

Requirements for the delegation of sovereign rights to the European Union, or so-called formal transfer control

Decision of the Federal Constitutional Court of 13 February 2020,
FCC 2 BvR 739/17

The Federal Constitutional Court requires that an act of parliament must be approved by a two-thirds majority if the delegation of sovereign rights entails an amendment to the Union's treaties or to German Basic Law itself (see art. 23 par. 1, s. 3, art. 79 par. 2 BL). Every citizen has an individual claim covered by art. 38 par. 1 s. 1 BL regarding compliance with these formal requirements (so-called formal transfer control).

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Commentary

I. The facts

The European Union is planning the establishment of a unified European Patent Court for future judicial disputes about European patents that will be implemented in the majority of its Member States. This common court will be responsible, for instance, for complaints about patent infringements or issues concerning the existence of patents. From the point of view of German Basic Law, the establishment of the unified Patent Court requires the delegation of sovereign rights by an act of legislation (art. 23 par. 1 s. 2 BL¹). Only 35 members of the parliament were present for the final positive vote for the bill in the *Deutschen Bundestag*². The complainant claims the violation of

¹ Basic Law.

² A concise summary of the facts is accessible at <https://www.bundesverfassungsgericht.de/Shared-Docs/Pressemitteilungen/DE/2020/bvg20-020.html> (accessed: 2020.04.23).

his right to democratic self-determination covered by art. 38 par. 1 s. 1, art. 20 par. 1 and 2, and art. 79 par. 3 BL.³

II. The legal situation and the outline of the problem

The essential provisions regarding Germany's participation in the European Union are laid down in art. 23 BL, which was incorporated into the German Constitution by the ratification of the Maastricht Treaty in 1992.⁴ To a certain extent, the Federal Republic of Germany contributes to the development of the European Union (art. 23 par. 1 s. 1 BL). Therefore, the Federal Government can delegate sovereign rights by an act of legislation that requests the approval of the Federal Council (art. 23 par. 1 s. 2 BL). The additional requirements of art. 23 par. 1 s. 3 BL, like the two-thirds-majority (art. 79 par. 2 BL), had to be fulfilled at the creation of the European Union, and is necessary for modifications to its treaty foundations and when the German Basic Law is amended.

Whereas art. 38 par. 1 s. 1 BL grants all citizens the individual right to be subject only to this kind of public power that has been democratically legitimated.⁵ Thus, the right to vote constitutes for the individual the noblest right for the citizen in a democratic state.⁶ In other words, art. 38 par. 1 s. 1 BL represents the individual legal form of the principle of democracy (art. 20 par. 1 BL).⁷ This warranty also includes a protection against modifications concerning the legal State organization – as does the delegation of sovereign rights to the European Union.⁸ In general, art. 38 par. 1 s. 1 protects a citizen – as an expression of his right to democracy – from a situation where his influence on German public power, which is guaranteed by his right to vote, is reduced by the delegation of sovereign rights to the European Union.⁹ So far, the Federal Constitutional Court has only recognized such an individual subjective right when the delegation of sovereign rights exceeds the EU's competences (so-called *ultra-vires*-control) or if the identity of the German Constitution (art. 79 par. 3 BL), like human dignity (art. 1 par. 1 BL) or the principles of art. 20 BL, were violated (so-called identity control).¹⁰

³ See FCC, order of 13 February 2020, 2 BvR, 739/17 recital 35 *et seq.*

⁴ Instead of many see: C.D. Classen [in:] H. v. Mangoldt, F. Klein, C. Starck, *Kommentar GG*, art. 23 recital. Regarding the elaboration of art. 23 BL compare F. Wollenschläger [in:] *Kommentar GG*, eds *idem*, H. Dreier *et al.*, art. 23 recital 4 ff *et seq.*

⁵ Settled case-law: FCC vol. 123, 267, 341; vol. 142, 123, 191 recital 128.

⁶ Fundamentally yet: FCC vol. 1, 14, 33.

⁷ See e.g. M. Morlok [in:] *Kommentar GG*, eds *idem*, H. Dreier, *et al.*, art. 38 recital 60; Müller [in:] H. v. Mangoldt, F. Klein, C. Starck, *Kommentar GG*, art. 38 recital 170. Compare FCC vol. 135, 317, 386 recital 125: The citizen's right to democracy.

⁸ FCC vol. 129, 124, 169; vol. 142, 123, 190 recital 126.

⁹ FCC vol. 89, 155, 172; vol. 123, 267, 330; vol. 134, 366, 396 recital 51; vol. 142, 123, 173 *et seq.* recital 81.

¹⁰ Concisely described by Müller [in:] H. v. Mangoldt, F. Klein, C. Starck, *Kommentar GG*, art. 38 recital 173. Compare also FCC vol. 134, 366, 382 *et seq.* recitals 22 *et seq.*; vol. 142, 123, 188 *et seq.* recitals 121 *et seq.*

Thus, the individual claim warranted by art. 38 par. 1 s. 1 BL requests, generally speaking, a substantial erosion of the political power of the German parliament because the openness of the German Constitution towards European Law (*Europarechtsfreundlichkeit*) demands that the existence of such a right is accepted in a restrictive manner.¹¹

But the complainant claims, in addition to the above, that the delegation of sovereign rights to the European Union, such as competences concerning jurisdiction, also demands compliance with the requirements of art. 23 par. 1 s. 3, and art. 79 par. 2 BL – like the approval by two thirds of the members of parliament. The citizen's right to have democratic influence (art. 38 par. s. 1 BL) requires with other words, in his opinion, that the formal conditions must be respected¹² since 35 members of parliament do not represent a two-thirds majority.¹³ In summary, one can question whether the disregard of the formal requirements for the act of legislation concerning the delegation of sovereign rights to the European Union was so closely related to the democratic principle that it violated the citizen in his individual rights guaranteed by art. 38 par. 1 s. 1, art. 20 par. 1 and 2, and art. 79 par. 3 BL.

III. The decision of the Federal Constitutional Court

The Federal Constitutional Court recognized the violation of the complainant's rights guaranteed by art. 38 par. 1 s. 1, art. 20 par. 1 and 2, and art. 79 par. 3 BL since the requirements of art. 23 par. 1 s. 3 and art. 79 par. 2 BL were not fulfilled.¹⁴ The Court pointed out concretely the following: In general, the comprehension of the European Union in art. 23 par. 1 BL needs to be interpreted more widely so that this understanding also includes intergovernmental institutions and international organizations.¹⁵ Consequently, there is no doubt that the unified European Patent Court, as a supranational institution, falls under art. 23 par. 1 BL.¹⁶ Furthermore, the necessary measures are linked to the integration program of the European Union as can be inferred by art. 118 and 262 TFEU¹⁷ in a material sense. Since members states are planning –

¹¹ Müller [in:] H. v. Mangoldt, F. Klein, C. Starck, *Kommentar GG*, art. 38 recital 173 *et seq.*

¹² FCC, order of 13 February 2020, 2 BvR, 739/17 recital 35 *et seq.*

¹³ The German parliament currently has 709 members, https://www.bundestag.de/parlament/plennum/sitzverteilung_19wp (accessed: 2020.05.01).

¹⁴ FCC, order of 13 February 2020, 2 BvR, 739/17, recital 117 *et seq.*

¹⁵ *Ibidem*, recital 122. Compare also FCC vol. 131, 152, 199 *et seq.*

¹⁶ Compare also FCC, order of 13 February 2020, 2 BvR, 739/17, recitals 143 *et seq.*

¹⁷ Art. 118 TFEU: "In the context of the establishment and functioning of the internal market, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union and for the setting up of centralised Union-wide authorisation, coordination and supervision arrangements."

Art. 262 TFEU: "Without prejudice to the other provisions of the Treaties, 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 Court

instead of delegating competences concerning the jurisprudence to the European Court of Justice – the establishment of a unified European Patent Court as a functional alternative under the condition that it remains bound to European Union law.¹⁸ Besides, European bodies and institutions have been involved in bringing this project to life.¹⁹

The demands of art. 23 par. 1 s. 1 BL are also relevant. The national act of legislation concerning the establishment of a unified European Patent Court entails modifying its treaty foundations and thus is relevant to for the German Constitution by implementing a new jurisdiction in the German legal system.²⁰ It also alters the Constitution itself as the establishment of the new supranational court influences national provisions with regard to the national structure of the jurisdiction (art. 92 BL) and even the principle of separation of powers (art. 20 par. 2 s. 2 BL).²¹ Thus, a two-thirds-majority would have been necessary to adopt the law (art. 23 par. 1 s. 3, art. 79 par. 2 BL) and this was obviously not obtained.²²

The Federal Constitutional Court justified the disregard of the demands of art. 23 par. 1 s. 3, and art. 79 par. 2 BL as a violation of an individual citizen's right to have democratic influence covered by art. 38 par. 1 s. 1, art. 20 par. 1 and 2, and art. 79 par. 3 BL as follows: If the delegation procedure of sovereign powers is observed, public power will not be delegated. The supranational organizations would rather act without democratically legitimated authority and would therefore be in violation of the principle of popular sovereignty (art. 20 par. 2 s. 1 BL: All state authority is derived from the people).²³ If the formal requirements of art. 23 par. 1 s. 3 BL concerning the delegation of sovereign rights are disregarded, art. 38 par. 1 s. 1 BL has to protect the individual from the disclosure of the principle of popular sovereignty as a part of the identity (compare art. 79 par. 3 BL) of the German Constitution (so-called formal transfer control). Since the competences were delegated at one point to the European Union, they are regularly lost and cannot be retrieved.²⁴ Without a valid – as unconstitutional in a formal matter – delegation, the European Union and its institutions lack democratic legitimation, which is the core of the right of democratic self-determination covered by art. 38 par. 1 s. 1, art. 20 par. 1 and 2, and art. 79 par. 3 BL²⁵.

of Justice of the European Union in disputes relating to the application of acts adopted on the basis of the Treaties which create European intellectual property rights. These provisions shall enter into force after their approval by the Member States in accordance with their respective constitutional requirements.”

¹⁸ FCC, order of 13 February 2020, 2 BvR, 739/17 recitals 144 *et seq.*

¹⁹ *Ibidem*, recitals 148 *et seq.*

²⁰ *Ibidem*, recitals 153 *et seq.*

²¹ *Ibidem*, recitals 157 *et seq.*

²² *Ibidem*, recitals 164 *et seq.*

²³ *Ibidem*, recital 133.

²⁴ *Ibidem*, recital 137.

²⁵ *Ibidem*, recitals 137 *et seq.*

IV. Critical appraisal

The decision of the Federal Constitutional Court presented in this review is convincing in every respect. Thus, the expressly manifested dissenting opinion within the senate of the court to formal transfer control had to be refused. First, the criticism is wrongfully based on the court's decision on the European stability mechanism.²⁶ In this judgement, the court cited that art. 79 par. 2 and art. 23 par. 1 s. 3 BL did not grant an individual citizen – with the exception of an *ultra-vires*-constellation – the individual right as the extent of the decision-making authority, thus the substance of the right to vote, does not depend on whether the parliament made its decision with a two-thirds-majority.²⁷ To that, the Federal Constitutional Court maintains that the decision itself cannot be transferred to the situation regarding the establishment of the unified European Patent Court, since the underlying case – in contrast to the decision on the European stability mechanism – involves the “non-retrievable delegation of sovereign rights” to the European Union. Rather, an act of legislation that is unconstitutional in a formal matter entails an *ultra-vires*-constellation – a fact that the Federal Constitutional Court recognized as an exception.²⁸

Furthermore, the dissenting opinion criticizes the fact that formal transfer control would not be suitable to protect a democratically legitimated body like the *Deutsche Bundestag* from disempowerment because formal defects in legislative procedures cannot substantially endanger the democratic process.²⁹ Formal transfer control could actually even lead to a situation in which the German parliament and the Federal council would always and compulsively organize a two-thirds majority unlike the provision in art. 23 par. 1 s. 2 BL. Such a hurdle could delay and also jeopardize European Union integration (art. 23 par. 1 s. 1 BL) and the general democratic process (art. 20 par. 1 and 2 BL). This would narrow the political scope, thus reversing the sense of art. 38 para 1 s. 1 BL.

These points of criticism, however, disregard the following aspects: it is important to remember that every citizen has an influence on public authority by exercising their right to vote.³⁰ By voting, he affects the political decision-making process.³¹ From a constitutional point of view, the democratic legitimation of the European Union assumes the participation of the German Parliament protected by the citizen's individual claim of art. 38 par. s. 1 BL.³² But if only a fraction of elected representatives of the people participate in the vote to enact a law in the sense of art. 23 par. 1 BL, and, thus, undercut the necessary two-thirds majority, it is no longer possible to recognize

²⁶ FCC, order of 13 February 2020, 2 BvR, 739/17, dissenting opinion recital 12.

²⁷ FCC vol. 135, 317, 388 *et seq.* Recital 129.

²⁸ Convincing: FCC, order of 13 February 2020, 2 BvR, 739/17, recital 99.

²⁹ FCC, order of 13 February 2020, 2 BvR, 739/17, dissenting opinion recital 16.

³⁰ See again: FCC vol. 89, 155, 171; vol. 123, 267, 332.

³¹ FCC vol. 123, 267, 341; vol. 142, 123, 173 *et seq.* recital 81.

³² Instead of many see: Müller [in:] H. v. Mangoldt, F. Klein, C. Starck, *Kommentar GG*, art. 38 recitals 32, 172.

the delegation of sovereign rights as democratically legitimated. The small number of members of the parliament that were present cannot represent the citizens' will in its entirety to establish a unified European Patent Court or not. This corresponds, in general, with the fact that the German constitutional bodies can violate their permanent responsibility for integration in the sense of art. 23 par. 1 BL and, consequently, the citizen's right covered by art. 38 par. 1 s. 1 BL, not only by active behavior but also by omission.³³ In other words, the citizens' political will – expressed through their vote – to what degree the Federal Republic of Germany should participate to the development of the European Union can only be reflected by a certain number of members of the parliament – namely two-thirds (art. 23 par. 1 s. 3, art. 79 par. 2 BL). For this reason, the main idea behind the requirements of a two-thirds majority is, in principle, to avoid an act of legislation that has been enacted in the mood of a political arbitrariness.³⁴ Hence, it is convincing that the *Deutsche Bundestag* can enact a law in the context of art. 23 par. 1 s. 3 BL if a two-thirds majority is in favor. Otherwise, the democratic process could be in substantial danger in terms of the delay of the integration process to the European Union according to art. 23 par. 1 BL.

Furthermore, the critics claim that the existence of formal transfer control would blur the contours of the right to democratic self-determination.³⁵ In fact, it would lead to a general legality control.³⁶ In other words, as a result of such an individual claim every lack in the legislative procedure would mean a failed delegation of sovereign rights.³⁷ Contrastingly, this opinion misjudges multiple fundamental constitutional principles. Since, the Federal Constitutional Courts understands the constitutional complaint (*Verfassungsbeschwerde*) as defined in art. 93 par. 1 Nr. 4a BL – besides the fundamental rights art. 38 BL can be claimed to be a specific instrument to guarantee legal protection concerning the objective constitutional law. The constitutional complaint also has the function of preserving objective constitutional law and serving for its interpretation.³⁸ The Federal Constitutional Court controls the challenged acts from every constitutional point of view.³⁹ Therefore, the acts of legislation constraining fundamental rights have to be reviewed in a formal manner.⁴⁰ So, if a citizen can claim through a fundamental right that a law is formally unconstitutional, then it would be a contradiction to deny such an individual control in the case of art. 38 par. 1 s. 1 BL that can be in the same way the subject of a constitutional complaint (compare again: art. 93 par. 1

³³ FCC vol. 134, 366, 395 recital 49; vol. 142, 123, 172 *et seq.* recital 78 *et seq.*

³⁴ Precisely: P. Badura *et. al*, *Handbuch des Staatsrechts*, eds J. Isensee, P. Kirchhof, vol. XII, par. 270 recital 3, Heidelberg, München, Landsberg, Frechen, Hamburg 2016.

³⁵ FCC, order of 13 February 2020, 2 BvR, 739/17, dissenting opinion recital 13.

³⁶ *Ibidem*, dissenting opinion recital 15. So far, also rejecting such a possibility: Müller [in:] H. v. Mangoldt, F. Klein, C. Starck, *Kommentar GG*, art. 38 recital 171.

³⁷ FCC, order of 13 February 2020, 2 BvR, 739/17, dissenting opinion recital 6.

³⁸ Settled Case Law: FCC vol. 33, 247, 259; vol. 45, 63, 74; vol. 98, 163, 167; vol. 113, 29, 47.

³⁹ Concisely: A. Voßkuhle [in:] H. v. Mangoldt, F. Klein, C. Starck, *Kommentar GG*, art. 93 recital 195. Compare also for instance FCC vol. 99, 100, 119 (settled case law).

⁴⁰ See with further references from the jurisdiction: A. Voßkuhle [in:] H. v. Mangoldt, F. Klein, C. Starck, *Kommentar GG*, art. 93 recital 180.

nr. 4a BL). If an individual person asserts the violation of art. 38 par. 1 s. 1 BL because of an act of legislation in the sense of art. 23 par. 1 BL, the Federal Constitutional Court has to control it from every constitutional point of view as well as its compatibility with the requirements of art. 23 par. 1 s. 3, art. 79 par. 2 BL, which stipulates a two-thirds majority.

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Summary

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Requirements for the delegation of sovereign rights to the European Union, or so-called formal transfer control

The delegation of sovereign rights to the European Union requires an act of legislation by the German parliament (*Deutscher Bundestag*) that is subject to approval by the Federal Council (*Deutscher Bundesrat*) (see art. 23 par. 1 s. 2 BL). So far, citizens have had the opportunity to take legal action against such a delegation only if the identity of Basic Law (art. 79 par. 3 BL) has been violated (so-called identity control) or if the institutions of the European Union have acted *ultra vires* (so-called *ultra-vires* control). Since its decision on the 13 February 2020 (FCC 2 BvR 739/17), the Federal Constitutional Court requires that an act of parliament must be approved by a two-thirds majority if the delegation of sovereign rights entails an amendment to the Union's treaties or to German Basic Law itself (see art. 23 par. s. 3, art. 79 par. 2 BL). Every citizen has an individual claim covered by art. 38 par. 1 s. 1 BL regarding compliance with these formal requirements (so-called formal transfer control).

Keywords: delegation of sovereign rights to the European Union, formal transfer control, integration program, right to democratic self-determination, two-thirds majority

Streszczenie

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Wymagania dotyczące delegowania suwerennych praw na Unię Europejską, czyli tzw. formalna kontrola transferu

Przekazanie suwerennych praw Unii Europejskiej wymaga aktu ustawodawczego niemieckiego parlamentu (Deutscher Bundestag), który podlega zatwierdzeniu przez Radę Federalną (Deutscher Bundesrat) (zob. art. 23 ust. 1 pkt 2 BL). Do tej pory obywatele mieli możliwość wytoczenia powództwa przeciwko takiej delegacji tylko w przypadku naruszenia tożsamości Ustawy Zasadniczej (art. 79 ust. 3 BL) (tzw. kontrola tożsamości) lub jeśli instytucje Unii Europejskiej działały *ultra-vires* (tzw. kontrola *ultra-vires*). Od momentu wydania decyzji przez Federalny Trybunał Konstytucyjny w dniu 13 lutego 2020 r. (FCC 2 BvR 739/17) wymagane jest, aby akt parlamentu został podjęty większością dwóch trzecich głosów, w przypadku gdy przekazanie suwerennych praw wymaga wprowadzenia zmiany do traktatów unijnych lub do samej niemieckiej Ustawy Zasadniczej (zob. art. 23 ust. 3, art. 79 ust. 2 BL). Każdy obywatel ma indywidualne roszczenie objęte art. 38 ust. 1 s. 1 BL, dotyczące zbadania zgodności przeprowadzonej procedury z tymi formalnymi wymogami (tzw. formalna kontrola transferu).

Słowa kluczowe: delegacja suwerennych praw na Unię Europejską, formalna kontrola transferu, program integracyjny, prawo do demokratycznego samostanowienia, większość dwóch trzecich