Headnotes

to the Order of the Second Senate of 13 February 2020

- 2 BvR 739/17 -

1. **The protection afforded by Article 38(1) first sentence of the Basic Law entails a right that the requirements for a transfer of sovereign powers laid down in Article 23(1) of the Basic Law be observed. In order to safeguard their democratic influence on the process of European integration, citizens are afforded a right that, in principle, sovereign powers be transferred only in the ways provided for in the Constitution, specifically in Article 23(1) second and third sentence in conjunction with Article 79(2) of the Basic Law (*formelle Übertragungskontrolle*). (paras. 97 and 98)**

2. **The domestic act of approval to an international treaty that supplements or is otherwise closely tied to the European Union's integration agenda must be measured against Article 23(1) of the Basic Law. (para. 118)**

3. **The act of approval to an international treaty adopted in violation of Article 23(1) third sentence in conjunction with Article 79(2) of the Basic law does not provide democratic legitimation for the exercise of public authority by institutions, bodies, offices and agencies of the European Union or by an international organisation supplementing or otherwise closely tied to the European Union; it therefore violates the right of citizens under Article 38(1) first sentence in conjunction with Article 20(1) and (2) and Article 79(3) of the Basic Law, which is a right equivalent to a fundamental right. (para. 133)**

FEDERAL CONSTITUTIONAL COURT

- 2 BvR 739/17 -

IN THE NAME OF THE PEOPLE

In the proceedings
on
the constitutional complaint

of Dr. S…,

against the Act of Approval to the Agreement on a Unified Patent Court of 19 February 2013 in conjunction with the Agreement on a Unified Patent Court

and on the application for a preliminary injunction

the Federal Constitutional Court – Second Senate –

with the participation of Justices:

President Voßkuhle,

Huber,

Hermanns,

Müller,

Kessal-Wulf,

König,

Maidowski,

Langenfeld

held on 13 February 2020:

1. **Article 1(1) first sentence of the Act of Approval to the Agreement on a Unified Patent Court of 19 February 2013 (Decision of the *Bundestag* of 10 March 2017, Minutes of plenary proceedings 18/221, p. 22262, *Bundestag* document 18/11137) violates the complainant's right deriving from Article 38(1) first sentence in conjunction with Article 20(1) and (2) and Article 79(3) of the Basic Law, a right which is equivalent to a fundamental right.**

2. **Article 1(1) first sentence of the Act of Approval to the Agreement on a Unified Patent Court of 19 February 2013 (Decision of the *Bundestag* of 10 March 2017, Minutes of plenary proceedings 18/221, p. 22262, *Bundestag* document 18/11137) is incompatible with Article 23(1) third sentence in conjunction with Article 79(2) of the Basic Law and thus void.**

3. **As a result, the application for a preliminary injunction is moot.**

4. **The Federal Republic of Germany must reimburse the complainant for his necessary expenses.**

Reasons:

A.

I.

The constitutional complaint challenges the Act of Approval to the Agreement on a Unified Patent Court of 19 February 2013 (hereinafter: UPC Act of Approval) adopted by the *Bundestag* and the *Bundesrat* (*Bundestag* document, *Bundestagsdrucksache* – BTDrucks 18/11137; *Bundesrat* document, *Bundesratsdrucksache* – BRDrucks 202/17). The Act of Approval serves to establish the preconditions for the ratification of the UPC Agreement (OJ EU C 175 of 20 June 2013, p. 1 *et seq*.). 1

[*Excerpt from Press Release No. 20/2020 of 20 March 2020*]

As an international treaty, the UPC Agreement is part of a European patent package at the core of which lies the introduction of a European patent with unitary effect at EU level implementing enhanced cooperation. The 'European patent with unitary effect' provides unitary protection in all participating Member States. The Agreement provides for the establishment of a Unified Patent Court (UPC) as a court common to most Member States for disputes concerning European patents and European patents with unitary effect. In relation to European patents and European patents with unitary effect, exclusive jurisdiction over patent disputes listed in an extensive catalogue is to be conferred upon this court. The catalogue comprises in particular actions for patent infringements, disputes on the validity of patents and certain actions against decisions of the European Patent Office. The challenged Act of Approval was adopted unanimously by the *Bundestag* in the third reading; about 35 members of

the *Bundestag* were present for the reading. Neither did the *Bundestag* invoke the procedure to ascertain the presence of a quorum, nor did the President of the *Bundestag* declare that the Act of Approval had been adopted by a qualified majority.

[*End of excerpt*]

[...] 2

1. […] 3-5

2. […] 6

a) […] 7-8

b) [...] 9-10

c) […] 11

d) […] 12-13

e) On 19 February 2013, a total of 25 Member States – excluding Spain, Poland and Croatia – signed the Agreement on a Unified Patent Court together with the annexed Statute of the Court (cf. Council document 6572/13). 14

According to its Art. 89(1), the UPC Agreement enters into force upon ratification, and deposit of the instrument of ratification, by at least 13 of the 25 Contracting Member States. Moreover, entry into force is contingent upon ratification by the [three] Contracting Member States (as defined in Art. 2 lit. b of the UPC Agreement) in which the highest number of European patents had effect in the year preceding the year in which the signature of the Agreement took place. These are Germany, France and the United Kingdom (cf. BTDrucks 18/11137, p. 94). 15

To date, 16 Member States have ratified the UPC Agreement (Austria, Belgium, Bulgaria, Denmark, Estonia, Finland, France, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Portugal, Sweden and the United Kingdom; cf. the list of ratifications available at http://www.consilium.europa.eu/de/documents-publications/agreements-conventions/agreement/?aid=2013001 <last accessed on 29 January 2020>). 16

By decision of 26 June 2018, the Constitutional Court of Hungary declared unconstitutional the Hungarian Act of Approval on the grounds that the UPC Agreement lacked a sufficient legal basis in the EU Treaties (cf. Constitutional Court of Hungary, Decision 9/2018 <VII. 9.> of 26 June 2018, official English translation available at https://hunconcourt.hu/uploads/sites/3/2018/07/dec-on-unified-patent-court.pdf). […] 17

3. […]. 18-21

4. […] 22-24

5. […] 25-30

6. […] 31-32

7. […] 33-34

II.

In his constitutional complaint of 31 March 2017, the complainant claims that the Act of Approval to the UPC Agreement violates his right derived from Art. 38(1) first sentence of the Basic Law (*Grundgesetz* – GG) in conjunction with Art. 20(1) and (2) GG and Art. 79(3) GG, which is a right equivalent to a fundamental right. In addition, he claims that the UPC Agreement violates EU law and proposes that a preliminary ruling of the Court of Justice of the European Union (CJEU) be requested in accordance with Art. 267 of the Treaty on the Functioning of the European Union (TFEU). 35

[...] 36-50

III.

The Federal Government, the German *Bundestag*, the *Bundesrat* and the governments of the German *Länder* (federal states) were notified of the constitutional complaint proceedings and the application for a preliminary injunction, and given the opportunity to submit a statement. Under § 27a of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* – BVerfGG), the opportunity to submit statements as expert third parties was given to the Federal Bar Association (*Bundesrechtsanwaltskammer*), the German Lawyers Association (*Deutscher Anwaltverein*), the President of the European Patent Office, the German Association for Industrial Property Rights and Copyright (*Deutsche Vereinigung für gewerblichen Rechtsschutz und Urheberrecht* – GRUR e.V.), the European Patent Lawyers Association, and the Federation of German Industries (*Bundesverband der Deutschen Industrie*). The *Bundesrat*, the governments of the *Länder,* and the Federation of German Industries refrained from submitting statements. 51

[...] 52-89

IV.

On 3 April 2017, the Federal President declared vis-à-vis the Federal Constitutional Court – in line with established German state practice – that he would refrain from certifying and promulgating the UPC Act of Approval, and that the UPC Agreement would not be ratified by Germany, until the Federal Constitutional Court renders its decision in the principal proceedings (cf. Decisions of the Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 123, 267 <304>; BVerfGE 132, 195 *et seq*. […]). There was thus no need for the Federal Constitutional Court to consider the application for a preliminary injunction. 90

B.

The constitutional complaint is admissible to the extent that the complainant asserts 91

a violation of his right derived from Art. 38(1) first sentence GG in conjunction with Art. 20(1) and (2) GG and Art. 79(3) GG on the grounds that the UPC Act of Approval was not adopted by qualified majority as required under Art. 23(1) third sentence GG in conjunction with Art. 79(2) GG (see I. below). For the rest, his constitutional complaint is inadmissible (see II. below).

I.

The domestic act of approval to an international treaty may be challenged with a constitutional complaint if the treaty contains provisions that directly affect the legal sphere of the individual complainant (see 1. below). In the present case, the complainant asserted and substantiated the possibility that the qualified majority requirement set out in Art. 23(1) third sentence GG in conjunction with Art. 79(2) GG was not observed (see 2. below). In respect of this challenge, the constitutional complaint also meets the other admissibility requirements (see 3. below). 92

1. a) The domestic act of approval to an international treaty may be challenged by means of a constitutional complaint if the treaty contains provisions that directly affect the legal sphere of the individual complainant (cf. BVerfGE 6, 290 <294 and 295>; 40, 141 <156>; 84, 90 <113>; 123, 148 <170>). Domestic treaty approval is generally indivisible given that the act of approval and the international treaty in principle form one inseparable whole; as a result, a constitutional complaint constitutes a unitary challenge to both the act of approval and the treaty (cf. BVerfGE 103, 332 <345 and 346>). However, this does not rule out the possibility to limit the proceedings in substance to only certain provisions of the challenged treaty, depending on the complainant's specific interest in seeking legal protection (cf. BVerfGE 14, 1 <6>; 123, 148 <170, 185>; 142, 234 <245 *et seq*. para. 10 *et seq*.>). Thus, constitutional complaints directed against the act of approval to an international treaty must observe the general requirement that the complainant state precisely which provisions are being challenged. 93

b) The act of approval to an international treaty can be challenged in constitutional complaint proceedings even before it enters into force provided that the legislative process has already been concluded except for certification of the act by the Federal President and its promulgation (cf. BVerfGE 1, 396 <411 *et seq*.>; 24, 33 <53 and 54>; 112, 363 <367>; 123, 267 <329>; 132, 195 <234 and 235 para. 92>; 134, 366 <391 and 392 para. 34>; 142, 123 <177 para. 91>). If constitutional challenges were not allowed at that point in time, Germany would risk assuming treaty obligations under international law that it could not fulfil without violating its Constitution. Thus, constitutional complaints lodged at a later stage could no longer serve the purpose of resolving relevant constitutional issues in advance, thereby safeguarding the peaceful legal order (*Rechtsfrieden*) and preventing discrepancies between binding obligations under international law and binding requirements under constitutional law (cf. BVerfGE 24, 33 <53 and 54>; 123, 267 <329>). Allowing constitutional challenges at this point in the legislative process enables the Court to conduct an *a priori* review of 94

future binding provisions in keeping with the requirement of effective judicial (fundamental rights) protection and in line with established German state practice. At the same time, constitutional complaints only become admissible once the legislative process for adopting the act of approval has already been concluded except for certification of the act by the Federal President and its promulgation (cf. BVerfGE 1, 396 <411 *et seq*.>; 24, 33 <53 and 54>; 112, 363 <367>; 123, 267 <329>). In the present case, the legislative process has already reached this stage.

2. By claiming that the UPC Act of Approval fails to meet the constitutional requirements for the effective transfer of sovereign powers (Art. 23(1) second and third sentence GG in conjunction with Art. 79(2) and (3) GG), the complainant asserted and substantiated a possible violation of Art. 38(1) first sentence GG. 95

a) Art. 38(1) first sentence GG protects citizens against a transfer of sovereign powers under Art. 23(1) first sentence GG where such transfer is in violation of Art. 79(3) GG because it affects essential elements of the sovereignty of the people, which is a constitutional principle enshrined in Art. 20(1) and (2) GG. The Federal Constitutional Court determines whether this is the case in its review on the basis of constitutional identity (identity review – *Identitätskontrolle*) (cf. most recently BVerfGE 151, 202 <287 *et seq*. para. 120 *et seq*.>). Moreover, Art. 38(1) first sentence GG in conjunction with Art. 20(1) and (2) first sentence GG affords citizens a right vis-à-vis the *Bundestag*, the *Bundesrat* and the Federal Government, compelling these constitutional organs to monitor, in the exercise of their responsibility with regard to European integration (*Integrationsverantwortung*), whether the European integration agenda (*Integrationsprogramm*) laid down in the respective act of approval is adhered to; where EU institutions, bodies, offices and agencies exceed their competences in a manifest and structurally significant manner, this right requires the competent constitutional organs to actively take steps to ensure conformity with, and respect for the limits of, the integration agenda laid down in the act of approval. The Federal Constitutional Court determines whether this is the case in its review on the basis of the *ultra vires* doctrine (*ultra vires* review – *Ultra-vires-Kontrolle*) (cf. most recently BVerfGE 151, 202 <296 *et seq*. para. 140 *et seq*.>). 96

In addition, the protection afforded by Art. 38(1) first sentence GG extends to ensuring that the requirements for an effective transfer of sovereign powers laid down Article 23(1) GG are observed. The guarantee of protection derived from Art. 38(1) first sentence GG applies to structural changes in the constitutional order of the state, which may, for instance, occur when sovereign powers are transferred to the European Union or other supranational organisations (cf. BVerfGE 129, 124 <169>; 142, 123 <190 para. 126>). Once competences have been transferred to another subject of international law, the transfer cannot easily be undone to “regain” the competence in question; this is a crucial difference between the transfer of sovereign powers and constitutional amendments. In this context, the requirement of a two-thirds majority that follows from Art. 23(1) third sentence GG in conjunction with Art. 79(2) GG serves to ensure the particularly high level of legitimation necessary for decisions that 97

diminish the substance of the right to vote in elections to the *Bundestag* and that weaken – within the limits set by the constitutional identity – the Basic Law's democratic guarantees, possibly with permanent effect. This serves to set a high hurdle for substantive constitutional amendments undertaken by the legislator deciding on matters of European integration (*Integrationsgesetzgeber*), as these decisions are taken without direct participation of the people […]. The transfer of sovereign powers invariably affects the guarantee enshrined in Art. 38(1) first sentence GG, whereas this is not necessarily the case with constitutional amendments. If constitutional requirements for a conferral of competences are not met, sovereign powers cannot be transferred with legal effect, regardless of whether the transfer amounts to a constitutional amendment; as a result, all measures based on such an ineffective "transfer" would constitute *ultra vires* acts.

98 In order to safeguard their democratic influence on the process of European integration, the Constitution affords citizens a right that, in principle, sovereign powers be transferred only in the ways provided for in Article 23(1) second and third sentence GG in conjunction with Article 79(2) GG (cf. BVerfGE 134, 366 <397 para. 53>; 142, 123 <193 para. 134>; 146, 216 <251 para. 50>). [Individual citizens] may thus bring a challenge on the grounds that the requirement of a federal law adopted with the consent of the *Bundesrat* (*zustimmungspflichtiges Bundesgesetz*) was not observed in cases falling under the second sentence of Art. 23(1) GG, or on the grounds that the requirement of a qualified majority set out in Art. 79(2) GG was not observed in cases falling under the third sentence of Art. 23(1) GG.

99 The fact that the Second Senate, in its judgment of 18 March 2014 on the ESM, held that a possible violation of Art. 38(1) first sentence GG cannot be asserted on the grounds that certain formal requirements have not been observed in the legislative process does not merit a different conclusion in the present proceedings. That case was different from the present one given that the ESM Financing Act at issue in those proceedings did not entail an irreversible transfer of sovereign powers (cf. BVerfGE 135, 317 <386 para. 125>). In the ESM proceedings, the Second Senate also dismissed as inadmissible another challenge raised by the then complainants, who had argued that *Bundestag* and *Bundesrat* decisions on special ESM measures, such as capital increases, bear on the *Bundestag*'s overall budgetary responsibility and would thus trigger the two-thirds majority requirement; in its reasoning, the Senate stated that Art. 79(2) GG, even when applied in conjunction with Art. 23(1) second sentence GG, is generally only an objective guarantee of constitutional law that does not confer individual rights upon citizens entitled to vote. However, these considerations do not justify a different conclusion in the present proceedings. As stated above, the challenge raised in the ESM proceedings did not concern a transfer of sovereign powers. In the ESM proceedings, the Second Senate made an express reservation that this decision was rendered without prejudice to the review of *ultra vires* challenges, which shows that different constitutional standards would be applicable in cases concerning an invalid transfer of sovereign powers (cf. BVerfGE 135,

317 <387 and 388 para. 129). The reservation issued in the ESM decision would make little sense if it were not intended to also apply to cases, such as the present one, that concern a review as to whether a transfer of sovereign powers is without legal effect given that invalidity of the transfer would lead to countless *ultra vires* acts.

b) In his constitutional complaint, the complainant asserts that the legislator deciding on European integration matters failed to meet the constitutional requirements for the transfer of sovereign powers to the Unified Patent Court, notably on the grounds that, contrary to Art. 23(1) third sentence GG in conjunction with Art. 79(2) GG, the UPC Act of Approval was not adopted with the necessary two-thirds majority. With this assertion, the complainant demonstrates and sufficiently substantiates the possibility that the challenged act violates Art. 38(1) first sentence GG. Drawing on views put forward in legal scholarship, the complainant elaborates on why he believes Art. 23(1) GG to be applicable to the challenged Act of Approval, and addresses the constituent elements deriving from the third sentence of that provision; moreover, the complainant refers to the case-law of the Second Senate in order to establish a link between the constitutional protection afforded by the right to vote and the constitutional requirement of a qualified majority in the legislative process. In addition, the complainant plausibly asserts that the majority requirements set out in Art. 79(2) GG in conjunction with Art. 23(1) third sentence GG were not met in the present case. 100

It is true that the complainant did not exhaustively discuss all possible ways in which Art. 23(1) third sentence GG could be interpreted. Yet this is not necessary in order to meet the admissibility requirement of sufficient substantiation. As regards the constitutional issue in dispute here, there are no decisions in the Senate's case-law that are directly applicable (cf. BVerfGE 129, 124 <171 and 172>) and discourse in legal scholarship on the relation between the second and third sentence of Art. 23(1) GG has branched into a myriad of different views the details of which are almost impossible to capture [...]. In order to satisfy the requirements of substantiation, it was thus sufficient for the complainant to base his submission on the prevailing view in scholarship, according to which any act on matters of European integration that entails a transfer of sovereign powers with direct legal consequences at the domestic level substantively amends the constitutional order [...]. The arguments put forward by the complainant make it sufficiently clear that the complainant views the departure from the allocation of jurisdiction to domestic courts laid down in Art. 92 GG as a considerable and structurally significant shift in the constitutional order. Regardless of whether the complainant's arguments are ultimately persuasive, the fact remains that his arguments are essentially in line with views held in legal scholarship, namely that determining the applicability of the third sentence of Art. 23(1) GG requires an appraisal of the consequences the challenged act entails for the constitutional order of the Basic Law [...]. 101

3. [To the extent set out above], the constitutional complaint also meets the other admissibility requirements. [...] 102

II.

However, the complainant lacks standing, rendering his constitutional complaint inadmissible, to the extent that he asserts a possible violation of his right derived from Art. 38(1) first sentence GG in conjunction with Art. 20(1) and (2) GG and Art. 79(3) GG on the grounds that the UPC Act of Approval violated the constitutional identity of the Basic Law as the complainant believes that the UPC regime governing the status of judges did not sufficiently give effect to the rule of law [...]; on the grounds that the establishment of the Unified Patent Court led to fundamental rights interferences lacking a sufficient statutory basis [...]; and on the grounds that the UPC Agreement was in breach of EU law [...]. 103

[...] 104-116

C.

To the extent that it is admissible, the constitutional complaint is also well-founded. Art. 1(1) first sentence of the UPC Act of Approval fails to satisfy the constitutional requirements derived from Art. 23(1) third sentence GG in conjunction with Art. 79(2) GG and thus violates the complainant's right of democratic self-determination enshrined in Art. 38(1) first sentence GG in conjunction with Art. 20(1) and (2) GG and Art. 79(3) GG. 117

I.

The domestic act of approval to an international treaty that supplements or is otherwise closely tied to the EU's integration agenda must be measured against Article 23(1) GG (see 1. below). Insofar as such an act substantively amends or supplements the Basic Law, or makes such amendments or supplements possible, it requires a two-thirds majority in the legislative bodies in accordance with Art. 23(1) third sentence GG in conjunction with Art. 79(2) GG (see 2. below). Where Germany assumes obligations under international law that subject German citizens to a supranational public authority without ensuring that the aforementioned constitutional requirements are observed, it violates the affected citizens' right derived from Art. 38(1) first sentence GG in conjunction with Art. 20(1) and (2) GG and Art. 79(3) GG (see 3. below). In any case, the substantive limits to the transfer of sovereign powers that follow from Art. 79(3) GG have to be respected (see 4. below). 118

1. In matters of European integration, Art. 23(1) GG supersedes Art. 24(1) as *lex specialis*; the second sentence of Art. 23(1) GG sets out a qualified requirement of a statutory provision (cf. BVerfGE 123, 267 <355>; [...]). Art. 23(1) GG is informed by a broad understanding of the term 'European Union', which also encompasses international organisations that do not directly form part of the EU's institutional framework (see a) below). The transfer of sovereign powers to independent international organisations must be measured against Art. 23(1) GG if these organisations supplement or are otherwise closely tied to the EU's integration agenda (see b) below). 119

a) In 1992, the Constitution-amending legislator inserted Art. 23(1) GG into the Basic Law. The underlying aim was to provide a new foundation for Germany's participation in European integration and to create a consolidated and comprehensive framework governing the different bodies and procedures involved (cf. BTDrucks 12/3338, pp. 1, 4 *et seq*.; 12/6000, p. 19 *et seq*). This notion is reflected in the wording of Art. 23(1) GG: the first sentence speaks generally of the development of the European Union with a view to establishing a united Europe, while the second sentence provides for the transfer of sovereign powers, which is not necessarily limited to the European Union; rather, the provision does not specify the legal subject upon which powers may be transferred (it merely states that powers may be transferred "to this end"). Lastly, the third sentence of Art. 23(1) GG applies not only to changes in the treaty foundations of the European Union but also refers to comparable arrangements ("comparable regulations"). 120

Given that European integration had already reached considerable depths, the purpose of Art. 23(1) third sentence GG is to subject any further expansion of the EU's integration agenda to strict procedural requirements. When deciding on the 1992 constitutional amendment, the legislator took up a proposal put forward by the *Bundestag* Committee on Legal Affairs and by the Special Committee on Affairs of the European Union that aimed to subject any expansion of EU competences to the new regime (cf. BTDrucks 12/3896, p. 14). The Constitution-amending legislator primarily intended for the new regime to apply to the exercise of evolutionary clauses and of bridging or '*passerelle*' clauses contained in the treaty foundations (cf. BTDrucks 12/3896, pp. 14, 18 and 19; BVerfGE 123, 276 <385 *et seq*.>). The legislator did not, however, intend to limit applicability to those cases. It would therefore be contrary to the legislative intent behind the constitutional amendment to exclude from the scope of Art. 23(1) GG certain parts of the dynamic and complex process that unfolds in the course and context of developing the European Union (cf. BVerfGE 131, 152 <199 *et seq*.>). Such a narrow reading would allow the creation of satellite bodies that are functionally equivalent to, yet independent from, EU institutions as a means to forgo a direct transfer of sovereign powers to the EU and thus also evade the need to conduct an overall assessment of the state of integration required for such a transfer. 121

Art. 23(1) GG – like Art. 23(2) GG – is informed by a broad understanding of the term 'European Union', which in principle comprises the EU's entire organisational framework and integration agenda and, under certain conditions, also international bodies and organisations that are separate from the EU (cf. BVerfGE 131, 152 <199 *et seq*., 217 and 218>). Based on this understanding, the provision is intended to apply to any legal act that governs, specifies, guarantees or supplements the Federal Republic of Germany's membership of the European Union, whereas its applicability does not necessarily require the direct transfer of sovereign powers to institutions, bodies, offices and agencies of the European Union. 122

b) If a transfer of sovereign powers to independent international organisations *de facto* amounts to a change in the treaty foundations, it must be measured against Art. 123

23(1) GG [...]. This is the case if the domestic act [of approval] to an integration measure and/or the international treaty in question serve as a functional substitute for amending or supplementing the treaty foundations. Examples for this type of “substitute EU law” [...] are the ESM Treaty and the domestic Act to the ESM Treaty: while these instruments did not entail a transfer of sovereign powers, they brought about fundamental changes to the original design of the Economic and Monetary Union (cf. BVerfGE 135, 317 <407 para. 180> with reference to BVerfGE 129, 124 <181 and 182>; 132, 195 <248 para. 128>; for a different view cf. CJEU, Judgment of 27 November 2012, Pringle, C-370/12, EU:C:2012:756, para. 73 *et seq*.); consequently, the Senate categorised these instruments as ‘matters concerning the European Union’ within the meaning of Art. 23(2) GG (cf. BVerfG 131, 152 <219>).

The finding that a legal act is functionally equivalent to primary EU law requires that the measure supplements or is otherwise closely tied to the integration agenda of the European Union [...]. Whether this is the case cannot be determined on the basis of a single selective, exhaustively defined and clear-cut criterion; instead, such a determination requires an overall assessment, taking into account the relevant circumstances and the objectives, contents and effects of the legal act in question (cf., on Art. 23(2) GG, BVerfGE 131, 152 <199>). 124

Criteria that indicate close ties to the EU’s integration agenda include that the envisaged organisation has a basis in primary EU law; that the project is envisaged in secondary or tertiary law provisions; and other grounds that establish a qualified substantive link to the EU’s integration agenda. Other relevant criteria include whether EU institutions are, at least in part, the driving force behind the project in question or are to be in involved its realisation – e.g. if it is envisaged that the EU will lend its institutions as ‘commissioned administrative agents’ (*Organleihe*) to carry out functions of the newly established organisation. In addition, there are indications that a project, in a qualified manner, supplements or is closely tied to the EU’s integration agenda where the project in question comprises an international treaty that is concluded exclusively between the European Union and its Member States; where the purpose pursued is inherently intertwined with a policy area for which the competence has been conferred upon the European Union; and, most notably, where the parties involved opted to coordinate the project on the basis of international law precisely because previous initiatives to create a legal framework set out directly in EU law failed to secure the necessary majorities (cf. BVerfGE 131, 152 < 199 and 200>). 125

2. To the extent that a domestic act of approval to an integration measure and/or the international treaty itself either supplement or are otherwise closely tied to the EU’s integration agenda, or substantively amend or supplement the Basic Law, or make such amendments or supplements possible, they require not only the consent of the *Bundesrat* (Art. 23(1) second sentence GG) but also a two-thirds majority in both the *Bundestag* and the *Bundesrat* pursuant to Art. 79(2) GG. The third sentence of Art. 23(1) GG makes it clear that an [integration measure] affects the constitutional order (*Verfassungsrelevanz*) not only if it concerns the establishment of the European 126

Union or changes to its treaty foundations – i.e. in the cases explicitly recognised in the Basic Law as modifying the constitutional order – but also in cases of "comparable regulations".

According to the wording of Art. 23(1) third sentence GG, the decisive criterion is whether a measure changes the Basic Law "in substantive terms" [in German: "*seinem Inhalt nach*" – *translator's note*: this clause is missing from the official English translation of the Basic Law], which evidently refers to the distinction made in the Senate's case-law between formal constitutional amendments, i.e. changes to the constitutional text adopted in the procedure set out in Art. 79(1) first sentence GG, and substantive constitutional amendments, i.e. amendments that have the same effect without modifying the text of the Basic Law (cf. BTDrucks 12/6000, p.21; BVerfGE 58,1 <36>; 68, 1 <114>). Moreover, the wording of the third sentence of Art. 23(1) GG is not limited to substantive amendments but also mentions acts that "supplement" the Basic Law or merely "make such amendments or supplements possible". This supports a broad understanding of what measures qualify as 'affecting the constitutional order'. From a systematic perspective, and in light of the spirit and purpose of the law, Art. 23(1) GG aims to set higher procedural and substantive hurdles for the legislator deciding on European integration matters than is the case under Art. 24(1) GG [concerning other forms of international cooperation]; this is primarily achieved – aside from requirement of the *Bundesrat*'s consent – by subjecting the relevant decisions to Art. 79(2) and (3) GG through the reference contained in the third sentence of Art. 23(1) GG. 127

The historic interpretation also supports this conclusion. Art. 23(1) GG was part of a comprehensive reform package adopted with a view to eliminating doubts voiced at the time as to the Maastricht Treaty's compatibility with the Basic Law (cf. for instance the remarks by Member of the *Bundestag* Verheugen and by the Hamburg Minister of Justice Peschel-Gutzeit in the Third Session of the Joint Constitutional Review Commission of the *Bundestag* and the *Bundesrat* held on 12 March 1992, official meeting minutes, pp. 12 and 20; BVerfGE 37, 271 <279 and 280>; 58, 1 <40 and 41>; 59, 63 <86>; 73, 339 <375 and 376>), as well as doubts as to the potential further development of the Maastricht framework [...], while ensuring that any future steps of [deeper] integration would be subject to stricter hurdles. The legislator deciding on the 1992 constitutional amendment clearly assumed that any further transfer of sovereign powers to institutions, bodies, offices and agencies of the European Union could only be approved by the qualified majority necessary for amending the Basic Law. The opposing view, which the Federal Government put forward in the [explanatory memorandum to] the draft act, was explicitly rejected in the *Bundesrat*. In this respect, the Final Report of the Joint Constitutional Review Commission states that Art. 23(1) second sentence GG allows the transfer of sovereign powers only insofar as it does not exceed the limit where "a new treaty or changes to the treaty foundations would become necessary under constitutional law" (cf. BTDrucks 12/6000, p. 28). The report of the Special *Bundestag* Committee on the "European Union 128

(Treaty of Maastricht)", on which the Joint Constitutional Review Commission based its final report, spells it out in even clearer language. That report explicitly states that "if a transfer of sovereign powers (...) exceeded the limits of the existing [constitutional] authorisations, it [shall] require a two-thirds majority. The third sentence of Article 23(1) was designed with this understanding in mind" (cf. BTDrucks 12/3896, p. 18). In light of this, the final commission report cites interferences "with the order of competences laid down in the Constitution" (cf. BTDrucks 12/6000, p.21) as one example where the transfer of sovereign powers amounts to a substantive constitutional amendment.

129 Back then, the legislator deciding on the 1992 constitutional amendment assumed that any transfer of sovereign powers "exceeding existing authorisations" constituted an amendment of the constitutional order (cf. the reference to BVerfGE 58, 1 <36> in BTDrucks 12/6000, p. 21). The report delivered by the Special Committee furthermore emphasised that the then decision on amending the Basic Law was a deliberate decision taken in light of the Basic Law's openness to European integration (cf. BTDrucks 12/3896, p. 18). The alternative interpretation of the 1992 constitutional amendment that the Federal Government had put forward – based on the exact same wording – in the draft act's explanatory memorandum was ultimately rejected by the [opposing] unanimous view in the *Bundestag* and the *Bundesrat* (cf. BTDrucks 12/6000, p. 28; [...]). Nevertheless, not every transfer of sovereign powers to the EU or an organisation that supplements or is otherwise closely tied to the EU necessarily amounts to an act that substantively amends or supplements the Basic Law or makes such amendments or supplements possible. Where a transfer of powers is already sufficiently anticipated ("implied") in the EU's integration agenda, and can be linked to an existing authorisation carried by a two-thirds majority, it does not (again) amount to a substantive amendment of the Basic Law. These cases are then solely governed by the second sentence of Art. 23(1) GG.

130 By contrast, the conferral of new competences upon the EU, or an organisation that supplements or is otherwise closely tied to the EU, must generally be qualified as a transfer of sovereign powers that at least "makes possible" an amendment of the Basic law within the meaning of that provision [...]; this follows from the fact that neither the EU nor the supplementing international organisation are bound by the fundamental rights of the Constitution, and from the fact that the future development of the EU's integration agenda is hardly foreseeable. This is especially true where an act of approval to an integration measure and/or the international treaty in question – from the perspective of domestic law – lead to an exclusive competence of the European Union or allow for federal legislative competences to be completely supplanted (Arts. 73 and 74, 105 GG), interfere with the legislative competences of the *Länder* (Arts. 30, 70 GG), or encroach upon administrative (Arts. 83 *et seq*., 108 GG) or judicial competences (Art. 92 GG) of the Federation or the *Länder*. It must furthermore be assumed that [an integration measure] will lead to the Europeanisation of constitutional standards where the act of approval and/or the international treaty modify or

are superimposed on the constitutional framework governing municipal self-administration (Art. 28(2) GG), the *Bundesbank* (Art. 88 GG) or the domestic court system (Art. 92 *et seq*., Art. 96 GG).

In light of this, it is evident that the transfer of judicial competences to a newly established international organisation – regardless of the corresponding powers to engage in judicial development of the law (*richterliche Rechtsfortbildung)* that are necessarily implied in such a transfer from a methodological perspective (cf. BVerfGE 75, 223 <241 *et seq*.>; 126, 286 <305 and 306>) – amounts to a substantive amendment of the Constitution. 131

3. An act of approval to an international treaty adopted in violation of Art. 23(1) third sentence GG in conjunction with Art. 79(2) GG cannot provide democratic legitimation for the exercise of public authority by institutions, bodies, offices and agencies of the European Union or by an international organisation that supplements or is otherwise closely tied to the EU (see a) below); it therefore violates the right of citizens deriving from Art. 38(1) first sentence GG in conjunction with Art. 20(1) and (2) GG and Art. 79(3) GG, which is a right equivalent to a fundamental right (see b) below). 132

a) The transfer of sovereign powers (with legal effect) is not possible unless it follows the procedure set out in constitutional law. Where the transfer does not take effect, it fails to create an opening for supranational law to enter the domestic legal order. If a supranational organisation were to exercise public authority on the basis of sovereign powers that have not in fact been transferred (with legal effect), it would act without democratic legitimation. As a consequence, any measure taken on that basis by EU institutions, bodies, offices and agencies, or by an international organisation that supplements or is otherwise closely tied to the EU, would necessarily constitute an *ultra vires* act and violate the principle of the sovereignty of the people enshrined in Art. 20(2) first sentence GG (cf. BVerfGE 83, 37 <50 and 51>; 89, 155 <182>; 93, 37 <66>; 130, 76 <123>; 137, 185 <232 and 233 para. 131>; 139, 194 <224 para. 106>; 142, 123 <174 para. 82>; 146, 216 <252 and 253 paras. 52 and 53; 255 para. 57>; 151, 202 <287 para. 120>). 133

b) Where the act of approval to an integration measure aims to authorise EU institutions, bodies, offices and agencies, or an international organisation that supplements or is otherwise closely tied to the EU, to exercise certain powers, but fails to do so with legal effect, it violates the right of German citizens derived from Art. 38(1) first sentence GG in conjunction with Art. 20(1) and (2) GG and Art. 79(3) GG. 134

Art. 38(1) first sentence GG guarantees the individual the right to vote in elections to the *Bundestag*. According to the Federal Constitutional Court's established case-law, this right is not limited to the formal legitimation of (federal) state authority but also encompasses a right of citizens to be subjected only to such public authority they can legitimate and influence (cf. BVerfGE 123, 267 <341>; 142, 123 <191 para. 128>). It must be kept in mind that Art. 38(1) first sentence GG, as a fundamental right to participation in the democratic self-governance of the people, does not gen- 135

erally confer standing to challenge parliamentary decisions, especially not parliamentary legislation. However, the guarantee of protection derived from Art. 38(1) first sentence GG extends to structural changes in the constitutional order of the state which may, for instance, occur when sovereign powers are transferred to the European Union or other supranational organisations (cf. BVerfGE 129, 124 <169>; 142, 123 <190 para. 126>).

Art. 38(1) first sentence GG protects citizens against a transfer of sovereign powers under Art. 23(1) GG where such transfer would exceed the limits set by Art. 79(3) GG in conjunction with Art. 23(1) third sentence GG because it affects essential contents of the principle of the sovereignty of the people (Art. 20(1) and (2) GG). The Federal Constitutional Court examines whether this is the case in the review on the basis of constitutional identity (*Identitätskontrolle*), examples of which include the judgments on the Maastricht Treaty (cf. BVerfGE 89, 155 *et seq*.), the Lisbon Treaty (cf. BVerfGE 123, 267 *et seq*.) and the ESM Treaty (cf. BVerfGE 132, 195 et *seq*.; 135, 317 *et seq*.). In addition, Art. 38(1) first sentence GG in conjunction with Art. 20(1) and (2) first sentence GG allows for an *ultra vires* review by the Federal Constitutional Court when a manifest and structurally significant exceeding of competences by EU institutions, bodies, offices and agencies is asserted (cf. most recently BVerfGE 151, 202 <296 *et seq*. para. 140 *et seq*.>). 136

Within the scope of applicability of Art. 23(1) GG, citizens are further protected by Art. 20(1) and (2) GG in conjunction with Art. 79(3) GG as these provisions allow a review as to whether the formal requirements for a transfer of sovereign powers – which are designed to set higher hurdles, including procedural ones, for the legislator in the context of European integration as compared to other forms of international cooperation governed by Art. 24(1) GG (see para. 119 *et. seq*. above) – were adhered to (review of the formal lawfulness of a transfer of sovereign powers – *formelle Übertragungskontrolle*). This is because competences that have been transferred to another subject of international law are usually “lost” in the sense that they cannot easily and unilaterally be “regained” by the legislator; this is a crucial difference between the transfer of sovereign powers and constitutional amendments that can be reversed with the necessary majorities in the legislative bodies. In the context of the European Union, the situation is even more complex as Art. 4(3) of the Treaty on European Union (TEU) may impose an obligation on the Member States to refrain from rescinding their approval [of integration measures] (cf. for instance Opinion of Advocate General Bot, C-146/13, EU:C:2014:2380, para. 175 *et seq*.), which gives rise to additional specific risks that could undermine the substantive contents of the right to democratic self-determination in the future. Most importantly, if the transfer of sovereign powers was not effective, each subsequent measure enacted by institutions, bodies, offices and agencies of the EU or by a supranational organisation based thereon would lack democratic legitimation. 137

It follows that the core of the right to democratic self-determination enshrined in Art. 38(1) first sentence GG in conjunction with Art. 20(1) and (2) GG and Art. 79(3) GG 138

– which is beyond the reach of constitutional amendment and confers standing to lodge a constitutional complaint – is affected in this scenario. The democratic core guarantees enshrined in Art. 38(1) first sentence GG would be rendered meaningless if there were no possibility to seek a review as to whether the principles enshrined in Art. 20(1) and (2) GG, to the extent that they partake in the absolute protection under Art. 79(3) GG, were violated [...].

4. Lastly, any transfer of sovereign powers is subject to the substantive limits set by the Basic Law's constitutional identity. The legislator deciding on matters of European integration must ensure that the constitutional principles enshrined in Arts. 1 and 20 GG (as referred to in Art. 23(1) third sentence GG in conjunction with Art. 79(3) GG) are not affected, including where sovereign powers are transferred to an international organisation that supplements or is otherwise closely tied to the EU. When conducting an identity review, the Federal Constitutional Court therefore examines whether the principles that are declared inviolable by Art. 79(3) GG are affected by the domestic act of approval to an integration measure and/or by an international treaty (cf. BVerfGE 123, 267 <344, 353 and 354>; 126, 286 <302>). 139

As regards the principle of democracy enshrined in Art. 20(1) and (2) GG, it must *inter alia* be ensured that even in the event of a transfer of sovereign powers pursuant to Art. 23(1) GG, the *Bundestag* retain for itself functions and powers of substantial political significance (cf. BVerfGE 89, 155 <182>; 123, 267 <330, 356>) and remain capable of exercising its overall budgetary responsibility (cf. BVerfGE 123, 267 <359>; 129, 124 <177>; 132, 195 <239 para. 106>; 135, 317 <399 and 400 para. 161>). Moreover, Art. 20(1) and (2) GG prevents the legislator from granting *carte blanche* authorisations (cf. BVerfGE 58, 1 <37>; 89, 155 <183 and 184, 187>; 123, 267 <351>; 132, 195 <238 para. 105>; 142, 123 <192 para. 130 *et seq*.>), which is why the legislator violates the Basic Law if it fails to sufficiently specify the contents of the envisaged integration agenda. In particular, the *Bundestag* must not evade its responsibility with regard to European integration, neither by granting vague authorisations to other actors nor by letting EU institutions, bodies, offices and agencies or an international organisation that supplements or is otherwise closely tied to the EU exert control over its decision-making to the effect that the *Bundestag* were no longer "its own master" (cf. BVerfGE 129, 124 <179 and 180>; 132, 195 <240>; 135, 317 <401 paras. 163 and 164>). 140

II.

Based on these standards, Art. 1(1) first sentence of the UPC Act of Approval violates the complainant's right to democratic self-determination derived from Art. 38(1) first sentence GG in conjunction with Art. 23(1) third sentence GG and Art. 79(2) GG, since the Act of Approval was not passed with a two thirds majority in the *Bundestag* as required by Art. 79(2) GG (see 1. below). It was thus not necessary for the Federal Constitutional Court to decide whether the absolute precedence of EU law laid down in Art. 20 and Art. 21 second sentence of the UPC Agreement is incompatible with 141

Art. 20(1) and (2) GG in conjunction with Art. 79(3) GG (see 2. below).

1. The Act of Approval to the UPC Agreement transfers sovereign powers to the Unified Patent Court (see a) below), which fits the element of ‘supplementing or being otherwise closely tied to the EU’ (see b) below), and essentially amounts to a substantive constitutional amendment (see c) below). Given that the Act of Approval was not, however, passed with the necessary two-thirds majority in accordance with Art. 23(1) third sentence GG in conjunction with Art. 79(2) GG (see d) below), it violates the complainant’s right [to democratic self-determination] derived from Art. 38(1) first sentence GG in conjunction with Art. 20(1) and (2) GG and Art. 79(3) GG (see e) below). 142

a) The UPC Agreement confers judicial competences upon a supranational court and law-making competences upon that court’s administrative bodies; by doing so, it creates an opening in the domestic legal order that allows European law to become directly effective and applicable, curtailing the exclusive sovereign authority of the Federal Republic of the Germany within the Basic Law’s scope of application (cf. BVerfGE 37, 271 <280>; 58, 1 <28>; 59, 63 <90>; 73, 339 <374 and 375>). Art. 32 of the UPC Agreement provides for the exclusive competence of the Unified Patent Court for certain matters, conferring upon the Court the power to make binding decisions in the cases before it. This “archetype of sovereign power” [...] is integral to securing the state’s monopoly on the use of force (cf. BVerfGE 54, 277 <291>) and indispensable for ensuring peaceful co-existence in society. Art. 82(1) first sentence of the UPC Agreement makes decisions and orders of the Patent Court enforceable in any Contracting Member State. In addition, Art. 40(2) and Art. 41(1) and (2) of the UPC Agreement confer upon the Patent Court’s Administrative Committee certain law-making powers, namely to amend the Statute of the Patent Court and to adopt and amend its Rules of Procedure. 143

b) The UPC Agreement fits the element of ‘supplementing or being otherwise closely tied to the EU’s integration agenda’ (cf. explanatory memorandum to the Federal Government’s draft act, BTDrucks 18/11137, p. 8) and was essentially designed as a substitute for an EU framework given that the proposal to create a framework directly set out in EU law was not able to secure the necessary majorities (cf. BVerfGE 131, 152 <200>). 144

aa) The UPC Agreement has a direct link to Art. 262 TFEU. This provision clarifies that the creation of an EU-based jurisdiction in patent law cases is intended by the Member States but is not yet included in the EU’s integration agenda. Against this backdrop, Art. 262 TFEU anticipates the conferral of jurisdiction upon the CJEU in disputes relating to European intellectual property rights; however, it makes such conferral subject to two conditions, a unanimous decision of the Council (first sentence) and ratification by the Member States (second sentence). So far neither condition has been fulfilled for lack of [political] support. Regardless of whether the creation of a Unified Patent Court on the basis of international law circumvents the 145

conditions set by Art. 262 TFEU, that provision in any case confirms that the Unified Patent Court at issue here is a functional equivalent for a “genuine” EU patent jurisdiction.

bb) In addition, the Agreement is closely enmeshed with secondary EU law enacted on the basis of Art. 118 TFEU (cf. also Recital 4 of the UPC Agreement). Its legal contents only come into full effect when read and applied in conjunction with certain provisions of secondary EU law enacted for the purpose of creating a European regime on unitary patent protection. For instance, the UPC Agreement refers to Regulation (EU) No. 1257/2012 and Regulation (EU) No. 1260/2012, which create the ‘European patent with unitary effect’. The entry into force of the aforementioned EU regulations is dependent on the entry into force of the UPC Agreement (cf. Art. 18(2) subpara. 1 of Regulation <EU> No. 1257/2012 as well as Art. 7(2) of Regulation <EU> No. 1260/2012), which means that the UPC Agreement’s entry into force determines not only the legal effect of the Agreement itself but is also a prerequisite for the effectiveness of the corresponding provisions of secondary EU law. To a significant extent, the judicial competences of the envisaged Patent Court will concern rights and claims governed by EU law (cf. Art. 2 lit. f and h, Art. 3 lit. a and b in conjunction with Art. 32 of the UPC Agreement), the uniform effect of which can only be ensured through the provisions set out in the UPC Agreement (Arts. 25 to 28, Art. 30 of the UPC Agreement). 146

Even though the Unified Patent Court is designed as an independent supranational organisation that is separate from the European Union, it is directly bound by EU law (Art. 24(1) lit. a of the UPC Agreement), which again illustrates that the UPC Agreement and the EU integration agenda are in fact closely interrelated. Moreover, the UPC Agreement subjects the Patent Court to the precedence of EU law (Art. 20 of the UPC Agreement), in respect of which the Contracting Member States recall the obligation “to ensure through the Unified Patent Court the full application of, and respect for, Union law in their respective territories and the judicial protection of an individual's rights under that law” (cf. Recital 9). 147

cc) It must further be noted that EU institutions were among the (main) driving force behind the UPC Agreement [...]. For quite some time, the establishment of a unified patent jurisdiction was considered an indispensable component of creating an EU patent law framework, which is why the project received support from both the European Commission and the Council. At least since the beginning of the new millennium, the European Commission has been advocating for the centralisation of judicial protection in this field (cf. Proposal for a Council Regulation on the Community patent, COM<2000> 412 final, OJ EU C 337 E of 28 November 2000, p. 278; Council document 7159/03 of 7 March 2003; Council document 17229/09 of 7 December 2009; […]), and also brought the matter before the Court of Justice of the European Union (CJEU). It is true that the initial draft for an agreement creating a European patent court was rejected by the CJEU in its opinion delivered on 8 March 2011 (cf. CJEU, Opinion 1/09, EU:C:2011:123, para. 71 *et seq*.). Nevertheless, provisions en- 148

visaged in that draft agreement now form part of the 'European unitary patent package', which comprises the UPC Agreement as well as Regulations (EU) No. 1257/2012 and No. 1260/2012 (cf. Advocate General Bot, Opinion of 18 November 2014, C-146/13, EU:C:2014:2380, para. 3) and – without prejudice to the allocation of competences – was explicitly endorsed by the European Parliament (cf. Resolution of the European Parliament of 11 December 2012, 2011/2176<INI>, OJ EU No. C 434 of 23 December 2015, p. 34 *et seq*.).

dd) The UPC Agreement envisages that EU institutions will be involved, to differing degrees, in its implementation: The General Secretariat of the Council of the European Union is called upon to act as the depository for instruments of ratification (Art. 84(2) second sentence, Art. 84(4) and Art. 85 of the UPC Agreement), and the European Commission is to be involved in the adoption and amendment of the Patent Court's Rules of Procedure and is to be responsible for ensuring that the Rules of Procedure are compatible with EU law (Art. 41(1) and (2) UPC Agreement). In addition, the UPC Agreement provides that the European Commission shall be represented at the meetings of the Patent Court's Administrative Committee as observer (Art. 12(1) second sentence of the UPC Agreement). Lastly, the envisaged Patent Court can and must request a preliminary ruling from the CJEU in accordance with Art. 267 TFEU if the criteria for such a request are fulfilled (Art. 21 of the UPC Agreement). 149

ee) What is more, accession to the Agreement is open only to EU Member States. In this respect, Art. 1(2) of the UPC Agreement defines the Unified Patent Court as "a court common to the Contracting Member States". According to Art. 2 lit. b and c of the UPC Agreement, the term 'Contracting Member States' means EU Member States that are party to the Agreement. The limitation regarding potential contracting parties is also reflected in the recitals attached to the UPC Agreement. For instance, Recital 1 states that "cooperation amongst the Member States of the European Union in the field of patents contributes significantly to the integration process in Europe, in particular to the establishment of an internal market within the European Union characterised by the free movement of goods and services and the creation of a system ensuring that competition in the internal market is not distorted" while Recital 14 clarifies that "this Agreement should be open to accession by any Member State of the European Union". This limitation is ultimately rooted in the CJEU's case-law (cf. CJEU, Opinion of 8 March 2011, Opinion 1/09, EU:C:2011:123, paras. 77 and 78, 89). The CJEU held – in terms that can be generalised and applied to other cases as well – that with a view to safeguarding the integrity of EU law it is impermissible to confer "on an international court which is outside the institutional and judicial framework of the European Union an exclusive jurisdiction to hear a significant number of actions brought by individuals in the field of the Community patent and to interpret and apply European Union law in that field" (cf. CJEU, Opinion of 8 March 2011, Opinion 1/09, EU:C:2011:123, para. 89). 150

The fact that not all EU Member States are UPC Contracting Member States does not call into question that the UPC Agreement supplements or is otherwise closely 151

tied to the EU's integration agenda. On the contrary, as a form of enhanced cooperation, it finds direct legitimation in Art. 20 TEU and Art. 326 *et seq*. TFEU and underlines the close enmeshment with the institutional framework of the EU.

c) The Act of Approval to the UPC Agreement must adhere to the requirements set out in Art. 23(1) third sentence GG in conjunction with Art. 79(2) GG, since it leads to Europeanisation of constitutional standards enshrined in the Basic Law and effectively amounts to a substantive constitutional amendment. 152

aa) The UPC Agreement affects the constitutional order and qualifies as 'a comparable regulation' within the meaning of Art. 23(1) third sentence GG given that in terms of its normative contents it serves as a functional equivalent to an amendment of the EU's treaty foundations pursuant to Art. 48 TEU. 153

The Agreement essentially amounts to an amendment or replacement of Art. 262 TFEU. Under that provision, the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament, may adopt provisions to confer jurisdiction, to the extent that it shall determine, on the CJEU in disputes relating to the application of acts adopted on the basis of the Treaties which create European intellectual property rights. The Treaty on the Functioning of the European Union not only requires a special legislative procedure and a unanimous Council decision (Art. 262 first sentence TFEU) but also provides that the legal act in question shall enter into force only after its approval by the Members States in accordance with their respective constitutional requirements (Art. 262 second sentence TFEU). This shows that Member States apparently considered conferral of jurisdiction in matters relating to intellectual and industrial property rights upon the CJEU to be a serious interference with the national competences of Member State courts, which is why they put in place the requirement of ratification. Following the Federal Constitutional Court's judgment on the Lisbon Treaty (cf. BVerfGE 123, 267 <387 and 388>), the German legislator endorsed this view in § 3(2) of the Act on the *Bundestag*'s and the *Bundesrat*'s Responsibility With Regard To European Integration (*Integrationsverantwortungsgesetz* – IntVG), which expressly qualifies these types of decisions as matters that are subject to the special procedure for treaty amendments [set out in Art. 23 GG]. 154

With the UPC Agreement and the creation of the Unified Patent Court it envisages, the Contracting Member States have chosen to go forward with a framework that serves as a functional alternative to the conferral of judicial competences on the CJEU that is anticipated in Art. 262 TFEU but so far evidently has not been realised in terms of enacting the necessary legal foundations. By doing so, the Contracting Member States modified the EU's integration agenda following from the Lisbon Treaty; they *de facto* removed the basis for pursuing the course of action laid down in Art. 262 TFEU and developed an alternative model, namely a new type of unified jurisdiction in intellectual and industrial property matters inspired by the EU model instead. This was done because it had not been possible to reach a unanimous deci- 155

sion of the Member States as would have been necessary to either move forward with the course of action outlined in the Treaties, specifically Art. 262 TFEU, or to amend the Treaties pursuant to Art. 48 TEU.

From a constitutional law perspective, this amounts to a change in the treaty foundations of the European Union and must thus be qualified as ‘comparable regulations’ within the meaning of the third sentence of Art. 23(1) GG. The requirement of ratification by the Member States set out in Art. 262 TFEU confirms this finding [...]. In its opinion on the EU-Singapore Free Trade Agreement (EUSFTA), the CJEU, too, arrived at the conclusion that an international law regime that removes disputes from the jurisdiction of Member State courts cannot be established without the Member States’ consent (cf. CJEU, Opinion 2/15 of 16 May 2017, EUSFTA, EU:C:2017:376, para. 292). 156

bb) Regardless of the specific set-up of the patent court system, a transfer of judicial competences that excludes the jurisdiction of German courts results in a substantive amendment of the Basic Law within the meaning of Art. 23(1) third sentence GG. According to Art. 92 GG, judicial power in Germany is exercised by the Federal Constitutional Court, the other federal courts and the courts of the *Länder*. Any transfer of judicial competences to international courts modifies this comprehensive allocation of jurisdiction and thus constitutes a substantive amendment of the Constitution. Such a transfer not only affects the fundamental rights guarantees of the Basic Law, given that German courts can no longer ensure protection of these rights (cf. Federal Constitutional Court, Order of the First Senate of 6 November 2019 - 1 BvR 276/17 -, paras. 42 *et seq*., 54), but also bears on the specific design of the separation of powers under Art. 20(2) second sentence GG. In its judgment on the Lisbon Treaty, the Second Senate of the Federal Constitutional Court already clarified that the Member States must retain, as a general rule, the competence for the administration of justice, especially with regard to the organisation of the court system (cf. BVerfGE 123, 267 <415 and 416>; cf. also CJEU, Judgment of 24 May 2011, C-54/08, Commission v Germany, EU:C:2011:339, para. 83 *et seq*.; Judgment of 12 December 1996, C-3/95, Reisebüro Broede v Sandker, EU:C:1996:487, paras. 37 and 38, 41). 157

(1) Art. 32 of the UPC Agreement confers upon the Unified Patent Court exclusive jurisdiction in matters listed in that provision, which concern a considerable and economically quite significant share of matters that currently fall under the jurisdiction of civil and administrative courts in the Member States; exempted from this exclusive jurisdiction are claims lodged with national courts during the seven-year transitional period (Art. 83 of the UPC Agreement). Decisions rendered by the Unified Patent Court are directly enforceable pursuant to Art. 82(3) second sentence of the UPC Agreement. Court orders to present evidence requested by the opposing party or third parties (Art. 59 of the UPC Agreement), the seizure of assets (Art. 60(2) of the UPC Agreement) or the ‘inspection of premises’ (Art. 60(3) of the UPC Agreement) are all measures that interfere with fundamental rights and have direct effect in the legal spheres of the Contracting Member States (Art. 34 of the UPC Agreement). 158

Moreover, the Unified Patent Court is called upon to interpret and apply national law (cf. Art. 24(1) lit. e of the UPC Agreement), which means – as intended by the Member States (cf. Recital 7 of the UPC Agreement) – that the Patent Court becomes part of the domestic judicial system (cf. Arts. 1(2) and 82(3) second sentence of the UPC Agreement). 159

(2) Ultimately, the UPC Agreement results in considerable modifications in the organisation of the court system regarding intellectual and industrial property matters provided for under the Basic Law. In this respect, Art. 96(1) GG allows for the establishment of a specialised federal court – which was implemented in practice [with the creation of the Federal Patent Court – *Bundespatentgericht*] – while Art. 96(3) GG designates the Federal Court of Justice (*Bundesgerichtshof* – BGH) as the final court of appeal for this jurisdiction. This organisational structure of the German court system as determined by constitutional law is modified by the UPC Agreement; the Agreement introduces another court that will supplement the German court system and operate its own appeal system. In this sense, the UPC Agreement fits the elements of a 'substantive constitutional amendment' as set out above. 160

Under Art. 24(1) of the UPC Agreement, the provisions of the Agreement take precedence over domestic law, which means that – conversely – the Basic Law's unconditional reach and scope of application are curtailed. 161

d) It would have been necessary for the legislative bodies to pass the Act of Approval with a qualified majority in accordance with Art. 79(2) GG. 162

In view of the great importance of the majority requirement for safeguarding constitutional integrity and for providing democratic legitimation for interferences with the constitutional order, an act passed without the majority required by Art. 79(2) GG does not come into effect. In this respect, the constitutional standards relating to acts that fail to meet the majority requirements set out in Art. 42(2) GG or in Art. 121 GG apply accordingly [...]. It is for good reason that, in the established practice of German state organs, the formal heading of promulgated laws and similar acts states, where applicable, that the relevant legislation was passed by qualified majority or with the consent of the *Bundesrat*. 163

In the present case, it is uncontested that the qualified majority required by Art. 79(2) GG was not reached. The fact that the minutes of the parliamentary session state that the Act of Approval was effectively adopted by "unanimous" decision in the *Bundestag* and then forwarded to the *Bundesrat* does not lead to a different result (cf. also Rule 48(2) and (3) of the *Bundestag* Rules of Procedure; BVerfGE 106, 310 <329 and 330, 336>). Thus, the *Bundestag* did not pass the Act of Approval with legal effect. 164

e) In light of the above, the Act of Approval to the UPC Agreement violates the complainant's right to democratic self-determination derived from Art. 38(1) first sentence GG in conjunction with Art. 20(1) and (2) GG and Art. 79(3) GG. Following the vote 165

in the legislative bodies, promulgation by the Federal President – who has no political discretion in this regard – would have been the final step before the Act of Approval would have entered into force. [For the purposes of standing in constitutional complaint proceedings,] the specific danger that impairments of (fundamental) rights will occur is equivalent to (fundamental) rights violations that did already occur (cf. BVerfGE 136, 277 <303 para. 70; 307 and 308, para. 85>; cf. also para. 140 above).

2. In the present proceedings, there are indications that the absolute precedence of EU law laid down in Art. 20 of the UPC Agreement could be incompatible with Art. 20(1) and (2) GG in conjunction with Art. 79(3) GG. Normally, it would thus be incumbent upon the Federal Constitutional Court to conduct a comprehensive review of whether the challenged measures are compatible with the aforementioned constitutional provisions (cf. BVerfGE 151, 2020 <326 and 327 para. 206>). However, it was ultimately not necessary for the Court to decide on this issue given that the Act of Approval to the UPC Agreement is in any case void for other reasons. 166

D.

[...] 167

E.

This decision was taken with 5:3 votes. 168

Voßkuhle Huber Hermanns

Müller Kessal-Wulf König

Maidowski Langenfeld

Dissenting Opinion of Justices König, Langenfeld and Maidowski

to the Order of the Second Senate of 13 February 2020

- 2 BvR 739/17 -

The Senate majority assumes that the ‘right to democracy’ derived from Art. 38(1) first sentence of the Basic Law (*Grundgesetz* – GG) in conjunction with Art. 20(1) and (2) GG and Art. 79(3) GG gave rise to an individual right that the formal requirements for a transfer of sovereign powers set out in Art. 23(1) second and third sentence GG in conjunction with Art. 79(2) GG be adhered to, and that this right were enforceable by means of a constitutional complaint (so-called review of the formal lawfulness of a transfer of sovereign powers – *formelle Übertragungskontrolle*). We cannot concur with this view. 1

Time and again, the Federal Constitutional Court has been called upon to determine how Germany’s participation in the development of the European Union, for which Art. 23 GG provides legitimation, can be accomplished within the margins of appreciation and the limits defined by constitutional law and without encroaching upon the constitutional identity protected by Art. 79(3) GG. In its decisions, the Court has directed considerable attention to this issue. The applicable case-law is – quite correctly – informed by the finding that the transfer of sovereign powers gives rise to specific risks: On the one hand, the transfer of sovereign powers invariably entails structural changes impacting the domestic constitutional sphere. As part of the mandate to participate in developing European integration, which provides a basis in constitutional law for such measures, these consequences must be accepted. On the other hand, the Constitution has put in place safeguards preventing the state from sacrificing those elements of the constitutional order that are integral to the Basic Law’s constitutional identity; as a result, these elements are beyond the reach of both constitutional amendment and measures of European integration or international cooperation. In its case-law, the Second Senate has recognised reservations that serve to give effect to these safeguards in practice: the review on the basis of constitutional identity (identity review – *Identitätskontrolle*) and the review on the basis of the *ultra vires* doctrine (*ultra vires* review – *Ultra-vires-Kontrolle*). 2

Where the state exercises its constitutional mandate to actively participate in European integration, a key issue in ensuring an effective review as to whether the measures taken are within the limits set by constitutional law is the question of standing and access to the Federal Constitutional Court – i.e. who may seek a review of whether constitutional organs have fulfilled their responsibility with regard to European integration (*Integrationsverantwortung*) or whether they exceeded the limits to which the European integration process is subject. The possibility to seek such a review may be afforded by way of *Organstreit* proceedings (disputes between constitutional organs) and constitutional complaints lodged by fundamental rights holders asserting that they themselves are specifically affected by acts of public authority that 3

are *ultra vires* or violate constitutional identity. Without prejudice to these options, Art. 38(1) first sentence GG confers upon each citizen entitled to vote standing to challenge a violation of the 'right to democracy' in constitutional complaint proceedings before the Federal Constitutional Court. All members of the electorate are therefore afforded a right, which is equivalent to a fundamental right, to protection against measures that would ultimately render the powers left to German state authority – as the recipient of democratic legitimation conferred by the people – meaningless. This right applies in the context of a transfer of sovereign powers but also provides protection against measures of EU institutions, bodies, offices and agencies that, according to the Second Senate's established case-law, constitute *ultra vires* acts. Thus, Art. 38(1) GG confers a right upon citizens that requires the competent constitutional organs to discharge their responsibility with regard to European integration. As regards the scope of protection and underlying rationale of this provision, it aims – solely – to give effect to democratic participation rights; it serves not to subject the contents of democratic decision-making to substantive review but to facilitate democratic decision-making processes as such (cf. Decisions of the Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgericht* – BVerfGE 129, 124 <168>; 134, 366 <396 and 397 para. 52>; 142, 123 <190 para. 126>).

4 The new type of review relating to the formal lawfulness of a transfer of sovereign powers based on Art. 38(1) first sentence GG is distinctly different from the identity review and the *ultra vires* review, the two instruments of constitutional review that the Federal Constitutional Court has recognised in its case-law as deriving from the 'right to democracy' for the purposes of safeguarding the democratic influence of citizens entitled to vote on the process of European integration (see I. below). The review of the formal lawfulness of a transfer of sovereign powers is based on an extensive reading of Art. 38(1) first sentence GG, which fails to correctly appraise the substance and limits of this right. A case brought against an act of approval solely on the grounds that formal requirements were not adhered to does not allow for a finding that such formal error by itself violates the substance of the right to vote, which forms the core of the principle of democracy that is rooted in human dignity (see II. below). Furthermore, allowing a review of whether the formal requirements of transfer were adhered to could ultimately – and contrary to the intentions of the Senate majority – obstruct and constrict the political process in the context of European integration, instead of facilitating and safeguarding it (see III. below). As the complainant did not therefore have standing to assert a possible violation of fundamental rights in the present case, the constitutional complaint should have been dismissed as inadmissible.

I.

5 1. In its judgment on the European Banking Union, the Second Senate has summarised the substantive contents of the 'right to democracy' deriving from Art. 38(1) first sentence GG as follows (BVerfGE 151, 202 <274 *et seq*. paras 91-94>):

Art. 38(1) first sentence GG affords citizens a right to political self-

determination and guarantees their free and equal participation in the process that provides legitimation to state authority exercised in Germany (cf. BVerfGE 123, 267 <340>;132, 195 <238 para. 104>; 135, 317 <399 para. 159>; 142, 123 <190 para. 126>; 146, 216 <249 and 250 para. 46>). This right, which is equivalent to a fundamental right, is not limited to the formal legitimation of (federal) state authority. Rather, it affords the individual the right to influence the formation of the political will by exercising their right to vote, meaning that they can effect real change. Within the scope of Art. 23 GG, it protects citizens against a transfer of competences and powers from the German *Bundestag* to the European Union where such transfer would violate the principle of democracy; this is the case if the transfer were to render meaningless the democratic legitimation of state power [at the domestic level] and the citizens' influence on the exercise of this power that are provided through elections (cf. BVerfGE 89, 155 <172>; 123, 267 <330>; 134, 366 <396 para. 51>; 142, 123<173 and 174 para. 81>; 146, 216 <249 para. 45>).

At its core, which is protected by Art. 20(1) and (2) GG in conjunction with Art. 79(3) GG, the right to vote enshrined in Art. 38(1) first sentence GG protects citizens not only from the substantial erosion of the German *Bundestag*'s latitude to shape policy but also affords them a right that institutions, bodies, offices and agencies of the European Union only exercise the competences transferred to them in accordance with Art. 23 GG (cf. BVerfGE 142, 123 <173 para. 80 *et seq*.>; 146, 216 <251 para. 50>). This right is violated where the transfer of sovereign powers or the implementation of the European integration agenda fail to respect the limits set by Art. 79(3) GG (cf. BVerfGE 123, 267 <353>; 126,286 <302>; 133, 277 <316>; 134, 366 <382 paras. 22, 384 *et seq*. para. 27 *et seq*.>; 140, 317 <336 *et seq*. para. 40 *et seq*.>; 142, 123 <203 para. 153>; 146, 216 <253 para. 54>) and where institutions, bodies, offices and agencies of the European Union take measures that (even though they do not encroach on the limits set by Art. 79(3) GG) exceed the limits of the integration agenda (cf. BVerfGE 75, 223 <235, 242>; 89, 155 <188>; 123, 267 <353>; 126, 286<302 *et seq*.>; 134, 366 <382 *et seq*. para. 23 *et seq*.>; 142, 123 <203 para. 153>; 146, 216 <252 and 253 paras. 52 and 53>). Thus, Art. 38(1) first sentence GG confers a 'right to democracy' in relation to matters affecting the democratic guarantees that are protected by Art. 79(3) GG and are therefore beyond the reach of the Constitution-amending legislator, and in relation to a manifest and structurally significant exceeding of competences on the part of European institutions (cf. BVerfGE 89, 155 <171>; 129, 124<168>; 134, 366 <396 para. 51>; 135, 317

<386 para. 125>; 142, 123 <219 para. 185>).

This also means that Parliament may not authorise the Federal Government to approve *ultra vires* acts of institutions, bodies, offices and agencies of the European Union. Otherwise the democratic decision-making process, as guaranteed by Art. 23(1) GG in conjunction with Art. 20(1) and (2) GG and Art. 79(3) GG, would be undermined. It is incumbent upon Parliament to decide, in a formal procedure, on the transfer of competences in the context of European integration, ensuring that the principle of conferral is observed (cf. BVerfGE 134, 366 <395 para. 48>). The protection afforded by Art. 38(1) first sentence GG with regard to a manifest and structurally significant exceeding of competences on the part of EU institutions comprises not only substantive but also procedural elements. In order to safeguard their democratic influence on the process of European integration, it confers upon citizens a right that, in principle, sovereign powers be transferred only in the ways provided for in Article 23(1) second and third sentence GG in conjunction with Art. 79(2) GG (cf. BVerfGE 134, 366 <397 para. 53>).

As part of their responsibility with regard to European integration, German constitutional organs furthermore have a duty to actively take steps against acts of EU institutions, bodies, offices, and agencies that result in a violation of constitutional identity, as well as against *ultra vires* acts – even if such acts do not encroach upon the domain that is beyond the reach of European integration according to Art. 23(1) third sentence GG in conjunction with Art. 79(3) GG (cf. BVerfGE 142, 123 <20 and 21 para. 163 *et seq*.>). This implies a duty of the Federal Government and the German *Bundestag* to monitor adherence to the integration agenda; they must refrain from participating in or implementing measures that constitute a manifest and structurally significant exceeding of competences by EU institutions, and must actively take steps seeking to ensure adherence to the integration agenda (cf. BVerfGE 134, 366 <395 para. 49>; 142, 123 <209 and 210 para. 167>).

2. The type of review that the Senate majority recognises in the present proceedings – a review of the formal lawfulness of a transfer of powers – goes beyond the view expressed by the Second Senate in its past decisions on the interpretation of Art. 38(1) first sentence GG, establishing a novel review mechanism in addition to the identity review and the *ultra vires* review. This new type of challenge is separate from and independent of the existing review mechanisms. The novel element of this review sought on grounds of formal errors is that it allows a statutory act of approval adopted by the *Bundestag* and the *Bundesrat* pursuant to Art. 23(1) GG to be challenged [before the Federal Constitutional Court] solely on the grounds that it does not satisfy 6

the formal requirements for the effective transfer of sovereign powers to the European Union or to international organisations that supplement or are otherwise closely tied to the EU's integration agenda (*Integrationsprogramm*). An act of approval to an international treaty adopted in violation of Art. 23(1) GG in conjunction with Art. 79(2) GG cannot provide democratic legitimation for the exercise of public authority by institutions, bodies, offices and agencies of the European Union or any other international organisation that supplements or is otherwise closely tied to the European Union, and – according to the Senate majority – therefore violates the right of citizens deriving from Art. 38(1) first sentence GG in conjunction with Art. 20(1) and (2) GG and Art. 79(3) GG, which is a right equivalent to a fundamental right. What follows from this, in the Senate majority's view, is that citizens may lodge a constitutional complaint challenging, for instance, that the requirement of the consent of the *Bundesrat* was not satisfied in cases falling under the second sentence of Art. 23(1) GG, or that the requirement of a qualified majority pursuant to Art. 79(2) GG was not met in cases falling under the third sentence of Art. 23(1) GG (see above para. 98 of the Order of the Senate). The Senate majority's line of argument builds on the ineffectiveness of the domestic act approving the transfer of sovereign powers, which renders ineffective the transfer itself; consequently, the same reasoning would have to apply in all other cases where formal errors in the legislative process leave the act of approval without legal effect.

3. a) By allowing a review of the formal lawfulness of a transfer of sovereign powers, the Senate majority's view adds an additional individual rights dimension to objective constitutional guarantees, specifically to the formal requirements of a transfer of sovereign powers pursuant to Art. 23(1) GG. As the law stands, the 'right to democracy' enshrined in Art. 38(1) first sentence GG allows citizens, regardless of whether they themselves are specifically affected as holders of fundamental rights, to lodge a constitutional complaint seeking a review of whether the act of approval to a transfer of sovereign powers, or to an international treaty that bears on the core of the principle of democracy, is compatible with the basic guarantees of the principle of democracy protected by Art. 79(3) GG. According to established case-law, such constitutional complaints can be lodged as a means of *a priori* review, i.e. at a stage where the act of approval to the transfer of sovereign powers or to an international treaty has not yet entered into force, provided that all steps of the legislative process as such have already been concluded except for certification by the Federal President and subsequent promulgation (cf. only BVerfGE 123, 267 <329>; 132, 195 <234 and 235 para. 92>; 134, 366 <391 and 392 para. 34>; 142, 123 <177 para. 91>). This was the procedural constellation, for instance, when the Federal Constitutional Court rendered its judgments on the Treaty of Maastricht and the Treaty of Lisbon (BVerfGE 89, 155 <171>; 123, 267 <329>) and on the Treaty of 2 February 2012 Establishing the European Stability Mechanism (hereinafter: ESM Treaty; BVerfGE 135, 317 <384 and 385 para. 122>). However, according to established case-law, admissible challenges against a transfer of competences can only be raised on the grounds that the resulting loss of competences on the part of the German *Bundestag* threatens to erode the 7

essence of the principle of the sovereignty of the people, encroaching on the substance of the right to vote. The constitutional issues raised in the proceedings on the Maastricht Treaty and on the Lisbon Treaty primarily concerned the question whether the envisaged transfer of sovereign powers could render meaningless the competences of the *Bundestag*; specifically, it was held that such risks could arise, firstly, from the scale and/or weight of the competences transferred or, secondly, from *carte blanche* authorisations rooted in EU law that could potentially lead to an unchecked advancing of the integration agenda contrary to the principle of conferral. In its judgments on the ESM Treaty, the Federal Constitutional Court recognised further grounds for challenging a possible undermining of Germany's competences. In those proceedings, the challenge heard by the Federal Constitutional Court concerned claims that the approval of the establishment of the European Stability Mechanism and the accompanying domestic legislation encroached upon the *Bundestag*'s overall budgetary responsibility, exceeding the limits set by Art. 79(3) GG.

b) The normative basis for recognising an individual right to respect for the basic guarantees of the principle of democracy, as part of the Basis Law's constitutional identity, is the right to vote enshrined in Art. 38(1) first sentence GG; it was the judgment on the Treaty of Maastricht that recognised, for the first time, the substantive rights dimension of the protection conferred by this guarantee (cf. BVerfGE 89, 155 >171 and 172>). Given these normative foundations, the standard affirmed back then still stands today: for a constitutional complaint to be admissible it is necessary to demonstrate that there is a sufficient connection to the principle of democracy, the [only] constitutional principle with regard to which Art. 38(1) first sentence GG confers standing for individuals to directly challenge violations – in consequence, this standard must apply all the more with regard to challenges that assert encroachments on other constitutional principles of the state order, such as the principles of the rule of law or of the social state. Most notably, the judgment on the Lisbon Treaty makes it abundantly clear that it is necessary to show that the challenge brought is sufficiently connected to the democratic latitude vested in Parliament (BVerfGE 123, 267 <332 and 333>). 8

> To the extent that the complainants (...) assert, on the basis of Art. 38(1) first sentence GG, violations of other constitutional principles of the state order, their constitutional complaints are only admissible as regards the assertion that the principle of the social state is violated.
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> The complainants (...) establish the necessary connection with the principle of democracy, with regard to which Art. 38(1) GG confers standing to directly challenge possible violations by means of a constitutional complaint. They assert, in a sufficiently specific manner, that the competences of the European Union laid down in the Lisbon Treaty could restrict the German *Bundestag*'s democratic latitude in social policy matters to such an extent that the *Bundestag* would no

longer be able to satisfy the constitutional requirements set by the principle of the social state that arise from Art. 23(1) third sentence GG in conjunction with Art. 79(3) GG.

However, insofar as the complainants (...) assert violations of the principles of the rule of law and of the separation of powers, they fail to demonstrate a comparable connection to the principle of democracy. To this extent, the constitutional complaints are inadmissible.

c) Essentially, the judgments on the Maastricht Treaty, the Lisbon Treaty and also the ESM concerned the compatibility of the respective domestic act of approval with the substantive core of the right to vote as protected by Art. 38(1) first sentence GG in conjunction with Art. 1(1) GG and Art. 79(3) GG. In the constitutional review of the relevant acts of approval, the legal question was whether the transfer of sovereign powers to the European Union or, in the case of the ESM Treaty, the curtailing of Parliament's budgetary sovereignty, would render meaningless the remaining competences and powers of the *Bundestag*, resulting in a violation of the '*core of the principle of democracy*' that enjoys absolute protection under Art. 79(3) GG. It is thus in cases where Parliament's competences are at risk of being rendered meaningless, a risk which can arise in different constellations, that the 'right to democracy' rooted in Art. 38(1) first sentence GG entitles citizens to challenge the respective acts with a constitutional complaint (cf. BVerfGE 129, 124 <169 and 170>). It is then for the Federal Constitutional Court to assess the merits of such a challenge as part of the identity review (cf. paras. 96 and 136 of the Order). 9

4. a) Ensuring protection against a loss of the autonomous and democratic latitude to shape policy is the key consideration informing the *ultra vires* challenge based on Art. 38(1) first sentence GG, given that it serves to protect citizens entitled to vote against the exercise of public authority upon which they can neither confer legitimation nor exert influence (cf. BVerfGE 142, 123 <189 para. 123; 194 para. 135>). Both the challenge on the basis of constitutional identity and the challenge on the basis of the *ultra vires* doctrine share the same root in constitutional law, namely the 'right to democracy' derived from Art. 38(1) first sentence GG in conjunction with Art. 20(1) and (2) GG and Art. 79(3) GG (cf. BVerfGE 151, 2020 <325 and 326 para. 205). Nevertheless, *ultra vires* review and identity review must be distinguished in that they each rely on a different standard of review. When conducting an *ultra vires* review, the Federal Constitutional Court examines whether measures taken by institutions, bodies, offices and agencies of the European Union, or an international organisation that supplements or is otherwise closely tied to the European Union, remain within the bounds of the European integration agenda as laid down in the domestic act of approval in accordance with Art. 23(1) GG, or whether they exceed the limits set by Parliament (cf. BVerfGE 89, 155 <188>; 123, 267 <353>; 126, 286 <302 *et seq*.>; 134, 366 <382 *et seq*. para. 23 *et seq*.>; 142, 123 <198 *et seq*. para. 143 *et seq*.>). By contrast, when conducting an identity review, the Court does not examine whether the challenged measures fall within the scope of the competences conferred but 10

whether the ‘absolute limit’ set by Art. 79(3) GG is respected (cf. BVerfGE 123, 267 <343, 348>; 134, 366 <386 para. 29>; 142, 123 <203 para. 153>; 151, 202 <325 para. 204>). The possibility of lodging constitutional complaints on the basis of Art. 38(1) first sentence GG serves to enable citizens to challenge the independent exercise of public authority by supranational institutions.

b) It is solely in this context that the Second Senate, in past decisions, has repeatedly emphasised the procedural dimension of the *ultra vires* review (cf. BVerfGE 134, 366 <397 para. 53>; 142, 123 <174 para. 82; 193 para. 134>; 146, 216 <251 para. 50>; 151, 202 <276 para. 93>). In order to safeguard their democratic influence on the process of European integration, citizens are “in principle afforded a right that sovereign powers be transferred only in the ways provided for in Art. 23(1) second and third sentence GG in conjunction with Art. 79(2) GG. In addition to ensuring that the transfer of sovereign powers is sufficiently specific (...), these constitutional provisions safeguard the democratic decision-making process [at the domestic level], which would be undermined if institutions or other bodies of the European Union were to seize competences unilaterally” (BVerfGE 134, 366 <387 para. 53>). In this regard, a ‘unilateral seizing of competences’ refers to cases where measures taken by EU institutions, bodies, offices and agencies exceed the competences conferred on them with the act of approval in a manifest and structurally significant manner, running counter to the principle of conferral. So far, however, it was not understood to refer to cases where the German act of approval pursuant to Art. 23(1) GG was void on formal grounds, for instance failure to achieve the necessary two-thirds majority, which would also render ineffective the envisaged transfer of sovereign powers. Yet with the present decision, the Senate majority now also categorises such cases as *ultra vires* acts (cf. paras. 97, 99 and 133 of the Order), which the review exercised by the Federal Constitutional Court must seek to prevent. 11

5. In its judgment on the European Stability Mechanism, the Second Senate clarified, in unequivocal terms, that “Art. 79(2) GG – including when applied in conjunction with Art. 23(1) third sentence GG – contains an objective rule of constitutional law that governs the internal decision-making processes of the *Bundestag* and the *Bundesrat.* Yet with the exception of *ultra vires* cases (cf. BVerfGE 134, 366 >383 and 384 para. 25>), it does not confer individual rights upon citizens entitled to vote (...), given that the scope of the *Bundestag*’s decision-making powers, in other words the substance of the right to vote, is not dependent on what type of majority carries decisions of the *Bundestag*” (BVerfGE 135, 317 <386 and 387 para. 129>). Both the reference made in this excerpt to the request for a preliminary ruling in the OMT proceedings (published in BVerfGE 134), which concerned an *ultra vires* challenge on the grounds of a manifest and structurally significant exceeding of competences, and the reasons provided on why it is necessary to reserve the power to conduct an *ultra vires* review, namely to ensure that the limits of competences that were in fact transferred with legal effect are subsequently adhered to (cf., e.g., BVerfGE 142, 123 <198 para. 143>), indicate that the *ultra vires* reservation does not apply to challenges such 12

as the one at issue in the present proceedings. Nonetheless, the Senate majority believes – citing the reservation of constitutional review expressly recognised for *ultra vires* challenges (BVerfGE 135, 317 <387 and 388 para. 129) – that its view is in keeping with its past decisions concerning transfer of sovereign powers (cf. para. 99 of the Order). At the same time, the Senate majority submits that as far as challenges on grounds of other threats to constitutional identity are concerned, such as the ones at issue in the judgments on the European Stability Mechanism, which are also based on Art. 38(1) first sentence GG, the rule remains that individual citizens do not have standing to seek a review of the formal lawfulness; in this respect, the Senate majority maintains that Art. 79(2) GG in conjunction with Art. 23(1) third sentence GG contains (only) an objective rule of constitutional law that has no bearing on the substance of the right to vote. In our view, the line of argument put forward by the Senate majority means that the standing conferred by Art. 38(1) first sentence GG is (yet again) expanded to allow a new, further type of challenge. The Senate majority thus deviates from the clear standards reiterated in the judgment on the European Stability Mechanism (BVerfGE 135, 317) regarding the admissibility of challenges on the grounds that the requirement of a two-thirds majority was not met, even though the arguments in favour of upholding the previous standards are far more convincing.

II.

1. a) The review of formal lawfulness of a transfer of sovereign powers is based on an extensive interpretation of the right to democratic self-determination derived from Art. 38(1) first sentence GG, which not only fails to correctly appraise the substance of that right but also reaches beyond its inherent limits. This interpretation assumes that the aforementioned right were also affected in cases where the German *Bundestag* does take action to provide democratic legitimation, through an act of approval, to a transfer of sovereign powers that is in principle permissible; this individual right is thus made applicable to cases where the German *Bundestag* actually exercises – albeit not fully in conformity with formal requirements – its responsibility with regard to European integration within the framework of a democratic process. The Senate majority's interpretation, which expands the 'right to democracy' by recognising an individual right that the formal requirements for an effective transfer of sovereign powers be adhered to, strips the right to vote of its specific substance, namely the aim of safeguarding democratic self-determination, which the identity review and the *ultra vires* review serve to protect. Yet a 'right to democracy' "can only be derived from Art. 38(1) first sentence GG, in cases not dealing with *ultra vires* situations, to the extent that the challenged act affects democratic principles that, pursuant to Art. 79(3) GG, are beyond the reach of even the Constitution-amending legislator (...)" (BVerfGE 135, 317 <386 para. 125). Where the requirement of a majority capable of amending the Constitution or other formal requirements were not adhered to in the transfer of sovereign powers, this constitutes neither a previously recognised *ultra vires* situation nor does it bear on the basic guarantees of the principle of democracy that are protected as unamendable by Art. 79(3) GG. Ultimately, recognising for- 13

mal errors as grounds for challenging a transfer of sovereign powers would completely blur the scope of protection of Art. 38(1) first sentence GG in the context of European integration.

b) In the present proceedings, the Senate majority now assumes for the first time that – in contrast to cases involving constitutional amendments – the transfer of sovereign powers invariably affects the substance of Art. 38(1) first sentence GG in terms of the core protected by Art. 79(3) GG (cf. para 97 of the Order); from this, the Senate majority deduces that the formal lawfulness of such a transfer must be included in the scope of constitutional review conducted on the basis of Art. 38(1) first sentence GG. We do not find these arguments persuasive. We do not agree that any transfer of sovereign powers invariably encroaches upon the substance of the right to vote protected by Art. 79(3) GG – i.e. those guarantees deriving from the principle of democracy that are beyond the reach of constitutional amendment – which is the central notion on which the Senate expressly bases its finding of a violation (cf. paras. 134 and 138 of the Order). The substance of the right to vote protected by Art. 79(3) GG serves to ensure that the German *Bundestag* retain sufficient latitude to exercise its democratic powers. In its case-law, the Second Senate has until now only recognised that this democratic latitude is at risk in the event that the *Bundestag*'s tasks and powers are substantially rendered meaningless, through extensive transfers of powers, *carte blanche* authorisations or the assumption of liabilities that prevent the *Bundestag* from exercising it overall budgetary responsibility, and in the event of an *ultra vires* act. What all these cases have in common – and what distinguishes them from cases where an act of approval merely fails to adhere to certain formal requirements set out in the second and third sentence of Art. 23(1) GG – is the risk that the democratic process could be eroded or undermined, exposing citizens entitled to vote to a public authority upon which they can neither confer democratic legitimation nor exert influence on free and equal terms (cf. BVerfGE 142, 123 <194 para. 135>). 14

c) Moreover, mere failure to comply with certain democratic procedural or majority requirements in the context of Parliament's participation [in the process of European integration] as such – which the review of the formal lawfulness of a transfer of sovereign powers recognises as grounds for an isolated constitutional challenge – cannot encroach on the substance of the right to vote, simply because the 'right to democracy' can in principle not be invoked against the democratic process itself. The opposing view essentially transforms the right derived from Art. 38(1) first sentence GG into a right that allows every citizen entitled to vote to subject democratic majority decisions to a general review of lawfulness. In this respect, others have already pointed out the dangers associated with using Art. 38(1) first sentence GG as a 'gateway' for granting each and every citizen entitled to vote standing to enforce legal rules (cf. BVerfGE 134, 366, 430 <432 para. 138>, dissenting opinion of Justice Gerhardt regarding the admissibility of an *ultra vires* challenges based on an asserted violation of Art. 38(1) GG). When the Senate majority now relies on Art. 38(1) first sentence GG to add to the types of challenges regarded as admissible in this context, by recog- 15

nising formal errors as sufficient grounds for challenging acts transferring sovereign powers or approving integration measures, it widens this gateway even further. In practice, this would create an individual right to seek a general review of lawfulness regarding acts of Parliament. Yet such a right cannot actually be derived from Art. 38(1) first sentence GG given that the purpose of this guarantee – as the Second Senate has reiterated time and again – is not to subject the contents of democratic decision-making to substantive review but to facilitate democratic processes as such (cf. BVerfGE 129, 124 <168>; 134, 366 <396 and 397 para. 52>; 142, 123 <190 para. 126>; 146, 216 <249 and 250 para. 46>; 151, 202 <286 para. 118>). It must be kept in mind that Art. 38(1) first sentence GG, as a fundamental right to participation in the democratic self-governance of the people, does not generally confer standing to challenge parliamentary decisions, especially not parliamentary legislation (cf. BVerfGE 129, 124 <168>; 142, 123 <190 para. 126>; 146, 216 <250 para. 46>; 151, 202 <286 para. 118>). This standard must be upheld and – outside the absolute protection afforded the basic guarantees of the principle of democracy protected by Art. 79(3) GG – also apply with regard to challenges directed against acts transferring sovereign powers or approving measures in the context of European integration.

d) Any challenge brought in this context must thus show a sufficient connection to the core of the principle of democracy and, by extension, the ‘right to democracy’ derived from Art. 38(1) first sentence GG. However, this necessary connection cannot be established merely by proclaiming that no citizen entitled to vote should be exposed to public authority exercised by a supranational organisation if the underlying transfer of powers is formally unconstitutional and thus without legal effect. Yet this is exactly the central line of argument on which the Senate majority bases the review of the formal lawfulness of the transfer of sovereign powers: The Senate majority argues that, in the aforementioned scenario, the exercise of supranational public authority lacks the necessary democratic legitimation given that the act transferring the exercised powers is formally unconstitutional and void, which is why it cannot provide a valid basis for exercising public authority (cf. paras. 133 and 137 of the Order). This consideration illustrates that the review of the formal lawfulness of a transfer of sovereign powers does not actually serve to protect the substance of the right to vote against measures that would render the German *Bundestag* “powerless”, but that it constitutes a general review of lawfulness. Where the link of democratic legitimation (*Legitimationszusammenhang*) is disrupted because formal errors render the transfer of sovereign powers ineffective, this does not substantially jeopardise the democratic process as such, at least not in a manner that could violate the corresponding ‘right to democracy’ (see also 2. a) below). In such cases, it is not for the Federal Constitutional Court to intervene on the basis of Art. 38(1) first sentence GG to provide protection to the democratic process where none is needed. 16

2. a) The Senate majority further argues that a transfer of sovereign powers to another subject of international law, such as the European Union or an international organisation that supplements or is otherwise closely tied to the European Union, would 17

generally result in these competences being “lost” in the sense that – as a key difference to ordinary constitutional amendments – they “cannot easily and unilaterally be ‘regained’ by the legislator” (cf. paras. 97 and 137 of the Order). Yet, in our view, this does not necessarily mean that such a transfer invariably affects the substance of the right to vote protected by Art. 79(3) GG. Citing the fact that the structural changes to the constitutional order of the state cannot readily be reversed in the aforementioned scenarios, the Senate majority considers it necessary to confer upon all citizens entitled to vote standing to lodge – precautionary – complaints on the basis of Art. 38(1) first sentence GG. This appears to be the central motivation informing the Senate majority’s decision as it upholds, on the one hand, the view that in (purely) domestic matters a comprehensive formal and substantive review, i.e. a general review of lawfulness, cannot be sought against parliamentary decisions, especially not legislative ones, while allowing, on the other hand, complaints seeking precisely this type of review against similar decisions and acts of Parliament taken in the context of European integration. By doing so, the Senate majority creates a “special regime” applicable only to the latter case. What is not clear to us, however, is why and how these considerations establish that the *substance* of the right to vote, in the understanding set out above, were affected. We therefore cannot see why the need for a review of formal lawfulness should arise in each and every case involving a transfer of sovereign powers in the context of European integration (Art. 23(1) GG) – a need which, by contrast, is quite clear in the cases of identity review and *ultra vires* review. Ensuring adherence to the formal requirements set out in the second and third sentence of Art. 23(1) GG neither facilitates democratic processes nor does it protect such processes from jeopardy or blockage. The present case is a perfect example: The German *Bundestag* followed and concluded the legislative procedure, and the competences it transferred are not beyond the reach of European integration, i.e. they are within the limits set by Art. 79(3) GG. The decision-making powers of Parliament were not curtailed without its consent or against its will, nor would the establishment of the Unified Patent Court, in the event of the UPC Agreement entering into force, exceed the limits of the agreed integration agenda.

b) It is understandable why the Senate majority wishes to allow the type of review sought in the present proceedings. If an act transferring sovereign powers were later found to be formally unconstitutional and thus without legal effect, countless measures regarding the matters for which public authority was supposedly transferred would lack the legitimation conferred by the domestic legislator’s act of approval and thus, according to the standards developed by the Senate majority, constitute *ultra vires* measures (cf. paras 97, 99 and 133 of the Order). The review of the formal lawfulness of a transfer of sovereign powers devised by the Senate majority aims to prevent such a situation. It is true that the ineffectiveness of the domestic act transferring sovereign powers has no bearing on the status of a supranational organisation established on the basis of an instrument of international law or EU law; consequently, that organisation can continue to exercise supranational public authority within the framework of the existing integration agenda. Yet it is within the powers of Parlia- 18

ment, as the German legislator (deciding on matters of European integration), to adopt an act approving the transfer of powers in a formally constitutional manner. A possibility to remedy procedural errors and the resulting violation of constitutional law (exercise of public authority without a statutory basis) is thus available at the domestic level. By contrast, such remedial action is not available to the legislator in the event that measures violate constitutional identity or amount to *ultra vires* acts. As regards violations of constitutional identity, the legislator may not approve a transfer of sovereign powers that intrudes on the constitutional identity protected by Art. 79(3) GG; as regards *ultra vires* acts in the traditional sense, the competent constitutional organs do not have the power to unilaterally remedy a manifest and structurally significant exceeding of competences on the part of EU institutions or treaty bodies (and thus remedy the resulting violation of constitutional law). In the event that the necessary two-thirds majority in the *Bundestag* and the *Bundesrat* cannot be achieved, it is incumbent upon the constitutional organs to exercise their responsibility with regard to European integration, and take steps seeking to resolve the discrepancy between what is required under international or EU law and what is permissible under constitutional law, and thus to remedy the violation of constitutional law.

3. Moreover, it would still be possible to challenge the formal unconstitutionality of the Act of Approval to the Agreement on a Unified Patent Court, even after the Agreement has entered into force. As regards the enforcement of decisions rendered by the Unified Patent Court, for instance, Art. 82 of the UPC Agreement provides that the enforcement procedure is governed by the domestic law of the respective Contracting Member States, which means that it is possible to seek recourse to the ordinary courts against domestic enforcement measures. In such proceedings challenging enforcement measures, claimants can assert the formal unconstitutionality of the Act of Approval given that the validity of the Act of Approval, and, by extension, of the transfer of sovereign powers, is a precondition for the binding effect and enforceability of the Patent Court's judgments in the German legal order. In this respect, a review of the Act of Approval by the Federal Constitutional Court can be sought by way of specific judicial review proceedings [following a referral from an ordinary court] pursuant to Art. 100(1) GG as well as by way of a constitutional complaint directed against a judgment rendered by an ordinary court as the final court of appeal in that matter. However, in these cases – and contrary to challenges asserting a violation of the 'right to democracy' derived from Art. 38(1) first sentence GG – it must always be established that the challenged measure, for instance an enforcement measure, specifically affects fundamental rights of the claimant or complainant. In these cases, the fact that the challenged measure specifically affects individual fundamental rights remains the point of reference for constitutional review. 19

III.

The Senate majority's view broadens access to the Federal Constitutional Court to a point where a review of formal lawfulness can be sought against almost any transfer of competences within the scope of application of Art. 23(1) GG; this may well 20

prompt the *Bundestag* and the *Bundesrat* to generally seek a two-thirds majority in such cases in order to avoid the risk that their decisions will be challenged before the Federal Constitutional Court on formal grounds. Thus, the requirement of a two-thirds majority, as applicable to constitutional amendments, will *de facto* become the rule not only when sovereign powers are transferred to EU institutions, bodies, offices and agencies, but also when powers are transferred to organisations established under international law that supplement or are otherwise closely tied to the EU. This was not the intent of the Constitution-amending legislator, which, by inserting Art. 23(1) first sentence GG, has imposed on the Federal Republic of Germany a duty to actively participate in the process of European integration and to this end has opened up the constitutional order to accommodate, in principle, the exercise of supranational public authority. Furthermore, such a rule is neither necessary for nor conducive to facilitating the democratic process, since decision-making with narrow majorities must also be possible in a democracy. Granting broad access to the Federal Constitutional Court on the basis of Art. 38(1) first sentence GG could prejudice democratic processes in the *Bundestag* and the *Bundesrat* in the future; it could, if not prevent, at least significantly delay further steps towards deeper integration. By including international organisations that supplement or are otherwise closely tied to the European Union in the scope of Art. 23(1) GG, and by generally relying on a rather broad interpretation of the third sentence of Art. 23(1) GG, the applicability of the two-thirds majority requirement is extended considerably, not least to cases that would have previously fallen under Art. 24(1) GG. Yet in cases governed by that provision, the transfer of sovereign powers [to international organisations] requires only an ordinary federal law.

In light of the direction of European integration, and with more and more competences being conferred upon the European Union, we do not categorically reject the possibility of a broader interpretation of Art. 23(1) GG regarding its scope of application. At the same time, we would like to point out that recognising the review of formal lawfulness of a transfer of powers in this context would open yet another area of constitutional dispute given that the delimitation of the second and third sentence of Art. 23(1) GG requires an appraisal that will be far from clear-cut in many cases. Not only will this curtail the indispensable political latitude afforded Parliament in the context of European integration and thus run counter to the intent of the Constitution-amending legislator. It also fails to give effect to the objective pursued in Art. 38(1) first sentence GG. Instead of safeguarding the democratic process, it might achieve the opposite. 21

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