Guiding Principles

1. **The protection of Article 38 (1) sentence 1 of the Basic Law also extends to compliance with the requirements of Article 23 (1) of the Basic Law for an effective transfer of sovereign rights. In order to secure their democratic influence in the process of European integration, citizens have a fundamental right to the transfer of sovereign rights only in the forms provided for by the Basic Law for this purpose in Article 23 (1) sentence 2 and sentence 3, Article 79 (2) of the Basic Law (formal control of transfer). (97 et seq.)**

2. **Laws approving international treaties which are in a complementary or other special proximity to the integration programme of the European Union are to be measured against Article 23 (1) of the Basic Law. (118)**

3. **A law approving an international treaty that was passed in violation of Article 23.1 sentence 3 in conjunction with Article 79.2 of the Basic Law cannot legitimise the exercise of official authority by organs, institutions and other bodies of the European Union or by an intergovernmental institution with which it has a complementary or other special close relationship, and therefore violates citizens' fundamental rights under Article 38 (1) sentence 1, Article 20 (1) and 20 (2) in conjunction with Article 79 (3) of the Basic Law. (133)**

FEDERAL CONSTITUTIONAL COURT

- 2 BvR 739/17 -

IN THE NAME OF THE PEOPLE

In the proceedings on the constitutional complaint of Dr. S... against the Act on the Agreement of 19 February 2013 on a Unified Patent Court in conjunction with the Agreement on a Unified Patent Court and on the issue of a temporary injunction, the Federal Constitutional Court - Second Senate - with the participation of the judges President Voßkuhle, Huber, Hermanns, Müller, Kessal-Wulf, König, Maidowski, Langenfeld, decided on 13 February 2020

1. Article 1 (1) sentence 1 of the Act on the Agreement of 19 February 2013 on a Unified Patent Court (Order of the Bundestag of 10 March 2017, Plenary Protocol 18/221, p. 22262, Bundestag document 18/11137) infringes the complainant's right, which is

equivalent to a fundamental right, under the first sentence of Article 38 (1) in conjunction with Article 20 (1) and (2) in conjunction with Article 79 (3) of the Basic Law.

2. Article 1 (1) sentence 1 of the Act on the Agreement of 19 February 2013 on a Unified Patent Court (Bundestag document 18/11137, Decision of the Bundestag of 10 March 2017, Plenary Protocol 18/221, p. 22262) is incompatible with the third sentence of Article 23 (1) in conjunction with Article 79 (2) of the Basic Law and is void.
3. That settles the application for a temporary injunction.
4. The Federal Republic of Germany shall reimburse the complainant for his necessary expenses.

G r o u n d s:

A.

I.

1 The constitutional complaint is directed against the Act adopted by the Bundestag and Bundesrat on the Agreement of 19 February 2013 on a Unified Patent Court (hereinafter: UPCA-Consent Act), which is intended to create the conditions for ratification of the said Agreement (OJ EU No. C 175 of 20 June 2013, p. 1 et seq.) (Bundestag document 18/11137; Federal Republic of Germany document 202/17).

2 The Unified Patent Court Agreement (hereinafter referred to as UPCA) is an international treaty which is open only to Member States of the European Union (see Article 84(1) and (4) in conjunction with Article 2 (b) UPCA). Its purpose is to establish a Unified Patent Court supported by a majority of the member states. It is part of a broader European regulatory package on patent law, the core of which is the introduction of a European patent with unitary effect as a new property right at the level of the European Union by means of enhanced cooperation pursuant to Article 20 TEU, Article 326 et seq. TFEU (see Bundestag document 18/8827, p. 1). The regulatory package also includes Regulation (EU) No. 1257/2012 of the European Parliament and of the Council of 17 December 2012 on the implementation of enhanced cooperation in the area of the creation of unitary patent protection (OJ EU No. L 361 of 31 December 2012, p. 1; No. L 307 of 28 December 2012, p. 1) and Council Regulation (EU) No. 1260/2012 of 17 December 2012 on the implementation of enhanced cooperation in the area of unitary patent

protection as regards the translation arrangements (OJ EU No. L 361 of 31 December 2012, p. 89). These are not the subject of the present constitutional complaint.

3 1. a) According to traditional (German) understanding, patents are subjective rights of exclusion granted by the state (see Ann, in: Kraßer/Ann, Patent Law, 7th ed. 2016, § 1, paras. 1 et seq.; Bacher, in: Benkard, Patent Act, 11th ed. 2015, § 1 para. 2) for new technical inventions which are based on an inventive step and are industrially applicable (see § 1 (1) of the German Patent Act). They are granted by administrative act in an administrative procedure and, after their grant, constitute absolute rights comparable to ownership (cf. Bacher, in: Benkard, Patent Act, 11th ed. 2015, § 1 paras. 2a et seq.), which can be enforced against third parties before the civil courts.

4 Patent protection is subject to the principle of territoriality, according to which a patent granted for a certain territory only has effect there (see FCJ, BGHZ 49, 331 <333 f.>).

5 b) In addition to national patents, there has been a European patent for several decades, based on the European Patent Convention of 5 October 1973 - EPC (see Federal Law Gazette 1976 II p. 826, amended by decision of the Administrative Council of 21 December 1978 <BGBl 1979 II p. 349> as well as by the Act revising Article 63 EPC of 17 December 1991 <BGBl 1993 II p. 242> and revising the Convention on the Grant of European Patents of 29 November 2000 <BGBl 2007 II p. 1083>) and is granted by the European Patent Office. Its carrier, the European Patent Organisation, is an intergovernmental institution within the meaning of Article 24 (1) of the Basic Law, which is to be distinguished from the European Union and whose task is to maintain an independent and autonomous patent law system (see Haedicke, in: Schulze/Zuleeg/Kadelbach, European Law – Handbook for the German Judicial Pracitce, 3rd ed. 2015, § 21 para. 79). However, the European Patent Office does not grant a uniform property right, but makes available a uniform grant procedure for the Contracting States involved. The legal effects and consequences of infringement of a European patent are essentially governed by the law of the Contracting States for which it is granted (see Article 64 EPC; Kolle, in: Benkard, European Patent Convention, 3rd ed. 2019, Art. 2 paras. 2 et seq., 15). In this respect, the European patent is also referred to as a "bundle patent" (see, for example, Ullmann/Tochtermann, in: Benkard, Patent Act, 11th ed. 2015, International Part, para. 104; Arntz, EuZW 2015, p. 544 <544>). For certain products, which are accessory to an already granted patent, the patent protection can be extended in time with "supplementary protection

certificates" (see Regulation <EC> No. 469/2009 of the European Parliament and of the Council of 6 December 2009 on the protection of industrial property May 2009 concerning the supplementary protection certificate for medicinal products, OJ EU No. L 152 of 16 June 2009, p. 1; Regulation <EC> No. 1610/96 of the European Parliament and of the Council of 23 July 1996 concerning the creation of a supplementary protection certificate for plant protection products, OJ EC No. L 198 of 8 August 1996, p. 30).

6 2. In the view of the Federal Government, the UPCA is the keystone of a reform of the European patent system that has been sought since the 1960s (see Bundestag document 18/11137, p. 79; historical overview in Augenstein/Haertel/Kiefer, in: Fitzner/Lutz/Bodewig, BeckOK PatR, UPCA, paras. 9 et seq. <15 January 2020>; Jaeger, IIC 2017, p. 254 <255 ff.>).

7 (a) Even after the adoption of the EPC, there were attempts to create a unitary patent title by means of agreements at the level of the European Economic Community, inter alia with an initiative of the European Commission to introduce a Community patent under secondary law from 2000 (cf. Proposal for a Council Regulation on the Community Patent, COM<2000> 412 final; see Ann, in: Kraßer/Ann, Patent Law, 7th edition 2016, § 7 paras. 90 et seq.; Adam/Grabinski, in: Benkard, European Patent Convention, 3rd edition 2019, Before Preamble paras. 33 et seq.) The proposal provided for the establishment of a judicial panel (Art. 225a EC Treaty <Specialised Court in the sense of Art. 257 TFEU>) for patent disputes, but did not lead to success (see Tochtermann, in: Benkard, Patent Act, 11th ed. 2015, International Part para. 154).

8 Parallel to this, there were attempts to create a unified patent jurisdiction both at the Community level and by a working group of the member states of the European Patent Organisation, which sought an agreement of the contracting states to the EPC (European Patent Litigation Agreement - EPLA) (see Adam/Grabinski, in: Benkard, EPC, 3rd ed. 2019, Preamble, paras. 36, 39 et seq.).

9 b) In autumn 2007, there were then new drafts for an agreement for a European patent jurisdiction (see Gaster, EuZW 2011, p. 394 <398 f.>; also Augenstein/Haertel/Kiefer, in: Fitzner/Lutz/Bodewig, BeckOK Patent Law, UPCA, para. 27 <15 January 2020>). On 20 March 2009, the European Commission recommended to the Council, on the basis of the discussions held until then, to authorise it to negotiate an agreement on the creation of a unified patent

litigation system (see SEC<2009> 330 final). In this respect, the aim was to conclude a mixed agreement linked to the EPC by member states, the European Union and third states on a patent jurisdiction (see Council document 7928/09 of 23 March 2009, p. 2).

10 At the same time, the project for a Community patent - now the European Union patent - was also pursued (see Proposal for a Council Regulation on the European Union patent, Council document 16113/09 Add. 1 of 27 November 2009). At the political level, the two projects were combined into a single "legislative package" which is collectively referred to as the "European Patent Reform" (see Bundestag document 18/8827, p. 15) or the "European Patent Package" (see Augenstein/Haertel/Kiefer, in: Fitzner/Lutz/Bodewig, BeckOK Patent Law, UPCA, para. 5 <15 January 2020>).

11 (c) The draft international agreement establishing a European and Community Patents Court (EEUPC) has been referred to the Court of Justice of the European Union (CJEU) for an opinion (OJ EU No C 220 of 12 September 2009, p. 15). In its opinion of 8 March 2011, the CJEU found that the planned agreement was not compatible with the European Treaties (see CJEU, Opinion of 8 March 2011, Opinion 1/09, EU:C:2011:123, para. 89). It was true that Art. 262 and Art. 344 TFEU did not prevent the transfer of competences to the court to be established, so that the creation of a unified patent jurisdiction is also possible outside Art. 262 TFEU (cf. ECJ, loc. cit., marginal 61 et seq.). However, the creation of a new judicial structure failed because of the fundamental elements of the legal and judicial system of the European Union. Even if the court in question were to be established outside the court system of the European Union (see CJEU, loc. cit., para. 71), the envisaged Convention provided that it would have to interpret Union law and take the place of the national courts of the Member States, thereby depriving them of the possibility of making a reference (see CJEU, loc. cit., para. 72 et seq.). Nor was it a court or tribunal common to several Member States, comparable to the Benelux Court of Justice, which was created for the purpose of interpreting the Convention by which it was established and which was integrated into the court system of the Member States (see CJEU, loc. cit., para. 82). Furthermore, there was no possibility of making a breach of Union law by the court the basis of a property liability of the Member States or the subject of infringement proceedings (see CJEU, loc. cit., para. 82 et seq.). In summary, the Court stated that the planned Convention would confer exclusive jurisdiction on an international court outside the institutional and judicial framework of the Union to hear and determine a considerable number of actions brought by individuals in connection with the Community patent and to interpret and

apply Union law in this area. This would deprive the courts of the Member States of their competence to interpret and apply Union law and the Court of Justice of its competence to reply to questions referred by those courts for a preliminary ruling, thereby distorting the competences which the Treaties conferred on the Union institutions and the Member States and which are essential to the preservation of the nature of Union law (see CJEU, loc. cit., para. 89).

12 (d) In response to the Court's opinion, the patent package was amended so that only members of the European Union would become party to the UPCA, and not the European Union itself or other states party to the EPCA. In order to safeguard the autonomy of Union law and to enable the Unified Patent Court to cooperate with the CJEU, further provisions were included in the drafts, in particular a provision expressly stating that it was a common court of the Member States, Art. 1 (1) and Art. 2 (b) UPCA (see Tochtermann, in: Benkard, Patent Act, 11th ed. 2015, International Part, para. 155).

13 In the parallel legislative procedure for the unitary patent, no agreement could be reached due to objections to the language and translation arrangements on the part of Italy and Spain. Therefore, the procedure was continued within the framework of enhanced cooperation (cf. Decision 2011/167/EU on the authorisation for enhanced cooperation in the area of the creation of unitary patent protection, OJ EU No. L 76 of 22 March 2011, p. 53). After political agreement was reached at the end of 2012, Regulation (EU) No. 1257/2012 and Regulation (EU) No. 1260/2012 were adopted by the European Parliament and the Council in December 2012. On 11 December 2012, the European Parliament called on the contracting states to conclude the international agreement on a Unified Patent Court (see European Parliament resolution of 11 December 2012, 2011/2176<INI>).

14 (e) The Agreement on a Unified Patent Court, including its Statute, was signed on 19 February 2013 by 25 Member States, but not by Spain, Poland and Croatia (see Council document 6572/13).

15 According to its Art. 89 para. 1, the Convention shall enter into force when at least 13 of the 25 Contracting States have ratified it and deposited their instrument of ratification. Ratification by the member states (within the meaning of Art. 2 (b) UPCA) in which the largest number of European patents existed in the year preceding the year of signature is mandatory. These are Germany, France and the United Kingdom (see Bundestag document 18/11137, p. 94).

16 Currently, the UPCA has been ratified by a total of 16 states (Austria, Belgium, Bulgaria, Denmark, Estonia, Finland, France, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Portugal, Sweden and the United Kingdom; see the list at http://www.consilium.europa.eu/ <last accessed on 29 January 2020>).

17 The Hungarian Constitutional Court declared the Hungarian Consent Act unconstitutional by decision of 26 June 2018, because it had no basis in the Treaties on European Union (see Hungarian Constitutional Court, decision 9/2018 <VII. 9.> of 26 June 2018, official English translation: LINK). The power of integration in Art. E.2 and E.4 Hungarian Basic Law applies to legal acts of enhanced cooperation only if they have their basis in the founding Treaties; whether this is the case is not covered by the decision-making competence of the Constitutional Court, but must be clarified by the government in the course of ratification (see Hungarian Constitutional Court, Decision 9/2018, para. 32). A consent act in accordance with the general rules of the Basic Law on Hungary's obligations under international law would violate the provisions of the Hungarian Basic Law on the constitution of the courts, which preclude an exclusive transfer of the application of Hungarian law from the court of first instance for certain private-law disputes to international courts, to the exclusion of national courts, and the envisaged constitutional review (see Hungarian Constitutional Court, Decision 9/2018, para. 49 et seq.

18 3. Regulation (EU) No. 1257/2012 creates the legal prerequisites for giving uniform effect to a European patent granted by the European Patent Office (see Bundestag document 18/8827, p. 11). The "European patent with unitary effect" provides unitary protection in all participating Member States and has the same effect there (Article 3 (2) Regulation <EU> No. 1257/2012). The basis for this is a European patent granted by the European Patent Office with the same claims for all participating Member States and entered in the Register of unitary patent protection (Art. 3 (1) Regulation <EU> No. 1257/2012). This is based on Art. 142 (1) EPC, according to which a group of Contracting States to this Convention which have determined in a "special agreement" that European patents are unitary for their territories may provide that they may only be granted jointly for all States. The Regulation is understood as a "special convention" in this sense (Art. 1 (2) Regulation <EU> No. 1257/2012). Pursuant to Part IX of the EPC, joint administrative tasks may be assigned to the European Patent Office, which thus acts as the granting authority for European patents with unitary effect.

19 Regulation (EU) No. 1260/2012 contains the translation rules necessary for the implementation of uniform patent protection (see Bundestag document 18/8827, p. 11). It is based on the language regime of the European Patent Office (cf. paras. 6 and 15) with the official languages German, English and French. Additional translations are normally not required (Article 3 (1) Regulation <EU> No. 1260/2012) but are provided for in the event of litigation and for a transitional period (Art. 4 and 6 Regulation <EU> No. 1260/2012). In future, applications will be possible in the official languages of the European Union (see paras. 10 and 11) and a "compensation system" for the reimbursement of translation costs from official languages of the European Union which are not official languages of the European Patent Office will be provided for (Art. 5 Regulation <EU> No. 1260/2012).

20 The effectiveness of both Regulations depends on the establishment of the Unified Patent Court. According to Art. 18 (2) sentence 1 of Regulation (EU) No 1257/2012 or Art. 7 (2) of Regulation (EU) No 1260/2012, the respective Regulation shall enter into force on 1 January 2014 or the date of entry into force of the Agreement on a Unified Patent Court, whichever is the later.

21 Both Regulations have already been the subject of actions for annulment before the CJEU. With these, Spain had raised not only questions of competence but also infringements of the principles of the rule of law and the requirements for legal protection, in particular the principles of unity and autonomy of Union law. The Court dismissed both actions (see CJEU, judgements of 5 May 2015, Spain v Parliament and Council, C-146/13 and C-147/13, EU:C:2015:298 and EU:C:2015:299). With regard to Regulation (EU) No. 1257/2012 establishing the patent with unitary effect, the Court denied an infringement of principles of the rule of law by linking the unitary patent to the grant of the patent by the European Patent Office, even if the latter was not subject to any legal protection by Union courts. For the grant of European patents is not regulated by the contested regulation and the grant procedure is not integrated into Union law by the accessory link (see CJEU, judgment of 5 May 2015, Spain v Parliament and Council, C-146/13, EU:C:2015:298, paras. 28 et seq.). Despite the reference to the UPCA, the regulation could be based on Article 118 (1) TFEU for essential questions of substantive law, since this did not require full harmonisation. It was not an abuse of discretion and did not constitute a violation of the requirements for the delegation of competences to independent agencies or Member States (see CJEU, loc. cit., paras. 33 et seq., 54 et seq., 60 et seq.) Nor did the regulation infringe the autonomy of Union law. The CJEU was not competent to decide on the

legality of the UPCA or its ratification by the Member States by means of an action for annulment; the linkage of the Regulation to the UPCA was not objectionable, since the Union legislature had left implementation to the Member States by measures under the EPC (see CJEU, loc. cit., paras. 89 et seq., 101, 106). In the judgment on Regulation (EU) No. 1260/2012, the Court also denied discrimination on the basis of the language regime and a violation of the principle of legal certainty due to insufficient translations into all official languages (see CJEU, judgment of 5 May 2015, Spain v Parliament and Council, C-147/13, EU:C:2015:299, paras. 22 et seq., 76 et seq.).

22 4. a) The UPCA provides for the establishment of a Unified Patent Court as a common court of the Member States for disputes concerning European patents and European patents with unitary effect (Art. 1 UPCA). It will have its own legal personality in each Contracting State (see Art. 2 (b) and (c) UPCA) (Art. 4 (1) UPCA). According to Art. 32 (1) UPCA, it is to be given exclusive jurisdiction over an extensive catalogue of disputes concerning the patents referred to in Art. 2 (g) UPCA - European patents and European patents with unitary effect. This includes, in particular, actions for infringement, disputes concerning the validity of patents and actions against decisions of the European Patent Office in the exercise of its functions under Art. 9 of Regulation (EU) No 1257/2012.

23 The UPCA stipulates the following - in extracts:

> PART I – General and Institutional Provisions
>
> CHAPTER I - General Provisions
>
> Article 1
>
> Unified Patent Court
>
> A Unified Patent Court for the settlement of disputes relating to European patents and European patents with unitary effect is hereby established.
>
> The Unified Patent Court shall be a court common to the Contracting Member States and thus subject to the same obligations under Union law as any national court of the Contracting Member States

Article 2

Definitions

For the purposes of this Agreement:

a) "Court" means the Unified Patent Court created by this Agreement,

b) "Member State" means a Member State of the European Union,

c) "Contracting Member State" means a Member State party to this Agreement,

d) "EPC" means the Convention on the Grant of European Patents of 5 October 1973, including any subsequent amendment,

e) "European patent" means a patent granted under the provisions of the EPC, which does not benefit from unitary effect by virtue of Regulation (EU) No 1257/2012,

f) "European patent with unitary effect" means a patent granted under the provisions of the EPC which benefits from unitary effect by virtue of Regulation (EU) No 1257/2012,

g) "Patent" means a European patent and/or a European patent with unitary effect,

h) "Supplementary protection certificate" means a supplementary protection certificate granted under Regulation (EC) No 469/2009 ([1]) or under Regulation (EC) No 1610/96 ([2]),

i) "Statute" means the Statute of the Court as set out in Annex I, which shall be an integral part of this Agreement,

j) "Rules of Procedure" means the Rules of Procedure of the Court, as established in accordance with Article 41.

([1]) Regulation (EC) No 469/2009 of the European Parliament and of the Council of 6 May 2009 concerning the supplementary protection certificate for medicinal products, (OJEU L 152, 16.6.2009, p.1) including any subsequent amendments.

([2]) Regulation (EC) No 1610/96 of the European Parliament and of the Council of 23 July 1996 concerning the creation of a supplementary certificate for plant protection products, (OJEC L 198, 8.8.1996, p.30) including any subsequent amendments.

Article 3

scope of application

This Agreement shall apply to any:

a) European patent with unitary effect;

b) supplementary protection certificate issued for a product protected by a patent;

c) European patent which has not yet lapsed at the date of entry into force of this Agreement or was granted after that date, without prejudice to Article 83; and

d) European patent application which is pending at the date of entry into force of this Agreement or which is filed after that date, without prejudice to Article 83.

Article 4

Legal status

(1) The Court shall have legal personality in each Contracting Member State and shall enjoy the most extensive legal capacity accorded to legal persons under the national law of that State.

(2) The Court shall be represented by the President of the Court of Appeal who shall be elected in accordance with the Statute.

CHAPTER II - Institutional Provisions

Article 6

The Court

(1) The Court shall comprise a Court of First Instance, a Court of Appeal and a Registry.

(2) The Court shall perform the functions assigned to it by this Agreement.

Article 8

Composition of the panels of the Court of First Instance

(1) Any panel of the Court of First Instance shall have a multinational composition. Without prejudice to paragraph 5 of this Article and to Article 33(3)(a), it shall sit in a composition of three judges.

(2) Any panel of a local division in a Contracting Member State where, during a period of three successive years prior or subsequent to the entry into force of this Agreement, less than fifty patent cases per calendar year on average have been commenced shall sit in a composition of one legally qualified judge who is a national of the Contracting Member State hosting the local division concerned and two legally qualified judges who are not nationals of the Contracting Member State concerned and are allocated from the Pool of Judges in accordance with Article 18(3) on a case by case basis.

(3) Notwithstanding paragraph 2, any panel of a local division in a Contracting Member State where, during a period of three successive years prior or subsequent to the entry into force of this Agreement, fifty or more patent cases per calendar year on average have been commenced, shall sit in a composition of two legally qualified judges who are nationals of the Contracting Member State hosting the local division concerned and one legally qualified judge who is not a national of the Contracting Member State concerned and is allocated from the Pool of Judges in accordance with Article 18(3). Such third judge shall serve at the local division on a long term basis, where this is necessary for the efficient functioning of divisions with a high work load.

(4) Any panel of a regional division shall sit in a composition of two legally qualified judges chosen from a regional list of judges, who shall be nationals of the Contracting Member States concerned, and one legally qualified judge who shall not be a national of the Contracting Member States concerned and who shall be allocated from the Pool of Judges in accordance with Article 18(3).

(5) Upon request by one of the parties, any panel of a local or regional division shall request the President of the Court of First Instance to allocate from the Pool of Judges in accordance with Article 18(3) an additional technically qualified judge with qualifications and experience in the field of technology concerned. Moreover, any panel of a local or regional division may, after having heard the parties, submit such request on its own initiative, where it deems this appropriate.

In cases where such a technically qualified judge is allocated, no further technically qualified judge may be allocated under Article 33(3)(a).

(6) Any panel of the central division shall sit in a composition of two legally qualified judges who are nationals of different Contracting Member States and one technically qualified judge allocated from the Pool of Judges in accordance with Article 18(3) with qualifications and experience in the field of technology concerned. However, any panel of the central division dealing with actions under Article 32(1)(i) shall sit in a composition of three legally qualified judges who are nationals of different Contracting Member States.

(7) Notwithstanding paragraphs 1 to 6 and in accordance with the Rules of Procedure, parties may agree to have their case heard by a single legally qualified judge.

(8) Any panel of the Court of First Instance shall be chaired by a legally qualified judge.

Article 9

The Court of Appeal

(1) Any panel of the Court of Appeal shall sit in a multinational composition of five judges. It shall sit in a composition of three legally qualified judges who are nationals of different Contracting Member States and two technically qualified judges with qualifications and experience in the field of technology concerned. Those technically qualified judges shall be assigned to the panel by the President of the Court of Appeal from the pool of judges in accordance with Article 18.

(2) Notwithstanding paragraph 1, a panel dealing with actions under Article 32(1)(i) shall sit in a composition of three legally qualified judges who are nationals of different Contracting Member States.

(3) Any panel of the Court of Appeal shall be chaired by a legally qualified judge.

(4) The panels of the Court of Appeal shall be set up in accordance with the Statute.

(5) The Court of Appeal shall have its seat in Luxembourg.

Article 11

Committees

An Administrative Committee, a Budget Committee and an Advisory Committee shall be set up in order to ensure the effective implementation and operation of this Agreement. They shall in particular exercise the duties foreseen by this Agreement and the Statute.

Article 12

The Administrative Committee

(1) The Administrative Committee shall be composed of one representative of each Contracting Member State. The European Commission shall be represented at the meetings of the Administrative Committee as observer.

(2) Each Contracting Member State shall have one vote.

(3) The Administrative Committee shall adopt its decisions by a majority of three quarters of the Contracting Member States represented and voting, except where this Agreement or the Statute provides otherwise.

(4) The Administrative Committee shall adopt its rules of procedure.

(5) The Administrative Committee shall elect a chairperson from among its members for a term of three years. That term shall be renewable.

Article 13

The Budget Committee

(1) The Budget Committee shall be composed of one representative of each Contracting Member State.

(2) Each Contracting Member State shall have one vote.

(3) The Budget Committee shall take its decisions by a simple majority of the representatives of the Contracting Member States. However, a majority of three-quarters of the representatives of Contracting Member States shall be required for the adoption of the budget.

(4)The Budget Committee shall adopt its rules of procedure.

(5) The Budget Committee shall elect a chairperson from among its members for a term of three years. That term shall be renewable.

Article 14

The Advisory Committee

(1)The Advisory Committee shall:

(a) assist the Administrative Committee in the preparation of the appointment of judges of the Court;

(b) make proposals to the Presidium referred to in Article 15 of the Statute on the guidelines for the training framework for judges referred to in Article 19; and

(c) deliver opinions to the Administrative Committee concerning the requirements for qualifications referred to in Article 48(2).

(2) The Advisory Committee shall comprise patent judges and practitioners in patent law and patent litigation with the highest recognised competence. They shall be appointed, in accordance with the procedure laid down in the Statute, for a term of six years. That term shall be renewable.

(3) The composition of the Advisory Committee shall ensure a broad range of relevant expertise and the representation of each of the Contracting Member States. The members of the Advisory Committee shall be completely independent in the performance of their duties and shall not be bound by any instructions.

(4) The Advisory Committee shall adopt its rules of procedure.

(5) The Advisory Committee shall elect a chairperson from among its members for a term of three years. That term shall be renewable.

CHAPTER III - Judges of the Court

Article 15

Eligibility criteria for the appointment of judges

(1) The Court shall comprise both legally qualified judges and technically qualified judges. Judges shall ensure the highest standards of competence and shall have proven experience in the field of patent litigation.

(2) Legally qualified judges shall possess the qualifications required for appointment to judicial offices in a Contracting Member State.

(3) Technically qualified judges shall have a university degree and proven expertise in a field of technology. They shall also have proven knowledge of civil law and procedure relevant in patent litigation.

Article 16

appointment procedure

(1) The Advisory Committee shall establish a list of the most suitable candidates to be appointed as judges of the Court, in accordance with the Statute.

(2) On the basis of that list, the Administrative Committee shall appoint the judges of the Court acting by common accord.

(3) The implementing provisions for the appointment of judges are set out in the Statute.

Article 17

Judicial independence and impartiality

(1) The Court, its judges and the Registrar shall enjoy judicial independence. In the performance of their duties, the judges shall not be bound by any instructions.

(2) Legally qualified judges, as well as technically qualified judges who are full-time judges of the Court, may not engage in any other occupation, whether gainful or not, unless an exception is granted by the Administrative Committee.

(3) Notwithstanding paragraph 2, the exercise of the office of judges shall not exclude the exercise of other judicial functions at national level.

(4) The exercise of the office of technically qualified judges who are part-time judges of the Court shall not exclude the exercise of other functions provided there is no conflict of interest.

(5) In case of a conflict of interest, the judge concerned shall not take part in proceedings. Rules governing conflicts of interest are set out in the Statute.

Article 18

Pool of Judges

(1) A Pool of Judges shall be established in accordance with the Statute.

(2) The Pool of Judges shall be composed of all legally qualified judges and technically qualified judges from the Court of First Instance who are full-time or part-time judges of

the Court. The Pool of Judges shall include at least one technically qualified judge per field of technology with the relevant qualifications and experience. The technically qualified judges from the Pool of Judges shall also be available to the Court of Appeal.

(3) Where so provided by this Agreement or the Statute, the judges from the Pool of Judges shall be allocated to the division concerned by the President of the Court of First Instance. The allocation of judges shall be based on their legal or technical expertise, linguistic skills and relevant experience. The allocation of judges shall guarantee the same high quality of work and the same high level of legal and technical expertise in all panels of the Court of First Instance.

CHAPTER IV – The Primacy of Union Law, Liability and Responsibility of the Contracting Member States

Article 20

Primacy of and respect for Union law

The Court shall apply Union law in its entirety and shall respect its primacy.

Article 21

Requests for preliminary rulings

As a court common to the Contracting Member States and as part of their judicial system, the Court shall cooperate with the Court of Justice of the European Union to ensure the correct application and uniform interpretation of Union law, as any national court, in accordance with Article 267 TFEU in particular. Decisions of the Court of Justice of the European Union shall be binding on the Court

CHAPTER V – Sources of Law and Substantive Law

Article 24

sources of law

(1) In full compliance with Article 20, when hearing a case brought before it under this Agreement, the Court shall base its decisions on:

(a) Union law, including Regulation (EU) No 1257/2012 and Regulation (EU) No 1260/2012 ([1]);

(b) this Agreement;

(c) the EPC;

(d) other international agreements applicable to patents and binding on all the Contracting Member States; and

(e) national law.

([1]) Council Regulation (EU) No 1260/2012 of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements (OJEU L 361, 31.12.2012, p. 89) including any subsequent amendment.

Article 25

Right to prevent the direct use of the invention

A patent shall confer on its proprietor the right to prevent any third party not having the proprietor's consent from the following:

(a) making, offering, placing on the market or using a product which is the subject matter of the patent, or importing or storing the product for those purposes;

(b) using a process which is the subject matter of the patent or, where the third party knows, or should have known, that the use of the process is prohibited without the consent of the patent proprietor, offering the process for use within the territory of the Contracting Member States in which that patent has effect;

(c) offering, placing on the market, using, or importing or storing for those purposes a product obtained directly by a process which is the subject matter of the paten

Article 26

Right to prevent the indirect use of the invention

(1) A patent shall confer on its proprietor the right to prevent any third party not having the proprietor's consent from supplying or offering to supply, within the territory of the

Contracting Member States in which that patent has effect, any person other than a party entitled to exploit the patented invention, with means, relating to an essential element of that invention, for putting it into effect therein, when the third party knows, or should have known, that those means are suitable and intended for putting that invention into effect.

(2) Paragraph 1 shall not apply when the means are staple commercial products, except where the third party induces the person supplied to perform any of the acts prohibited by Article 25.

(3) Persons performing the acts referred to in Article 27(a) to (e) shall not be considered to be parties entitled to exploit the invention within the meaning of paragraph 1.

Article 27

Limitations of the effects of a patent

The rights conferred by a patent shall not extend to any of the following:

(a) acts done privately and for non-commercial purpose;

(b) acts done for experimental purposes relating to the subject matter of the patented invention;

(c) the use of biological material for the purpose of breeding, or discovering and developing other plant varieties;

(d) the acts allowed pursuant to Article 13(6) of Directive 2001/82/EC ([1]) or Article 10(6) of Directive 2001/83/EC ([2]) in respect of any patent covering the product within the meaning of either of those Directives;

(e) the extemporaneous preparation by a pharmacy, for individual cases, of a medicine in accordance with a medical prescription or acts concerning the medicine so prepared;

(f) the use of the patented invention on board vessels of countries of the International Union for the Protection of Industrial Property (Paris Union) or members of the World Trade Organisation, other than those Contracting Member States in which that patent has effect, in the body of such vessel, in the machinery, tackle, gear and other accessories, when such vessels temporarily or accidentally enter the waters of a Contracting Member State in which that patent has effect, provided that the invention is used there exclusively for the needs of the vessel;

(g) the use of the patented invention in the construction or operation of aircraft or land vehicles or other means of transport of countries of the International Union for the Protection of Industrial Property (Paris Union) or members of the World Trade Organisation, other than those Contracting Member States in which that patent has effect, or of accessories to such aircraft or land vehicles, when these temporarily or accidentally enter the territory of a Contracting Member State in which that patent has effect;

(h) the acts specified in Article 27 of the Convention on International Civil Aviation of 7 December 1944 ([3]), where these acts concern the aircraft of a country party to that Convention other than a Contracting Member State in which that patent has effect;

(i) the use by a farmer of the product of his harvest for propagation or multiplication by him on his own holding, provided that the plant propagating material was sold or otherwise commercialised to the farmer by or with the consent of the patent proprietor for agricultural use. The extent and the conditions for this use correspond to those under Article 14 of Regulation (EC) No. 2100/94 ([4]);

(j) the use by a farmer of protected livestock for an agricultural purpose, provided that the breeding stock or other animal reproductive material were sold or otherwise commercialised to the farmer by or with the consent of the patent proprietor. Such use includes making the animal or other animal reproductive material available for the purposes of pursuing the farmer's agricultural activity, but not the sale thereof within the framework of, or for the purpose of, a commercial reproductive activity

(k) the acts and the use of the obtained information as allowed under Articles 5 and 6 of Directive 2009/24/EC ([5]), in particular, by its provisions on decompilation and interoperability; and (l)the acts allowed pursuant to Article 10 of Directive 98/44/EC ([6]).

([1]) Directive 2001/82/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to veterinary medicinal products (OJEC L 311, 28.11.2001, p. 1) including any subsequent amendment.

([2]) Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use (OJEC L 311, 28.11.2001, p. 67) including any subsequent amendment.

([3]) International Civil Aviation Organization (ICAO), "Chicago Convention", Document 7300/9 (9th edition, 2006).

([4]) Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights (OJEC L 227, 1.9.1994, p. 1) including any subsequent amendment.

([5]) Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (OJEU L 111, 05/05/2009, p. 16) including any subsequent amendments.

([6]) Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions (OJEC L 213, 30.7.1998, p. 13) including any subsequent amendments.

Article 28

Right based on prior use of the invention

Any person, who, if a national patent had been granted in respect of an invention, would have had, in a Contracting Member State, a right based on prior use of that invention or a right of personal possession of that invention, shall enjoy, in that Contracting Member State, the same rights in respect of a patent for the same invention

Article 30

Effects of supplementary protection certificates A supplementary protection certificate shall confer the same rights as conferred by the patent and shall be subject to the same limitations and the same obligations.

CHAPTER VI – International Jurisdiction and Competence

Article 31

International jurisdiction The international jurisdiction of the Court shall be established in accordance with Regulation (EU) No 1215/2012 or, where applicable, on the basis of the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Lugano Convention) ([1]).

([1]) Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, done at Lugano on 30 October 2007, including any subsequent amendments.

Article 32

Competence of the Court

(1) The Court shall have exclusive competence in respect of:

(a) actions for actual or threatened infringements of patents and supplementary protection certificates and related defences, including counterclaims concerning licences;

(b) actions for declarations of non-infringement of patents and supplementary protection certificates;

(c) actions for provisional and protective measures and injunctions;

(d) actions for revocation of patents and for declaration of invalidity of supplementary protection certificates;

(e) counterclaims for revocation of patents and for declaration of invalidity of supplementary protection certificates;

(f) actions for damages or compensation derived from the provisional protection conferred by a published European patent application;

(g) actions relating to the use of the invention prior to the granting of the patent or to the right based on prior use of the invention;

(h) actions for compensation for licences on the basis of Article 8 of Regulation (EU) No 1257/2012; and

(i) actions concerning decisions of the European Patent Office in carrying out the tasks referred to in Article 9 of Regulation (EU) No 1257/2012.

(2) The national courts of the Contracting Member States shall remain competent for actions relating to patents and supplementary protection certificates which do not come within the exclusive competence of the Court

Article 34

Territorial scope of decisions Decisions of the Court shall cover, in the case of a European patent, the territory of those Contracting Member States for which the European patent has effect.

PART III – Organisation and Procedural Provisions

CHAPTER I - General Provisions

Article 40

Statute

(1) The Statute shall lay down the details of the organisation and functioning of the Court.

(2) The Statute is annexed to this Agreement. The Statute may be amended by decision of the Administrative Committee, on the basis of a proposal of the Court or a proposal of a Contracting Member State after consultation with the Court. However, such amendments shall not contradict or alter this Agreement.

(3) The Statute shall guarantee that the functioning of the Court is organised in the most efficient and cost-effective manner and shall ensure equitable access to justice.

Article 41

rules of procedure

(1) The Rules of Procedure shall lay down the details of the proceedings before the Court. They shall comply with this Agreement and the Statute.

(2) The Rules of Procedure shall be adopted by the Administrative Committee on the basis of broad consultations with stakeholders. The prior opinion of the European Commission on the compatibility of the Rules of Procedure with Union law shall be requested.

The Rules of Procedure may be amended by a decision of the Administrative Committee, on the basis of a proposal from the Court and after consultation with the European Commission. However, such amendments shall not contradict or alter this Agreement or the Statute.

(3) The Rules of Procedure shall guarantee that the decisions of the Court are of the highest quality and that proceedings are organised in the most efficient and cost effective manner. They shall ensure a fair balance between the legitimate interests of all parties. They shall provide for the required level of discretion of judges without impairing the predictability of proceedings for the parties

Article 42

Proportionality and fairness

(1) The Court shall deal with litigation in ways which are proportionate to the importance and complexity thereof.

(2) The Court shall ensure that the rules, procedures and remedies provided for in this Agreement and in the Statute are used in a fair and equitable manner and do not distort competition.

Article 43

case management

The Court shall actively manage the cases before it in accordance with the Rules of Procedure without impairing the freedom of the parties to determine the subject-matter of, and the supporting evidence for, their case.

Article 45

public proceedings

The proceedings shall be open to the public unless the Court decides to make them confidential, to the extent necessary, in the interest of one of the parties or other affected persons, or in the general interest of justice or public order.

CHAPTER III – Proceedings before the Court

Article 52

Written, interim and oral procedures

(1) The proceedings before the Court shall consist of a written, an interim and an oral procedure, in accordance with the Rules of Procedure. All procedures shall be organized in a flexible and balanced manner.

(2) In the interim procedure, after the written procedure and if appropriate, the judge acting as Rapporteur, subject to a mandate of the full panel, shall be responsible for convening an interim hearing. That judge shall in particular explore with the parties the possibility for a settlement, including through mediation, and/or arbitration, by using the facilities of the Centre referred to in Article 35.

(3) The oral procedure shall give parties the opportunity to explain properly their arguments. The Court may, with the agreement of the parties, dispense with the oral hearing.

Article 53

Means of evidence

(1) In proceedings before the Court, the means of giving or obtaining evidence shall include in particular the following:

(a) hearing the parties;

(b) requests for information;

(c) production of documents;

(d) hearing witnesses;

(e) opinions by experts;

(f) inspection;

(g) comparative tests or experiments;

(h) sworn statements in writing (affidavits).

(2) The Rules of Procedure shall govern the procedure for taking such evidence. Questioning of witnesses and experts shall be under the control of the Court and be limited to what is necessary.

Article 54

Burden of proof Without prejudice to Article 24(2) and (3), the burden of the proof of facts shall be on the party relying on those facts.

Article 55

reversal of burden of proof

(1) Without prejudice to Article 24(2) and (3), if the subject-matter of a patent is a process for obtaining a new product, the identical product when produced without the consent of

the patent proprietor shall, in the absence of proof to the contrary, be deemed to have been obtained by the patented process.

(2) The principle set out in paragraph 1 shall also apply where there is a substantial likelihood that the identical product was made by the patented process and the patent proprietor has been unable, despite reasonable efforts, to determine the process actually used for such identical product.

(3) In the adduction of proof to the contrary, the legitimate interests of the defendant in protecting its manufacturing and trade secrets shall be taken into account.

CHAPTER IV – Powers of the Court

Article 56

The general powers of the Court

(1) The Court may impose such measures, procedures and remedies as are laid down in this Agreement and may make its orders subject to conditions, in accordance with the Rules of Procedure.

(2) The Court shall take due account of the interest of the parties and shall, before making an order, give any party the opportunity to be heard, unless this is incompatible with the effective enforcement of such order.

Article 60

Order to preserve evidence and to inspect premises

(1) At the request of the applicant which has presented reasonably available evidence to support the claim that the patent has been infringed or is about to be infringed the Court may, even before the commencement of proceedings on the merits of the case, order prompt and effective provisional measures to preserve relevant evidence in respect of the alleged infringement, subject to the protection of confidential information.

(2) Such measures may include the detailed description, with or without the taking of samples, or the physical seizure of the infringing products, and, in appropriate cases, the materials and implements used in the production and/or distribution of those products and the documents relating thereto.

(3) The Court may, even before the commencement of proceedings on the merits of the case, at the request of the applicant who has presented evidence to support the claim that the patent has been infringed or is about to be infringed, order the inspection of premises. Such inspection of premises shall be conducted by a person appointed by the Court in accordance with the Rules of Procedure.

(4) At the inspection of the premises the applicant shall not be present itself but may be represented by an independent professional practitioner whose name has to be specified in the Court's order.

(5) Measures shall be ordered, if necessary without the other party having been heard, in particular where any delay is likely to cause irreparable harm to the proprietor of the patent, or where there is a demonstrable risk of evidence being destroyed.

(6) Where measures to preserve evidence or inspect premises are ordered without the other party in the case having been heard, the parties affected shall be given notice, without delay and at the latest immediately after the execution of the measures. A review, including a right to be heard, shall take place upon request of the parties affected with a view to deciding, within a reasonable period after the notification of the measures, whether the measures are to be modified, revoked or confirmed.

(7) The measures to preserve evidence may be subject to the lodging by the applicant of adequate security or an equivalent assurance intended to ensure compensation for any prejudice suffered by the defendant as provided for in paragraph 9.

(8) The Court shall ensure that the measures to preserve evidence are revoked or otherwise cease to have effect, at the defendant's request, without prejudice to the damages which may be claimed, if the applicant does not bring, within a period not exceeding 31 calendar days or 20 working days, whichever is the longer, action leading to a decision on the merits of the case before the Court.

(9) Where the measures to preserve evidence are revoked, or where they lapse due to any act or omission by the applicant, or where it is subsequently found that there has been no infringement or threat of infringement of the patent, the Court may order the applicant, at the defendant's request, to provide the defendant with appropriate compensation for any damage suffered as a result of those measures.

Article 69

Legal costs

(1) Reasonable and proportionate legal costs and other expenses incurred by the successful party shall, as a general rule, be borne by the unsuccessful party, unless equity requires otherwise, up to a ceiling set in accordance with the Rules of Procedure.

(2) Where a party succeeds only in part or in exceptional circumstances, the Court may order that costs be apportioned equitably or that the parties bear their own costs.

(3) A party should bear any unnecessary costs it has caused the Court or another party.

(4) At the request of the defendant, the Court may order the applicant to provide adequate security for the legal costs and other expenses incurred by the defendant which the applicant may be liable to bear, in particular in the cases referred to in Articles 59 to 62.

CHAPTER VI - Decisions

Article 82

Enforcement of decisions and orders

(1) Decisions and orders of the Court shall be enforceable in any Contracting Member State. An order for the enforcement of a decision shall be appended to the decision by the Court.

(2) Where appropriate, the enforcement of a decision may be subject to the provision of security or an equivalent assurance to ensure compensation for any damage suffered, in particular in the case of injunctions.

(3) Without prejudice to this Agreement and the Statute, enforcement procedures shall be governed by the law of the Contracting Member State where the enforcement takes place. Any decision of the Court shall be enforced under the same conditions as a decision given in the Contracting Member State where the enforcement takes place.

(4) If a party does not comply with the terms of an order of the Court, that party may be sanctioned with a recurring penalty payment payable to the Court. The individual penalty shall be proportionate to the importance of the order to be enforced and shall be without prejudice to the party's right to claim damages or security.

PART IV - Transitional Provisions

Article 83

transitional regime

(1) During a transitional period of seven years after the date of entry into force of this Agreement, an action for infringement or for revocation of a European patent or an action for infringement or for declaration of invalidity of a supplementary protection certificate issued for a product protected by a European patent may still be brought before national courts or other competent national authorities.

(2) An action pending before a national court at the end of the transitional period shall not be affected by the expiry of this period.

(3) Unless an action has already been brought before the Court, a proprietor of or an applicant for a European patent granted or applied for prior to the end of the transitional period under paragraph 1 and, where applicable, paragraph 5, as well as a holder of a supplementary protection certificate issued for a product protected by a European patent, shall have the possibility to opt out from the exclusive competence of the Court. To this end they shall notify their opt-out to the Registry by the latest one month before expiry of the transitional period. The opt-out shall take effect upon its entry into the register.

(4) Unless an action has already been brought before a national court, proprietors of or applicants for European patents or holders of supplementary protection certificates issued for a product protected by a European patent who made use of the opt-out in accordance with paragraph 3 shall be entitled to withdraw their opt-out at any moment. In this event they shall notify the Registry accordingly. The withdrawal of the opt-out shall take effect upon its entry into the register.

(5) Five years after the entry into force of this Agreement, the Administrative Committee shall carry out a broad consultation with the users of the patent system and a survey on the number of European patents and supplementary protection certificates issued for products protected by European patents with respect to which actions for infringement or for revocation or declaration of invalidity are still brought before the national courts pursuant to paragraph 1, the reasons for this and the implications thereof. On the basis of this consultation and an opinion of the Court, the Administrative Committee may decide to prolong the transitional period by up to seven years.

PART V - Final Provisions

Article 84

Signature, ratification and accession

(1) This Agreement shall be open for signature by any Member State on 19 February 2013.

(2) This Agreement shall be subject to ratification in accordance with the respective constitutional requirements of the Member States. Instruments of ratification shall be deposited with the General Secretariat of the Council of the European Union (hereinafter referred to as "the depositary").

(3) Each Member State having signed this Agreement shall notify the European Commission of its ratification of the Agreement at the time of the deposit of its ratification instrument pursuant to Article 18(3) of Regulation (EU) No 1257/2012.

(4) This Agreement shall be open to accession by any Member State. Instruments of accession shall be deposited with the depositary.

Article 85

Functions of the depositary

(1) The depositary shall draw up certified true copies of this Agreement and shall transmit them to the governments of all signatory or acceding Member States.

(2) The depositary shall notify the governments of the signatory or acceding Member States of:

(a) any signature;

(b) the deposit of any instrument of ratification or accession;

(c) the date of entry into force of this Agreement.

(3) The depositary shall register this Agreement with the Secretariat of the United Nations.

Article 86

Duration of the Agreement

This Agreement shall be of unlimited duration

Article 87

Revision

(1) Either seven years after the entry into force of this Agreement or once 2000 infringement cases have been decided by the Court, whichever is the later point in time, and if necessary at regular intervals thereafter, a broad consultation with the users of the patent system shall be carried out by the Administrative Committee on the functioning, efficiency and cost-effectiveness of the Court and on the trust and confidence of users of the patent system in the quality of the Court's decisions. On the basis of this consultation and an opinion of the Court, the Administrative Committee may decide to revise this Agreement with a view to improving the functioning of the Court.

(2) The Administrative Committee may amend this Agreement to bring it into line with an international treaty relating to patents or Union law.

(3) A decision of the Administrative Committee taken on the basis of paragraphs 1 and 2 shall not take effect if a Contracting Member State declares within twelve months of the date of the decision, on the basis of its relevant internal decision-making procedures, that it does not wish to be bound by the decision. In this case, a Review Conference of the Contracting Member States shall be convened.

Article 88

Languages of the Agreement

(1) This Agreement is drawn up in a single original in the English, French and German languages, each text being equally authentic.

(2) The texts of this Agreement drawn up in official languages of Contracting Member States other than those specified in paragraph 1 shall, if they have been approved by the Administrative Committee, be considered as official texts. In the event of divergences between the various texts, the texts referred to in paragraph 1 shall prevail.

Article 89

entry into force

(1) This Agreement shall enter into force on 1 January 2014 or on the first day of the fourth month after the deposit of the thirteenth instrument of ratification or accession in accordance with Article 84, including the three Member States in which the highest number of European patents had effect in the year preceding the year in which the signature of the Agreement takes place or on the first day of the fourth month after the date of entry

into force of the amendments to Regulation (EU) No 1215/2012 concerning its relationship with this Agreement, whichever is the latest.

(2) Any ratification or accession after the entry into force of this Agreement shall take effect on the first day of the fourth month after the deposit of the instrument of ratification or accession

24 (b) The Statute of the Unified Patent Court is an integral part of the Agreement in accordance with Article 2 (i) UPCA and is annexed thereto in accordance with the first sentence of Article 40 (2) UPCA. It contains in particular provisions on the appointment and legal status of the judges and on the Presidium.

25 5. a) On June 20, 2016, the Federal Government initiated the ratification procedure for the UPCA and submitted to the Bundestag the "Draft Law on the Agreement of February 19, 2013, on a Unified Patent Court" (see Bundestag document 18/8826) and the "Draft Law on the Adaptation of Patent Law Provisions Based on the European Patent Reform" (see Bundestag document 18/8827). Both laws had previously been submitted to the Bundesrat as being particularly urgent under Article 76 (2) sentence 4 of the Basic Law (see Bundestag documents 280/16 and 282/16).

26 b) The draft of the challenged consent act was again submitted to the Bundesrat on 9 December 2016 - as the complainant submits, in response to the indication that due to the transfer of sovereign rights the treatment of the submission as particularly urgent under Article 76 (2) sentence 5 of the Basic Law was not permissible (see Federal Law Gazette, pp. 751/16). The accompanying letter of the Federal Chancellor to the newly submitted draft now contained the note "sovereign rights are transferred here in accordance with Article 23 (1) sentence 2 of the Basic Law".

27 On 10 March 2017, the Bundestag unanimously adopted the draft of the consent act (Bundestag document 18/11137) at its third reading (see Plenary Protocol of the 221st Session of the 18th parliamentary term of 9 March 2017, p. 22262). As the complainant submits, without contradiction and referring to a video recording, some 35 Members were present. According to the relevant video file, up to 38 Members of Parliament, including the incumbent President and the Secretary, can be identified (see the video file available from the Bundestag's media library at http://www.bundestag.de/mediathekoverlay?videoid=7083109od=mod442356 <last accessed on 29 January 2020>). Neither the quorum within the meaning of Sec. 45 (2) of the Rules of

Procedure of the Bundestag (hereinafter: RoP-BT) nor the statement by the President of the Bundestag that the assent law had been adopted by qualified majority (Sec. 48 (3) of the RoP-BT).

28 The Bundesrat unanimously approved the law in its meeting on 31 March 2017 (see Federal Law Gazette 202/17; Minutes of the 956th session of the Bundesrat of 31 March 2017, p. 174).

29 c) The "Draft Law on the Agreement of 19 February 2013 on a Unified Patent Court" (see Bundestag document 18/11137, p. 7) contains the following provisions:

> Article 1
>
> (1) The Agreement on a Unified Patent Court signed in Brussels on 19 February 2013 by the Federal Republic of Germany and the Protocol to the Agreement on a Unified Patent Court signed in Luxembourg on 1 October 2015 concerning provisional application is hereby approved. The Agreement and the Protocol are published below.
>
> (2) The Federal Government is obliged to object to an amendment to the Agreement by a decision of the Administrative Committee under Article 87 (1) of the Agreement in accordance with Article 87 (3) of the Agreement, unless it has previously been authorised by law to approve the amendment.
>
> Article 2
>
> Amendments to the Agreement by decision of the Administrative Committee under Article 87 (2) of the Agreement shall be published by the Federal Ministry of Justice and Consumer Protection in the Federal Law Gazette.
>
> Article 3
>
> (1) This Act shall enter into force on the day following its promulgation.
>
> (2) The date on which the Agreement pursuant to Article 89 (1) thereof and the Protocol pursuant to Article 3 thereof enter into force for the Federal Republic of Germany shall be announced in the Federal Law Gazette.

30 The text of the Agreement and its annexes, a declaration by "Contracting Member States on preparations for the establishment of the Unified Patent Court" and a protocol on provisional application are annexed to the act. The Protocol referred to in Art. 1 (1) UPCA-Consent Act provides for the provisional application of mainly institutional and organisational provisions of the UPCA and the Statute (hereinafter referred to as the UPC Statute), which should enable

the establishment of the Unified Patent Court even before the entry into force of the Agreement and ensure its operational capacity from the date of entry into force (see Bundestag document 18/11137, p. 1, 83 et seq.).

31 6. In March 2013, the contracting member states established a "Preparatory Committee" to prepare for the commencement of the activities of the Unified Patent Court (Bundestag document 18/11137, p. 70 et seq.), which was to prepare the work and decisions necessary for the establishment of the Unified Patent Court in the context of the provisional application of the UPCA (see Tochtermann, in: Benkard, Patent Act, 11th ed. 2015, International Part, para. 187). This included, inter alia, the drafting of the Rules of Procedure, the Rules of Registry, the Rules of Arbitration and Mediation, the Rules of Procedure of the Committees, rules of representation for patent attorneys, a staff statute as well as invitations to tender for the filling of the posts of judges and the coordination of the establishment of the chambers in the contracting member states. This work has been completed.

32 The "Preparatory Committee" prepared a draft for the future Rules of Procedure, which has been available in a "final" (18th) version since 15 July 2015, but which has been amended several times, most recently on 15 March 2017 (see draft Rules of Procedure of 15 March 2017, https://www.unified-patent-court.org/documents <last accessed on 29 January 2020>). It is to be decided by the Administrative Committee already during the provisional application of the UPCA, and the bodies responsible for the selection of judges should also be appointed so that the Unified Patent Court will be operational as of the date of entry into force of the Agreement (see Bundestag document 18/11137, p. 94 et seq.). The Preparatory Committee has also prepared drafts for decisions of the Administrative Committee with regard to court fees and reimbursable costs (see draft of 25 February 2016, https://www.unified-patent-court.org/sites/default/files/agreed_and_final_r370_subject_to_legal_scrubbing_to_secretariat.pdf <last accessed on 29 January 2020>) and with regard to the maximum amounts of reimbursement of costs (see draft of 16 June 2016, https://www.unified-patent-court.org/sites/default/files/recoverable_costs_2016.06.pdf <last accessed on 29 January 2020>).

33 7. On 29 June 2016, the contracting member states signed a "Protocol on the Privileges and Immunities of the Unified Patent Court" (see the notification at https://www.unified-patent-court.org/news/protocol-privileges-and-immunities), which is intended to concretise the

provision currently contained in Art. 8 of the EPC Statute (see Bundestag document 18/11238, p. 58, 82 et seq.).

34 The Bundestag passed the consent act to these Minutes on 27 April 2017 (see Plenary Protocol of the 231st Session of the 18th parliamentary term of 27 April 2017, pp. 23229 et seq.).

II.

35 In his constitutional complaint of 31 March 2017, the complainant argues the violation of his right, which is equivalent to a fundamental right, under Article 38 (1) sentence 1 in conjunction with Article 20 (1) and 20 (2) in conjunction with Article 79 (3) of the Basic Law by the UPCA-Consent Act. In addition, he considers the UPCA to be contrary to Union law and suggests obtaining a preliminary ruling from the Court of Justice under Article 267 TFEU.

36 1. The constitutional complaint was admissible.

37 a) The constitutional complaint was directed against the Act on the Agreement of 19 February 2013 on a Unified Patent Court and is admissible; the legislative procedure for the approval act is concluded except for the signature and pronouncement by the Federal President.

38 (b) The complainant also had the right to complain. Article 38 (1) sentence 1, Article 20 (1) and 20 (2) in conjunction with Article 79 (3) of the Basic Law established a right of democratic self-determination for the citizen, which allowed him or her to defend himself or herself against a substantial reduction of the Bundestag's power to shape policy and against sufficiently relevant transgressions of competences by organs of the European Union. International agreements that would provide for a transfer of sovereign powers were subject to substantive review by the Federal Constitutional Court, with the limits for the transfer of sovereign rights being marked by the constitutional identity of the Basic Law (Article 23 (1) sentence 3 in conjunction with Article 79 (3) of the Basic Law) and by the integration programme laid down in the UPCA-Consent Act (Article 23 (1) sentence 2 of the Basic Law). The Consent Act could therefore only issue a legal application order for supranational law in accordance with the Basic Law. This concerned the protection of the core human dignity of fundamental rights as well as the principles laid down in Article 20 of the Basic Law. The principle of the rule of law with its core elements, such as the guarantee of effective legal protection by independent courts, the granting of the right to be heard by a court of law or the binding by law of administration and

jurisdiction, was part of this constitutional identity. In particular, the citizen was entitled to the transfer of sovereign rights only in the forms provided for by the Basic Law.

39 The constitutional requirements for the transfer of sovereignty corresponded to a claim of the citizen vis-à-vis the state authorities to preserve and protect the integrity of the state authority and to prevent the impairment of the constitutional identity or the core of the constitution, which is resistant to amendment, by a transfer of sovereignty. In this respect, the transfer of sovereign rights to the European Union or other supranational institutions affected the right under Article 38 (1) sentence 1, Article 20 (1) and 20 (2) in conjunction with Article 79 (3) of the Basic Law.

40 As a result of their responsibility for integration, the constitutional bodies were obliged to ensure that the requirements of Article 23 of the Basic Law were observed when sovereign rights are transferred.

41 (c) This case-law should also apply to the UPCA, as the Federal Government also considered that the UPCA was a matter for the European Union. Admittedly, the UPCA was not a treaty within the meaning of Article 48 TEU and the Unified Patent Court was formally not a body of the European Union, but a supranational body with its own legal personality (see Article 4 (1) UPCA). However, it was closely linked to the European Union. In this respect, the Federal Constitutional Court had already decided in the context of the information duties under Article 23 (2) sentence 1 of the Basic Law that the affairs of the European Union also included international treaties that were in a supplementary or particularly close relationship to Union law. Such a close relationship also existed here: The Agreement had been deliberately negotiated within the framework of the European Union and as part of the "legislative package" on European patent reform, the circle of eligible states was limited to Member States of the European Union and the Unified Patent Court was subject to Union law.

42 2. The constitutional complaint was also well-founded. The UPCA violated the constitutional identity of the Basic Law, since the requirement of a qualified majority pursuant to Article 23 (1) sentence 3 in conjunction with Article 79 (2) of the Basic Law had not been complied with during its ratification. Article 23 (1) sentence 3 of the Basic Law required, in the case of a transfer of sovereign rights in the context of the European Union, compliance with the procedural requirement of a two-thirds majority laid down there, whereas Article 38 (1) sentence 1 of the Basic Law also gave the individual citizen a right to compliance with these procedural

provisions in order to ensure democratic influence. Respecting these requirements was the subject of the responsibility for integration.

43 (a) The transfer of jurisdiction was a transfer of sovereign rights. This was constitutionally relevant because a contractual basis for the transfer of jurisdictional sovereignty was not evident in this respect; in substantive terms, therefore, it was a constitutional amendment that had not been adopted by the Bundestag with the required majority, as shown by the recording of the proceedings.

44 b) The constitutional identity of the Basic Law was also violated due to the inadequate legal status of judges. There was no legal basis for their selection and appointment, nor for the authorisation to intervene in fundamental rights by judicial activity. The selection and appointment procedure was inadequate, since a close relationship with the patent practitioners represented on the Advisory Committee could result. The Consultative Committee had drawn up the list of candidates, although it was not excluded that members of the Committee or their law firms might appear before the judges they had selected as lawyers and patent attorneys. The independence of the judges was also jeopardised by the short term of office of only six years and the possibility of reappointment, as well as the absence of legal protection against interference with their position. The complainant considers his remarks to be confirmed by the decision of the Second Senate of 22 March 2018 on the appointment of a temporary judge (see FCC, BVerfGE 148, 69 et seq.).

45 c) The first sentence of Article 38 (1) in conjunction with Article 20 (1) and (2) in conjunction with Article 79 (3) of the Basic Law would also be violated by the fact that the Agreement permitted encroachments on fundamental rights without a sufficiently specific basis for competence. Thus, the Rules of Procedure were adopted by the Administrative Committee, whereas Article 41 UPCA, as the relevant legal basis, did not provide for parliamentary participation and did not contain an explicit authorisation to intervene in fundamental rights by the judges of the Unified Patent Court. In any case, Article 41 (2) UPCA was too vague. In this respect, it was a blanket authorisation that was inadmissible under the case-law of the Federal Constitutional Court. Since the provision also lacked the necessary transformation into domestic law, the principle was also affected by the reservation of the law (Article 20 (3) of the Basic Law). The same applied to the insufficient regulation of the maximum reimbursement amounts

for representation costs (Article 69 (1) UPCA). The regulation was arbitrary, not justified and its extent was not recognisable for the parties involved.

46 The complainant was also presently, directly and personally affected by the UPCA-Consent Act. The fact that he was personally affected resulted from his capacity as the holder of a right that was equivalent to a fundamental right under Article 38 (1) sentence 1, Article 20 (1) and 20 (2) in conjunction with Article 79 (3) of the Basic Law. It was already readily foreseeable that the above-mentioned legal affectedness would occur upon conclusion of the ratification proceedings. A further implementation or enforcement act was not required for this.

47 3. In a further submission of 31 March 2017, the complainant filed an application for a temporary injunction pursuant to Sec. 32 of the Rules of Procedure of the Federal Constitutional Court (BVerfGG, hereinafter: RoP-FCC) to order the Federal President to refrain from signing and promulgating the UPCA-Consent Act until the Federal Constitutional Court has decided on the merits of the case and not to ratify the UPCA.

48 4. With regard to the question of the UPCA's conformity with Union law, the complainant also suggests that a request for a preliminary ruling be made to the CJEU. The UPCA infringed Union law and thus at the same time violated the constitutional identity of the Basic Law. Since the principle of loyal cooperation prohibited the Member States from ratifying agreements that are contrary to Union law, transfers of sovereignty were also only permissible within the framework of agreements that are in conformity with Union law. The fact that, according to the case-law of the Federal Constitutional Court, no constitutional requirements for national laws were derived from Union law did not contradict this, because the cases that had been decided were concerned with the question of the primacy of application or validity of Union law, but here the question had to be answered as to whether the transfer of sovereign rights by agreements that were contrary to Union law could be permitted. This was contrary to the case-law of the CJEU and the principle that the Basic Law is compatible with European law.

49 According to the case-law of the CJEU, the conferral of jurisdiction on an international court or tribunal presupposed that it was limited to the application of the Agreement, did not replace national courts and tribunals and interacted with the CJEU. The complainant submits that the Unified Patent Court did not fulfil those conditions and that the UPCA therefore affected the autonomy of Union law and the system of remedies.

50 The UPCA also violated Article 3 (2) TFEU, the principle of the rule of law (Article 2, first sentence, TEU) and the right to an effective defence (Article 47 (2) and Article 48 (2) of the Charter).

III.

51 The constitutional complaint and the application for a temporary injunction have been served on the Federal Government, the German Bundestag, the Bundesrat and all state governments, with an opportunity to comment. In addition, the Federal Bar Association, the German Bar Association, the President of the European Patent Office, the German Association for the Protection of Industrial Property and Copyright (GRUR e.V.), the European Patent Lawyers Association, the European Patent Litigators Association and the Federation of German Industries have been given the opportunity to comment pursuant to Sec. 27a of the RoP-FCC. The Bundesrat, the state governments and the Federation of German Industry did not make use of the opportunity to comment.

52 1. The Federal Government submitted its comments by letter dated 15 December 2017. It considers the constitutional complaint to be inadmissible (a), but in any event unfounded (b).

53 (a) The complainant had not sufficiently substantiated that an infringement of fundamental rights appeared possible. The guaranteed contents of Article 38 of the Basic Law could not be violated by the Agreement. These included protection against an excessively extensive transfer of sovereign rights with regard to democratic legitimation, the safeguarding of constitutional contents of the Basic Law from the perspective of identity control, the assumption of obligations with budgetary effect that threaten democracy, and protection against a handling of sovereign rights that had already been transferred in excess of competences ("ultra vires"). In this respect, a distinction had to be made between the standards to be applied before and after a transfer of sovereign rights. Prior to the transfer, an assessment could only relate to whether the Bundestag was left with tasks of sufficient weight or whether the transfer of sovereignty affected constitutional content that could not be amended; the latter was only relevant with regard to Article 38 of the Basic Law if the transfer of sovereignty had a democratic connection.

54 An impairment of the above-mentioned guaranteed contents was out of the question from any conceivable point of view. There was no threat of the democratic substance of the Bundestag

being emptied, as the areas mentioned in the Lisbon judgment were not affected; there was no concern that the institutions to be established by the Agreement would become independent, as it was ensured that the Administrative Committee would not amend the Agreement without the approval of the Bundestag and that the standard-setting powers of the Administrative Committee with regard to the statutes and rules of procedure were defined and limited in terms of subject matter.

55 Furthermore, the constitutional identity would not infringed by the Union law incompatibility of the Agreement alleged by the complainant, by procedural errors in the legislative procedure or by insufficient guarantees of judicial impartiality and independence within the scope of the UPCA. Irrespective of the fact that the allegation that the Unified Patent Court was incompatible with Union law was not true, the complainant disregarded the assertion that this violated the constitutional identity of the Basic Law, that the safeguarding of Union law itself was not part of the constitutional identity and that violations of Union law could not be directly challenged in a constitutional complaint.

56 Nor did non-compliance with the qualified majority requirement constitute a violation of the constitutional identity of the Basic Law, as this was aimed at identifying the non-transferable. A transfer of sovereign rights that was permissible in principle could not violate the constitutional identity of the Basic Law. Nor could anything else be inferred from the case-law of the Federal Constitutional Court. As a rule of objective constitutional law, Article 79 (2) of the Basic Law did not confer subjective rights, since the substance of the right to vote was not affected by the majorities of a resolution passed in the Bundestag. Insofar as a violation of the principle of the sovereignty of the people, which is part of constitutional identity, was asserted, it had to be taken into account that the individual's claim to democratic self-determination is strictly limited to the human dignity core of the principle of democracy, a general claim to a general constitutional review of legislative decisions was ruled out, and only structural changes in the structure of state organisation law could be reviewed.

57 To the extent that the constitutional complaint, finally, as part of the principle of the rule of law, the judicial impartiality and independence as well as the cost and procedural regulations of the Unified Patent Court were part of the constitutional identity, it should also not be followed. Here too, complainant did not demonstrate the necessary specific reference to the principle of democracy. If the bridge that the constitutional complaint had built beyond Article 38 of the Basic

Law with the help of the principle of the rule of law to other constitutional contents were sufficient for the right to complain, agreements under international law could be submitted for review by anyone without being affected by fundamental rights themselves. In substance, this would then be a review of the law.

58 b) The complainant's constitutional objections were also proved to be unfounded. The UPCA-Consent Act was not a case of application of Article 23 (1) sentence 3 of the Basic Law. It was true that sovereign rights were transferred with it; because of the obvious proximity to Union law, Article 23 of the Basic Law also had to be applied with priority. However, Article 23 (1) sentence 3 of the Basic Law required a qualified transfer of sovereign rights with structural constitutional relevance. According to the reasons given for Article 23 of the Basic Law, a decisive aspect was in particular whether the matter concerned a transaction that was comparable in weight to the establishment of the European Union and in this respect concerned the basis of primary law. The transaction must be a material constitutional amendment that is not bound by any further act of consent. This was not the case with the UPCA-Consent Act. It had no constitutional quality, since although jurisdictional and legislative powers were transferred, jurisdiction was a selective, thematically narrowly defined transfer of sovereign rights, the regulatory powers of the administrative committee were narrowly defined and therefore did not achieve a significance comparable to that of an amendment of primary law, neither in the breadth nor in the quality of the transferred powers. Nor did anything else follow from the allocation of judicial power to the judges in Article 92 of the Basic Law. This only regulated the domestic judicial function, but not the establishment of courts in an international context. This was a result of the openness of the Basic Law to international cooperation and in particular of Article 24 (3) of the Basic Law – which even expressly provided for Germany's accession to a general international arbitration body. No participation by Germany in existing courts under international law had so far given rise to the idea of a constitutional break.

59 Moreover, the rules on the selection and legal status of judges did not constitute a breach of the principle of the rule of law. They followed established and tested procedures that have long existed in other European courts. A threat to the independence of the judges through the participation of individual lawyers (probably meant: members of the legal advisory professions) in the Advisory Committee did not appear comprehensible in view of the structure of the procedure. The examination of professional competence followed the approach tried and tested at the European Union Civil Service Tribunal. The actual selection of candidates was left to the

discretion of the Administrative Committee. The independence of the judges was guaranteed, and a lifetime appointment was not necessary.

60 The requirements for a submission under Article 267 TFEU were not met. Since the infringements of Union law alleged by the complainant were constitutionally irrelevant, the questions of interpretation were not relevant to the decision and a submission was therefore inadmissible. Moreover, the questions had been sufficiently clarified and there was no apparent infringement of Union law.

61 2. In a written statement dated 22 January 2018, the German Bundestag commented on the proceedings. It also considers the constitutional complaint to be inadmissible (a) for lack of a right to complain and sufficiently substantiated grounds – and in any event unfounded (b).

62 (a) There was already a lack of a substantiated statement of the right to complain. The conclusion of an international treaty that is – allegedly – contrary to Union law could not constitute a violation of Article 38 (1) sentence 1 of the Basic Law, since Union law and domestic constitutional law constituted different standards; something else did not result from the principle of openness to Union law either. Even if one were to see this differently, no infringement of the constitutional identity of the Basic Law was associated with it. The claim to the validity and primacy of Union law could not on the one hand be part of constitutional identity and at the same time mark the outermost limits of Union law in the German constitutional area. This would give rise to a situation of conflict within the identity, by which Article 79 (3) of the Basic Law would lose its absolute nature and the complaints based on its violation would lose their factual limitation. In any event, such a complaint would no longer have anything to do with the right to democracy under Article 38 (1) sentence 1 of the Basic Law. A corresponding connection was not plausibly asserted, since there was no justification for a reference to the breaking of the legitimation connection. The case groups developed in the case-law concerning the "right to democracy" were not relevant; a further development in the direction of a right to general control of legality would dissolve the boundaries between democratic legitimation and legality and make any violation of the right under Article 38 (1) of the Basic Law objectionable. However, the Senate had always emphasised that the "fundamental right to democracy" was precisely not about a general control of the legality of political processes. In this respect, there was no complete correspondence between the limits of integration under Article 79 (3) of the Basic Law and the area in which a complaint may be lodged with reference to Article 38 (1)

sentence 1 of the Basic Law. An extension of the right to democracy to a "fundamental right to preserve identity" was far-fetched, since then no connection could be established with the principle of democracy. Nor did this connection result from the Senate's case-law; a corresponding development of the law would moreover shift the balance of powers between the Federal Constitutional Court and the other constitutional bodies. Moreover, there was no need for such an extension of the possibilities of giving notice of defects, since a possible gap in protection could be closed by Article 2 (1) of the Basic Law.

63 The complaint that the quorum required for the UPCA-Consent Act was violated was also inadmissible. It was true that Article 23 (1) sentence 2 of the Basic Law applied to the present case, since sovereign rights were transferred to the Unified Patent Court and the UPCA is in a particularly close relationship with the European Union. However, Article 23 (1) sentence 3 of the Basic Law was not applicable to the present constellation of the transfer of sovereign rights to another supranational institution. The history of its development, which is based solely on extensions of the integration programme without formal treaty changes - in particular evolutionary clauses - spoke in favour of this.

64 The application of Article 23 (1) sentence 2 of the Basic Law to international associations such as the present one was suggested by an understanding of Article 23 (2) of the Basic Law according to which a project that is separate from the European Union in terms of international law and institutions could nevertheless be a matter for the European Union within the meaning of Article 23 (2) of the Basic Law. This understanding of paragraph 2 was based on a special need of the legislative bodies for information and participation, was based on the open concept of the affairs of the European Union and was consistent with historical and systematic arguments. The fact that it also suggested the application of Article 23 (1) sentence 2 of the Basic Law as the basis for consent was based on the idea that there had to be a parallelism between the informed participation of the Bundestag in the run-up to the conclusion of the treaty and the material basis of the law on consent, that was, a uniform legal framework for the Bundestag to exercise its responsibility for integration. The same applied to the participation of the Bundesrat. In contrast, Article 23 (1) sentence 3 of the Basic Law, compared with Article 24 (1) of the Basic Law, did not lead to any additional material requirements, but it did lead to a considerable deviation from the decision of the constitutional legislature to be able to transfer sovereign rights by simple law. This could not be circumvented and the transfer of sovereign rights could not be made subject to the requirement of constitution-altering majorities merely because

there was a specific proximity to Union law. In such cases, no additional sovereign rights of the European Union would be established and its legal basis would not be changed. This was particularly clear from the fact that Article 262 TFEU already provided for the possibility of a transfer of sovereignty to the European Union, but that it was decided instead to establish a patent court on the basis of international law, which will be outside the institutional framework of the European Union. Against this background, Article 23 (1) sentence 3 of the Basic Law, as the more specific provision in relation to Article 24 (1) of the Basic Law, could not apply to international associations in a close relationship with the European Union. In its decision on Article 23 (2) of the Basic Law, the Federal Constitutional Court had also rejected such an automatism (with reference to BVerfGE 131, 152 <199>).

65 In any event, the complainant's "right to democracy" had not been violated by the failure to comply with constitutional majority requirements. Article 38 (1) sentence 1 of the Basic Law could not be impaired by the fact that the German Bundestag took a decision within its competence, as was the case with the UPCA itself. Admittedly, the question of the required majority also had legitimatory content; however, this related exclusively to the representative, internally effective legitimation, not to the law's being bound back to citizens. This was in line with the case-law of the Federal Constitutional Court, which not only ruled out a general review of legality on the basis of Article 38 (1) of the Basic Law, but also stated that in this respect it could not be argued that a particular decision had to be taken by a majority that would change the constitution. In the judgment on the European Stability Mechanism - ESM (with reference to BVerfGE 135, 317 <387 et seq.), the Senate had stated that Article 79 (2) of the Basic Law did not generally - also in conjunction with Article 23 (1) sentence 3 of the Basic Law - confer any subjective rights, since the substance of the right to vote did not depend on the majority with which the Bundestag made its decisions. The complainant had inadmissibly removed from its context the claim formulated in the judgment on the OMT programme that the forms of Article 23 (1) sentence 2 and sentence 3 of the Basic Law should be complied with. In this respect, the Senate had had in mind the transfer of sovereign rights in the area protected by Article 79 (3) of the Basic Law and the opening of a competence of the European Union. Moreover, the grounds of the constitutional complaint fell short of the statutory requirements for the statement of reasons.

66 The complaint that the right to vote was infringed by the arrangement of the legal relationships and the appointment of the judges of the Unified Patent Court was inadmissible. It was ruled

out from the outset that the "right to democracy" was affected by deficiencies of the Unified Patent Court in the rule of law. In this respect, there was also no sufficiently substantiated argument both for a specific reference to the legitimacy of the legal status of the judges and for a violation of Article 79 (3) of the Basic Law. There was a lack of any discussion of the question as to what standards under the rule of law were to be set when sovereign rights were transferred to an international court. Because of the different legal traditions of the Member States, it could in any case not be expected that all the constitutional requirements that the Basic Law placed on the judiciary also had to be observed at the supranational level. In this respect, the constitutional complaint lacked the necessary differentiation between the usual constitutional requirements and the "core contents". It was true that the complaint, that there is no legal basis for the selection and appointment of judges, had a democratic content. However, the complainant did not explain what level of legitimacy the sovereign power of a supranational organisation had to meet, nor did he explain how democratic legitimacy could generally be conveyed in such an organisation. However, this would have been necessary in view of the Maastricht and Lisbon rulings of the Federal Constitutional Court. That the legitimation of the UPCA-Consent Act was not sufficient in this respect was based by the complainant solely on the requirements of certainty under Article 80 (1) of the Basic Law, which did not, however, apply to treaties under international law.

67 Nor was the right under Article 38 (1) sentence 1 of the Basic Law, which is equivalent to a fundamental right, affected with regard to the powers of the Administrative Committee. Insofar as the complainant asserted a violation of the prohibition of arbitrariness, there was a lack of a substantiated statement.

68 b) In any event, the constitutional complaint was unfounded. With his constitutional complaint, the complainant sought to achieve access to the Court of Justice in the matter, which was not provided for in the applicable law.

69 aa) The assertion that a majority was required to change the constitution did not hold water because the transfer of sovereign rights in question was not a material constitutional amendment. It was incorrect that every transfer of sovereign rights to the European Union required a majority to amend the constitution; otherwise, the requirement of a two-thirds majority could have been regulated equally in Article 23 (1) sentence 2 of the Basic Law. The Basic Law had permitted the transfer of sovereign rights by simple statute in Article 24 (1) of the Basic Law

from the outset. The history of the origin of Article 23 (1) sentence 2 and sentence 3 of the Basic Law did not provide a clear picture in this respect. However, it demonstrated that an automatic mechanism had been rejected. Nor did constitutional practice assume such a junket. It was correct to focus on whether there was a change in the content of the Basic Law - directly or indirectly. A treaty amendment or comparable provision had to be compared as to whether it deviated from substantive provisions of the Basic Law, as was the case, for example, with the communitarisation of the right of asylum according to principles that deviated from Article 16a of the Basic Law, the integration of the Bundesbank into the European System of Central Banks or the extension of the German fundamental rights to citizens of the Union of other Member States.

70 After all, the Bundestag, Bundesrat and Federal Government had assumed a simple majority requirement; this too had a certain normative significance.

71 According to these standards, the UPCA-Consent Act, even if Article 23 (1) sentence 3 of the Basic Law was applicable, did not have to be decided by a majority vote that changed the constitution. The changes in the constitutional framework brought about by the UPCA were concomitants of any transfer of sovereign rights, which did not constitute a substantive amendment of the Basic Law. Nor did such a change result from the transfer of jurisdiction (with reference to Article 24 (3) of the Basic Law). According to the case-law of the Federal Constitutional Court, the Basic Law did not fundamentally preclude such a transfer of sovereignty, as has already occurred in other cases. The Federal Constitutional Court had approved the Moselle Shipping Courts and the Moselle Commission's Appeals Committee, as well as the International Criminal Court or the Chamber for Seabed Disputes of the International Tribunal for the Law of the Sea. In the EUROCONTROL decision, the Federal Constitutional Court had even approved the transfer to Belgian courts.

72 bb) To the extent that the constitutional complaint alleged a violation of minimum standards of the rule of law, it was also unfounded. There was no violation of the core content of the principle of the rule of law, which was covered by Article 79.3 of the Basic Law. Irrespective of the extent of the protection afforded by Article 79.3 of the Basic Law, the partial guarantees under the rule of law were at most in their core content and not comprehensively protected. For this reason, only substantial reductions that impair the legal position of judges in such a way that, as a whole, it is no longer possible to speak of a justice system based on the rule of law could

lead to a violation of Article 79.3 of the Basic Law. However, there could be no question of an encroachment of such weight. In any event, the fact that members of the Advisory Committee could appear before the Unified Patent Court did not impair the impartiality of the judges and was not sufficient to affect the constitutional identity of the Basic Law. Moreover, the Committee was not ultimately responsible for the selection of the judges and it was not apparent to whom they owed their appointment. Moreover, in the national context, there were quite comparable constellations (with reference to Sec. 7 of the Act on the Election of Judges).

73 Art. 17 UPCA guaranteed the independence of the judges in the sense of freedom from instructions and avoidance of conflicts of interest. Their appointment was based on a call for tenders and they enjoyed immunity. The possibility of reappointment was common in an international context, for example at the CJEU, the International Court of Justice, the International Tribunal for the Law of the Sea and the International Criminal Tribunal for the former Yugoslavia. The same applied to the procedure for impeachment, which was sufficiently restricted by concrete conditions of the facts, the requirement of a hearing and procedural requirements.

74 cc) The UPCA also did not affect the democratic principle in its core, which was protected by Article 79 (3) of the Basic Law. Democratic legitimacy was conveyed to the judges by parliamentary approval of the UPCA's Basic Law and by the indirect feedback of the German representatives acting in the institutional structure of the UPCA.

75 3. The Federal Chamber of Lawyers considered the constitutional complaint to be inadmissible for lack of authority to appeal. Article 38 (1) of the Basic Law merely protected against a loss of substance of the constitutionally established power of government by a transfer of tasks and powers of the Bundestag that led to a deprivation of the right to vote. The complainant had not substantiated such a depletion.

76 The standard of review was Article 24 (1) of the Basic Law. That followed from the history of the origin of the UPCA and from its purpose within the framework of the European Patent Organisation. The UPCA also satisfied the requirements of Article 23 of the Basic Law because it was not a "comparable regulation" within the meaning of Article 23 (1) sentence 3 of the Basic Law. It was merely a very limited transfer of judicial power in a very limited field of law.

77 The transfer of exclusive jurisdiction for certain patent disputes did not cause a structural shift in the constitutionally guaranteed constitutional structure. The replacement of the national courts would only affect the previous "classical" European patents. In addition, a hitherto non-existent control of the European Patent Office was made possible, with an opt-out option for patent holders. The independence of the judges of the Unified Patent Court was guaranteed to the necessary extent, the planned appointment procedure is appropriate, potential conflicts of interest were prevented, and participation of the Bundestag in the appointment of judges was constitutionally not required. The regulations on the term of office and removal from office were not objectionable; a possible gap in legal protection could be closed by analogous application of Article 13 EPC, which established the jurisdiction of the Administrative Court of the International Labour Organisation (ILO) for disputes between employees of the European Patent Office and the European Patent Organisation. The EPC statutes met the requirements for the determination of the integration programme also with regard to the powers of the Administrative Council to amend them. The contractual provisions for the Rules of Procedure of the Unified Patent Court as well as the regulations on the bearing of costs were sufficiently defined. Finally, the compatibility of the UPCA with Union law was irrelevant for the constitutionality of the UPCA-Consent Act.

78 4. The German Bar Association also considered the constitutional complaint to be inadmissible, at any rate unfounded. It was true that the right equivalent to a fundamental right under Article 38 (1) sentence 1 in conjunction with Article 20 (1) to 20 (3) of the Basic Law enabled a constitutional identity check against the standard of Article 79 (3) of the Basic Law, whereby the transfer of not only legislative but also other sovereign rights could be measured against the core contents guaranteed there, in particular against the principle of the rule of law. However, nothing was apparent of any violation of these core contents; in particular, it was not necessary for the UPCA to be in conformity with constitutional law and Union law in every respect.

79 The UPCA was an international treaty based on Art. 149a EPC. The regulations creating a European patent with unitary effect defined themselves as an agreement within the meaning of Art. 142 EPC, which gave the unitary effect a dual legal character at international and European level. Even if the CJEU had approved this construction, this did not alter the fact that the international law character of the agreement under Article 142 EPC remained intact. As an

international treaty, the UPCA was not close to Union law, so that there was no special relationship of proximity within the meaning of the case-law of the Federal Constitutional Court.

80 An infringement of the UPCA-Consent Act against Article 23 (1) sentence 3 in conjunction with Article 79 (2) of the Basic Law could not be challenged in a constitutional complaint. In this respect, it was merely a sentence of objective constitutional law. Nor did the UPCA-Consent Act require a majority to amend the constitution because it lacked the necessary supplementary or other proximity to Union law. The fact that the preparatory work had been carried out in parallel with the regulations on the unitary patent and that the entry into force of the UPCA was a prerequisite for the entry into force of those regulations was not sufficient for that purpose, nor was the restriction of the participating States to Member States of the European Union. This was merely a reaction to the Opinion 1/09 of the CJEU, whereas the obligation of the Unified Patent Court to refer cases to the Court under Article 267 TFEU already resulted from general Union law. It did not create a special relationship of proximity, nor did the application of the Protocol on Privileges and Immunities on the premises of the European Union.

81 However, the constitutional complaint was also otherwise unsuccessful. Admittedly, identity control encompassed all three powers and was relevant if the principle of democracy and/or the rule of law was abandoned in principle. However, it was limited to the core area of Article 79 (3) of the Basic Law. It was not evident that this was affected, since any possible constitutional and democratic shortcomings of the procedure for appointing and dismissing the judges of the Unified Patent Court were in any case not so serious that they would be associated with a fundamental abandonment of the principle of democracy or the rule of law. The independence of the judges was unconditionally guaranteed under Art. 17 UPCA; the limitation of the term of office to six years with the possibility of reappointment was common practice in the European and international field. The UPCA also contained sufficient provisions to ensure independence, since the Advisory Committee - according to the interpretation of the German Bar Association - only participated in the initial appointment of judges (reference to Article 16 UPCA). In the case of a reappointment, the majority requirement ensured that no decisive influence of individuals on the list of nominees would arise, the candidates could not see who had voted in their favour and the final decision would be reserved for the Administrative Committee. By setting a minimum number of candidates to be nominated, a possibility of selection was ensured. Although the lack of an appeal against the dismissal of a judge was questionable,

this did not yet constitute a violation of Article 38 (1) in conjunction with Article 20 (1) to 20 (3) of the Basic Law.

82 Whether the UPCA is also compatible with Union law was constitutionally irrelevant. Moreover, the provisions of the UPCA took account of earlier objections of the CJEU to the participation of third states, to the lack of claims for damages under Union law and infringement proceedings, and to the original lack of a possibility of submission under Article 267 TFEU.

83 5. The European Patent Office issued a statement of opinion by letter dated 18 December 2017. It considers the constitutional complaint to be inadmissible. Article 79 (2) of the Basic Law, in conjunction with Article 23 (1) sentence 3 of the Basic Law, also constituted a rule of objective constitutional law and did not give third parties the right to complain. The complainant had not shown that he was directly and currently affected by the provisions of the UPCA.

84 In any event, the constitutional complaint was unfounded. Article 23 of the Basic Law was not applicable to the UPCA and the requirements for a qualified majority were not met. TEU and TFEU did not provide for the establishment of a Unified Patent Court by intergovernmental agreement of the Member States. Rather, it was an alternative to the transfer to specialised courts provided for under primary law. The fact that Art. 262 TFEU does not provide for the transfer of bundle patents was irrelevant, since Art. 118 TFEU also allowed the bundle patent to be replaced by uniform EU patents.

85 The judicial independence pursuant to Article 97 of the Basic Law and the court organisation prescribed by Article 92 of the Basic Law were not among the principles of the rule of law covered by Article 20 of the Basic Law and could therefore not be asserted as a violation of Article 38 (1) sentence 1 of the Basic Law. Furthermore, there was no requirement of structural congruence.

86 The EPO also submitted that there was no threat of the Bundestag's powers being undermined, as the patent disputes concerned only accounted for about 0.045% of all civil proceedings in Germany. Moreover, the Federal Republic of Germany was represented in the Administrative Committee by ministerial officials bound by instructions.

87 6. The German Association for the Protection of Industrial Property and Copyright (GRUR e.V.) submitted its comments in a letter dated 21/27 December 2017, pointing out that the UPCA

was an essential step on the way to international harmonization of patent law. It considerably extended the legal protection in connection with European patents.

88 7. The European Patent Lawyers Association, by letter dated 13 November 2017, has submitted a statement of opinion which is limited to observations supplementing the facts as regards the election and re-election of judges, the Rules of Procedure, the reimbursement of costs and the language regime.

89 8. The European Patent Litigators Association stated in its letter of 22 December 2017 that the question whether the Unified Patent Court as a common court of several member states is compatible with the case-law of the CJEU did not affect the rights of the complainant under Article 38 (1) sentence 1, of the Basic Law. According to the case-law of the CJEU, any shortcomings in the legal protection against decisions of the European Patent Office were irrelevant under Union law and had no connection with the complainant's fundamental rights. Basic constitutional requirements with regard to the independence of judges were not violated. Legal protection of the judges against dismissal was not excluded and could be opened by analogy with Article 13 (1) EPC. Art. 41 UPCA was a sufficient basis for the adoption of the Rules of Procedure, since the Convention already contained detailed procedural rules in Art. 42 et seq. and the Rules of Procedure only regulated the details. It did not follow from the Basic Law that a corresponding integration programme had to contain more detailed provisions. There was no need to transform the Rules of Procedure into domestic law. The capping of possible procedural costs also had no connection with Article 38 (1) sentence 1 of the Basic Law.

IV.

90 On 3 April 2017, the Federal President stated to the Federal Constitutional Court - in accordance with consistent state practice - that he was prepared neither to sign nor to promulgate the UPCA-Consent Act until the Federal Constitutional Court had reached a decision on the main issue, nor to ratify the UPCA (cf. BVerfGE 123, 267 <304>; BVerfGE 132, 195 et seq., see Schneider, in: Burkiczak/Dollinger/Schorkopf, RoP-FCC, 2015, Sec. 32 para. 268 fn. 478). A decision on the application for a temporary injunction was therefore not required.

B.

91 The constitutional complaint is admissible to the extent that it alleges a violation of the complainant's right under Article 38 (1) sentence 1 in conjunction with Article 20 (1) and 20 (2), Article 79 (3) of the Basic Law by violation of the requirement of a qualified majority for the UPCA-Consent Act under Article 23 (1) sentence 3 in conjunction with Article 79 (2) of the Basic Law (I.). Beyond this, it is inadmissible (II.).

I.

92 Acts of consent to international agreements can be challenged with the constitutional complaint if the agreement contains provisions which directly affect the legal sphere of the individual (1.). The complainant has substantiated a possible violation of Article 38 (1) sentence 1 of the Basic Law by violating the requirement of a qualified majority under Article 23 (1) sentence 3 in conjunction with Article 79 (2) of the Basic Law (2.). In this respect, the other admissibility requirements are also fulfilled (3.).

93 1. a) Acts consenting to international agreements can be challenged with a constitutional complaint if the agreement contains provisions that directly intervene in the legal sphere of the individual (cf. BVerfGE 6, 290 <294 f.>; 40, 141 <156>; 84, 90 <113>; 123, 148 <170>). Even if the consent to an international agreement is as a rule not divisible, because the law of consent in principle forms a unit that cannot be separated from the international agreement, and both constitute a uniform object of attack in this respect (see BVerfGE 286, 386 (388); 294 et seq. BVerfGE 103, 332 <345 et seq.), this does not exclude a limitation of the subject-matter of the proceedings with regard to the provisions of the agreement referred to (cf. BVerfGE 14, 1 <6>; 123, 148 <170, 185>; 142, 234 <245 et seq. marginal no. 10 et seq.>). In this respect, a precise description of the provisions challenged by the constitutional complaint is also necessary in the case of laws consenting to international agreements.

94 b) The law consenting to an international agreement is already a suitable object of a constitutional complaint before it enters into force if the legislative procedure has been completed except for the signature by the Federal President and the promulgation (cf. BVerfGE 1, 396 <411 ff.>; 24, 33 <53 f.>; 112, 363 <367>; 123, 267 <329>; 132, 195 <234 f.). para. 92>; 134, 366 <391 et seq. para. 34>; 142, 123 <177 para. 91>), because otherwise there would be a risk

that Germany could only fulfil its obligations under international law in violation of its constitution. In this way, the constitutional complaint could fail in its purpose of serving the cause of legal peace by clarifying the constitutional situation and avoiding a disintegration of obligations under international and constitutional law (see BVerfGE 24, 33 <53 et seq.) It is therefore in accordance with the requirement of effective (fundamental) legal protection and state practice to enable a preventive examination of future regulations already at this time. The legislative procedure must, however, be completed except for the signature of the treaty law by the Federal President and its promulgation (cf. BVerfGE 1, 396 <411 et seq.>; 24, 33 <53 et seq.>; 112, 363 <367>; 123, 267 <329>). That stage has been reached in the present case.

95 2. The complainant has substantiated a possible violation of Article 38 (1) sentence 1 of the Basic Law by asserting a violation of the Consent Act against the constitutional requirements for an effective transfer of sovereign rights (Article 23 (1) sentence 2 and sentence 3 in conjunction with Article 79 (2) and 79 (3) of the Basic Law).

96 a) Article 38 (1) sentence 1 of the Basic Law protects citizens entitled to vote from a transfer of sovereign rights under Article 23 (1) of the Basic Law, which in violation of Article 79 (3) in conjunction with Article 23 (1) sentence 3 of the Basic Law reveals the essential content of the principle of sovereignty of the people (Article 20 (1) and (2) of the Basic Law). This is examined by the Federal Constitutional Court in the context of identity control (see most recently BVerfG, Judgment of the Second Senate of 30 July 2019 - 2 BvR 1685/14 et al.). Article 38 (1) sentence 1 in conjunction with Article 20 (1) and 20 (2) sentence 1 of the Basic Law also grants the persons entitled to vote a right vis-à-vis the Bundestag, the Bundesrat and the Federal Government to ensure that they, in the exercise of their responsibility for integration, monitor compliance with the integration programme laid down in the Consent Act and, in the case of obvious and structurally significant transgressions of competences by organs, institutions and other bodies of the European Union, actively work to ensure that the limits of the integration programme laid down in the Consent Act are observed and complied with. This is examined by the Federal Constitutional Court within the framework of ultra vires review (see most recently BVerfG, judgment of the Second Senate of 30 July 2019 - 2 BvR 1685/14 et al.).

97 In addition, the protection of the right equivalent to a fundamental right under Article 38 (1) sentence 1 of the Basic Law also extends to compliance with the requirements of Article 23 (1) of the Basic Law for an effective transfer of sovereign rights. The scope of the guarantee of

Article 38 (1) sentence 1 of the Basic Law covers structural changes in the structure of state organisation law, such as may occur in the transfer of sovereign rights to the European Union or other supranational institutions (see BVerfGE 129, 124 <169>; 142, 123 <190 para. 126>). Competences that are transferred to another subject of international law cannot, in contrast to a constitutional amendment, be "retrieved" without further ado. In this respect, the requirement of a two-thirds majority in Article 23 (1) sentence 3 in conjunction with Article 79 (2) of the Basic Law serves to guarantee a special level of legitimacy for decisions that weaken the substance of the right to vote in the Bundestag and possibly permanently withdraw the democratic guarantees of the Basic Law up to the limit protected by constitutional identity. In doing so, the integration legislator appointed to amend the constitution without the direct participation of the people should have to overcome a substantial hurdle (see Hobe, in: Friauf/Höfling, Berlin Commentary on the Basic Law, Art. 23 para. 49 <September 2011>; Wendel, Permeability in European Constitutional Law, 2011, p. 246; Michael, in: Bonn Commentary on the Basi Law, Art. 146 para. 396, 512 <November 2013>). Unlike constitutional amendments, Article 38 (1) sentence 1 of the Basic Law is always affected by the transfer of sovereign rights. Sovereign rights cannot be effectively transferred without observing the constitutional requirements for the transfer of competences, even if this is not accompanied by a constitutional amendment, so that acts linked to such a "transfer" must be regarded as ultra vires acts.

98 Against this background, in order to secure their democratic influence in the process of European integration, citizens have a fundamental right to the transfer of sovereign rights only in the forms provided for by the Basic Law for this purpose in Article 23 (1) sentence 2 and sentence 3, Article 79 (2) of the Basic Law (see BVerfGE 134, 366 <397 para. 53>; 142, 123 <193 para. 134>; 146, 216 <251 para. 50>). In the case of Article 23 (1) sentence 2 of the Basic Law, the absence of a federal law requiring consent can therefore be criticised, and in the case of Article 23 (1) sentence 3 of the Basic Law, the absence of a qualified majority under Article 79 (2) of the Basic Law.

99 This is not contradicted by the fact that in its ruling on the ESM of 18 March 2014, the Senate denied a possible violation of Article 38 (1) sentence 1 of the German Constitution with regard to compliance with a formal requirement in the legislative procedure. The case was different in that the ESM Finance Act did not deal with a non-recoverable transfer of sovereign rights (see BVerfGE 135, 317 <386 para. 125>). To the extent that the Senate also considered the complaint that the Bundestag and Bundesrat must decide on special measures of the ESM, such

as a capital increase with a view to the overall budgetary responsibility of the Bundestag with a two-thirds majority, to be inadmissible because Article 79 (2) of the Basic Law, also in conjunction with Article 23 (1) sentence 2 of the Basic Law, is a rule of objective constitutional law which does not confer any rights on those entitled to vote, the same applies. In this respect too, there is no transfer of sovereign rights. That something else would have applied in the case of an ineffective transfer of sovereign rights is shown by the express reservation for the ultra vires constellations (see BVerfGE 135, 317 <387 et seq.) It would be meaningless if it were not understood as a reservation for the constellation of an ineffective transfer of sovereign rights that is to be decided here, which would consequently entail countless ultra vires acts.

100 b) In his constitutional complaint, the complainant complains that the Consent Act did not comply with the constitutional requirements for a transfer of sovereign rights to the Unified Patent Court, primarily because the UPCA-Consent Act was not adopted with the required two-thirds majority, contrary to Article 23 (1) sentence 3 in conjunction with Article 79 (2) of the Basic Law. He thus sufficiently substantiated a possible violation of Article 38 (1) sentence 1 of the Basic Law. He discusses in detail and with reference to the literature the applicability of Article 23 (1) of the Basic Law to the challenged consent law and the constituent elements of Article 23 (1) sentence 3 of the Basic Law and, with reference to the case-law of the Senate, establishes a connection with the protection of the right to vote by the qualified majority requirement. In addition, he conclusively asserts that the majority requirements of Article 79 (2) in conjunction with Article 23 (1) sentence 3 of the Basic Law have not been complied with in the present case.

101 The fact that the complainant did not deal with all conceivable variants of interpretation of Article 23 (1) sentence 3 of the Basic Law does not call into question the sufficient substantiation. Since there is no directly relevant case-law of the Senate in this respect (see BVerfGE 129, 124 <171 et seq.) and the opinions expressed in the literature on the relationship between Article 23 (1) sentence 2 and sentence 3 of the Basic Law are disintegrating into ramifications that are scarcely comprehensible any more (on this, see Wollenschläger, NVwZ 2012, p. 731 <715>), the prerequisite of substantiation is fulfilled if the complainant in view of sentence 3 agrees to the majority opinion in the literature, which confirms a substantive constitutional relevance for any transfer of sovereign rights with permeable effect (for example Rathke, in: v. Arnauld/Hufeld, SK-Lisbon, 2nd ed. 2018, § 7 para. 43 et seq.; Hillgruber, in: Schmidt-Bleibtreu/Hofmann/Henneke, Basic Law, 14th ed. 2018, Article 23 para. 35). It is also

sufficiently clear from his remarks that the complainant sees in the violation of the jurisdictional assignment in Article 92 of the Basic Law a considerable and structurally significant shift in the constitutional structure. Irrespective of the persuasive power of these remarks, he thus in any event also takes account of the view held in the literature that the application of Article 23.1 sentence 3 of the Basic Law depends on an evaluative consideration of the effects on the constitutional order (see for example Wollenschläger, in: Dreier, Basic Law, Vol. 2, 3rd ed. 2015, Article 23 para. 57).

102 3. The other prerequisites for admissibility are also fulfilled. The transfer of sovereign rights to the Unified Patent Court provided for by the UPCA-Consent Act takes effect immediately upon the start of its work, without the need for a further executive act of German public authority (see also BVerfGE 142, 234 <245 et seq. para. 12>). Insofar as the complainant substantiatedly asserts the possibility of a violation of fundamental rights, he is therefore himself and currently affected in his right under Article 38 (1) sentence 1 of the Basic Law, which is in danger of being impaired by the UPCA-Consent Act that is specifically to be executed. This is also directly affected because the UPCA-Consent Act, once it has been executed, would diminish the right to democratic self-determination, which is conveyed through the Bundestag, without any further act of implementation (see BVerfGE 1, 97 <101 f.>; 53, 366 <389>; 126, 112 <133>; common interpretation).

II.

103 In the absence of a right to complain, the constitutional complaint is inadmissible, however, in so far as the complainant alleges a possible violation of his right under Article 38 (1) sentence 1 in conjunction with Article 20 (1) and 20 (2) in conjunction with Article 79 (1) and (3) of the Basic Law that the UPCA-Consent Act violates constitutional identity because the legal status of the judges is insufficiently regulated under the rule of law (1.), encroachments on fundamental rights by the Unified Patent Court are not sufficiently legitimised by law (2.) and the UPCA violates Union law (3.).

104 1. Insofar as the constitutional complaint complains that the procedure for selecting and appointing the judges of the Unified Patent Court and their legal status does not meet constitutional requirements, there is no substantiated explanation of a possible violation of the right under Article 38 (1) sentence 1 of the Basic Law (Sec. 23 (1) sentence 2, Sec. 92 of the RoP-

FCC). If there is case-law of the Federal Constitutional Court on a question, the complainant must deal with it in order to sufficiently demonstrate the possibility of a violation of fundamental rights in his or her case (cf. BVerfGE 99, 84 <87>; 101, 331 <346>; 123, 186 <234>; 130, 76 <110>; 142, 234 <251 para. 28>; 149, 346 <359 para. 23>). This also applies in the context of the identity check pursuant to Article 23 (1) sentence 3 in conjunction with Article 79 (3) of the Basic Law (on the requirements for substantiation, see also BVerfGE 129, 124 <167 et seq.) The constitutional complaint does not meet these requirements.

105 a) Admittedly, the complaints concerning the provisions of the UPCA on the appointment and legal status of the judges of the Unified Patent Court also address their democratic legitimacy, which can be directly challenged under Article 38 (1) sentence 1 of the Basic Law (Article 20 (1) and (2) sentence 1 of the Basic Law). Insofar as the complainant claims that there was no sufficiently specific legal basis for the appointment of judges and no parliamentary involvement to legitimise encroachments on fundamental rights by the judges, this could be understood in substance as an assertion of insufficient democratic legitimation for the exercise of judicial power by the Unified Patent Court.

106 However, these explanations are not sufficient to sufficiently demonstrate the possibility of a violation of the principle of democracy pursuant to Article 20 (1) and (2) in conjunction with Article 79 (3) of the Basic Law. In addition to the factual and substantive legitimation of the judicial activity by the UPCA-Consent Act, the judges of the Unified Patent Court also have personal legitimation from the perspective of the Basic Law. The appointment of the judges by the Administrative Committee requires unanimity, so that the German representative has an equal and decisive role in this respect. In view of this, and also in view of the fact that Germany's participation in supranational courts has never before been called into question by the Federal Constitutional Court (cf. BVerfGE 73, 339 <366 et seq.>; 149, 346 <364 et seq. paras.36 et seq.; 366 paras. 41, 43>), it would have required a closer examination of the requirements for the democratic legitimation of judicial tasks in a supranational context and the relevant case-law of the Federal Constitutional Court. The reference to the case-law of the Federal Constitutional Court is, however, obviously limited to a simple transfer of requirements of certainty developed for the domestic sphere. The constitutional complaint does not address the fact that in this respect the same requirements of certainty and density of regulation cannot be imposed on an international treaty that has to be negotiated with other contracting parties as on a statute (see BVerfGE 77, 170 <231 et seq.; 89, 155 <187 et seq.). Nor can it provide any

specific justification as to why the rules governing the procedure for the appointment of judges and in particular the requirement of agreement of the representatives of the Member States meeting in the Administrative Committee (Article 16 (2) UPCA) should not provide a sufficient level of legitimacy in view of the fact that the judges of the Unified Patent Court are bound by law and statute (cf. Article 24 UPCA).

107 b) Insofar as on the basis of Article 38 (1) sentence 1 of the Basic Law, the violation of other principles of state structure such as the principle of the rule of law in this case is criticised, the case-law of the Federal Constitutional Court requires the complainant to establish a connection with the state structure principles described in Article 38 (1) sentence 1 of the Basic Law. 38 (1) sentence 1 of the Basic Law that can be directly challenged (see BVerfGE 123, 267 <332 et seq.; 129, 124 <169, 177>; 132, 195 <238 para. 104>; 134, 366 <397 para. 53>; 135, 317 <386 para. 125>; 142, 123 <190 para. 126>; 146, 216 <249 e seq. para. 44 et seq.>).

108 The constitutional complaint does not relate to this requirement. With regard to the legal status of the judges of the Unified Patent Court, it is limited in the end to a conflict with provisions of - in part simple - national law.

109 2. Furthermore, the constitutional complaint is inadmissible to the extent that the complainant alleges a violation of his right under Article 38 (1) sentence 1 of the Basic Law arising from the principles set out in Articles 41 and 69 (1) UPCA for the adoption of rules of procedure of the Unified Patent Court and for the determination of maximum amounts for reimbursable representation costs, on the grounds that the Unified Patent Court is thus enabled to influence the fundamentally protected legal positions of voters in Germany without a sufficiently specific parliamentary authorisation being available.

110 a) Admittedly, the Senate excluded blanket authorisations in its judgments on the Treaties of Maastricht (see BVerfGE 89, 155 <187 et seq.>) and Lisbon (see BVerfGE 123, 267 <351, 353>), and in its judgment on the Free Trade Agreement between the European Union and Canada (CETA) of 13 January 2006, the Senate did not rule out blanket authorisations. In October 2016, the Senate considered that an excessively vague form of the committee system provided for in the CETA could affect the principles of the principle of democracy as part of the constitutional identity of the Basic Law (see BVerfGE 143, 65 <95 et seq. paras. 59, 65> with reference to BVerfGE 142, 123 <183 et seq. paras. 110 et seq.>). In this respect, Article 38 (1)

sentence 1 in conjunction with Article 20 (1) and 20 (2) of the Basic Law can be violated if sovereign rights are transferred without a sufficient limitation to an institution that is not democratically legitimised or only weakly legitimised (cf. BVerfGE 89, 155 <187>; 123, 267 <351>; 142, 123 <193 et seq. para. 134>).

111 However, these comments are made in the context of a European Union trade agreement, which does not guarantee that the Member States are represented on the committees provided for in the agreement and can exercise a decisive influence on their decisions. The constitutional complaint does not substantiate why something similar should apply to the Unified Patent Court to be established by an international treaty of the Federal Republic of Germany under Article 59 (2) of the Basic Law. The mere reference to the decision of the Senate of October 13, 2016, in the matter of CETA is not sufficient in this respect already because an equal participation of Germany in the decisions of the Administrative Committee is basically ensured (Art. 41 (2) UPCA) and these decisions require a majority of three quarters of the votes (Art. 12 (3) UPCA). Nor does the constitutional complaint address the fact that the Federal Republic of Germany has a right of veto in revisions of the Agreement under Article 87 (3) UPCA and that the activities of the Administrative Committee are furthermore subject to parliamentary recourse under Article 23 (2) and 23 (3) of the Basic Law in conjunction with the Act on Cooperation between the Federal Government and the German Bundestag in European Union Affairs (EUZBBG) of 4 July 2013 (Federal Law Gazette I p. 2170).

112 Even the assertion of insufficient democratic legitimation of the Administrative Committee, which is based solely on the national requirements for an authorisation to issue ordinances that follow from Article 80 (1) of the Basic Law, does not meet the substantiation requirements of Sec. 23 (1) sentence 2 and Sec. 92 of the RoP-FCC. Typically, an integration law can only outline the programme within the limits of which a political development may take place, but cannot predetermine this in every point (cf. BVerfGE 123, 267 <351>; 135, 317 <429 para. 236>). In this respect, the complainant is already not concerned with the fact that the rules laid down in Article 52 et seq. UPCA cannot be amended by the Administrative Committee, but is limited to the "details of the proceedings". In particular, Art. 41 UPCA does not allow to extend the competences of the Unified Patent Court.

113 b) The complaint is also unsubstantiated in so far as it concerns the fixing of a ceiling on the reimbursement of costs in Article 69 (1) in conjunction with Article 41 (2) UPCA. According to

Art. 69 (1) UPCA, the costs to be reimbursed must be "reasonable and proportionate", whereas the Rules of Procedure must ensure a fair balance between the interests of the parties, according to Art. 41 (3) sentence 2 UPCA. From this, at least starting points for the specification of the upper limit can be derived.

114 3. Insofar as the constitutional complaint alleges that the UPCA has violated Union law, a violation of the complainant's right under Article 38 (1) sentence 1 of the Basic Law is ruled out from the outset. No formal or substantive requirements for national laws whose violation could call their validity into question or even violate the constitutional identity of the Basic Law arise from Union law. Moreover, according to the consistent case-law of the Federal Constitutional Court, Union law only has priority over German law in terms of application and not in terms of validity, so that a violation of Union law does not lead to the invalidity of the national provision. Nor does a violation of Union law automatically constitute a violation of the Basic Law. If a legal provision of German law satisfies the national legislation, it remains effective even if it violates Union law (see BVerfGE 31, 145 <174 et seq.; 82, 159 <191 et seq.; 110, 141 <154 et seq.; 115, 276 <299 et seq.; BVerfG, decision of the Third Chamber of the Second Senate of 4 November 2015 - 2 BvR 282/13 -, para. 19).

115 Nothing else follows from the principle that the Basic Law is friendly to European law (see BVerfGE 123, 267 <354>; 126, 286 <303>; 129, 124 <172>). It is true that this constitutionally obliges German bodies to comply with Union law (see BVerfGE 129, 124 <172>). They must avoid violations of Union law to the extent that this is possible within the framework of methodologically justifiable interpretation and application of national law (see BVerfGE 127, 293 <334>; BVerfG, decision of the Third Chamber of the Second Senate of 4 November 2015 - 2 BvR 282/13 -, para. 20). However, this alone does not lead to Union law itself becoming the constitutional standard. Its validity and application in Germany are based - in accordance with Article 23 (1) sentence 2 of the Basic Law - on the order for the application of the law issued with the law approving the Treaties, which itself has no constitutional quality (see BVerfGE 22, 293 <296>; 31, 145 <173 et seq, 301>; 75, 223 <244>; 89, 155 <190>; 123, 267 <398, 400, 402>; 129, 78 <99>). This cannot be overplayed by recourse to the principle of European law-friendliness (see BVerfG, Order of the Third Chamber of the Second Senate of 4 November 2015 - 2 BvR 282/13 -, para. 21).

116 However, it can be left open at this point whether, where a legal issue is completely regulated by Union law within the framework of the integration programme, something else could apply with regard to the fundamental rights regulated in the Charter of Fundamental Rights of the European Union (cf. in this respect FCC, decision of the First Senate of 6 November 2019 - 1 BvR 276/17 - which leaves this question open). For the UPCA-Consent Act is intended to establish the Unified Patent Court as an independent supranational institution beyond the European Union. There are no specific requirements under Union law.

C.

117 The constitutional complaint is, as far as admissible, also well-founded. Article 1 (1) sentence 1 of the UPCA-Consent Act does not meet the constitutional requirements of Article 23 (1) sentence 3 in conjunction with Article 79 (2) of the Basic Law and therefore violates the complainant's right, which is equivalent to a fundamental right, under Article 38 (1) sentence 1 in conjunction with Article 20 (1) and 20 (2) in conjunction with Article 79 (3) of the Basic Law.

I.

118 Acts of consent to international agreements which are in a complementary or other special proximity to the integration programme of the European Union are to be measured against Article 23 (1) of the Basic Law (1.). Insofar as they amend or supplement the content of the Basic Law or make such amendments or supplements possible, they require a two-thirds majority in the legislative bodies pursuant to Article 23 (1) sentence 3 in conjunction with Article 79 (2) of the Basic Law (2.). An obligation under international law entered into in violation of these provisions, which opens the door to the influence of a supranational public authority on citizens in Germany, violates their fundamental right, which is equal to a fundamental right under Article 38 (1) sentence 1, Article 20 (1) and 20 (2) in conjunction with Article 79 (3) of the Basic Law (3.). In addition, the material limits on the transfer of sovereign rights resulting from Article 79 (3) of the Basic Law must always be observed (4.).

119 1. Article 23 (1) of the Basic Law represents the regulation that takes precedence over Article 24 (1) of the Basic Law for European integration because it is more specific and contains a special legal reservation in sentence 2 (see FCC, BVerfGE 123, 267 <355>; Scholz, in: Maunz/Dürig, Basic Law, Article 23, para. 4 <October 2009>; Uerpmann-Wittzack, in: v.

Münch/Kunig, Basic Law, Vol. 1, 6th ed. 2012, Art. 23, para. 2; Simon, Limits of the FCC in the process of European integration, 2016, pp. 52 et seq. with further references; Streinz, in: Sachs, Basic Law, 8th ed. 2018, Art. 23, para. 9; Jarass, in: Jarass/Pieroth, Basic Law, 15th ed. 2018, Art. 23, para. 4). The provision is based on a broad conceptual understanding of the European Union, which may also include intergovernmental institutions beyond the institutional framework of the European Union (a). The transfer of sovereign rights to independent intergovernmental institutions falls under Article 23 (1) of the Basic Law if they are in a complementary or other special proximity to the integration programme of the European Union (b).

120 a) With Article 23 (1) of the Basic Law, the legislator who amended the constitution in 1992 wanted to give the European integration of Germany a new basis and bring together its various institutions and procedures in a comprehensive regulation (see Bundestag document 12/3338, pp. 1, 4 et seq.; 12/6000, pp. 19 et seq.) This has found expression in the wording of Article 23 (1) of the Basic Law to the extent that Article 23 (1) sentence 1 of the Basic Law speaks generally of the development of the European Union for the purpose of achieving a united Europe, while Article 23 (1) sentence 2 of the Basic Law permits a transfer of sovereign rights, the addressee of which does not necessarily have to be the European Union; the specific addressee of the transfer is rather left open ("to this end"). Finally, Article 23 (1) sentence 3 of the Basic Law does not only want to cover the amendment of the treaty foundations of the European Union, but also "comparable regulations".

121 The purpose of Article 23 (1) sentence 3 of the Basic Law is to make an extension of the European Union's integration programme subject to increased procedural requirements in view of the scope already achieved. In this respect, the constitution-amending legislature took up a proposal of the Committee on Legal Affairs and the Special Committee on the European Union of the Bundestag which sought to cover all extensions of the European Union's competences (see Bundestag document 12/3896, p. 14). In doing so, the legislature amending the constitution had above all the evolutionary and bridging clauses in mind (see Bundestag document 12/3896, pp. 14, 18 et seq.; FCC, BVerfGE 123, 267 <385 et seq.). It would therefore be contrary to the will of the legislature amending the constitution to withdraw parts of the dynamic and multifarious development process within the framework of and in connection with the European Union from the scope of application of Article 23 (1) of the Basic Law (cf. FCC, BVerfGE 131, 152 <199 et seq.) and, instead of a further transfer of sovereign rights directly to organs

of the European Union and the overall view of the state of European integration that is thus being taken, to enable the creation of isolated but functionally equivalent satellite facilities.

122 Article 23 (1) of the Basic Law therefore assumes - as does its paragraph 2 - a broad understanding of the concept of the European Union, which in principle encompasses its entire organisation and its integration programme and which under certain conditions also applies to intergovernmental institutions and international organisations that are to be distinguished from it (cf. FCC, BVerfGE 131, 152 <199 ff., 217 f.>). It claims validity for all legal acts that regulate, specify, safeguard or supplement the membership of the Federal Republic of Germany in the European Union, and does not presuppose that a direct transfer of sovereign rights to organs, institutions and other bodies of the European Union takes place.

123 b) The transfer of sovereign rights to independent intergovernmental institutions falls under Article 23 (1) of the Basic Law if this is tantamount to a de facto amendment to the Treaty (see Schorkopf, in: Bonn Commentary to Basic Law, Art. 23, para. 79 <August 2011>; Schorkopf, State Law of international relations, 2017, § 3, paras. 189, 203; Möllers/Reinhardt, JZ 2012, p. 693 <695 et seq.>; Wollenschläger, in: Dreier, Basic Law, Vol. 2, 3rd ed. 2015, Art. 23, para. 54; Streinz, in: Sachs, Basic Law, 8th ed. 2018, Art. 23, para. 90; Heintschel v. Heinegg/Frau, in: Epping/Hillgruber, BeckOK Basic Law, Art. 23, para. 29.1 <December 2019>). This is to be assumed if the act of consent and/or the international agreement functionally replaces a treaty amendment or supplements the treaty. Such "substitute union law" (cf. Lorz/Sauer, DÖV 2012, p. 573 <573 et seq.) is the case, for example, with the ESM Treaty and the law on the ESM Treaty, which, although it did not transfer sovereign rights, nevertheless brought about a fundamental reorganisation of the original economic and monetary union (cf. FCC, BVerfGE 135, 317 <407 para. 180> with reference to FCC, BVerfGE 129, 124 <181 et seq.; 132, 195 <248 para. 128>; CJEU, judgment of 27 November 2012, Pringle, C-370/12, EU:C:2012:756, paras. 73 et seq.), so that the Senate has classified it as a matter for the European Union within the meaning of Article 23 (2) of the Basic Law (see FCC, BVerfGE 131, 152 <219>).

124 Such an equivalence of primary law requires a complementary or other special proximity relationship to the integration programme of the European Union (see Scholz, in: Maunz/Dürig, Basic Law, Art. 23, para. 63 <October 2009>; Schorkopf, in: Bonn Commentary on Basic Law, Art. 23, para. 64 <August 2011>; Calliess, NVwZ 2012, p. 1 <3>; Hölscheidt/Rohleder, DVBl 2012, p. 806 <807 et seq.>; Kube, WM 2012, p. 245 <247 et seq.>; Wollenschläger, NVwZ

2012, p. 713 <715>; Wollenschläger in: Dreier, Basic Law, Vol. 2, 3rd ed. 2015, Art. 23, para. 41; Schmahl, DÖV 2014, p. 501 <507 f.>; Classen, in: v. Mangoldt/Klein/Starck, Basic Law, Vol. 2, 7th ed. 2018, Art. 23, para. 6, 12; Jarass, in: Jarass/Pieroth, Basic Law, 15th ed. 2018, Art. 23, para. 3; Streinz, in: Sachs, Basic Law, 8th ed. 2018, Art. 23, para. 56a, 90; Wolff, in: Hömig/Wolff, Basic Law, 12th ed. 2018, Art. 23, para. 4, 24; Heintschel v. Heinegg/Frau, in: Epping/Hillgruber, BeckOK Basic Law, Art. 23, para. 5 <December 2019>). Whether such a relationship exists cannot be determined on the basis of a single conclusive and at the same time selective feature, but only on the basis of an overall consideration of the circumstances, regulatory objectives, contents and effects (see on Article 23 (2) of the Basic Law, FCC, BVerfGE 131, 152 <199>).

125 A complementary or other special proximity relationship may be indicated by the fact that the planned institution is enshrined in primary law, the project is provided for in secondary or tertiary law or there is another qualified substantive connection with the European Union integration programme. This also applies if the project is (also) being promoted by European Union institutions or their involvement in the implementation of the project is envisaged - for example, by means of organ loans. Furthermore, it speaks for a qualified complementary and close relationship if an international-law treaty is to be concluded exclusively between Member States of the European Union, if the purpose of the project lies precisely in the mutual interaction with a policy area assigned to the European Union and in particular if the path of coordination under international law is chosen because similar efforts to anchor it in Union law have not found the necessary majorities (see FCC, BVerfGE 131, 152 <199 et seq.>).

126 2. Insofar as consent acts and/or international agreements which are in a supplementary or other special proximity to the integration programme of the European Union amend or supplement the content of the Basic Law or enable such amendments or supplements, they not only require the consent of the Bundesrat (Article 23 (1) sentence 2 of the Basic Law), but must be adopted by the Bundestag and Bundesrat with the majority of Article 79 (2) of the Basic Law. According to Article 23 (1) sentence 3 of the Basic Law, not only the establishment of the European Union and the amendment of its treaty foundations - here it is established by constitutional order - but also "comparable regulations" have such constitutional relevance.

127 In this respect, the wording of Article 23 (1) sentence 3 of the Basic Law is based on an amendment of the Basic Law "in terms of its content" and thus clearly links to the distinction drawn

from the Senate's case-law between formal constitutional amendments within the meaning of Article 79 (1) sentence 1 of the Basic Law and substantive constitutional amendments without amendments to the constitutional text (see Bundestag document 12/6000, p. 21; FCC, BVerfGE 58, 1 <36>; 68, 1 <114>). Moreover, Article 23 (1) sentence 3 of the Basic Law speaks not only of changes to the content of the Basic Law, but also of "additions" and the mere "enabling" of changes and additions. This speaks for a broad understanding of "constitutional relevance". From a systematic-teleological point of view, there is also the fact that the provision is intended to contain the integration legislator more procedurally and materially than Article 24 (1) of the Basic Law, which - apart from the requirement for the Federal Council's consent - is primarily achieved by the reference to Article 79 (2) and 79 (3) of the Basic Law contained in Article 23 (1) sentence 3 of the Basic Law.

128 The historical interpretation underlines this result. Article 23 (1) of the Basic Law was part of an overall package that dispelled the doubts that existed at the time about the constitutional admissibility of the Maastricht Treaty (see, for example, Member of Parliament Verheugen and Senator Peschel-Gutzeit in the 3rd session of the Joint Constitutional Commission on 12 March 1992, Stenographic Report p. 12, 20; FCC, BVerfGE 37, 271 <279 et seq.>; 58, 1 <40 et seq.>; 59, 63 <86>; 73, 339 <375 f.>) and its possible continuation (cf. Di Fabio, Der Staat 32 <1993>, p. 191 <195>), but at the same time subject further integration steps to higher hurdles. The constitution-amending legislature evidently assumed that any further transfer of sovereign rights to organs, institutions and other bodies of the European Union would only be possible with a constitution-amending majority. The Federal Government's interpretation to the contrary in the draft bill was expressly contradicted by the Bundesrat. In this respect, the final report of the Joint Constitutional Commission states that Article 23 (1) sentence 2 of the Basic Law permits the transfer of sovereign rights up to the limit "where a new treaty or an amendment of the treaty basis would be necessary for constitutional reasons" (see Bundestag document 12/6000, p. 28). This is expressed even more clearly in the report of the Special Committee "European Union (Maastricht Treaty)" of the German Bundestag, which forms the basis of the final report of the Joint Constitutional Commission. There it expressly states that "a transfer of sovereign rights should be made dependent on a two-thirds majority if one goes beyond existing authorizations. Article 23 (1) sentence 3 is based on this consideration" (see Bundestag document 12/3896, p. 18). Against this background, the final report cites interventions in "the constitutionally established system of competences" (see Bundestag document 12/6000, p.

21) as an example of the fact that a transfer of sovereign rights entails a material amendment of the constitution.

129 The legislature that amended the constitution was based on the idea that every transfer of sovereign rights "beyond existing authorisations" constitutes a constitutional amendment (cf. the reference to FCC, BVerfGE 58, 1 <36> in Bundestag document 12/6000, p. 21). The report of the special committee also makes it clear that this decision was deliberately made also in the light of the Basic Law's openness to integration (see Bundestag document 12/3896, p. 18). The alternative interpretation offered - on an identical textual basis - by the Federal Government in its explanatory statement to the draft could not prevail over the unanimously held view in the legislative bodies (see Bundestag document 12/6000, p. 28; Bothe/Lohmann, ZaöRV 58 <1998>, p. 1 <10 et seq.>). However, the content of the Basic Law is not changed or supplemented or such changes or supplements are made possible every time sovereign rights are transferred to the European Union or institutions with a supplementary or other special relationship to it. In particular, transfers that are sufficiently defined ("covered") in the integration programme and have already been approved by a two-thirds majority do not constitute a (repeated) material amendment of the Basic Law. Only Article 23 (1) sentence 2 of the Basic Law applies to them.

130 On the other hand, the transfer of new competences to the European Union or the establishment of new intergovernmental institutions that are complementary or otherwise particularly close to the European Union regularly leads to the fact that the transfer of sovereign rights also "enables" amendments to the Basic Law in the sense of the provision (cf. Classen, in: v. Mangoldt/Klein/Starck, Basic Law, Vol. 2, 7th ed. 2018, Article 23, para. 14; in the result also Scholz, NJW 1992, p. 2593 <2599>; ders, NVwZ 1993, p. 817 <822>; see also the following, in: Maunz/Dürig, Basic Law, Art. 23, paras. 118 et seq. <October 2009>). This is above all the case if the consent act and/or the international agreement - conceived as domestic law - establishes exclusive competence of the European Union or allows the federal legislature to be completely ousted (Articles 73 et seq., 105 of the Basic Law), allows encroachments on the legislative competence of the States (Articles 30, 70 of the Basic Law) or impairs the administrative (Articles 83 et seq., 108 of the Basic Law) and judicial competences (Article 92 of the Basic Law) of the Federation and the States. A Europeanisation of constitutional provisions can also be assumed if the act of consent and/or the international agreement changes or reshapes the constitutional provisions for local self-government (Article 28 (2) of the Basic Law),

the Bundesbank (Article 88 of the Basic Law) or the structure of the courts (Article 92 et seq., Article 96 of the Basic Law).

131 It is obvious that the transfer of jurisdictional tasks to a newly created intergovernmental institution constitutes a material constitutional amendment, even without the associated, methodologically indispensable authority for the further development of judicial law (see FCC; BVerfGE 75, 223 <241 et seq.; 126, 286 <305 et seq.).

132 3. An act of consent to an international agreement which, in breach of the third sentence of Article 23 (1) in conjunction with Article 79 (1) and (2) of the Basic Law cannot legitimise the exercise of official authority by organs, institutions and other bodies of the European Union or by an intergovernmental institution with which it has a complementary or other special relationship (a) and therefore violates citizens' fundamental rights under Article 38 (1) sentence 1, Article 20 (1) and 20 (2) in conjunction with Article 79 (3) of the Basic Law (b).

133 a) If sovereign rights are not transferred in the procedure provided for by the Constitution, they are not transferred (effectively) at all. The German legal system shall not be opened to the influence of supranational law. By claiming sovereign rights that have not been (effectively) transferred, supranational organisations would therefore make use of sovereign power without being democratically legitimised to do so. Corresponding measures by institutions, bodies, offices and other bodies of the European Union or by the intergovernmental institution which is in a complementary or other special relationship to the latter were necessarily ultra vires and thus violated the principle of sovereignty of the people under Articles 2 (1), 20 (2) sentence 1 of the Basic Law (see FCC, BVerfGE 83, 37 <50 et seq.>; 89, 155 <182>; 93, 37 <66>; 130, 76 <123>; 137, 185 <232 et seq. para. 131>; 139, 194 <224 para. 106>; 142, 123 <174 para. 82>; 146, 216 <252 et seq. paras. 52 et seq.; 255 para. 57>; FCC, judgment of the Second Senate of 30 July 2019 - 2 BvR 1685/14 and others -, para. 120).

134 b) If an integration law does not effectively authorise institutions, bodies, offices and other bodies of the European Union or intergovernmental bodies in a complementary or other special relationship with the European Union to adopt measures, this violates the citizens of Germany in their fundamental rights under Article 38 (1) sentence 1, Article 20 (1) and (2) in conjunction with Article 79 (3) of the Basic Law.

135 According to the consistent case-law of the Federal Constitutional Court, the right to vote in the German Bundestag guaranteed to the individual in Article 38 (1) sentence 1 of the Basic Law is not limited to a formal legitimation of the (federal) state power, but also includes the citizen's claim to be exposed only to a public authority that he or she can legitimise and influence (see FCC, BVerfGE 123, 267 <341>; 142, 123 <191 para. 128>). As a fundamental right to participate in the democratic self-rule of the people, Article 38 (1) sentence 1 of the Basic Law does not, in principle, confer any power of appeal against parliamentary decisions, in particular decisions by statute. However, its scope of guarantee covers structural changes in the structure of the law on the organisation of the state, such as may occur in the case of the transfer of sovereign rights to the European Union or other supranational institutions (see FCC, BVerfGE 129, 124 <169>; 142, 123 <190 para. 126>).

136 Article 38 (1) sentence 1 of the Basic Law therefore protects citizens entitled to vote from a transfer of sovereign rights under Article 23 (1) of the Basic Law, which, by exceeding the limits of Article 79 (3) in conjunction with Article 23 (1) sentence 3 of the Basic Law, materially reveals the essential content of the principle of sovereignty of the people (Article 20 (1) and (2) of the Basic Law). This is examined by the Federal Constitutional Court in the context of the identity check as it was the subject of the judgments on the Treaty of Maastricht (cf. FCC, BVerfGE 89, 155 et seq.), on the Treaty of Lisbon (cf. FCC, BVerfGE 123, 267 et seq.) and on the ESM Treaty (cf. FCC, BVerfGE 132, 195 et seq.; 135, 317 et seq.). Moreover, Article 38 (1) sentence 1 in conjunction with Article 20 (1) and 20 (2) sentence 1 of the Basic Law also makes ultra vires review by the Federal Constitutional Court possible in the case of obvious and structurally significant transgressions of competences by organs, bodies, offices and agencies of the European Union (see most recently FCC, decision of the Second Senate of 30 July 2019 - 2 BvR 1685/14 et al.).

137 Within the scope of application of Article 23 (1) of the Basic Law, Article 20 (1) and (2) in conjunction with Article 79 (3) of the Basic Law also protects those entitled to vote from the fact that the formal requirements of Article 23 (1) of the Basic Law for a transfer of sovereign rights, which the legislature should also contain more procedurally than under Article 24 (1) of the Basic Law in the process of European integration (see paras. 119 et seq. above), are complied with (formal transfer control). While a constitutional amendment can be reversed with the appropriate majorities, competences that are transferred to another subject of international law are generally "lost" and cannot be "retrieved" by the legislature on its own. In the context

of the European Union, it should be added that an obligation may arise from Article 4 (3) TEU not to withdraw consent once it has been granted (see for example Advocate General Bot, Opinion of 18 November 2014, C-146/13, EU:C:2014:2380, paras. 175 et seq.), which could result in an additional specific threat to the future content of the right to democratic self-determination. Above all, without an effective transfer of sovereign rights, any measure nevertheless adopted by institutions, bodies, offices and agencies of the European Union or a supranational organisation lacked democratic legitimacy.

138 This affects the core of the right to democratic self-determination, which is enshrined in Article 38 (1) sentence 1, Article 20 (1) and (2) in conjunction with Article 79 (3) of the Basic Law and which is constitutionally subject to appeal, and which is not at issue. Without the possibility of having the objective principles of Article 20 (1) and 20 (2) of the Basic Law reviewed in their core protected by Article 79 (3) of the Basic Law, the democratic core content of Article 38 (1) sentence 1 of the Basic Law would lose its meaning (see Simon, Limits of the FCC in the process of European integration, 2016, p. 108).

139 4. Finally, any transfer of sovereign rights must respect the material limits resulting from the constitutional identity of the Basic Law. Even in the case of the transfer of sovereign rights to an intergovernmental institution that is in a complementary and other special proximity to the European Union, the integration legislature must ensure that the principles of Article 1 and Article 20 of the Basic Law are not affected (Article 23 (1) sentence 3 in conjunction with Article 79 (3) of the Basic Law). Within the framework of identity control, the Federal Constitutional Court therefore examines whether the principles declared inviolable by Article 79 (3) of the Basic Law are affected by an integration law and/or an international treaty (cf. FCC, BVerfGE 123, 267 <344, 353 et seq.>; 126, 286 <302>).

140 With regard to the democratic principle of Article 20 (1) and (2) of the Basic Law, it must be ensured, among other things, that the German Bundestag retains its own tasks and powers of substantial political weight when sovereign rights are transferred under Article 23 (1) of the Basic Law (cf. FCC, BVerfGE 89, 155 <182>; 123, 267 <330, 356>) and that it remains in a position to exercise its overall responsibility for budgetary policy (see FCC, BVerfGE 123, 267 <359>; 129, 124 <177>; 132, 195 <239 para. 106>; 135, 317 <399 et seq. para. 161>). Article 20 (1) and 20 (2) of the Basic Law also prohibits blanket authorisations (cf. FCC, BVerfGE 58, 1 <37>; 89, 155 <183 et seq., 187>; 123, 267 <351>; 132, 195 <238 para. 105>; 142, 123

<192 paras. 130 et seq. In particular, the Bundestag may not evade its responsibility for integration by assigning undefined powers to other actors or by allowing itself to be externally determined by organs, institutions or other bodies of the European Union, by intergovernmental institutions with which it has a complementary or other special relationship or by other member states and thus no longer remains "master of its decisions" (cf. FCC, BVerfGE 129, 124 <179 et seq.>; 132, 195 <240>; 135, 317 <401 pars. 163 et seq.>).

II.

141 According to these standards, Article 1 (1) sentence 1 of the UPCA-Consent Act violates the complainant's right under Article 38 (1) sentence 1, Article 23 (1) sentence 3 in conjunction with Article 79 (2) of the Basic Law, because the UPCA-Consent Act was not adopted with the consent of two thirds of the members of the Bundestag (Article 79 (2) of the Basic Law) (1.). Whether the establishment of an unconditional primacy of Union law in Article 20 and Article 21 sentence 2 UPCA violates Article 20 (1) and (2) in conjunction with Article 79 (3) of the Basic Law therefore does not require a decision (2.).

142 (1) The UPCA-Consent Act transfers sovereign rights to the Unified Patent Court (a), is complementary to or otherwise particularly close to the integration programme of the European Union (b), and brings about a substantive constitutional amendment (c). However, it has not been adopted by the Bundestag with the two-thirds majority required under Article 23 (1) sentence 3 in conjunction with Article 79 (2) of the Basic Law (d) and therefore violates the complainant's right, which is equivalent to a fundamental right, under Article 38 (1) sentence 1 in conjunction with Article 20 (1) and (2) in conjunction with Article 79 (3) of the Basic Law (e).

143 a) The UPCA-Consent Act assigns jurisdictional tasks to a supranational court and legislative tasks to its administrative bodies and thus opens up the German legal system in such a way that the exclusive claim to sovereignty of the Federal Republic of Germany within the scope of application of the Basic Law is withdrawn to this extent and the direct validity and applicability of European law is left to the discretion of the Federal Republic of Germany (cf. FCC, BVerfGE 37, 271 <280>; 58, 1 <28>; 59, 63 <90>; 73, 339 <374 et seq.>). Art. 32 UPCA assigns certain disputes to the Unified Patent Court for exclusive decision, thus giving it the power to make binding decisions. This "original form of sovereign activity" (see Roellecke, VVDStRL 34 <1976>, p. 7 <25>; Classen, in: v. Mangoldt/Klein/Starck, Basic Law, Vol. 3, 7th ed. 2018, Art.

92 para. 1) is an elementary prerequisite for the enforcement of the state monopoly on the use of force (see FCC, BVerfGE 54, 277 <291>) and is indispensable for the peaceful coexistence of human beings. Moreover, Article 82 (1) sentence 1 UPCA determines the decisions and orders of the Unified Patent Court as enforceable titles. Furthermore, inter alia, Art. 40 (2) and Art. 41 (1) and (2) UPCA provide for legislative powers of the Administrative Committee with regard to amendments of the Statute and the adoption and amendment of the Rules of Procedure.

144 b) The UPCA is in a supplementary or other special relationship to the integration programme of the European Union (cf. Federal Government Draft Law, Bundestag document 18/11137, p. 8) and replaces Union law regulations in the matter, the anchoring of which in the law of the European Union has not found the necessary majorities (cf. FCC, BVerfGE 131, 152 <200>).

145 aa) The UPCA finds a direct connecting factor in primary law in Art. 262 TFEU. This makes it clear that the creation of a Union jurisdiction in the field of patent law is desired by the member states but is not yet covered by the integration programme. In this respect, Art. 262 TFEU provides for a transfer of jurisdiction for disputes concerning European intellectual property rights to the CJEU but makes this subject to a unanimous Council decision (first sentence) and ratification by the Member States (second sentence). So far there has been insufficient support for both. Irrespective of the question whether the establishment of the Unified Patent Court on the basis of international law undermines this requirement of Art. 262 TFEU, the provision shows that the Unified Patent Court should only be a functional equivalent of a "proper" union patent jurisdiction.

146 bb) Furthermore, the UPCA is closely interwoven with secondary legislation adopted on the basis of Art. 118 TFEU (see also recital 4 to the UPCA). It only develops its regulatory content in interaction with these regulations, which provide for the creation of a uniformly effective European property right for patents. Thus, it ties in with Regulation (EU) No. 1257/2012 and Regulation (EU) No. 1260/2012, which create the European patent with unitary effect. The entry into force of these Regulations is linked to the entry into force of the UPCA (see Article 18 (2), (1) Regulation <EU> No 1257/2012 and Article 7(2) Regulation <EU> No 1260/2012), so that the effectiveness of the UPCA is at the same time a precondition for the effectiveness of the relevant secondary legislation. A substantial part of the jurisdictional tasks of the Unified Patent Court will concern rights and claims governed by Union law (see Art. 2 (f) and (h), Art.

3 (a) and (b) in conjunction with Art. 32 UPCA), the uniform effect of which will only be ensured by the rules contained in the UPCA (Art. 25 to 28, 30 UPCA).

147 The close interlocking of the UPCA with the integration programme of the European Union is also reflected in the fact that the Unified Patent Court, despite its qualification as an independent supranational body distinct from the European Union, is directly bound by Union law (Art. 24 (1) (a) UPCA). The UPCA also commits it to the primacy of Union law (Art. 20 UPCA), with the Contracting Member States expressing an obligation "to ensure, through the Unified Patent Court, the full application of and respect for Union law in their respective territories and the judicial protection of the rights which individuals derive from that law" (cf. 9th recital).

148 cc) The Agreement was also (co-)promoted to a large extent by institutions of the European Union (see Augenstein/Haertel/Kiefer, in: Fitzner/Lutz/Bodewig, BeckOK Patent Law, UPCA, para. 5 <15 January 2020>). The project of a unified European patent jurisdiction has long been regarded as a necessary part of a union patent law, which was supported by the European Commission as well as by the Council. At least since the turn of the millennium, the European Commission has been working towards a centralisation of judicial protection in this area (see draft GPVO COM<2000> 412 final), OJ EU No. C 337 E of 28 November 2000, p. 278; Council document 7159/03 of 7 March 2003; Council document 17229/09 of 7 December 2009; Adam/Grabinski, in: Benkard, European Patent Convention, 3rd edition 2019, Preamble, paras. 36 et seq.). It is true that the original draft of a European patent jurisdiction was rejected by the CJEU in the Opinion of 8 March 2011 (see CJEU, Opinion 1/09, EU:C:2011:123, paras. 71 et seq.). However, the provisions provided for there have been incorporated into the "European Patent Package", which, in addition to the UPCA, also includes Regulation (EU) No. 1257/2012 and Regulation (EU) No. 1260/2012 (see Advocate General Bot, Opinion of 18 November 2014, C-146/13, EU:C:2014:2380, para. 3) and, quite apart from questions of competence, has been strongly promoted by the European Parliament (see European Parliament Resolution of 11 December 2012, 2011/2176<INI>, OJ EU No C 434 of 23 December 2015, p. 34 et seq.).

149 dd) The European Union institutions are involved to varying degrees in the implementation of the UPCA. The General Secretariat of the Council will be called upon to act as depositary of the instruments of ratification (Article 84 (2) sentence 2 and (4), Article 85 UPCA), and the European Commission will be involved in the adoption and amendment of the Rules of

Procedure and ensure their compatibility with Union law (Article 41 (1) and (2) UPCA). It is also represented as an observer at the meetings of the Management Committee (Art. 12 (1) sentence 2 UPCA). Finally, the European Patent Court itself may or must, pursuant to Art. 267 TFEU, request preliminary rulings from the Court of Justice if the conditions are met (Art. 21 UPCA).

150 (ee) Furthermore, the Convention is open only to Member States of the European Union. Art. 1 (2) UPCA defines the Unified Patent Court in this respect as a "common court of the Contracting Member States", the term Contracting Member State as used in Art. 2 (b) and (c) UPCA designating a Member State of the European Union which is a party to this Agreement. The limitation of the circle of contracting parties is also reflected in the recitals to the UPCA. Thus, the first recital states that "cooperation between the Member States of the European Union in the field of patents makes an essential contribution to the process of integration in Europe, in particular to the creation of an internal market within the European Union characterised by the free movement of goods and services and the establishment of a system ensuring that competition in the internal market is not distorted", while the 14th recital makes it clear that "this Agreement should be open for accession by any Member State of the European Union". This limitation is ultimately rooted in the - generalisable - case law of the CJEU (see CJEU, Opinion of 8 March 2011, Opinion 1/09, EU:C:2011:123, paras. 77 et seq., 89), which, in view of the integrity of the Union legal order, considers it inadmissible to confer "exclusive jurisdiction on an international court standing outside the institutional and judicial framework of the Union to hear and determine a considerable number of actions brought by individuals in connection with the Community patent and to interpret and apply Union law in this area" (see CJEU, Opinion of 8 March 2011, Opinion 1/09, EU:C:2011:123, para. 89).

151 The fact that not all Member States of the European Union are also contracting parties to the UPCA does not call into question the complementary or other special proximity to the European Union integration programme. On the contrary, this is guaranteed by the Institute of Enhanced Cooperation pursuant to Art. 20 TEU, Art. 326 et seq. TFEU and underlines the close interlocking with the institutional structure of the European Union.

152 c) The UPCA-Consent Act is subject to the requirements of Art. 23 (1) sentence 3 in conjunction with Art. 79 (2) of the Basic Law, because it Europeanizes regulations of the Basic Law and brings about a material constitutional change.

153 aa) The UPCA has constitutional relevance and constitutes a comparable regulation within the meaning of Article 23 (1) sentence 3 of the Basic Law because it contains a functionally equivalent regulation to an amendment of the treaty foundations of the European Union under Article 48 TEU.

154 In substance, the UPCA constitutes an amendment or replacement of Art. 262 TFEU. According to that provision, the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament, may adopt provisions conferring jurisdiction on the Court of Justice, to the extent determined by the Council, to rule on disputes relating to the application of acts adopted pursuant to the Treaties which create European intellectual property rights. The Treaty not only provides for a special legislative procedure and a unanimous decision of the Council (Art. 262 sentence 1 TFEU), but also that this act shall not enter into force until it has been approved by the Member States in accordance with their respective constitutional requirements (Art. 262 sentence 2 TFEU). The Member States have apparently regarded the creation of a jurisdiction of the Court of Justice for industrial property rights as a serious encroachment on national jurisdictional competence and have structured it as a matter requiring ratification. The German legislature has classified this - following the Lisbon judgment (see FCC, BVerfGE 123, 267 <387 et seq.>) - as a special treaty amendment procedure, as shown by Sec. 3 (2) of the Law on the Exercise of the Integration Responsibility of the Bundestag and the Bundesrat in Matters of the European Union (IntVG).

155 With the UPCA and the establishment of the Unified Patent Court provided for therein, the contracting member states have chosen a functional alternative to the transfer of jurisdictional tasks to the CJEU provided for in Art. 262 TFEU, for which a legal basis was apparently lacking until now. In doing so, they have changed the integration programme of the Lisbon Treaty, de facto removed the basis for the path provided for in Art. 262 TFEU and created the possibility of a new type of unified jurisdiction in industrial property protection along the lines of the European Union, because there was neither the necessary unanimity for the path of Art. 262 TFEU provided for in the Treaty nor for an amendment under Art. 48 TEU.

156 From the point of view of Article 23 (1) sentence 3 of the Basic Law, this is a change in the contractual foundations of the European Union and thus a case of "comparable regulations". The reservation of ratification in Article 262 sentence 2 TFEU confirms this (see Sauer, State Law III, 5th ed. 2018, § 4 para. 8c). In its opinion on the Free Trade Agreement between the

European Union and Singapore (EUSFTA), the Court of Justice also comes to the conclusion that a regulation under international law which withdraws disputes from the jurisdiction of the Member States requires the consent of the Member States (see CJEU, opinion of 16 May 2017, opinion 2/15, EUSFTA, EU:C:2017:376, para. 89).

157 bb) Irrespective of the concrete structure of the patent jurisdiction, a transfer of jurisdictional tasks with the ousting of German courts results in a substantive amendment of the Basic Law within the meaning of Article 23 (1) sentence 3 of the Basic Law. Pursuant to Article 92 of the Basic Law, judicial power is exercised by the Federal Constitutional Court, the Federal Courts and the courts of the States. Any transfer of jurisdictional tasks to interstate courts modifies this comprehensive allocation of jurisdiction and in this respect constitutes a substantive amendment of the Constitution. It not only affects the fundamental rights guarantees of the Basic Law, because German courts can no longer grant protection of fundamental rights in this respect (see FCC, BVerfG, decision of the First Senate of 6 November 2019 - 1 BvR 276/17 - , paras. 42 et seq., 54), but also affects the concrete form of the separation of powers under Article 20 (2) sentence 2 of the Basic Law. Already in its judgment on the Treaty of Lisbon, the Senate therefore made it clear that as a rule the competence for the administration of justice - particularly with regard to the constitution of the courts - must remain with the Member States (see FCC, BVerfGE 15, 2 (2), 2 (3)). BVerfGE 123, 267 <415 et seq.>; see also CJEU, judgment of 24 May 2011, C-54/08, Commission v Germany, EU:C:2011:339, paras. 83 et seq.; judgment of 12 December 1996, C-3/95, Reisebüro Broede/Sandker, EU:C:1996:487, paras. 37 et seq., 41).

158 (1) Art. 32 UPCA confers on the Unified Patent Court the jurisdictional powers listed therein and thus a not inconsiderable part of the civil and administrative jurisdiction of the Member States of considerable economic relevance for exclusive settlement, unless actions are still brought before the national courts during a transitional period of seven years (Art. 83 UPCA). Its judgments are immediately enforceable under Art. 82 (3) sentence 2 UPCA. The order to produce evidence by the other party or third parties (Art. 59 UPCA), the seizure of objects (Art. 60 (2) UPCA) or the "inspection" of premises (Art. 60 (3) UPCA) constitute encroachments on fundamental rights and have a direct effect in the legal territory of the Contracting States (Art. 34 UPCA).

159 At the same time, however, the Unified Patent Court is also obliged to interpret and apply national law (cf. Art. 24 (1) (e) UPCA), making it part of the national jurisdiction, as intended by the Member States (7th recital to the UPCA) (cf. Art. 1 (2), Art. 82 (3) sentence 2 UPCA).

160 (2) Ultimately, the UPCA leads to a considerable modification of the court organization provided by the Basic Law for matters of industrial property rights. Art. 96 (1) of the Basic Law allows the - actually occurred - establishment of an independent Federal Court, for which Art. 96 (3) of the Basic Law appoints the Federal Court of Justice as the supreme court. This constitutionally ordered structure of the German court constitution is modified by the UPCA, supplemented by a further court and provided with its own internal appeal mechanism. In this sense, the UPCA contains a material constitutional amendment in the sense described above.

161 Art. 24 (1) UPCA grants the Agreement precedence over national law and the comprehensive claim to validity of the Basic Law is withdrawn in this respect.

162 d) The UPCA-Consent Act was to be adopted by the legislative bodies by the qualified majority of Article 79 (2) of the Basic Law.

163 In view of the special importance of the majority requirement for the integrity of the constitution and the democratic legitimation of interventions in the constitutional order, a law that fails to achieve the majority of Article 79 (2) of the Basic Law cannot be passed. In this respect, nothing else applies than in the case of a law that does not achieve the majorities required under Article 42 (2) or Article 121 of the Basic Law (see Klein, in: Maunz/Dürig, Basic Law, Article 121 para. 23 <June 2017>; Magiera, in: Sachs, Basic Law, 8th ed. 2018, Article 121 para. 1; Brocker, in: Epping/Hillgruber, BeckOK Basic law, Article 121 para. 15 <December 2019>). It is therefore no coincidence that state practice shows a qualified majority in the opening formula as well as a granted consent of the Bundesrat.

164 The qualified majority of Article 79 (2) of the Basic Law was indisputably not achieved in the German Bundestag. The determination of an effective "unanimous" adoption of the bill in the minutes and its transmission to the Bundesrat cannot change this (see also Sec. 48 (2) and 48 (3) of the RoP-BT; FCC, BVerfGE 106, 310 <329 et seq.) The UPCA-Consent Act has therefore not been effectively adopted by the German Bundestag.

165 e) According to all of the above, the UPCA-Consent Act violates the complainant's right to democratic self-determination, which is equivalent to a fundamental right, under Article 38 (1) sentence 1 in conjunction with Article 20 (1) and 20 (2) in conjunction with Article 79 (3) of the Basic Law. After the resolution by the legislative bodies, its entry into force is now only dependent on the Federal President, who has no political discretion in this respect (see Brenner, in: v. Mangoldt/Klein/Starck, Basic Law, Vol. 2, 7th ed. 2018, Article 82 para. 24 with further references; loc. cit. Butzer, in: Maunz/Dürig, Basic Law, Article 82 para. 209 et seq. <December 2014> with further references). The specific risk of an impairment of (fundamental) rights is in this respect equal to the (fundamental) violation of rights (see FCC, BVerfGE 136, 277 <303 para. 70; 307 et seq. para. 85>; see also marginal 140).

166 2. In so far as there is evidence to suggest that the imposition of unconditional primacy of Union law in Article 20 UPCA is contrary to Article 20 (1) and (2) in conjunction with Article 79 (2) sentence 3 of the Basic Law, the Federal Constitutional Court in principle comprehensively examines the measure in question for its compatibility with Article 20 (1) and 20 (2) in conjunction with Article 79 (3) of the Basic Law (see FCC, BVerfG, decision of the Second Senate of 30 July 2019 - 2 BvR 1685/14 and others -, para. 206). However, a final decision can be dispensed with in the present case because the nullity of the UPCA-Consent Act already results from other reasons.

D.

167 The decision on expenses is based on Sec. 34a (2) RoP-FCC.

E.

168 The decision was adopted by 5 : 3 votes.

Voßkuhle	Huber	Hermanns
Miller	Kessal-Wulf	König
Maidowski	Langenfeld	