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ARTICLE

The End of Satellite Treaty Law as We Know It? The German Federal Constitutional Court, European Integration by International Law and Treaties "Supplementing or Being Otherwise Closely Tied to the EU"

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Abstract

Amidst the first wave of the coronavirus pandemic, the German Federal Constitutional Court rendered a little-noticed, but potentially far-reaching decision regarding European integration. When it declared the law ratifying the Unitary Patent Court Agreement unconstitutional, it did so because it is a treaty "supplementing or being otherwise closely tied to the EU", in other words, a satellite treaty, inter-se agreement, or more generally: an international law agreement furthering European integration outside the EU law framework. This commonly used integration technique is therefore going to be a lot more difficult in future whenever Germany is involved. At the same time, the court order gives all German citizens a far-reaching right to have laws ratifying such treaties checked before the Constitutional Court, which is a significant extension compared to its earlier case-law. In future cases of disagreement, EU Member States may have to find different ways to proceed than resorting to international law, such as using the enhanced cooperation mechanism.

Keywords: Bundesverfassungsgericht; German Federal Constitutional Court; European integration; EU law; international law; satellite treaties; Unitary Patent; Unified Patent Court; Treaties Supplementing or Being Otherwise Closely Tied to the EU; enhanced cooperation

Amidst the first wave of the coronavirus pandemic, the German Federal Constitutional Court, *Bundesverfassungsgericht* (BVerfG), rendered a decision with potentially dramatic effects on European integration—yet, we are not talking about the infamous and much-debated judgement on the Public Sector Purchase Program of the European Central Bank.[1] The decision in question concerns a very different area, namely patent law. More precisely, it concerns the international

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[1]Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], May 5, 2020, 2 BvR 859/15, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2020/05/rs20200505_2bvr085915.html.

"Agreement on a Unified Patent Court" (UPC Agreement). Intentionally or not, the BVerfG, in a little-noticed order, may have steered the future of European Union integration towards action within the framework of EU law as opposed to international law treaties. The purpose of this article is to present this order and to highlight its significant consequences.

A. The BVerfG Order on the Unified Patent Court Agreement

By February 13, 2020, SARS-Cov-2 had made its way to Europe and into the headlines around the world. In this critical moment, the BVerfG published its long-awaited decision on the Unified Patent Court Agreement[2] and—due to the public attention being entirely focused on the virus—it almost went unnoticed. This notwithstanding, the order is likely to shape European integration for years to come. In the following, I will first examine the background to the order and then explain the Court order.

I. The Never-Ending Story of the EU Unitary Patent

1. The Unitary Patent

The unitary European protection of patents is a true evergreen of European politics, which has been advocated for by the EU and its Member States since the 1960s. The idea behind it is the introduction of a single European intellectual property right that is valid throughout the EU. This would mean that only one patent would have to be applied for in order to protect an innovation in the entire EU. In addition, infringements could be handled uniformly; one single court decision stating that a patent is being infringed upon would be sufficient to stop the practice in all EU Member States. Ideally, translations would no longer be necessary. At present, the only possibility to protect an innovation beyond the border of the patent holder's home state is to apply for individual patents in the other European states. Furthermore, infringement proceedings must be brought before a court in each country, individually, in case of doubt. The European Patent Office (EPO), an international organization whose reach and membership goes beyond the EU, facilitates the process of obtaining the bundle of national patents on the basis of the European Patent Convention (EPC). However, it still needs to translate the original patent into the languages of all countries where protection is sought. A single EU patent would, therefore, make patent protection significantly easier and less costly for companies and individuals. The Treaty on the Functioning of the European Union (TFEU) provides a legal basis for the creation of European intellectual property rights in Article 118. According to this, the patent can be adopted by a qualified majority in the Council—only the language regime of the patent requires unanimity.[3]

In 2000, the EU Commission presented a first proposal for a regulation that would create a European patent. After ten years without a result, the Commission put the issue back on the agenda with another legislative proposal—this time specifically on the language arrangements of the patent. Six months later, the Council declared that the unanimity required for the legislative package could not be reached. As a result, initially twelve and finally twenty-five Member States requested that the legislative procedure be continued by way of an enhanced cooperation. This mechanism—outlined in Article 20 of the Treaty on European Union (TEU) and Article 326 et seqq. TFEU[4]—enables Member States to pass EU law in smaller groups without affecting the non-participating states. Finally, in 2012, a group of participants passed Regulation

[2]Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Feb. 13, 2020, 2 BvR 739/17, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/02/rs20200213_2bvr073917en.html [hereinafter Judgment of Feb. 13, 2020].

[3]Consolidated Version of the Treaty on the Functioning of the European Union art. 118(2), 2016 O.J. (C 202) 13 [hereinafter TFEU].

[4]TFEU art. 326; Treaty on European Union, art. 20, 2016 O.J. (C 202) 1 [hereinafter TEU].

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No. 1257/2012, thus creating the unitary patent.[5] However, its entrance into force was delayed until the coming into force of the international Agreement on a Unified Patent Court (UPC Agreement).[6]

2. The UPC Agreement

In the current system of nationally organized patent protection, national courts have jurisdiction over any legal dispute arising in the context of a patent. This causes problems relating to a lack of judicial coherence and abusive litigation strategies.[7] The introduction of a European patent was, thus, always envisioned to accompany a dedicated EU patent court system. For this reason, a legal basis for the creation of such a system was already created by the Treaty of Nice[8] and extended in the Lisbon Treaty.[9] Article 262 TFEU makes it possible to confer "jurisdiction ... in disputes relating to the application of acts ... which create European intellectual property rights" to the Court of Justice of the European Union (CJEU). The wording is a direct reference to Article 118 TFEU, which the unitary patent is based on. A conferral of jurisdiction to the CJEU would most likely—though not mandatorily—imply the creation of a specialized court attached to the General Court according to Article 257 TFEU.[10] In December 2003, the Commission published a legislative proposal for creating a court system on this legal basis.[11] However, the very fact that the proposal was based on the predecessor of today's Article 262 TFEU was the reason it failed: Firstly, Article 262 TFEU, as its predecessor, is governed by a complicated procedure, requiring ratification by all Member States in addition to unanimity in the Council. More importantly, however, it was criticized that a jurisdiction of the CJEU could include only the new unitary patent. The existing EPO-system of bundled national patents would continue to be dependent on national courts. This "entrenchment of institutional parallelism for patents in Europe"[12] was considered to be complicated and inefficient and, thus, inapt to solve the existing problems. For this reason, from the very beginning, a solution outside the EU legal system on the level of international law was propagated and expected by large parts of the patent law community.[13]

In 2009, the European institutions eventually agreed to and proposed the creation of a unified court for both the EU unitary patent and the classic European patent system. It was to be instated on the basis of a mixed agreement between the EU, its Member States, and the non-EU state members to the EPO system.[14] In order to guarantee the legality of this approach, the Council requested an opinion from the CJEU on the compatibility of such an agreement with EU law. In the resulting

[5]Regulation 1257/2012 of the European Parliament and of the Council of 17 December 2012 Implementing Enhanced Cooperation in the Area of the Creation of Unitary Patent Protection, 2012 O.J. (L 361) 1 (EU).

[6]*Id.* at art. 18(2).

[7]Juliana Almeida & Guilherme Oliveira E. Costa, *From the Unitary Patent Package to a Federal EU Patent Law*, 10 PERSPS. ON FEDERALISM 126, 129 (2018); Federica Baldan & Esther van Zimmeren, *Exploring Different Concepts of Judicial Coherence in the Patent Context: The Future Role of the (New) Unified Patent Court and its Interaction with Other (Old) Actors of the European Patent System*, 8 REV. EUR. ADMIN. L. 377, 379 (2015).

[8]Treaty of Nice art. 229a 26, 2001 O.J. (C 80) 1 [hereinafter ECT-Nice].

[9]*See* TFEU, art. 262. *See also* Stéphanie Carre, *Art. 262*, *in* TFEU: A COMMENTARY, at para. 3 (Hermann-Josef Blanke & Stelio Mangiameli eds., 2020) (forthcoming); Jörg-Philipp Terhechte, *Art. 262 AEUV*, *in* DAS RECHT DER EUROPÄISCHEN UNION (Eberhard Grabitz et al. eds., 65th ed. 2018).

[10]Matthias Pechstein, *Art. 262 AEUV*, *in* FRANKFURTER KOMMENTAR ZU EUV, GRC UND AEUV, at para. 4 (Matthias Pechstein et al. eds., 2017).

[11]*Proposal for a Council Decision Conferring Jurisdiction on the Court of Justice in Disputes Relating to the Community Patent*, COM (2003) 827 final (Dec. 13, 2003).

[12]Thomas Jaeger, *The EU Patent: Cui Bono et Quo Vadit?*, 47 COMMON MKT. L. REV. 63, 82 (2010).

[13]*See* Carre, *supra* note 9, at para. 14.

[14]Council Document 7928/09 of 23 March 2009 on a Revised Presidency Text of the Draft Agreement on the European and Community Patents Court and the Draft Statute of That Court.

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opinion,[15] the CJEU concluded that the proposed "Agreement on the European and Community Patents Court" was contrary to the EU legal order.

Article 262 TFEU and its predecessor did not—according to the Court—prohibit *per se* the creation of a court with jurisdiction for patents outside the EU legal order by having jurisdiction over both classical European patents and EU patents.[16] However, a joint institution of the EU as well as EU and non-EU states would be outside the system of "ordinary" courts within the EU legal order. As such, it would deprive the ordinary courts—the courts of the EU Member States—of their task and duty to implement EU law, in particular, by using the preliminary ruling procedure.[17] Given this fundamental criticism of a cornerstone of the proposal, the second attempt to create a European patent jurisdiction had also failed after the publication of the CJEU opinion.

Subsequently, when the creation of the novel EU patent became the subject of an enhanced cooperation,[18] yet another attempt to create a unified patent court for both types of patents was launched. In light of the CJEU opinion, it was now planned to be based on an international law treaty involving only the participating EU-Member States, thus leaving out the non-EU members of the EPC. As such, the new court would be a "[c]ourt common to a number of Member States" and consequently able—possibly even obliged—to refer cases to the CJEU.[19] The underlying UPC-Agreement was signed in 2013 and will enter into force as soon as thirteen states, including the three states with the most patents, ratify it.[20] At the time of signing, Germany, the United Kingdom, and France were the states with the most patents. Before signing the agreement, Poland announced, on the basis of a controversial analysis of an economic consultancy,[21] that it did not want to participate in the Unified Patent Court, despite being a member of the enhanced cooperation on the unitary patent.[22] Notwithstanding this, the minimum number of ratifications required to bring the Convention into force was reached in 2017. Among the sixteen ratifying states was France—one of the three states necessary for the agreement to enter into force—which had already joined at an early stage of the process in 2014.[23] Thus, the entering into force of the UPC Agreement depended only on the ratification by the UK and Germany.

This promising dynamic came to halt, however, when Brexit confronted the project with an existential challenge.[24] As a signatory state of the UPC Agreement, and for the time being still an EU member, the UK was needed to unblock the entrance of the agreement into force. Yet, the UK had decided to leave the EU and the new Prime Minister, Theresa May, had promptly pointed out that "Brexit means Brexit." There seemed to be no reason, therefore, why the UK would ratify the UPC Agreement. It was in this crucial situation that the UK, in the middle of its own withdrawal process, surprisingly ratified the UPC Agreement and made clear its interest in continued

[15]ECJ, Case C-1/09, Creation of a Unified Patent Litigation System, ECLI:EU:C:2011:123 (Mar. 8, 2011).

[16]*Id.* at para. 61.

[17]*Id.* at para. 80.

[18]*See supra* A.I.1.

[19]ECJ, Case C-337/95, Parfums Christian Dior v. Evora, ECLI:EU:C:1997:517 (Nov. 4, 1997), para. 21.

[20]Agreement on a Unified Patent Court art. 89, 2013 O.J. C (175) 1 [hereinafter UPC Agreement].

[21]Deloitte, *Analysis of Prospective Economic Effects Related to the Implementation of the System of Unitary Patent Protection in Poland*, Oct. 1, 2012, http://www.uil-sipo.si/uploads/media/UPP-Analiza-PL.pdf. The study comes to the conclusion that it would be more advantageous for Poland not to implement the patent, as Poland would avoid implementation costs, but Polish innovations could still be protected as unitary patents in the other countries. For a critical assessment of this approach, see Janusz Fiolka, *Patent Enforcement in Poland*, *in* Patent Enforcement Worldwide: Writings in Honour of Dieter Stauder, at para. 121 (Christopher Heath & Dieter Stauder eds., 2015).

[22]Jacek Ciesnowski, *Poland Takes Wait-and-See Approach on Unitary Patent,* Warsaw Bus. J., Feb. 4, 2013.

[23]European Council, *Agreement on a Unified Patent Court*, https://www.consilium.europa.eu/en/documents-publications/treaties-agreements/agreement/?id=2013001 (last visited Aug. 5, 2020).

[24]The Impact of Brexit on Unitary Patent Protection and its Court, 18–20 (Matthias Lamping & Hanns Ullrich eds., 2018); Thomas Jaeger, *Reset and Go: The Unitary Patent System Post-Brexit*, 48 Int'l Rev. Intell. Prop. & Competition L. 254 (2017).

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membership.[25] This raised the question of whether it might be possible for the UK to remain in the patent system even after Brexit—a question that was at least partly answered in the affirmative in academia.[26],[27]

Thus, only a ratification by Germany was required for the UPC Agreement to finally enter into force. The German legislature, consisting of the *Bundesrat* and the *Bundestag,* granted the necessary approval in March 2017. However, the Federal Constitutional Court asked the Federal President not to sign the act of approval and consequently not to ratify the UPC Agreement in order for the Court to decide on a constitutional complaint that had been filed in the meantime. In March 2020, the Court ruled that the act of approval violated the Basic Law[28] and was void because it had not been adopted by a two-thirds majority in both legislative bodies.[29]

II. International Law "Supplementing or Being Otherwise Closely Tied to the EU" as an Ultra Vires Act

The Order of the BVerfG consists of a procedural and a substantive component. On the substantive side, it states that the UPC Agreement is an act of international law "supplementing or being otherwise closely tied to the EU", which is equivalent to an amendment of the Treaties;[2930]; and therefore, it would have had to be adopted by a two-thirds majority of both the *Bundesrat* and the *Bundestag*. Whether an international law agreement constitutes such a factual treaty change can now, according to the procedural component, be reviewed as part of the constitutional complaint.[31]

1. International Law "Supplementing or Being Otherwise Closely Tied to the EU"

In its substantive component, the BVerfG order states that the UPC Agreement is not just a regular treaty under international law transfering sovereign rights to an intergovernmental organization. If it were such, the go-to provision of the Basic Law for international law treaties, Article 24 of the Basic Law, would merely require an ordinary law for it to be ratified. The UPC Agreement, however, is characterized by "supplementing or being otherwise closely tied to the European Union´s integration agenda (*Integrationsprogramm*)", according to the BVerfG.[32] For this reason, it is not to be measured by the standard of Article 24, but rather by the constitutional provision

[25]HM Gov't, The Future Relationship Between the United Kingdom and the European Union, White Paper, 2018, Cm. 9593, sub. 1.7.8, at para. 151 (UK).

[26]*See, e.g.*, Jaeger, *supra* note 24; Matthias Lamping, *The Unified Patent Court, and How Brexit Breaks It*, *in* The Impact of Brexit on Unitary Patent Protection and its Court, at 117–82 (Matthias Lamping & Hanns Ullrich eds., 2018); Ansgar Ohly & Rudolf Streinz, *Can the UK Stay in the UPC System After Brexit?*, 12 J. Intell. Prop. L. & Prac. 245–58 (2017).

[27]For completeness, it should be noted that in the meantime and after the change of government from the *May* to the *Johnson* administration, the UK's position has changed, yet again, and it has withdrawn its ratification. *See* European Council, *Agreement on a Unified Patent Court (UPC)*, Consilium.Europa https://www.consilium.europa.eu/en/documents-publications/treaties-agreements/agreement/?id=2013001. Given that it is now—as opposed to when it first ratified—not an EU Member State any longer, Italy stands ready to take over its position in the ranking of states with most patents. Italy has already ratified the agreement. On this latter aspect, see Winfried Tilmann, *Zur Nichtigerklärung des EPGÜ-Ratifizierungsgesetzes,* J. Eur. & Int'l IP L. 441, 445 (2020); Winfried Tilmann, *The UPC without the UK: Consequences and Alternatives*, 69 J. Eur. & Int'l IP L. 847 (2020); Doris Möller, *Patentrecht: Nichtigkeit des Gesetzes zum Abkommen über ein Einheitliches Patentgericht* EUZW 324, 337 (2020). *See also The Interpretation of the German Government*: Bt-Drs. 19/22847, at 2–3, https://dserver.bundestag.de/btd/19/228/1922847.pdf.

[28]For an official translation of Grundgesetz [GG] [Basic Law], see http://www.gesetze-im-internet.de/englisch_gg/index.html (last accessed Nov. 2, 2020).

[29]Judgment of Feb. 13, 2020. For comments on this case, see Aurora Plomer, *The Unified Patent Court and the Transformation of the European Patent System*, 51 Int'l Rev. Intell. Prop. & Competition L. 791 (2020). *See also* GG, art. 23(1) at 3.

[30]*Infra* A.II.1, A.II.2.

[31]*See infra* A.II.3.

[32]Judgment of Feb. 13, 2020 at para. 118.

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authorizing EU integration found in Article 23 of the Basic Law. Given the supranational character of the EU and the fact that competences transferred to the EU cannot easily be regained by the legislature, this latter Article sets much stricter standards for the transfer of sovereign rights, which will be laid out below.

The formula according to which agreements supplementing or otherwise closely tied to EU matters falls under Article 23 of the Basic Law is not new. In fact, in its first judgement on the Euro Plus Pact in 2012, the *BVerfG* ruled that international treaties can be in such a relationship with EU law.[33] Unfortunately for non-German speakers, however, the *BVerfG* is not consistent in its translations of the term. In its first judgement using the term, the English versions spoke of "a supplementary relationship or another relationship of particular proximity" to EU law.[34] In its latest order, the Court speaks of law "supplementing or being otherwise closely tied to the EU" to the EU.[35] While the two formulations may not differ largely in their meanings, the different translations obscure the fact that the BVerfG has introduced a new concept—a category of international law that profoundly influences EU law making. For the sake of clarity, it should be noted that in German, both judgements use the same wording, "*Ergänzungs- oder sonstiges besonderes Näheverhältnis*". Henceforth, I will use only the newer wording "supplementing or [. . .] otherwise closely tied to the EU", even when speaking about the older judgement, in order to reflect this fact.

Although picking up a concept from an earlier judgement, the BVerfG went a major step further in its recent order. In 2012, it decided that the Euro Plus Pact was a treaty supplementing or being otherwise closely tied to the EU to EU law, thus falling under Article 23 of the Basic Law. Yet, the law ratifying the Euro Plus Pact had been passed amidst the Eurozone crisis as part of a package of measures, some of which amended the Basic Law itself. Therefore, the entire package had been adopted with two-thirds majorities, and there was no ground for criticizing the decision-making in the case. Rather, the BVerfG deduced from the fact that the Pact was "supplementing" EU law that Article 23 (2) of the Basic Law was applicable to it. According to this provision, the *Bundestag* and *Bundesrat* have a constitutional right to comprehensive information on such matters at the earliest time possible. This, according to the BVerfG in 2012, had been breached when the Euro Plus Pact was passed.

In its 2020 order on the UPC Agreement, however, the *BVerfG* takes its formula much further. On the one hand, we can see a widening of the formula on a rhetorical level when the BVerfG turns the wording supplementing or being otherwise closely tied "to *European Union Law*"[36] into "supplementing or being otherwise closely tied to the *European Union´s integration agenda* (*Integrationsprogramm*)"[37]. It does not become clear whether this makes any difference in terms of substance or why the formula was adapted. On the other hand, one can argue that the BVerfG has now fully unleashed its formula. While its first use merely led to a right to enhanced information for the Parliament according to Article 23 (2) of the Basic Law, the BVerfG now brings the much more meaningful first paragraph of Article 23 into the equation: The ratification of treaties *supplementing or being otherwise closely tied to the European Union´s integration agenda* require the same legislative procedures as any transfer of sovereignty to the EU.

[33]BVerfG, June 19, 2012, 131 BVerfGE 152, 2 BvE 4/11, para 100, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2012/06/es20120619_2bve000411en.html.

[34]BVerfG, BvE 4/11, paras. 100, 144.

[35]Judgment of Feb. 13, 2020 at para. 142. Yet another wording was offered in the first BVerfG translation of the order in an English language press release, which for a long time was the only English source on it, when it spoke of treaties "supplementary to or otherwise closely tied to the European Union´s integration agenda," https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2020/bvg20-020.html (last visited Jan. 6, 2022).

[36]*See* BVerfG, BvE 4/11, at paras. 100, 144.

[37]Judgment of Feb. 13, 2020 at para. 142 (emphasis added, except in parentheses).

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Article 23

[European Union – Protection of basic rights – Principle of subsidiarity]

(1)[1]With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social and federal principles, to the rule of law and to the principle of subsidiarity and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law. [2]To this end the Federation may transfer sovereign powers by a law with the consent of the Bundesrat. [3]The establishment of the European Union, as well as changes in its treaty foundations and comparable regulations that amend or supplement this Basic Law or make such amendments or supplements possible, shall be subject to paragraphs (2) and (3) of Article 79.

In contrast to a ratification on the basis of Article 24 of the Basic Law, which requires only an approval by *Bundestag* law,[38] a law according to Article 23 (1) always requires the approval of the *Bundestag* and *Bundesrat*.[39] This is the first way in which Articles 23 and 24 differ procedurally. More significantly, however, for any "changes in [the EU's] treaty foundations" or for "comparable regulations that amend or supplement this Basic Law or make such amendments or supplements possible," sentence 3 of Article 23 (1) of the Basic Law even prescribes the need for a two-thirds majority in *Bundestag* and *Bundesrat*. The idea behind this last provision is that such fundamental [EU] Treaty changes always affect the Basic Law itself and, therefore, their approval requires the same legislative procedure, including the same majorities, as changing the Basic Law.

It must be noted, however, that the distinction between sentence 2 and 3 of Article 23 (1) of the Basic Law is inherently difficult and controversial because of its unclear wording, which has euphemistically been referred to as "unfortunate."[40],[41] A precise delineation of the scope of sentences 1 and 2 has been avoided even within the BVerfG case law,[42] which leads to a generalized uncertainty in the context of their application. In short: it is hardly ever clear whether a draft law falls under the second sentence of Article 23 (1) of the Basic Law, requiring merely a law passed by both legislative chambers, or under the third sentence, requiring a majority able to change the constitution. So far, this uncertainty has—as problematic as it is—only affected changes of the EU treaties. Now, this uncertainty has expanded, affecting all international law treaties *supplementing or being otherwise closely tied* to EU matters. Thus, the BVerfG moves any international law treaty within the proximity of EU law from the field of mere international law, where the government enjoys maximum room for maneuver, to a legal grey area where anything could be found to affect the Basic Law—and therefore require majorities that fulfill the highest legislative threshold within the German legal system.[43]

[38]Whether the consent of the *Bundesrat* is required as well depends on the subject matter. *See* Rudolf Streinz, *Art. 24*, *in* GRUNDGESETZ. KOMMENTAR, at para. 24 (Michael Sachs ed., 2018).

[39]*See* Grundgesetz [GG] [Basic Law], art. 23(1), sentence 2 (Ger.).

[40]"Verunglückte Formulierung", Rudolf Streinz, *Art. 23 GG*, *in* GRUNDGESETZ. KOMMENTAR, at para. 54 (Michael Sachs ed., 2018). It should be pointed out that "verunglückt" can also mean having had a fatal accident, which is hardly a coincidential double-meaning in this context.

[41]Claus Dieter Classen, *Art. 23 GG*, *in* GRUNDGESETZ. KOMMENTAR para. 14 (Hermann von Mangoldtet al. eds., 7th ed. 2018); Streinz, *supra* note 26, at para. 71.; Daniel Nees, Hybrides Unionsrecht, 413 (2020).

[42]Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], June 30, 2009, 123 BVerfGE 267, 391, 434, http://www.bverfg.de/e/es20090630_2bve000208en.html.

[43]*See* Lena Ketterer, *Zustimmungserfordernis beim europäischen Stabilitätsmechanismus*, Band 17, 184 (2016). Lena Ketterer anticipated this development prior to the judgement: "Ultimately, all groups of cases requiring a law in the sense of Article 23(1) sentence 2 Basic Law are potential cases of application of the qualified requirements of Article 23(1) sentence 3 Basic Law" (own translation).

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2. Equivalence to an Amendment of the Treaties

Having placed international treaties within this grey area raises the question of which of the two options—sentence 2 or 3 of Article 23 (1), that is, simple majority or constitution-changing two-thirds majority—is applicable in the case in question, that is to the UPC agreement. As explained above, the question behind this is whether the UPC Agreement is a "simple" transfer of sovereignty to a European body, or whether the transfer amounts to a Treaty change and/or affects the Basic Law. This is addressed in the second substantive leg of the BVerfG order.

In order to distinguish between the two, the BVerfG puts the provisions of the TFEU at the center of its considerations. As outlined above, Article 262 TFEU provides for the establishment of a specialized patent court at the CJEU. Such a court could have decided disputes regarding the new unitary patent, but not those concerning the classic European bundle patent.

The fact that the EU Member States disregarded Article 262 and instead created a patent jurisdiction outside the EU framework, also including the bundle patent, is, according to the BVerfG, "equivalent to an amendment of the Treaties" and "[e]ffectively . . . an amendment or replacement of Article 262 TFEU"[44] From this, the Court held that it is the third sentence of Article 23 (1) of the Basic Law that is applicable, requiring a two-thirds majority. The underlying finding that Article 262 TFEU is effectively amended or replaced by the UPC agreement is in remarkable contradiction to the statements of the CJEU on Article 262 TFEU. In its Opinion 1/09 on the first attempt to create a patent court under international law, it stated explicitly:

> 61. As regards Article 262 TFEU, that article cannot preclude the creation of the PC [Patent Court] . . . . [T]he procedure described in that article is not the only conceivable way of creating a unified patent court.
>
> 62. Article 262 TFEU provides for the option of extending the jurisdiction of the European Union courts to disputes relating to the application of acts of the European Union which create European intellectual property rights. Consequently, that article does not establish a monopoly for the Court in the field concerned and does not predetermine the choice of judicial structure which may be established for disputes between individuals relating to intellectual property rights.[45]

The CJEU speaks precisely of the compatibility with the current treaties, meaning that it could not make any statements on the admissibility of agreements outside Union law that would result in a treaty amendment. Furthermore, it clearly states that the current EU treaties allow, in principle, a patent court based on an international agreement instead of Article 262 TFEU.

When assessing the BVerfG's argument on Article 262 TFEU, one needs to take note of this latter Article's procedural peculiarity: Not only does it require unanimity in the Council in order to create an EU patent court, but also, according to its second sentence, any provision passed under this legal basis enters into force only after the *approval* by the Member States. In other words, Member States need to ratify legislation passed according to Article 262 TFEU.[46] Thus, Article 262 qualifies as an "evolutionary clause", or a provision outside the procedure of Article 48 TEU that can amend the EU treaties in a specified way.[47] However, such a treaty change does not affect Article 262 TFEU – it is not Article 262 that is changed – —but the Treaties as a whole.

[44]Judgment of Feb. 13, 2020 at paras. 153–54.

[45]*See Creation of a Unified Patent Litigation System*, Case C-1/09 at para. 61. Interestingly, the BVerfG does refer to the Opinion, but only in the context of the justification that the UPC is supplementing or otherwise closely tied to EU matters and not in these paragraphs.

[46]Bernhard Schima, *Art. 262 TFEU*, *in* The EU Treaties and the Charter of Fundamental Rights: A Commentary, at para. 2 (Manuel Kellerbauer et al. eds., 2019).

[47]*Id.*; Pechstein, *supra* note 10, at para. 2.

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Given the fact that using Article 262 TFEU changes the Treaties, a convincing case can be made that such a treaty amendment, simplified or not, always affects the Basic Law enough to require the approval of two-thirds of the members of the *Bundestag* and *Bundesrat*.[48] If we assume this, the argument that a circumvention of this particular requirement by international law cannot be permissible seems quite reasonable and convincing. One could argue, then, that ratifying the international law treaty that takes the role of Article 262 TFEU requires the same majorities as acting under Article 262, which would then be the two-thirds majority in both chambers. However, under this interpretation, what triggers the need for a majority capable of changing the constitution is not the fact that the treaty is "equivalent" to an "amendment or replacement of Article 262 TFEU"—again, Opinion 1/09 taught us that an amendment or replacement would not be necessary to act outside EU law—but an equivalent of *using* Article 262 TFEU.

Why, then, would the BVerfG use a formulation that seemingly does not make sense in this context? Why speak of an agreement that is "equivalent to ... an amendment or replacement" of Article 262 TFEU? In order to answer this question, it is necessary to outline the effect of this choice of words in cases where it is not an evolutionary clause like Article 262 TFEU that is affected by an international law treaty supplementing or being otherwise closely tied to EU matters. This is the point where the statement that the UPC Agreement is a functional equivalent to an *amendment or replacement* of Article 262 TFEU becomes effective.

Opinion 1/09 of the CJEU, which contradicts the order of the BVerfG, was requested precisely in the context of an evolutionary clause, namely Article 262 TFEU. On the basis of this clause, new competences can be given to the EU, in this case specifically to the CJEU, in a simplified manner. Said competences have not been conferred to the EU by the TFEU itself, the TFEU merely offers the Member States a possibility to do so in a simplified way. Because of this, the CJEU ruled that it did not have a monopoly in the field of European patent judiciary and that a European patent court could in principle be based just as well on international law outside the Treaties. However, where such competence has already been transferred by way of ratification of the Lisbon Treaty, the situation must be assessed differently. If, in such a case, an international agreement is concluded between EU Member States outside the EU legal framework that could have been passed within the EU framework in the same or a similar way, it suddenly makes sense that the BVerfG speaks of an equivalent to the amendment or replacement of the corresponding EU competence. In this case, it can be argued that Member States are effectively using an EU competence without taking into account the specific procedural hurdles built into the Treaties, such as an unanimity requirement in the Council or Parliament participation.[49] In order to circumvent such hurdles *within* EU law, a treaty amendment would be necessary. A solution *outside* EU law that circumvents these hurdles could thus be considered to be "equivalent to an amendment" of the respective Treaty provisions, at least from the perspective of German constitutional law.[50] This is all the more true when other factors—such as the involvement of EU institutions[51] or the interaction of the agreement with EU law—brings the project in greater proximity to EU policies.

[48]Note, however, that the BVerfG explicitly left this question open in its seminal Lisbon judgement. *See* BVerfG, 123 BVerfGE 267, 434 (June 30, 2009).

[49]*See, e.g.*, Johannes Graf von Luckner, *How to Bring It Home—The EU's Options for Incorporating the Fiscal Compact into EU Law*, EUR. L. BLOG (2018).

[50]What the BVerfG's view does not take into account, however, is the different effects of international law and supranational Union law. Even international law "supplementing or being otherwise closely tied to the EU" is unable to cross the line to real EU law. *See* Hannes Rathke, *Sondervertragliche Kooperationen*. 118. (2019) (Ph.D dissertation); Tilmann, *Zur Nichtigerklärung des EPGÜ-Ratifizierungsgesetzes, supra* note 27, at 442. Tilman argues on the concrete case that the UPC agreement can be terminated "at any time". Giegerich diverges on this latter aspect. *See* Thomas Giegerich, *BVerfG verzögert europäische Patentreform: Vorschläge zur Schadensbegrenzung* EUZW 560, 562 (2020).

[51]On this aspect, see Steve Peers, *Towards a New Form of EU Law? The Use of EU Institutions Outside the EU Legal Framework*, 9 EUR. CONST. L. REV. 37 (2013).

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Thus, the order of the BVerfG can be understood also—or even especially—beyond evolutionary clauses as a new and above all strict standard of review applied to international law satellite agreements—in the words of the BVerfG: Agreements "supplementing or being otherwise closely tied to the European Union´s integration agenda"[52]. Where international law agreements create law that could also be passed within the EU legal order, for German constitutional law the agreement is considered equivalent to an EU treaty amendment. As such, the international agreement will generally have to be ratified by a majority capable of changing the constitution, that is by two-thirds of the *Bundesrat* and *Bundestag*.

3. Review of the Formal Aspects of Conferral

All of the above would be significant and remarkable, yet still somewhat limited in its effects if it were not for the formal, procedural leg of the BVerfG order.[53] According to long-standing case law, the BVerfG would have undoubtedly declared the case inadmissible, up until a spectacular turnaround in the UPC case. The reason for this is that the case reached the BVerfG by way of a constitutional complaint (*Verfassungsbeschwerde*)[54]. This procedure opens a path for ordinary persons, legal and natural, to the Constitutional Court. The BVerfG is not a Supreme Court in the sense that it can regularly be reached by appeal against a decision of a court of a lower level. Its sole task is to decide matters of exclusively constitutional nature, whereas questions of ordinary law are resolved at local courts, regional courts, or the Federal Court of Justice. Resorting to the constitutional complaint, citizens and companies or organizations have a possibility to complain about breaches of their constitutionally guaranteed individual rights. Therefore, the mechanism is usually limited to adjudicating infringements of fundamental rights. For constitutional complaints to be admissible, complainants must prove that they are affected directly, personally, and presently.[55] The complainant in the UPC Agreement case claims an infringement of his "right to democratic self-determination"[56] or more broadly speaking of his right to democracy[57]. The line of argument is that by conferring competences to a European institution, these competences are removed from the national legislator and, therefore, from the influence of the complainant's vote.[58] The idea that this can, *per se*, infringe the right enshrined in Article 38 of the Basic Law is a well-settled rule following from the BVerfG's case law. However, this always concerned the substantial question of *whether* competences could lawfully be conferred upon the EU, and not the formal question of *how* the legislature makes this decision. It should be noted that the members of the *Bundestag* and *Bundesrat* themselves have the ability to bring cases before the BVerfG not only in their capacity of citizens claiming individual rights (constitutional complaint), but also as members of the constitutional organs they are part of, claiming infringements of this organ's rights.[59] Moreover, a quarter of the MPs may ask the BVerfG for an "abstract judicial review of statutes" of

[52]Judgment of Feb. 13, 2020 at para. 142.

[53]For critical assessments, see Tilmann, *supra* note 27; Mehrdad Payandeh, *Verfassungsrecht: Rechtsschutz gegen die Übertragung von Hoheitsrechten im Kontext der Europäischen Union* JUS 702 (2020).

[54]Grundgesetz [GG] [Basic Law], art. 93(1) No. 4a (Ger.). *See also* Donald P. Kommers & Russel A. Miller, *Das Bundesverfassungsgericht: Procedure, Practice and Policy of the German Federal Constitutional Court,* 3 J. COMP. L. 194–211 (2008).

[55]Bundesverfassungsgericht [Federal Constitutional Court], *Constitutional Complaints*, https://www.bundesverfassungsgericht.de/EN/Verfahren/Wichtige-Verfahrensarten/Verfassungsbeschwerde/verfassungsbeschwerde_node.html (last visited Nov. 5, 2020) (Ger.).

[56]Judgment of Feb. 13, 2020 at paras. 102, 165 [translation from Press release, see fn. 2].

[57]On this concept and its role in the case-law of the BVerfG, see Russel A. Miller, *Germany v. Europe: The Principle of Democracy in German Constitutional Law and the Troubled Future of European Integration*, 54 VA. J. INT'L L. 579 (2014). *See also* Grundgesetz [GG] [Basic Law], art. 38.

[58]Judgment of Feb. 13, 2020 at para. 38 et seq.

[59]*Organstreit*, GG, art. 93(1) No. 1. *See also* Kommers & Miller, *supra* note 54, at 201; BVerfG, 134 BVerfGE 366, 397 et seq., Jan. 14, 2014 (on organ's rights in cases relating to European integration).

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any law, which is a procedure foreseen precisely to claim formal or substantial infringements of the constitution by a piece of legislation.[60] For acts ratifying international law treaties, the BVerfG even accepts an exception to the rule that acts need to enter into force prior to their review, in order to prevent international law obligations from arising. Given these two procedures, opposition parties can always, if concerned about the formalities of decision-making, seek clarification before the BVerfG. However, until now, this was not possible for ordinary citizens, who could claim only the infringement of the substantial issues in European integration as infringing their individual right to democracy. Following this logic, as recently as 2014, the BVerfG had declared a similar case, also regarding Article 23 of the Basic Law and satellite treaties, inadmissible.[61] This fundamentally changed in the 2020 order:

> Within the scope of applicability of [Article 23 (1) of the Basic Law], citizens are further protected by [Articles 20 (1), (2) and 79 (3) of the Basic Law] as these provisions allow a review as to whether the formal requirements for a transfer of sovereign powers . . . were adhered to (review of the formal lawfulness of a transfer of sovereign powers – *formelle Übertragungskontrolle*).[62]

Invoking Article 38 (1) of the Basic Law, all Germans with a right to vote can henceforth demand BVerfG scrutiny of whether the formal requirements of Article 23 (1) of the Basic Law are met. This examination, which the BVerfG has rather complicatedly named "review of the formal lawfulness of a transfer of sovereign powers",[63] fits in with the development of an ever-broader scope of the constitutional complaint mechanism in European law matters.[64] In its *Maastricht* judgment, the BVerfG had first taken Article 38 (1) of the Basic Law as the basis for an individual right to safeguard the powers of the Federal Parliament, considerably lowering the admissibility hurdle for constitutional complaints in EU matters.[65] This approach was continued in the Lisbon judgement,[66] which led to the accusation that the BVerfG was ignoring the need for complainants to be affected personally, presently, and directly; thus, turning the constitutional complaint into an *actio popularis*[67] for EU-cases.[68] With its recent order and the introduction of the "review of the formal aspects of conferral," the Federal Constitutional Court once again expanded the scope of the constitutional complaint, now also including the formal requirements of Article 23 (1) of the Basic Law, which are thereby *de facto* declared individual rights.

Now, because the BVerfG assumes that international agreements *supplementing or being otherwise closely tied* to the EU are always subject to Article 23(1) of the Basic Law, it becomes

[60] *Abstrakte Normenkontrolle*, GG, art. 93(1) No. 2. *See also* Kommers & Miller, *supra* note 54, at 201.

[61] BVerfG, 2 BvR 1390, 1421, 1438, 1439, 1440, 1824/12, 2 BvE 6/12, 135 BVerfGE 317, 386, Mar. 18, 2014, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2014/03/rs20140318_2bvr139012en.html (Ger.).

[62] Judgment of Feb. 13, 2020 at para. 137.

[63] *Id.* In its first translation, in the press release on the order, the BVerfG used the much catchier term "review of the formal aspects of conferral", which unfortunately did not make it into the official translation.

[64] On this development in general, see Donald P. Kommers & Russel A. Miller, The Constitutional Jurisprudence of the Federal Republic of Germany 325 (3d. ed., 2012).

[65] *See id.* at 335; BVerfG, 89 BVerfGE 155, 171, Oct. 12, 1993 (Maastricht).

[66] BVerfG, 123 BVerfGE 267, 329 ff., 340, Jun. 30, 2009 (Lisbon). *See* Herbert Bethge, *Vorbem: § 13*, *in* Bundesverfassungsgerichtsgesetz: Kommentar, at para. 24 (Theodor Maunzet et. al. eds., 58th ed., 2020); Hermann Butzer, *Art. 38*, *in* BeckOK Grundgesetz, at para. 39 (Volker Epping & Christian Hillgruber eds., 43rd ed., 2020); Hans H. Klein, *Art. 38*, *in* Grundgesetz. Kommentar, at para. 145 (2020).

[67] In other words, a "right resident in any member of a community to take legal action in vindication of a public interest.". *See* Andrea Gattini, *Actio Popularis*, *in* Max Planck Encyclopedia of International Procedural Law (Hélène Ruiz Fabri ed., 2019).

[68] *See, e.g.*, Giegerich, *supra* note 50, at 566.

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apparent that a constitutional complaint can be raised by *anyone* against *any* international law agreement close to EU integration, as long as it was not ratified with two-thirds majorities in the *Bundesrat* and *Bundestag*. The constitutional complaint is thus extended to a general review mechanism for international treaties close to EU law. Proof of the fact that this is far more than an academic consideration is provided by the same case that led to the "review of the formal lawfulness of a transfer of sovereign powers" in the first place: Germany, in an attempt to finally unblock the unitary patent, ratified the UPC agreement for the second time in the end of 2020,[69] this time using the necessary two-thirds majorities in both chambers. Immediately afterwards, not one but two constitutional complaints were launched before the BVerfG, once again halting the UPC agreement.[70],[71]

In their dissenting opinion in the UPC order,[72] BVerfG Justices König, Langenfeld, and Maidowski anticipated such developments and outlined the possible effects that opening the constitutional complaint for a review of formal aspects may have on the future of regular EU integration and satellite treaties:

> 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[icle] 23(1) [of the Basic Law]; this may well 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.[73]

4. Concluding Remarks on the BVerfG's UPC Agreement Order

The far-reaching decision can be summarized as follows: As was already to be expected going by its previous case law, the BVerfG has included international satellite treaties to EU law, that is treaties that are "supplementing or being otherwise closely tied to the European Union´s integration agenda," in the scope of application of Article 23(1) Basic Law. This provisions' ambiguity causes difficulties regarding the question of which majorities in the *Bundestag* and *Bundesrat* are required to ratify the respective agreement. Yet, whenever the international law agreement could have also been passed under EU law, the BVerfG will, from now on, consider it equivalent to an amendment of the Treaties, and, therefore, demand a two-thirds majority in both legislative chambers. All Germans entitled to vote can have the compliance with this decision-making requirement checked by means of a constitutional complaint before the BVerfG.

[69]Deutscher Bundesrat: Drucksachen [BR] 723/20, https://www.bundesrat.de/SharedDocs/drucksachen/2020/0701-0800/723-20(B).pdf (Ger.).

[70]*See* FAZ.NET, *Unified Patent Court: Verfassungklage blockiert abermals Einheitspatent*, FAZ.NET, (Jan. 13, 2021), https://www.faz.net/aktuell/wirtschaft/upc-in-karlsruhe-verfassungsklage-blockiert-abermals-einheitspatent-17144279.html (last visited Mar. 16, 2021). One of the complaints was launched by the complainant of the first proceeding (on the same day the law was passed), whereas the second one remains unknown.

[71]This time, however, the actions were eventually declared inadmissible after a comparatively short period of seven months. *See* BVerfG, 2 BvR 2216/20, 2 BvR 2217/20, Jun. 23, 2021, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2021/06/rs20210623_2bvr221620en.html.

[72]On the fact that dissenting opinions are rather rare and thus all the more noteworthy in the work of the BVerfG, see Kommers & Miller, *supra* note 54, at 205.

[73]Judgment of Feb. 13, 2020 at para. 20 (König, Langenfeld, and Maidowski, dissenting).

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B. What the Order Means for EU Integration

"Satellite treaties"[74], "parallel agreements"[75], "agreements *extra muros*"[76], "international side agreements" or "*inter se* agreements"[77] are terms used to describe international legal agreements by which EU Member States take integration steps outside of EU law. They are as numerous as the reasons given for doing so. The method, however, is anything but new.[78] Its most recent peak was reached during the financial and sovereign debt crisis when treaties such as the Fiscal Compact and the ESM Treaty were concluded alongside Union law. The approach was repeatedly criticized. Among other things, it was argued that because of the introduction of enhanced cooperation, treaties under international law are not permissible if their content could also be established within the Union legal framework.[79] So far, this has in no way prevented such cooperation. Even those who hoped that the CJEU would put an end to this method were disappointed when the Luxembourg Court did not follow this line of argument in the *Pringle* case.[80]

The other court relevant in this saga, the BVerfG, has in a long chain of decisions critically accompanied European integration. In light of the principle of conferral and the constitutional identity of the Basic Law, it has repeatedly made clear that European integration is possible under the Basic Law only as long as state sovereignty is preserved. This court has now signaled that, in the future, integration by way of international satellite treaties will be more difficult, despite the fact that international law treaties are regarded as an expression of state sovereignty. Where, in the future, the majorities necessary for a political project cannot be found within the EU framework, Member States can, of course, still pursue such a project on the level of international law. However, in Germany, it will from now on be necessary to seek a majority in the *Bundestag* and *Bundesrat* able to change the constitution in order to ratify the international treaty. Even if it is uncertain in individual cases whether such a majority is actually necessary—it could, for example, be disputed whether a concrete project really is provided for by the EU legal order[81]—this requirement will nevertheless be considered obligatory if the legislators want to be on the safe side. Where previously, political agreements with the opposition could help minimize the risk of legal disputes delaying the matter, it can be considered as virtually guaranteed that one of 60 million Germans with the right to vote will bring the ratification act before the BVerfG. The argument often put forward in favor of a flight into international law that controversial projects can be realized more quickly outside EU law is void under these circumstances. In the case at hand, it took the BVerfG no less than three years to come up with its decision.

In the past, international satellite treaties have been made use of largely in two scenarios: Either there was no EU competence for the desired action—including the possibilities that the existence of such a competence was disputed or, as in the case of the patent court, a competence existed but was not deemed sufficiently extensive for the desired action—or the necessary Council majority

[74]Anzhela Cédelle, Enhanced Cooperation: A Way Forward for Tax Harmonisation in the EU? 33 (2015); Alberto de Gregorio Merino, *Institutional Aspects of Variable Geometry*: *Special Consideration of the Intergovernmental Method,* Stud. Dipl. 101, 106 (2013).

[75]*See* Peers, *supra* note 51, at 41.

[76]*See* de Gregorio Merino, *supra* note 74, at 102.

[77]Bruno de Witte, *An Undivided Union?: Differentiated Integration in Post-Brexit Times*, 55 Common Mkt. L. Rev. 227, 236 (2018).

[78]On this, see Bruno de Witte, *Old-fashioned Flexibility: International Agreements Between Member States of the European Union*, *in* Constitutional Change in the EU: From Uniformity to Flexibility, at 31 (Gráinne de Búrca & Joanne Scott eds., 2000).

[79]Kaarlo Tuori & Klaus Tuori, The Eurozone Crisis: A constitutional Analysis 174 (2014).

[80]ECJ, Case C-370/12, Thomas Pringle v. Government of Ireland, ECLI:EU:C:2012:756 (Nov. 27, 2012), para. 166. However, the court avoids giving a final decision on the matter.

[81]*Id.*

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for action within the EU framework could not be reached. One of these scenarios is likely not to be affected by the BVerfG UPC-order: If it is crystal clear that a desired action is not covered by the EU Treaties and no use is to be made of EU institutions, one can assume that an international law treaty is not "supplementing or being otherwise closely tied to the EU" and thus can be passed in Germany as an ordinary act of international law, not putting at risk its ratification. If, however, the action pursued could factually or potentially be passed within the ambit of EU law, in part or in total, or if it has a particular proximity to EU law because it is tied to it—for example, by using EU institutions, as has become customary in recent years[82]—the project will need to be deemed "supplementing or being otherwise closely tied to the EU" and be passed by a double two-thirds majority in Germany.

In cases in which the Treaties do not contain the competence for a desired EU action, such as the ESM-Treaty, at least until the ratification of the respective amendment to the TFEU, resorting to international law satellite agreements may still be an appropriate tool given the newly required constitution-changing majority in Germany would still be easier to achieve than a Treaty change on short notice. Where parts of the desired action are possible within EU law, MS would be well-advised to evaluate whether the part of the desired legislation that is not covered by EU competences is indeed worth risking the path outside EU law.

In regard to the potentially more relevant scenario of disagreement between Member States, and consequently a lack of the required Council majority—for example, in the case of the Fiscal Compact or as discussed for a short period for a post-Covid-19 Recovery Fund without Poland and Hungary[83]—leaders will be inclined to search for alternatives to the now risky avenue of an international law agreement. Rather, they will be likely to favor solutions within the EU law framework. At first, this may strengthen the position of the vetoing Council members, as it largely takes one possibility to overcome the veto from the other MS. Specifically because of that, however, the recent German development is likely to turn the national leader's attention to the possibility of surrounding single states' vetoes within the EU law framework. Specifically, the BVerfG's UPC order could make politicians and officials take a closer look at an EU law instrument that allows for greater flexibility under these changed circumstances: The enhanced cooperation mechanism.

Enhanced cooperation is an instrument that enables groups of Member States to implement integration projects that do not find a majority in the Council in smaller groups. The major difference to using international satellite treaties is that this occurs within the EU law framework when enhanced cooperation is used.[84] One the one hand, this offers Member States the advantages of EU law, including direct effect, supremacy over national law, or binding interpretation by the CJEU, and the possibility to make use of the EU institutions.[85] On the other hand, in view of the BVerfG's order on the UPC Agreement, using enhanced cooperation is a way to avoid the need to seek majorities able to change the German constitution on a regular basis when ratifying a satellite treaty to EU law. As a result, enhanced cooperation could be given a new, more prominent position in EU law-making in the nearer future.

It should also be noted that the uncertainties on the way to the ratification of treaties such as those tagged by the BVerfG as "supplementing or being otherwise closely tied to the EU", do not originate solely in the German legal system. In Austria, too, it is at least presumed that international treaties with a supplementary or otherwise close relationship to EU law require approval by means of a constitutional law.[86]

[82]*See generally* Peers, *supra* note 51.

[83]Johannes Graf von Luckner, *A Novel "Reinforced Cooperation" in the EU: The Viable Option of a NextGen EU without Poland and Hungary*, VerfBlog (Dec. 9, 2020), https://verfassungsblog.de/a-novel-reinforced-cooperation-in-the-eu/.

[84]*See* TEU, art. 20. *See also* TFEU, art. 326.

[85]*See* TEU, art. 20(1).

[86]Stefan Griller, *Zur verfassungsrechtlichen Beurteilung des Vertrags über Stabilität, Koordinierung und Steuerung in der Wirtschafts- und Währungsunion ("Fiskalpakt")*, 20 J. für Rechtspolitik 177, 182 (2012).

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Furthermore, the Hungarian Constitutional Court has declared the Act of Consent of the National Parliament to the UPC Agreement void because of the interplay between national law, Union law, and international law, although—as far as this can be judged from the outside—with a less fundamental, but more case-related justification.[87] The Czech Republic has equally decided not to ratify the UPC Agreement for the time being, partly because of constitutional doubts.[88]

In sum, all of these legal doubts seem to make the search for solutions within the framework of the EU all the more relevant.

C. Conclusion

In a decision that went largely unnoticed, the BVerfG has brought the UPC agreement to the verge of collapse and in doing so has put the future of European integration by way of satellite treaties into question. At the same time, however, it has strengthened EU action within the Union law framework even in situations with difficult majorities. Therefore, it is likely that the Court, in its first decision related to the instrument of enhanced cooperation, has perhaps unintentionally strengthened enhanced cooperation for the time to come.

In Germany, international treaties supplementing or being otherwise closely tied to the EU will from now on have to be ratified on the basis of Article 23 of the Basic Law. This places them right in the middle of the legal minefield that is the distinction of Article 23(1) of the Basic Law's different variants, that is sentences 2 and 3. Wherever an international law treaty appears to be implementable within the framework of EU law, sentence 3 is henceforth relevant, which is why the ratification act requires a two-thirds majority in the *Bundestag* and *Bundesrat*. In practice, EU governments will therefore have to consider carefully whether they really want to try their luck on the "outside" or whether it is does hold true that "there is no place like home", within the framework of the already ratified Union law.

A final interesting side remark concerns the set-up of the BVerfG's Second Senate, which made the order. The eight-person chamber is responsible for matters concerning the state as such, including its relationship to the EU. The decision on the UPC Agreement was one of the last involving departing Court President Andreas Voßkuhle, who retired in June 2020. Together with the significantly more discussed judgement on the ECB's PSPP program, the decision can also be understood as a European policy legacy of the BVerfG in the composition around Voßkuhle—a demanding inheritance for the succeeding Justices. However, it is worth remembering that three of the Second Senate's Justices openly disagreed with the UPC Agreement order.[89] One of the three, Justice König, is now presiding over the chamber. Justice Voßkuhle's seat was filled by Justice Astrid Wallrabenstein, whose track record as a Justice remains to be seen, but who does refer to herself as a "European citizen."[90] It will be interesting to find out how the new set-up of the Second Senate handles its inheritance. The fact that the changed majorities are affecting the chamber profoundly is witnessed by the recent development that new Justice

[87]Hungarian Constitutional Court, Decision 9/2018 <VII. 9.> of 26 June 2018; English translation: https://hunconcourt.hu/uploads/sites/3/2018/07/dec-on-unified-patent-court.pdf (last visited Nov. 9, 2020).

[88]*Legal and Financial Concerns: Czech Republic Will Not Ratify UPCA Any Time Soon*, KLUWER PATENT BLOG (Sept. 13, 2020), http://patentblog.kluweriplaw.com/2019/09/13/legal-and-financial-concerns-czech-republic-will-not-ratify-upca-any-time-soon/?doing_wp_cron=1594134453.6169369220733642578125.

[89]Judgment of Feb. 13, 2020, dissenting opinion.

[90]Konrad Schuller, *Wallrabenstein sieht Lösungen im Streit zwischen Karlsruhe und EZB,* FAZ.NET, (June. 21, 2020), https://www.faz.net/aktuell/politik/inland/wallrabenstein-loesungen-im-ezb-karlsruhe-streit-16825490.html. This was, of course, also true for retired Justice Voßkuhle. *See* Melanie Amann, Dietmar Hipp, René Pfister & Christoph Schult, *Die Anmaßung,* DER SPIEGEL 20 (2014).

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Wallrabenstein has, by majority decision, been declared biased and therefore excluded from the follow-up of the PSPP judgemend on the ECB due to an interview she gave prior to taking office in which she offered a possible interpretation of the judgement.[91] In particular, the fact that the decision has been passed "with votes against" without, as usual, specifying how many votes against it, raised the suspicion that the exclusion was an attempt to preserve the "old" majority for as long as possible.[92]

[91]Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Jan. 12, 2021, 2 BvR 2006/15, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2021/01/rs20210112_2bvr200615.html.

[92]Florian Meinel & Christian Neumeier, *Befangen?: Zur Ablehnung der Bundesverfassungsrichterin Astrid Wallrabenstein im PSPP-Verfahren*, VerfBlog (Feb. 10, 2021), https://verfassungsblog.de/befangen/; Christian Walter & Philip Nedelcu, *Der Wallrabenstein-Beschluss und die politische Dimension des Verfassungsprozessrechts*, VerfBlog (Feb. 16, 2021), https://verfassungsblog.de/der-wallrabenstein-beschluss-und-die-politische-dimension-des-verfassungsprozessrechts.

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