group applies here as well (cf. BVerfGE 100, 214 <223> with further references). It would be impermissible to prescribe a specific profile. The Basic Law protects “the variety of associations” (BVerfGE 18, 18 <32 and 33>). This also implies the possibility that associations compete with each other.

2. The challenged provisions impair the fundamental right enshrined in Art. 9(3) GG. 134

a) An order to the effect that a collective agreement be supplanted in case of a collision, pursuant to § 4a(2) second sentence TVG, entails an impairment that has the effect of an interference with the right to freedom of association, which is protected by Art. 9(3) GG and which protects the conclusion of a collective agreement. The rule on colliding collective agreements stipulated in § 4a(2) second sentence TVG eliminates the result of free collective bargaining activities of the trade union; it prevents the application of the legal standards agreed upon in this collective agreement to the union’s members, and it removes their entitlement to the benefits agreed upon. 135

Furthermore, the supplanting provision in § 4a(2) second sentence TVG may unfold advance effects that impair fundamental rights, because the threat that one´s collective agreement may be supplanted may in fact influence the actions of a trade union even before a collision of agreements occurs. The Act does indeed specifically aim at creating such an advance effect. […] 136

b) With the challenged provisions, the legislature has neither stipulated directly applicable requirements with regard to the establishment and continued existence of trade unions nor regarding their profile. The wording of Art. 9(3) GG itself would lead to a conflict with the Basic Law if there were an attempt to reserve the possibility to conclude effective collective agreements to multi-sector trade unions (*Multibranchengewerkschaften*) or to deprive trade unions that organise specific professions (*Berufsgruppengewerkschaften*) from participating in collective bargaining, since the right to freedom of association is explicitly guaranteed to all professional or occupational groups. 137

c) The right protected under Art. 9(3) GG to use measures of industrial action to apply pressure and counter-pressure on the respective opponent, in order to reach a collective agreement, is not impaired by the challenged provisions either. In particular, the right to strike is not restricted, and there is no increase of the liability risk in connection with a strike. 138

However, the protection of companies and the public against increasing strike activities may have been a motive of the legislature. Yet, the legislature intentionally opted against proposals to stipulate requirements for measures of industrial action, in order to prevent unbearable effects on third parties (see A II 3 b and A III 4 paras. 10 and 25 above). Although the memorandum to the draft act refers to measures of industrial action (BTDrucks 18/4062 p. 12), the provision on colliding collective agreements stipulated in § 4a TVG has no effect on the permissibility of measures of industrial action. 139

The right to strike of the trade union that only organises a lower number of employees in all companies also remains unaffected; it even applies if the existing majorities of organized employees in a company are already known. This follows from the fact that the provision on colliding collective agreements in § 4a(2) second sentence TVG, as well as the right to adopt the collective agreement of the majority union (*Nachzeichnung*) provided in § 4a(4) TVG, require the conclusion of a separate collective agreement; hence it must be possible to take measures of industrial action to reach this collective agreement. Thus, industrial action for the conclusion of a collective agreement that will overlap with another collective agreement is not unlawful, and it is, specifically, not disproportionate simply because of that overlap. The uncertainty that arises before the conclusion of a collective agreement about the risk that this agreement may be supplanted - an uncertainty which is intended by the legislature - may not establish a risk for the trade union's liability for measures of industrial action, neither in case of clear nor in case of uncertain majorities; if necessary, the labour courts have to apply the liability provisions accordingly, in conformity with the Constitution. 140

3. When interpreted and applied in the constitutionally required manner, the challenged provisions are, for the most part, justifiable. […] 141

a) The right to freedom of association, as an unconditional guarantee, can be restricted by legal provisions governing the relationship of competing parties to a collective agreement that are on the same side, in order to create the structural preconditions for a fair balance in collective negotiations on economic and working conditions. 142

aa) The right to form associations to safeguard and improve working and economic conditions is granted unconditionally. It is not a special case of the general right to freedom of association and thus not subject to the limitations of Art. 9(2) GG. However, this does not preclude the legislature from setting any rules at all within the scope of protection of this fundamental right. Legal provisions that cause an impairment of Art. 9(3) GG can be justified if they protect fundamental rights of third parties or other rights of constitutional rank and the common good (cf. BVerfGE 84, 212 <228>; 92, 365 <403>; 100, 271 <283>; 103, 293 <306>; established case-law). 143

bb) Legal provisions that are covered by the scope of protection of Art. 9(3) GG and are intended to establish and ensure the functioning of the system of autonomy of collective bargaining pursue a legitimate objective (cf. BVerfGE 84, 212 <225, 228>; 88, 103 <114 and 115>; 92, 365 <394 and 395, 397>; 94, 268 <284>; 116, 202 <224>). […] 144

cc) in particular, Art. 9(3) GG entitles the legislature to regulate the relationship between opposing parties of collective agreements, in order to create structural preconditions for a fair balance in collective negotiations, and in order to ensure that collective agreements, which are presumed to be inherently correct, generate reasonable economic and working conditions. 145

Principally, the state abstains from taking any influence and leaves autonomous agreements on economic and working conditions for the most part to the associations; these include, in particular, wages and other material working conditions. (cf. BVerfGE 94, 268 <283>; 100, 271 <282>; 103, 293 <304>; 116, 202 <219>). The guarantee of autonomy of collective bargaining as a fundamental right ensures that employees and employers are free to negotiate their conflicting interests independently. This freedom is based on the historical experience that this approach is more likely than state arbitration to obtain results that are in the interest of the opposing groups and the common good. (BVerfGE 88, 103 <114 and 115>). A collective agreement is therefore presumed to be correct. Principally, it may be presumed that the agreement negotiated by the parties is correct and that it appropriately balances the interests of both sides; there is no objective standard to judge the correctness more accurately. The focal point of the presumption of correctness is that the system of collective agreements contributes to overcoming the structural disadvantages suffered by individual employees. The collective agreements system is designed to compensate their structural disadvantage when concluding individual employment contracts by collective action, in order to achieve a relative balance when negotiating wages and working conditions. Thus, free collective bargaining is only effective as long as a relative balance of powers – parity – exists between the parties to a collective agreement (cf. BVerfGE 92, 365 <395>; established case-law). Therefore, the presumption that the agreement negotiated by the parties to a collective agreement is correct only works if these preconditions are met. 146

Since Art. 9(3) first sentence GG guarantees the social protection of employees by way of collectivised individual autonomy […], and in consideration of the principle of a social state enshrined in Art. 20(1) GG, it is the legislature's duty to create the structural parameters necessary for collective negotiations to ensure a fair balance (cf. already BVerfGE 44, 322 <341 and 342>; 92, 26 <41>). In this context, the legislature is not prevented from changing the parameters for the actions of the respective associations (cf. BVerfGE 84, 212 <228 and 229>; 92, 365 <394>); rather, it is obliged to interfere if persistent disruptions of the system's functioning occur (cf. BVerfGE 92, 365 <397>). 147

dd) […] Art. 9(3) GG also entitles the legislature to adopt rules governing the relationship between parties of collective agreements that are on the same side, in order to create the structural preconditions for a fair balance in collective negotiations in that respect as well, and in order to ensure that collective agreements, which are presumed to be inherently correct, generate reasonable economic and working conditions. […] Hence, the effectiveness of the autonomy of collective bargaining, which is protected under Art. 9(3) GG, does not only include a structural parity between employers and employees. In cases in which several trade unions or employers compete with each other on their respective side, it also includes the conditions for the negotiation of collective agreements which ensure that freedom of association as such can unfold, by generating the preconditions for a fair balance of the affected inter- 148

ests.

ee) With regard to regulating the structural preconditions for the autonomy of collective bargaining, the legislature has the prerogative of assessment and wide latitude (cf. BVerfGE 92, 365 <394>). […] 149

Actual difficulties and, in particular, difficulties on the employers' side, resulting from the fact that there are several trade unions operating, do not generally justify a limitation of the right to freedom of association. Whether an association can be established and prevail in a working environment specifically depends on competition among different groups. (cf. BVerfGE 55, 7 <24>). The degree to which an association can organise its members, its ability to recruit members and other similar factors are not within the responsibility of the legislature. It is not required to ensure that weak associations have clout in collective negotiations, because Art. 9(3) GG does not require that the conditions for labour disputes are optimised, but rather commits the state to neutrality in this respect as well (cf. BVerfGE 92, 365 <396>). Also, the legislature may not seek to weaken strong associations if this violates the principle of parity (see C III 3 a cc paras. 145 and 146 above), in relation to the opposite side. Nor may the legislature target specific associations of specific occupations or professions (see C III 1 b and c paras. 132 and 133 above). 150

b) When interpreted and applied in the constitutionally required manner, the challenged provisions comply, for the most part, but not in every respect, with the requirements of proportionality. […] 151

aa) The objective pursued by the legislature (1) is legitimate under constitutional law (2). 152

(1) It is the objective of the challenged provisions to generate incentives for a coordinated and cooperative approach of the employees' side when entering into collective negotiations, in order to avoid a collision of collective agreements (cf. BTDrucks 18/4062, p. 9). By this, the legislature intends to create the basic conditions for functioning collective negotiations within the collective bargaining system, which it considers specifically jeopardised if a collision of collective agreements occurs in a company due to the exploitation of key positions on the employees' side. […] 153

(2) The objective pursued by the legislature is legitimate. 154

(a) The legislature is entitled to adopt provisions on the relationship between parties to a collective agreement in order to create structural preconditions for collective negotiations to achieve a fair balance (see C III 3 a dd above para. 148). […] However, the legislature's leeway is limited by the objective content of Art. 9(3) GG. […] 155

(b) The legislature pursues the legitimate objective of regulating the relation-ship among trade unions in order to ensure the structural conditions of collective negotiations, and in order to avoid that, by isolated exploitation of a key position, the structural conditions of collective negotiations are changed in a way that a fair negotiation of 156

working and economic conditions is no longer guaranteed.

[…] 157

bb) The challenged provisions are suitable, within the meaning of the principle of proportionality, to reach the objective of causing the employees' side to take a coordinated and cooperative approach when negotiating collective agreements, even if it is not certain that this effect is in fact achieved. 158

(1) It is sufficient that the provisions of the Act on Uniformity of Collective Agreements are not obviously unsuitable to counteract a situation in which individual groups of employees use their power to obstruct the collective determination of working and employment conditions. Constitutional law only requires that there is the possibility that an act will promote the pursued objective, i.e. the possibility to reach the objective must exist (cf. BVerfGE 90, 145 <172>; 126, 112 <144>; established case-law). In any event, it is mandatory that the provisions are not unsuitable from the outset (cf. BVerfGE 100, 313 <373>). They are not unsuitable from the outset simply because their implementation is difficult - as long as implementation appears to be possible at all (cf. BVerfGE 110, 141 <164>). In a similar vein, the legislature has a margin of appreciation when assessing the factual bases of a legal provision (cf. BVerfGE 104, 337 <347 and 348>). The line must only be drawn if it is obvious that an erroneous assessment was made (cf. BVerfGE 92, 365 <395 and 396>). 159

(2) […] The legislature has adopted the severe sanction of supplanting one collective agreement in case of overlapping collective agreements, in order to encourage the trade unions to cooperate so that a collision of collective agreements in a company is avoided in the first place. It does not appear unlikely that the provisions do in fact work as an incentive to cooperate. In any case, the assessment made by the legislature does not appear to be completely wrong. 160

The objections raised in the constitutional complaints are not effective in this respect. […] 161

cc) There are no effective constitutional concerns regarding the necessity of the challenged provisions. The legislature has a margin of assessment and prognosis in this respect as well. As a consequence, measures which the legislature considers necessary for the protection of an important objective can only be constitutionally objected to, if, based on the facts known to the legislature and based on previous experience, it can be determined that alternative provisions promise to have the same effect but are less of a burden for the parties involved (cf. BVerfGE 116, 202 <225>; established case-law). In the case at hand, however, there is no clearly equivalent measure that is equally effective and interferes less with the fundamental right holders in order to reach the objective intended by the Act. […] 162

[…] 163-165

dd) The burden arising in the context of the challenged provisions are, for the most 166

part, reasonable. […]

(1) The impairments of the right to freedom of association that arise in the context of the challenged provisions are severe. That holds true for the supplanting effect itself that is stipulated in § 4a(2) TVG (a), as well as for this provision's advance effects which are intended by the legislature (b). 167

(a) In case of colliding collective agreements, § 4a(2) second sentence TVG has the effect that the legal provisions of a concluded collective agreement are supplanted. Thereby, the achievements negotiated by the trade union whose agreement is supplanted are removed and its members are left without a collective agreement. Nonetheless, the trade union is still required to abstain from industrial action and to obey the agreed term of its own collective agreement. […] By being supplanted, concluded collective agreements are devalued; and this impairs the constitutionally guaranteed protection of collective agreements. 168

(b) The impairments of the rights under Art. 9(3) GG suffered in the context of the intended advance effects of the provision prior to a collision of collective agreements are also of substantial weight. The challenged provision impairs the freedom of collective bargaining of the trade unions and their members, who only organise a structural or even clear minority in a company, already before a collision of collective agreements occurs. They run the risk of not being considered as a serious collective bargaining partner by their social counterpart in the first place, because it is clear or at least probable that the collective agreements concluded by them will not be applied. These trade unions lose their ability to attract members, and thus lose their power to mobilise employees for industrial action. The potential loss of importance and the reduced influence in shaping collective agreements also increase the pressure to change the collective bargaining strategy. As evidenced by the statements and arguments presented in the oral hearing, there is frequently no knowledge within companies which trade union organises a majority of employees, in relation to other trade unions that are, according to their statutes, responsible for several collective agreements. This lack of knowledge of one‘s own relative strength results in an uncertainty about the enforceability of one's own collective agreements, and it weakens the position in the collective bargaining process. This is intended, because it is the purpose of the Act to encourage the willingness to enter into negotiations and to find compromise, in a coordinated and cooperative approach by the trade unions. This impairs the freedom of internal organisation and orientation which is protected by the Basic Law. However, if majorities are known in a company, the trade union which organises the minority of employees is, due to the challenged provisions, in a particularly weak position, because it is obvious in such a case that the trade union will have no clout in that company. 169

(c) An additional impairment of the right to freedom of association by the challenged provisions follows from the fact that the court proceedings pursuant to § 2a(1) no. 6, § 99 ArbGG in cases of colliding collective agreements involve the risk for a trade union 170

of having to disclose the number of its members and thereby their fighting strength in a company.

(2) The purpose of the Act on Uniformity of Collective Agreements is to create and preserve the structural preconditions so that collective negotiations enable a fair balance. Since the state generally refrains from regulating the material aspects of wages and other working conditions - leaving their negotiation to the parties to collective agreements -, it can regulate the structural preconditions for these negotiations; Art. 9(3) GG stipulates the respective authority to design and, if necessary, even mandates such design (see C III 3 a bb above, para. 144). […] 171

(3) The challenged provisions of the Act on Uniformity of Collective Agreements considerably impair the autonomy of collective bargaining due to their advance effects on the trade unions‘ organisation, their tariff-related strategy, their ability to negotiate and, in case a collective agreement is supplanted, devalue the results negotiated by the minority trade union. Even if one considers the great significance of the objectives pursued with the Act on Uniformity of Collective Agreements, these burdens only prove to be reasonable in an overall assessment, if their sharp edges are softened by a restrictive interpretation of the supplanting provision, and by supporting procedural provisions. Partly, the restrictive interpretation and application itself is required under constitutional law. As for the rest, the Senate has based its assessment of reasonableness on a restrictive interpretation of the challenged provisions which would not be mandated by constitutional law. In so far as the regular courts come to different conclusions, they must consider the reasonableness of the provisions with regard to their overall burdening in view of Art. 9(3) GG as well. To the extent that there are no regulations to guarantee the protection of professional groups, the legislature is required to remedy that situation. 172

Here, it is important that the stipulation that a collective agreement be supplanted pursuant to § 4a(2) TVG, provided this is effected by virtue of the law, can be waived by the parties to a collective agreement under certain conditions (a). Generally, the colliding agreement of the trade union that organises the minority of members in a company is completely supplanted; however, the supplanting provision must be interpreted restrictively, and the supplanting effect is limited in several respects (b). Certain benefits guaranteed by collective agreement must be exempt from the supplanting effect, in order to avoid unreasonable hardship (c). If a collective agreement is supplanted, that agreement generally regains its applicability when the supplanting collective agreement ends (d). The provision under § 4a(4) TVG concerning the right to adopt the collective agreement of the majority union, which is intended to partially compensate for the suffered loss of rights, is to be interpreted extensively, in line with the scope of the supplanted agreement (e). If the requirements for an announcement of collective negotiations in a company pursuant to § 4a(5) first sentence TVG, and for a presentation of the views of competing trade unions pursuant to § 4a(5) second sentence TVG, are violated, the prerequisites for supplanting are not met (f). The labour court proceedings pursuant to § 99 ArbGG must be conducted in a manner 173

that ensures that the number of members of the trade unions is not disclosed (g).

(a) The degree of the impairment is relativised by the fact that the persons concerned are, to a certain extent, in control of whether the provisions unfold their supplanting effect or not. 174

(aa) Presently, the prevailing opinion is that the supplanting effect pursuant to § 4a(2) second sentence TVG applies by virtue of the law as soon as there is a collision of collective agreements. […] 175

The fact that the legislature, in § 4a(2) second sentence TVG, determines the conclusion of the colliding collective agreement to be the relevant point in time when the collision occurs also speaks in favour of applying the supplanting effect from that point in time; from that time on, benefits agreed upon in a collective agreement by the minority trade union can no longer be claimed. Such interpretation is, however, not mandatory under constitutional law. 176

(bb) There are possibilities to take influence for the parties to a collective agreement to the extent that the application of the provision under § 4a TVG can itself be determined in a collective agreement. 177

The assumption that the application of the provision on colliding collective agreements in § 4a TVG can be decided upon by the parties to a collective agreement […] is supported by the fact that the legislature's main objective of the Act on the Uniformity of Collective Agreements is the trade unions' self-control, in order to avoid a collision resulting in a loss of a collective agreement through the advance effects of this provision. An interpretation of § 4a TVG in light of the fundamental right to freedom of association also speaks in favour of regarding the provision's application as dispositive, because this gives more leeway to the parties to the collective agreement. 178

However, all parties to a collective agreement, be they affected positively or negatively by the provision on colliding collective agreements, must agree to exclude the application of § 4a TVG. Thus, all trade unions with colliding collective agreements in a company and the employer must reach an agreement to that end. […] 179

(b) The reasonableness of the challenged provision also depends upon the scope of the supplanting effect of § 4a(2) second sentence TVG. Interpreted according to its statutory design, the supplanting effect is restricted in various regards. 180

(aa) § 4a(2) second sentence TVG regulates the supplanting of the colliding collective agreement of the minority trade union to the extent that it clashes with the collective agreement of the trade union that organises the majority of employees in terms of region, time, company or trade, and employees. Insofar as the collective agreement of the majority trade union contains provisions on working conditions for the same professional group in one and the same company, which collide with non-identical provisions of the collective agreement of the minority of employees, the minority collective agreement will generally be supplanted as a whole, i.e. not only with regard to 181

the colliding part. This follows from the fact that the application of the provision to colliding collective agreements does not require that issues that have been negotiated in collective agreements that overlap in terms of persons are completely identical (cf. BTDrucks 18/4062, p. 13; BTDrucks 18/4156, p. 10). […] In that case, the supplanting of collective agreements regulated in § 4a(2) second sentence TVG only affects the specifically legal provisions of the minority collective agreement, i.e. rules on content, the organisation of a company and works constitution, subject to the special provision under § 4a(3) TVG; it does not, however, affect obligatory agreements. Thus, the members of the minority trade union are still bound by the obligation to abstain from industrial action as provided for in the supplanted collective agreement.

However, if two collective agreements do not overlap with regard to their personal scope of application, there is no collision of agreements; in such a case, both collective agreements are applicable only to those persons for whom arrangements were made in the respective agreement. […] 182

Pursuant to § 4a(3) TVG, the supplanting provision is only applicable to specific norms on work constitution, if there is an overlap with regard to content; by this, the legislature intends to ensure the continuity of structures of representation in a company created by collective agreement (BTDrucks 18/4062, p. 14). 183

[…] 184-185

(bb) Furthermore, in case of a collision, the labour courts are obliged to interpret collective agreements that overlap within one company in a way that protects, to the largest extent possible, the fundamental rights positions impaired by the supplanting effect; the courts must ensure reasonableness of the impairments of rights under Art. 9 (3) GG suffered in connection with the Act on the Uniformity of Collective Agreements. Provisions will not be supplanted if and in as far as it is the intention of the parties to the majority collective agreement to accept that their provisions are complemented accordingly by collective agreements of competing trade unions (cf. BTDrucks 18/4062, p. 13). This intention may be explicitly documented but may also be expressed implicitly. […] Hence, for constitutional reasons, the supplanting effect pursuant to § 4a(2) second sentence TVG must be limited to those parts of a collective agreement that diverge from an objective point of view as well. Hence, supplanting is limited if, from the subjective perspective of the majority trade union or from an objectivised perspective, other content-related provisions shall continue to apply alongside the applicable collective agreement. […] 186

(c) It would be incompatible with the protection of benefits which are guaranteed by a collective agreement warranted under Art. 9(3) GG […] if employees lost long-term claims from the supplanted minority collective agreement that affect their life planning, while not having the possibility to obtain comparable benefits under the majority collective agreement whose supplanting provisions can be adopted. This concerns longer term benefits on which employees typically rely in their life planning and which they legitimately expect to be permanent. The loss without compensation or the sub- 187

stantial devaluation of already acquired claims or benefit entitlements (*Anwartschaften*), as a result of a supplanting of the collective agreement ensuring these claims, would constitute an unreasonable interference with the constitutionally protected right to benefit from a collective agreement that has been negotiated successfully. It would, for instance, constitute an unreasonable hardship if already acquired long-term contributions to old-age provision, or benefits relating to job guarantees or working life agreed upon in a collective agreement, were lost or rendered substantially less effective due to a supplanting collective agreement, which does not provide for such benefits at all. It would also be unreasonable if, due to a collision pursuant to § 4a(2) second sentence TVG, employees were forced to refrain from participating in or to discontinue professional training that is about to start or has already started.

In § 4a TVG, the legislature failed to adopt protective provisions to avoid such unreasonable hardship. When applying the law governing the continued provision of such long-term benefits, the courts are obliged, for constitutional reasons, to ensure that such hardship is avoided. If hardship cannot be avoided by applicable law, the conflicting provisions would have to be submitted to the Federal Constitutional Court pursuant to Art. 100(1) GG, for review of their constitutionality. If necessary, the legislature is obliged to ensure that supplanting such benefits is reasonable. 188

(d) The impairment resulting from the challenged provisions is also limited by the fact that § 4a(2) TVG must be interpreted in such a way that ensures that the supplanting effect applies only for the time in which the supplanting collective agreement is actually valid, and if there is no other collective agreement with a supplanting effect. As a consequence, the supplanted collective agreement revives when the term of the supplanting collective agreement ends. […] It is for the regular courts to decide whether and to what extent – as argued in the oral hearing – such reviving must be excluded to avoid a foreseeably short-term change between different collective agreements, also in consideration of the effect of the majority collective agreement after the end of its term. 189

(e) The option to adopt the supplanting provisions of the majority collective agreement under § 4a(4) TVG mitigates the burdening effect of the supplanting provision for the affected employees. In order to ensure that the supplanting effect is reasonable, the provision requires, for constitutional reasons, an extensive interpretation. 190

In accordance with § 4a(4) TVG, the right to adopt the supplanting provisions can only be asserted if two colliding collective agreements have in fact been concluded. […] 191

Content and scope of the right to adopt the supplanting provisions ensue from § 4a(4) second sentence TVG. The provision stipulates the adoption of the pursued collective agreement in so far as the scope of application and legal provisions of the collective agreements overlap. This must not be misinterpreted to mean that an adoption of the supplanting collective agreement only applies to such issues which were specifically regulated in the supplanted collective agreement. Such interpretation 192

would limit a trade union's right to adopt the supplanting agreement to the provisions of the collective agreements that in fact overlap, while supplanting in case of a collision pursuant to § 4a(2) TVG would generally be comprehensive, i.e. apply also beyond the overlapping provisions.

Such interpretation is incompatible with Art. 9(3) GG. […] 193

No viable reasons in favour of limiting the right to adopt provisions of the supplanting collective agreement to areas in which agreements actually overlap, have been presented in the course of the legislative procedure or by the constitutional complaints, and none can be found elsewhere. Rather, in order to protect the rights under Art. 9(3) GG, § 4a(4) second sentence TVG must be interpreted in conformity with the Constitution to mean that the trade union whose collective agreement is not or will not be applicable in a company, due to a collision, has a right to adopt the supplanting collective agreement in its entirety. This means that the right to adopt the supplanting collective agreement at least extends to the scope of the supplanted provisions, but it can also go beyond the content of one´s own - supplanted - collective agreement. The entire loss of the negotiated collective agreement by one trade union is mitigated by the option to fully adopt the other collective agreement (cf. BTDrucks 18/4062, p. 9 […]). 194

(f) The impairment of the fundamental right enshrined in Art. 9(3) GG, by the supplanting of concluded collective agreements, is mitigated by procedural and participation rights granted to the affected trade union under § 4a(5) TVG. Pursuant to § 4a(5) first sentence TVG, the employer is obliged to announce, within the company, in due time and in an appropriate manner, that he will engage in collective bargaining; in addition, the trade union which is not involved in the negotiations, but competent for collective bargaining according to its statutes, is entitled to orally present its views to the employer, pursuant to § 4a(5) second sentence TVG. This right to presentation is independently enforceable (cf. BTDrucks 18/4062, p. 15). 195

The obligation to announce collective bargaining and the trade union's right to present its views in collective negotiations conducted with another trade union ensure its participation and safeguard its procedural rights under Art. 9(3) GG, which are at risk of being supplanted pursuant to § 4a(2) TVG. Furthermore, they provide the opportunity, prior to collective negotiations, to coordinate collective demands and thereby independently avoid a collision of collective agreements (cf. BTDrucks 18/4062, p. 15). These procedural positions must not be considered as mere formalities or simple obligations. Rather, both must be regarded as constituting genuine legal duties. Because these procedures contribute to the protection of fundamental rights, and because the coordination and avoidance of collisions by the trade unions pursued by the legislature, can only be reasonably achieved if other trade unions that are competent for collective bargaining are in fact involved, before engaging in collective bargaining, a violation of the procedural rights which are of constitutional relevance in this context may not be accepted without sanctions. This is the only way to ensure 196

their constitutionally required effectivity. The challenged provisions under § 4a(5) TVG are therefore to be interpreted and applied in such a way that the constituent requirements for a supplanting collision of collective agreements pursuant to § 4a(2) second sentence TVG are only met if the obligations, with regard to the announcement of collective bargaining and the presentation of demands, have not been violated. […] It is for the regular courts to specify the requirements for an effective presentation of demands and announcement of collective bargaining pursuant to § 4a(5) TVG.

(g) Ultimately, the burdens that trade unions might have to deal with due to a possible disclosure of the number of their members in connection with the court proceedings pursuant to § 2a(1) no. 6, § 99 ArbGG are reasonable. 197

The determination of the majority in court proceedings pursuant to § 2a(1) no. 6, § 99 ArbGG bears the risk that the trade unions' number of members is disclosed to the employer. If possible, this should be avoided in consideration of the parity between trade unions and employers protected under Art. 9(3) GG (see C III 1 a and C III 3 a cc paras. 131 and 146 and 147 above). The uncertainty about the number of members, which is essential for the trade union's actual clout (cf. BVerfGE 93, 352 <358>) when entering into specific negotiations, is of specific importance for the employer's willingness to negotiate, and for reaching an appropriate balance of interests (cf. Federal Labour Court, *Bundesarbeitsgericht* – BAG, Judgment of 18 November 2014 - 1 AZR 257/13 -, juris, para. 30). 198

The regular courts must take this into consideration. They must use all available means of procedural law to avoid, as far as possible, a disclosure of the number of union members. By introducing § 58(3) into the Labour Court Act, the legislature provides for the possibility to avoid naming members of trade unions in court proceedings (cf. BTDrucks 18/4062, p. 16). Also, it can be certified by a notary which union organises the majority in a company, in order to avoid disclosure of a trade union's actual clout. The court must seek to achieve this. In consideration of the objective pursued by the legislature, it is however also reasonable if this cannot be achieved in each and every case. 199

(4) Despite the great importance of the objectives pursued by the Act on Uniformity of Collective Agreements, and even in consideration of the constitutionally required stipulations regarding interpretation and application, the impairments resulting from the supplanting effect of the colliding majority collective agreement, pursuant to § 4a(2) second sentence TVG, are disproportionate to the extent that the challenged provisions do not provide for precautionary measures against a one-sided neglect of members of particular professions or sectors, by the majority trade union. 200

(a) Under the Act on Uniformity of Collective Agreements, employees who form small trade unions that organise specific professions bear the risk – although not only them – that the collective agreement negotiated by their trade union will not be applied. In principle, this burden is mitigated by the fact that the trade union has the right 201

to adopt the collective agreement of the majority trade union, so that collectively agreed working conditions also apply to the employees in the minority trade union. However, there are no structural precautions in place to ensure that the interests of these employees are sufficiently taken into account. Without such precautions, it cannot be ruled out that the majority collective agreement that is applicable in a company, even if adopted by the minority trade union, unreasonably disregards the working conditions and interests of members of specific professions or sectors whose collective agreement has been supplanted, because this group is not effectively represented in the majority trade union.

(aa) The right to freedom of association guaranteed as a fundamental right in Art. 9(3) GG and the autonomy of collective bargaining are based on the assumption that fair working conditions and wages can generally not be provided by the state, but are subject to negotiations by parties to a collective agreement. This system proceeds from the assumption that freely negotiated collective agreements are correct if parity of the parties to a collective agreement is generally ensured. (see C III 3 a cc and dd paras. 145 and 146 and 148 above). 202

The provisions challenged in the case at hand serve the functioning of this system, because they are meant to ensure the structural prerequisites for collective agreements among trade unions. Their purpose is to prevent that isolated exploitation of key positions results in a situation in which there is no safeguard to ensure fair negotiations of working and economic conditions. The assumption of correctness of collective agreements reached either by negotiations or measures of industrial action also requires that, on the side of the employees, all professional and occupational groups are given the chance to effectively represent their interests. However, if a collective agreement is supplanted pursuant to § 4a(2) second sentence TVG, only the collective agreement negotiated by the majority trade union remains applicable to one professional group in a company. Therefore, structural precautions are necessary to ensure that the interests of the professional group whose collective agreement is supplanted will be effectively taken into account, in the collective agreement of the majority trade union. It is only under such conditions that the assumption of correctness inherent in this collective agreement can take effect to the extent of the right to adopt the collective agreement of the majority union. 203

(bb) Here, such precautions are lacking. The legislature failed to take precautions in order to protect small professional groups in a company from being subjected to the application of a collective agreement that has been negotiated under conditions under which their interests could, structurally, not be taken into account. As a consequence, pursuant to § 4a(2) TVG, even a collective agreement of a sectoral trade union, in which the professional group whose collective agreement is supplanted is only marginally or not at all represented, can prevail. In such a case, it can no longer be assumed that an appropriate overall outcome, based on the assumption that a collective agreement is correct, was negotiated for this professional group as well. The legislature’s objective to create a fair balance is not reached if certain professional 204

groups are disregarded. Due to the lack of sufficient compensation in case the collective agreement of the majority trade union were adopted, supplanting a collective agreement concluded by these groups would then not be compatible with the protection of the right to freedom of association enshrined in Art. 9(3) GG.

(b) The legislature is obliged to remedy the situation. In this respect, it has wide latitude to find various solutions. 205

4. Contrary to the statements presented in the constitutional complaints, no further requirements with regard to the constitutionality of the challenged provisions do result from the consideration of international law that is required when interpreting the Basic Law (cf. BVerfGE 74, 358 <370>; 82, 106 <120>; 111, 307 <316 and 317.>; 120, 180 <200 and 201>; 128, 326 <366 et seq.>; 137, 273 <320 et seq. para. 127 et seq.>; 138, 296 <355 et seq. para. 148 et seq.>; established case-law). This is the case with regard to the guarantee of freedom of association under Art. 22 of the International Covenant on Civil and Political Rights (ICCPR), which is binding for Germany, and Art. 8(1a) of the International Covenant on Economic, Social and Cultural Rights (ICESCR); as well as for Art. 23 of the Universal Declaration of Human Rights (UDHR), and for the Conventions of the International Labour Organization (ILO), as well as for the European Convention on Human Rights (ECHR) and its Additional Protocols and the European Social Charter (ESC). The protection that accrues from these agreements does not reach beyond what is guaranteed under Art. 9(3) GG. 206

a) In particular Art. 11(1) second half sentence of the ECHR, just like Art. 9(3) GG, does guarantee the right to form and to join trade unions for the protection of one's interests. That comprises the individual and collective right to freedom of association also of a trade union and prohibits the requirement of trade union monopolies. (cf. ECtHR) (GC), Sørensen and Rasmussen v. Denmark, Judgment of 11 January 2006, no. 52562/99 and 52620/99, §§ 64 et seq.). The states that are party to the Convention are obliged to enable trade unions to champion the interests of their members (cf. ECtHR, Matelly v. France, Judgment of 2 October 2014, No. 10609/10, § 55); according to the ECHR, the right to engage in collective bargaining is also a fundamental element of the right to freedom of association (cf. EGMR (GC), Demir and Baykara v. Turkey, Judgment of 12 November 2008, No. 34503/97, §§ 147 et seq., 154) as is the right that a concluded collective agreement is in fact applied (loc. cit., § 157). 207

If those rights are impaired, as is the case here, such impairment must be stipulated by law, it must pursue an objective stated in Art. 11(2) first sentence ECHR, and it must seem necessary in a democratic order. The right to freedom of association stipulated in the ECHR is regarded as a social right, which is why the legislature is granted a margin of appreciation (cf. ECtHR, Stankov and the United Macedonian Organisation Ilinden v. Bulgaria, Judgment of 2 October 2001, No. 29221/95 and 29225/95, § 87; (GC), Demir and Baykara v. Turkey, Judgment of 12 November 2008, No. 34503/97, § 119). A trade union has no guarantee of any particular treatment (cf. ECtHR (GC), Sindicatul „Păstorul cel Bun“ v. Romania, Judgment of 9 July 2013, No. 208

2330/09, § 134). Rather, the ECtHR has accepted a Swedish provision according to which the employer must only engage in collective bargaining with the trade union that represents the majority of employees (cf. ECtHR, Swedish Engine Drivers´ Union v. Sweden, Judgment of 6 February 1976, No. 5614/72, §§ 46 and 47). In the same vein, it has not objected to a Croatian provision that only allowed the employer to enter into negotiations with a board on which all trade unions are represented, in order to ensure parity (cf. ECtHR, Hrvatski liječnički sindikat v. Croatia, Judgment of 27 November 2014, No. 36701/09, §§ 32, 57, 59). This case-law does not go beyond the requirements stipulated in the Basic Law.

b) This is also true for the pertinent Conventions of the International Labour Organization (ILO) that are applicable in Germany. Convention No. 87 of 9 July 1948 concerning Freedom of Association and Protection of the Right to Organize (Law of 20 December 1956, BGBl II p. 2072; cf. also ECtHR, Associated Society of Locomotive Engineers & Firemen (ASLEF) v. the United Kingdom, Judgment of 27 February 2007, No. 11002/05, § 38; (GC), Demir and Baykara v. Turkey, Judgment of 12 November 2008, No. 34503/97, § 70; Enerji Yapı-Yol Sen v. Turkey, Judgement of 21 April 2009, No. 68959/01, § 24) and Convention No. 98 concerning the Application of the Principles of the Right to Organise and to Bargain Collectively of 1 July 1949 (ratified by Law of 23 December 1955, BGBl II p. 1122; to be considered by the labour courts BVerfGE 96, 152 <170>; also BVerfGE 98, 169 <206>; 109, 64 <89>; see also BAG, Judgment of 20 November 2012 - 1 AZR 179/11 -, juris, para. 133; judgment of 20 November 2012 - 1 AZR 611/11 -, juris, para. 76) do not reach beyond the guarantee under the Basic Law either. According to the decision-making practice of the ILO monitoring boards, states are not allowed to specifically support or promote certain trade unions or their members, in order to prevent that they indirectly influence the employees' decision which trade union they want to join (CFA, Case No 981 <Belgium>, Report No 208, June 1981, Normlex, para. 102; Case No 2139 <Japan>, Report No 328, June 2002, Normlex, para. 445). Provisions pursuant to which only one trade union may exist in specific sectors or professions are also incompatible with the Convention (CFA, Case No 956 <New Zealand>, Report No 204, November 1980, Normlex, para. 177; Case No 266 <Portugal>, Report No 65, 1962, Normlex, para. 61). It must also be regarded as a violation of ILO provisions if the establishment of a trade union would be denied, based on the existence of another trade union (CFA, Case No 103 <United Kingdom>, Report No 15, 1955, Normlex, para. 212). Thus, there are no requirements that reach beyond what is guaranteed by Art. 9(3) GG. 209

IV.

The constitutional complaint re 1 BvR 2883/15 also claims incompatibility of the Act on Uniformity of Collective Agreements with Art. 2(1) in conjunction with Art. 20(3) GG, arguing that the provisions with regard to court proceedings under § 2a(1) no. 6, § 99 ArbGG were not adequate to solve the problem, and that the determination of the majority was unrealistic in individual court proceedings. Insofar, this raises no requirements, in the case at hand, that reach beyond the safeguarding of rights under 210

Art. 9(3) GG.

1. Legal protection granted by the courts must always be specified by procedural rules that may also include rules establishing special formal requirements for an application for legal protection, and may thereby impose limits on the parties seeking legal protection (cf. BVerfGE 10, 264 <267 and 268>; 60, 253 <268 and 269>; 77, 275 <284>). The challenged provisions must be compatible with the rule of law applied to rules of procedure, they may not disproportionately burden the individual seeking legal protection (cf. BVerfGE 10, 264 <267 and 268>; 77, 275 <284>; 88, 118 <123 and 124>), and they must ensure that legal protection is granted within reasonable time (cf. BVerfGE 55, 349 <369>; 60, 253 <269>; 93, 1 <13>). 211

2. The court proceedings pursuant to § 2a(1) no. 6, § 99 ArbGG serve to clarify how to proceed when collective agreements collide in a company. A labour court does act if the parties to a collective agreement seek such recourse. The fact that the duration of these proceedings might exceed the term of the disputed collective agreement is not objectionable under constitutional law. Furthermore, the fact that the determination of the majority of union members in the company is subject to procedural requirements, and that therefore, actual majorities cannot be determined in every case, does not constitute a violation of Art. 2(1), Art. 20(3) GG either. In this regard, the labour courts must decide in accordance with the procedural principles regarding the burden of evidence and the burden of proof. 212

[…] 213-214

D.

The fact that § 4a TVG is partly unconstitutional does not lead to it being voided, but only to the finding that it is incompatible with the Basic Law. Until the Act is recast, the provision may only be applied under the proviso that one collective agreement only supplants another pursuant to § 4a(2) second sentence TVG if it can be plausibly shown that the majority trade union has, in its collective agreement, seriously and effectively considered the interests of the professional groups whose collective agreement is supplanted. For the time of the transitional period in which the provision remains effective, until the Act is recast by the legislature, this can be assumed in particular if a specific minimum number of these professional groups is organised in the trade union whose collective agreement will then be applied, or if the statutes of the trade union stipulate that those professional groups have sufficient influence on the collective bargaining decisions relevant for them. It is for the regular courts to assess this in full detail. 215

I.

If provisions are found to be unconstitutional they are principally being voided. However, as stipulated in § 31(2) second and third sentence of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* – BVerfGG) and § 79(1) first sentence 1 BVerfGG, the Federal Constitutional Court may limit itself to declaring an un- 216

constitutional legal provision incompatible with the Constitution (BVerfGE 109, 190 <235>). The Court may combine the declaration of incompatibility with an order that the unconstitutional provision continues to be in effect.

II.

To the extent that there are no precautions to structurally ensure that professional groups whose collective agreement is supplanted, on the basis of the provision under § 4a(2) second sentence TVG, are sufficiently taken into account, § 4a TVG must be declared incompatible with the Constitution; the declaration of incompatibility is, however, combined with the order that the provision remains effective until the Act is amended or recast by the legislature. The reasons that render the challenged provisions to be partly unconstitutional do not affect the core of this provision. In view of the great importance of structural parameters for negotiations of collective agreements, for which the legislature had the right to assume the regulation of the uniformity of collective agreements to be necessary, and because the effective constitutional concerns can be mitigated by the order issued in this judgment until the Act is recast, the interim continued application of the provision – which has been supplemented to include the constitutionally required protection of professional groups – is, out of respect for the legislature, preferable to declaring the provision void. 217

III.

The legislature must enact new provisions eliminating the constitutional objection by 31 December 2018 at the latest. 218

E.

[…] 219-220

F.

Overall, the judgment was handed down with 6 : 2 votes with regard to C III 3 b and D, and with another separate opinion with regard to the necessity of a transitional regulation. 221

Kirchhof Eichberger Schluckebier

Masing Paulus Baer

Britz Ott

Separate Opinion of Justice Paulus and Justice Baer

concerning the Judgment of the First Senate of 11 July 2017

- 1 BvR 1571/15 -

- 1 BvR 1588/15 -

- 1 BvR 2883/15 -

- 1 BvR 1043/16 -

- 1 BvR 1477/16 -

Respectfully, we can only agree with parts of the judgment. It underestimates the actual burden and risks which the Act on Uniformity of Collective Agreements bears for the freedom of trade unions to independently engage in collective bargaining that is guaranteed by the constitution; at the same time, it overestimates the margin of assessment which is granted to the legislature in general and in the case at hand, and thereby curtails the Federal Constitutional Court's review and monitoring function. In its laudable effort to take account of a legitimate aim pursued by the legislature, who is in fact authorised to regulate negative effects of the competition among trade unions, the judgment, in its assessment of what is reasonable, and in the decision on the legal consequences, fails to recognise, in our view, that the Act clearly overshoots the mark. 1

The Senate agrees on the requirements arising from Art. 9(3) of the Basic Law (*Grundgesetz* – GG). However, we cannot agree with the judgment in terms of its constitutional assessment of the means the legislature uses to strengthen free collective bargaining. By adopting the Act on Uniformity of Collective Agreements, the legislature has decided to use the means of supplanting a collective agreement, as an incentive for trade unions to cooperate before entering into collective negotiations. This interference with the autonomy of collective bargaining, which is the focus of Art. 9(3) GG, and the resulting multiple impairments of the trade union's freedom of collective bargaining before entering into collective negotiations bear considerable weight with regard to fundamental rights. Legislative precautions to nonetheless justify this interference as reasonable are unclear, insufficient or entirely missing. Although the Act pursues a legitimate aim to the extent that it intends to ensure the structural preconditions for fair collective negotiations, the sanctions by which this is to be achieved are too heavy. 2

The Senate also agrees on the insufficient consideration of legal positions protected by fundamental rights by the legislature. However, we cannot endorse the judgment in its conclusion that a continued application of the deficient provisions can be nonetheless justified. In particular, there are no reasons to order a transitional rule. It is not for the Senate to decide how to solve the doubtlessly complex problem of safeguarding specific protective rights in a collective agreement system that is under considerable pressure from various sides; instead, this matter is within the legislature's 3

discretion and responsibility. Similarly, the additional fundamental rights issues of the Act on the Uniform Application of Collective Agreements that are pointed out in the judgment cannot just be left for the regular courts to decide; in the field of collective labour law and industrial action, these courts are already criticised for their far-reaching judicial development of the law resulting from the fact that the legislature has, for a long time, been reluctant when it faced the political costs of controversial provisions. However, within the area circumscribed by Art. 9(3) GG, which is a sensitive area when it comes to fundamental rights, it is for the legislature itself to set clear rules, again within the framework determined by fundamental rights. As a consequence, all other constitutional deficits of the Act on the Uniform Application of Collective Agreements that have been identified in the judgment would have to be resolved either by a mandatory interpretation in conformity with the constitution, or by enacting new provisions, and thus, by the legislature.

B.

The common ground that serves as the starting point of the judgment is, since the end of a limitation of Art. 9(3) GG to protection of a core area (clearly stated in Decisions of the Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 93, 352 <357>; ever since established case-law), as the primary standard for an assessment of collective agreement provisions in accordance with constitutional law, the freedom enshrined in Art. 9(3) GG. The judgment rightfully emphasises its scope of protection, specifically the autonomy of collective bargaining and the right to choose bargaining strategies that include industrial action, as well as the right of each party to a collective agreement to determine its own profile. The judgment again highlights the legislature's task to ensure that this fundamental freedom may indeed be exercised through the law of collective bargaining. However, this does not mean that the legislature is given unlimited discretion. As in other cases, the legislature is obliged to enact regulations only under special circumstances (in particular BVerfGE 94, 268 <284>). In addition, the legislature may not base its decision to limit the right to freedom of association on simple fear; as always, a limitation of Art. 9(3) GG is only justifiable on the basis of actual facts (para. 157). There must be "real reasons" for concerns that the system is at risk (cf. BVerfGE 94, 268 <294 et seq., 295> - separate opinion Kühling). 4

The legislature may react to the erosion of a commitment to collective agreements. It is a legitimate aim to establish and maintain a functioning system of free collective bargaining that may justify an impairment of the rights protected under Art. 9(3) GG. […] 5

[…] Within the scope of protection of Art. 9(3) GG, the legislature may only enact such provisions that limit the freedom to engage in collective bargaining in a proportionate way. If this endeavour fails, the legislature must legislate anew and decide differently. 6

C.

The judgment is based on doubtful assessments of social reality. 7

The argument used to justify the Act, namely that wages which are negotiated in case of a collision of collective agreements are currently considered unfair and would therefore adversely affect peace within a company (*Bundestag* document, *Bundestagsdrucksache* – BTDrucks 18/4062, p. 8, 11 and 12), has neither been substantiated nor verified with regard to the counter arguments in the briefs and in light of the evidently more moderate long-term wage increases even for professional groups with much clout […]. At the same time, collective agreements do only have a relative effect due to their limited binding force; they cannot create peace in every situation or regulate in an overarching manner. 8

Furthermore, one cannot ignore that trade unions, who now object to a cooperation that has been indirectly mandated by law, did not end such cooperation as a matter of principle in the past, but rather terminated it for specific reasons. Namely, the interests of the respective professional groups were disregarded in sectoral trade unions, compromises were reached to the disadvantage of a numerical minority over a long period of time, or professional identity was not sufficiently protected […]. The judgment's assessment of the challenged provisions and its transitional regulation for the time until the legislature has enacted new provisions do both not sufficiently consider these factors. 9

There are more arguments to defend the Act that rest on unsafe ground. The existence of multiple collective agreements is not the result of destructive competition among trade unions; it follows from the freedom to exercise fundamental rights, and it is often desired, especially by employers […]. Collisions between collective agreements are rare. The known conflicts that arose between several trade unions and employers must be seen in connection with very specific developments, among which there were consequences of the privatisation of state-owned companies, insufficient representation of traditional professional identities by sectoral trade unions, or discrepancies between working conditions of particular domestic professions and their foreign counterparts that followed from compromises made in years of an economic crisis […]. Furthermore, clarifying proceedings organised by the associations for the solution of trade agreement collisions have been established a long time ago (such as proceedings pursuant to the statutes of the Federation of German Trade Unions, *Deutscher Gewerkschaftsbund* – DGB); in addition, collisions are sometimes also solved in collective agreements themselves (as was the case in the Collective Agreement on Basic Issues of the German Rail – *Bahn* –, after arbitration). Here again, we see the effect of the Basic Law's approach to leave collective bargaining first and foremost to the parties to collective agreements themselves under Art. 9(3) GG. This must be taken into account more strongly in the assessment of justifications for legislative limitations of a protected fundamental freedom. 10

Insofar as the judgment is based on the assumption that the employees' side is 11

strengthened by the, supposedly, merely indirect pressure to cooperate, because the strong professional groups that hold key positions in a company are now forced to cooperate with other employees, this is reassuring only to some extent. It cannot be overlooked that the challenged provisions are the result of a one-sided political compromise between the two umbrella organisations, the Federation of German Trade Unions and the Federal Organisation of German Employers' Associations (*Bundesvereinigung der Deutschen Arbeitgeberverbände*) (para. 9 of the judgment); in fact, none of the trade unions that lodged the constitutional complaint were actually involved. The fact that sectoral trade unions as well as trade unions that organise specific professions have filed largely similar concerns with regard to the Act on Uniformity of Collective Agreements clearly demonstrates that the affected parties do not see a need for legislative action.

12 Considering the arguments presented in the constitutional complaints and the oral hearing, it cannot be overlooked either that there will be no peaceful cooperation in case the provision on colliding collective agreements is applied without a clarifying decision by a labour court before collective negotiations are started and agreements are concluded; instead, "in-house battles" fought to gain the majority in a company are to be expected […]. In this context, it also needs to be considered that the legislature does not only provide for heavy sanctions if cooperation prior to collective bargaining is unsuccessful. In fact, with the Act´s principle of majority within a company and the option to adopt the collective agreement of the majority union, the legislature has also adopted a structurally biased solution: the union that organises a typically small professional group is supplanted; to adopt the collective agreement of the majority trade union essentially equals a "submission" to agreements made by others that fail to reflect one's own tariff-related profile, and thus suspends the freedom of collective bargaining which is protected under Art. 9(3) GG. In this regard, consideration needs to be given to the failure of earlier cooperation in collective bargaining and the jeopardising of still functioning cooperations by reference to the Act on Uniformity of Collective Agreements. In our view, the cases described in the proceedings in which employers already refused to engage in collective negotiations at all, and the obvious strategy of no action until a decision is passed by the Senate […] were not adequately considered in the judgment. However, if the consequences that were presented in the proceedings, and that did not substantially influence the evaluation of reasonableness in the judgment, materialise in the future, the Act would have to be re-evaluated under constitutional law (cf. BVerfGE 92, 365 <396>).

D.

13 The limited view of the reality of collective bargaining affects the evaluation of the Act in question under constitutional law. […]

14 It is questionable whether the challenged provisions are even suitable to achieve the objective of a functioning system of collective agreements. In our view, as demonstrated in the proceedings, the probability appears high that the legislature, by using

the criterion of majority of union membership, rather provokes stronger competition and status battles in companies. […]. If “one side holds all aces”, there is no incentive to cooperate […].

We also have considerable doubts regarding the necessity of the challenged provisions when it comes to achieving the objective of structurally fair collective negotiations […]. Supplanting a collective agreement only subject to regular court proceedings (and retroactively, i.e. *ex tunc*) would have been a less severe but equally effective means to create an incentive to cooperate. 15

In fact, there has been no relevant increase in the formation of trade unions that organise specific professions since the case-law of the labour courts changed in 2010 […]. Overall, the frequency and intensity of strikes, which has not been addressed directly by the legislature, has not increased […]. […] According to the previously applicable standards, the order of provisional continuation of the application of the Act held in many respects unconstitutional is thus not justifiable. 16

The challenged provisions are not only unreasonable in terms of the protection of specific professions in the applicable collective agreement. In particular, they are unreasonable in terms of an interpretation of the provisions in the sense that a collective agreement may be supplanted without a labour court decision, which the judgment allows for. The interference with free collective bargaining protected by the right to freedom of association pursuant to Art. 9(3) GG, which manifests itself in the supplanting of a concluded collective agreement and the loss of respective benefits, as well as the severely limiting effects of such supplanting on the entire range of tariff-related actions protected by fundamental rights, go too far. This holds even in light of the legitimate legislative aims, at least if such interference occurs by virtue of law alone, and not due to an application filed by a party to a collective agreement. The judgment rightfully assumes that one can also interpret § 4a(2) second sentence of the Act on Collective Agreements (*Tarifvertragsgesetz* – TVG) in a way according to which supplanting of a conflicting collective agreement does not occur *ipso jure,* rather than making this loss subject to the decision of the labour court in proceedings pursuant to § 99 of the Labour Court Act (*Arbeitsgerichtsgesetz* – ArbGG), which is applied *ex tunc* (paras. 175 and 176; cf. BVerfGE 140, 211 <213 and 214 para. 4> […]). To that extent, the judgment leaves the interpretation of the Act to the labour courts. In our view, an interpretation is mandatory under constitutional law according to which the nullification of union agreements should be left to specialised court proceedings (*Beschlussverfahren*). Supplanting a collective agreement by court pronouncement is the only way to create legal certainty and avoid unpredictability, which would be an additional burden on the system of collective agreements. Otherwise, these uncertainties will affect individual employees. Also, *ipso jure* supplanting of a collective agreement allows for divergent decisions in the litigation on individual rights. Without clarification by universally valid court proceedings, there is an increased incentive to fight “in-house battles” to recruit a majority in a given company before engaging in collective negotiations. In fact, to subject the solution of collective agreement colli- 17

sions to court proceedings is in accordance with the legislature's repeatedly stated objective to preserve, if possible, the freedom of the parties under Art. 9(3) GG to conclude a collective agreement (cf. BTDrucks 18/4062, p. 1, 12). In the course of the proceedings before this Court, the Federal Government also emphasised that the Act on Uniformity of Collective Agreements was only intended to create incentives, to unfold its effect before collective negotiations were conducted, and to protect to the extent possible the freedom of trade unions to engage in collective bargaining. Accordingly, § 4a(2) first sentence TVG explicitly accepts the existence of multiple collective agreements.

Furthermore, the judgment rightly assumes that it would be incompatible with Art. 9(3) GG if the provision on colliding collective agreements led to a loss of individual claims from a collective agreement which are of a long-term nature and affect the life-planning of individual employees (paras. 187 and 188). The legislature did not consider this. In our view, the provision is therefore incompatible with the Basic Law in that respect as well. Leaving to the courts whether and how to remedy this loss, and suggesting that the courts submit the issue of whether the legislature is called upon to take action once more to the Federal Constitutional Court, is yet another consequence of the ignorance as to how the Act on Uniformity of Collective Agreements will work in practice. However, if it is obvious that interests that are clearly protected by the Basic Law have simply been ignored, it is the legislature's responsibility to take a decision in favour of one of many possible solutions in very different regulatory contexts – be it company pension schemes, insolvency protection, job guarantees, partial retirement schemes or time credit systems. Whether and to what extent the legislature must resort to a general clause due to the variety of issues must be decided in a legislative procedure that takes all arguments and parties concerned into account. 18

Finally, we cannot agree with the judgment to the extent that it is based on the assumption of the Federal Government that the adoption of the collective agreement of another trade union lessens the effects of the loss of a union's own collective agreement (para. 194). This assumption is based on a dangerous tendency of uniformity of interests of all employees, thereby sacrificing the fundamental freedom enshrined in Art. 9(3) first sentence GG for a notion of objective correctness. In light of today's structures of employment this is absolutely unrealistic and amounts to giving up the commitment to collective agreements. In fact, the concept to consider the commitment to a collective agreement, and not the specifically negotiated agreement, as essential privileges the big sectoral trade unions. This contradicts the fundamental concept of Art. 9(3) GG which relies on the self-determined commitment of members of all professions to collective bargaining. The right to freedom of association under Art. 9(3) GG protects the variety of interests in multiple associations and does not justify any "act of submission" in the course of "collective begging" […]. […] in particular, a mode of quantitative representation contradicts the character of the freedom to organise and engage in collective bargaining, which is enshrined in Art. 9(3) GG. To the contrary, plurality is the necessary consequence and specifically characteristic of this 19

liberal system (cf. Dieterich, in: *GS für Ulrich Zachert*, 2010, p. 532 <541>).

Finally, the judgment allows for the possibility that, in the course of court proceedings pursuant to § 99 ArbGG, the relative strength of trade unions in a company is disclosed. While the judgment recognises a duty of the regular courts to avoid disclosure, it also accepts it if necessary (para. 199). As long as the legislature does not provide for safeguards that prevent a shift of parity in trade bargaining […], such disclosure is unreasonable. The existence of multiple collective agreements, which the legislature generally accepts in § 4a(2) first sentence TVG, must then be condoned […]. 20

[…] 21

If one - in our view substantial - aspect of a challenged provision is unconstitutional, the law requires, as a regular consequence, that the provision at issue is voided; § 95(3) first sentence of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* – BVerfGG. Particularly when striving to respect the legislature's leeway, which we support, this measure is severe but clearly required; in our view, it also applies in the case at hand. "The Constitutional Court should refrain from looking after the legislature" (cf. BVerfGE 93, 121 <152> - separate opinion Böckenförde). […] To repair a law that proves to be unconstitutional in parts because fundamental rights are unreasonably impaired is not among the task of the Federal Constitutional Court. It is for the legislature to decide on how to design a provision so that resulting limitations of rights under Art. 9(3) GG become reasonable. For this reason precisely, the legislature is granted a margin of appreciation. As a consequence, the Federal Constitutional Court's task to review compliance with fundamental rights requirements of laws that limit the right to freedom of association guaranteed by Art. 9(3) GG should have led to the decision to declare the Act on Uniformity of Collective Agreements unconstitutional and void, at least to the extent that there is consensus that supplanting of a collective agreement is unreasonable. § 4a(2) second sentence TVG should have been inapplicable to that extent, until the legislature has adopted a new provision. There are no obvious reasons to deviate from this. 22

[…] Where the legislature did not set the course for a reasonable limitation of the right to freedom of association, it has to act itself. There was no need to go through the trouble of pointing out options for the interpretation of statutory law in the judgment, in order to be able to accommodate the wishes of the legislature to the extent possible. Instead, and particularly in order to protect fundamental rights of small trade unions, the judgment should have exercised the Federal Constitutional Court's powers of review even against strong political majorities and should have decided that, by adopting the Act on Uniformity of Collective Agreement, the legislature chose a weapon that missed its aim. 23

Individual and collective exercise of fundamental freedoms can sometimes be demanding, in particular for third parties that are not directly involved in the conflict. The legislature is called upon to provide a legal framework so that these rights can be ex- 24

ercised, and it is the task of the Federal Constitutional Court to protect the exercise of freedoms from private interference (Art. 9(3) second sentence GG), as well as from disproportionate interference by the legislature. While trying to reach a balance that serves all interests, the Senate requires the regular courts to assess the substantive reasonableness of collective agreements for individual professional groups. Art. 9(3) GG, on the contrary, trusts in the responsible exercise of freedom.

Paulus Baer

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