Bundesverfassungsgericht

Act of Approval to the Agreement on a Unified Patent Court is void

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Order of 13 February 2020
2 BvR 739/17

The Act of Approval to the Agreement on a Unified Patent Court ("the Act of Approval") to confer sovereign powers on the Unified Patent Court is void. In its outcome, it amends the Constitution in substantive terms, though it has not been approved by the *Bundestag* with the required two-thirds majority. This is what the Second Senate of the Federal Constitutional Court decided on a constitutional complaint in an order published today. In its reasoning, the Senate stated that, in order to safeguard their right to influence the process of European integration by democratic means, this, in principle, also entails the right of citizens that sovereign powers be conferred only in the ways provided for by the Basic Law. An act of approval to an international treaty that has been adopted in violation thereof cannot provide democratic legitimation for the exercise of public authority by the EU or any other international institution supplementary to or otherwise closely tied to the EU.

Facts of the case:

The purpose of the Act of Approval is to establish the preconditions for the ratification of the Agreement on a Unified Patent Court of 19 February 2013 ("the Agreement"). As an international treaty, the Agreement is part of a regulatory package on patents at the core of which lies the introduction of a European patent with unitary effect at EU level by way of 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 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 competence for an extensive catalogue of disputes is to be conferred on the European Patent Court. This catalogue comprises primarily actions for patent infringements, disputes on the validity of patents and certain actions against decisions of the European Patent Office. The draft of the challenged Act of Approval was adopted unanimously by the *Bundestag* in the third reading but only by about 35 members of the *Bundestag* present. Neither was the presence of the required quorum determined, nor did the President of the *Bundestag* declare that the Act of Approval had been adopted by a qualified majority.

Key considerations of the Senate:

I. An act of approval to an international treaty that is supplementary to or otherwise closely tied to the European Union´s integration agenda (*Integrationsprogramm*) must be measured against Art. 23(1) of the Basic Law (*Grundgesetz* – GG). Insofar as such an act amends or supplements the Basic Law in substantive terms, or makes such amendments or supplements possible, it requires a two-thirds majority in the legislative bodies pursuant to Art. 23(1) third sentence in conjunction with Art. 79(2) GG. An obligation under international law, assumed in violation of these requirements, that exposes German citizens to the influence of a supranational public authority, violates their right equivalent to a fundamental right derived from Art. 38(1) first sentence and Art. 20(1) and (2) in conjunction with Art. 79(3) GG. In order to safeguard their rights to influence the process of European integration, citizens, in principle, can also claim that sovereign powers be conferred only in the ways provided for by the Basic Law in Art. 23(1) second and third sentence in conjunction with, Art. 79(2) GG (review of the formal aspects of conferral – *formelle Übertragungskontrolle*). This is because competences conferred on another entity under international law are usually "lost" and cannot easily be regained by the legislator. However, without an effective conferral of sovereign powers, each subsequent measure issued by the EU or a supranational organisation would lack democratic legitimation. Furthermore, the substantive limits to the conferral of sovereign powers that follow from Art. 79(3) GG must always be adhered to.

II. Pursuant to these standards, Art. 1(1) first sentence of the Act of Approval violates the complainant's right to democratic self-determination derived from Art. 38(1) first sentence, Art. 20(1) and (2) and Art. 79(3) in conjunction with Art. 23(1) third sentence and Art. 79(2) GG, as the Act of Approval was not passed by two thirds of the members of the *Bundestag*.

1. The Act of Approval confers judicial functions on a supranational court and sets out that this court has exclusive competence to decide on certain legal disputes. Additionally, the Agreement makes decisions and orders of the Unified Patent Court enforceable in any Contracting Member State.

2. The Agreement is supplementary to or otherwise closely tied to the European Union's integration agenda (*Integrationsprogramm*) and effectively replaces provisions that did not achieve the majorities necessary to be adopted as EU law.

a) The direct primary law basis of the Agreement is Art. 262 TFEU. It provides for the conferral of jurisdiction on the CJEU in disputes relating to European intellectual property rights, provided there is a unanimous decision of the Council and ratification by the Member States. Until now, the political will has been lacking in this respect.

b) In addition, the Agreement is very closely enmeshed with secondary law enacted on the basis of Art. 118 TFEU. An essential part of the judicial functions of the Unified Patent Court will relate to rights and claims based on EU law the unitary effect of which can only be guaranteed by the provisions laid down in the Agreement. Furthermore, the Unified Patent Court is directly bound by EU law.

c) The Agreement was also pushed forward by EU organs. Since at least the turn of the millennium, the European Commission has insisted on the centralisation of judicial protection in this field. The European Parliament also strongly supported the "European Patent Package".

The Agreement is open exclusively to EU Member States. The fact that not all EU Member States are also Contracting Member States does not call into question the particularly close ties to the European Union's integration agenda (*Integrationsprogramm*). On the contrary, it is expressly legitimated by the concept of enhanced cooperation and it underlines the close enmeshment with the institutional system of the EU.

3. The Act of Approval is subject to the requirements in Art. 23(1) third sentence in conjunction with Art. 79(2) GG, since it effectively amends the Constitution in substantive terms.

a) The Agreement relates to the Constitution and is a comparable regulation within the meaning of Art. 23(1) third sentence GG given that it contains a provision, which, in its function, is equivalent to an amendment of the Treaties pursuant to Art. 48 TEU. Effectively, the Agreement is an amendment or replacement of Art. 262 TFEU. In Art. 262 TFEU, the Treaty not only calls for a special legislative procedure and a unanimous decision of the Council, but also sets out that provisions conferring jurisdiction shall enter into force only after their approval by the Members States in accordance with their respective constitutional requirements. Thus, Member States considered the creation of novel jurisdiction for the CJEU over industrial property law to be a severe interference with national jurisdiction and designed it as a process requiring ratification. The German legislature classified the process set out in Art. 262 TFEU as a special process of amending the Treaties. By way of the Agreement, the Contracting Members States changed the European Union's integration agenda (*Integrationsprogramm*) of the Lisbon Treaty, factually removed the basis of the process provided for in Art. 262 TFEU and rendered a new, EU-inspired type of unified court system for industrial property possible. This is because the necessary unanimity could neither be achieved for the way outlined in the Treaties by Art. 262 TFEU nor for an amendment pursuant to Art. 48 TEU.

b) Regardless of the specific set-up of the patent court system, conferring judicial functions while superseding German courts results in a substantive amendment of the Basic Law within the meaning of Art. 23(1) third sentence GG. Pursuant to Art. 92 GG, judicial power in Germany is exercised by the Federal Constitutional Court, the federal courts and the courts of the *Länder*. Any conferral of judicial functions on international courts modifies this comprehensive allocation of jurisdiction and, in this respect, constitutes an amendment of the Constitution in substantive terms. The conferral not only affects the fundamental rights guaranteed in the Basic Law, given that German courts can no longer ensure the protection of these rights, but also the specific design of the separation of powers. A significant part of the Member States' jurisdiction over private and administrative legal matters of economic significance is conferred to the exclusive jurisdiction of the Unified Patent Court by Art. 32 of the Agreement. Under the Agreement, the structure of the German court system set out in the Constitution is modified and supplemented by another court with its own hierarchy.

4. The Act of Approval had to be adopted by a qualified majority pursuant to Art. 79(2) GG. In view of the particular importance of the majority requirement for the integrity of the Constitution and the democratic legitimation of interferences with the constitutional order, a law cannot be enacted when it does not achieve this majority. Thus, the *Bundestag* did not effectively pass the Act of Approval. It is void.

Dissenting Opinion of Justices König, Langenfeld and Maidowski

The "right to democracy" does not give rise to a right that formal requirements for the conferral of sovereign powers be adhered to, which can be relied on before the Federal Constitutional Court. This would lead to an extension of the right derived from Art. 38(1) first sentence GG that fails to recognise its substance and limits. There is no scope for a violation of the substance of the right to vote and be elected in a case that only concerns the failure to adhere to formal requirements for an act of approval. This is because this right shall now apparently also be affected in situations in which the *Bundestag* does indeed seek to establish democratic legitimation for a conferral of sovereign powers, which is permissible in principle, by way of legislation and in which the *Bundestag* thus performs its responsibility with respect to European integration (*Integrationsverantwortung*). When the "right to democracy" is extended to cover the adherence to formal requirements for an effective conferral of sovereign powers, it loses its specific substance, which aims to enable and safeguard democratic self-determination. Beyond *ultra-vires* situations, Art. 38(1) first sentence GG grants such a right only to the extent that an act affects democratic principles that, pursuant to Art. 79(3) GG, are even beyond the

reach of the Constitution-amending legislature. Not adhering to the requirement of a majority capable of amending the constitution or other formal requirements when conferring sovereign powers is neither a previously recognised *ultra-vires* situation nor does it affect those foundations of the principle of democracy that cannot be changed. Consequently, allowing a conferral to be challenged on formal grounds completely blurs the scope of protection of Art. 38(1) first sentence GG in the context of European integration.

Furthermore, a review of the formal aspects of conferral could ultimately – and contrary to the intentions of the Second Senate's majority – obstruct and narrow the political process in the context of European integration. It can be expected that this further extension of access to the Federal Constitutional Court in almost any case of conferral of jurisdiction within the scope of application of Art. 23(1) GG will prompt the *Bundestag* and the *Bundesrat* to seek a two-thirds majority in order to avoid the risk of a review of the formal aspects of conferral. Thus, it will factually become the rule that a two-thirds majority will be necessary not only for conferring additional sovereign powers on the EU, but also for establishing institutions under international law that have close ties to the EU. This is neither the Constitution-amending legislature's intention nor is it necessary or beneficial for facilitating the democratic process, since decision-making with narrow majorities must also be possible. Granting broad access to the Federal Constitutional Court could prejudice the democratic process in the future and could, if not prevent, at least significantly delay further steps towards integration. The requirement of a two-thirds majority is extended significantly into an area that was previously covered by Art. 24(1) GG. According to this constitutional provision, only ordinary federal law is required for the conferral of sovereign powers. Permitting a review of the formal aspects of conferral opens up further areas to dispute before the Constitutional Court. This will result in the narrowing of Parliament's necessary political leeway in the context of European integration and the protection of the democratic process intended by Art. 38(1) first sentence GG may thus be turned into its opposite.
