KATHER · AUGENSTEIN
RECHTSANWÄLTE

FEDERAL CONSTITUTIONAL COURT

- 2 BvR 2216/20 -

- 2 BvR 2217/20 -

ON BEHALF OF THE PEOPLE

In the
proceedings
concerning
the constitutional complaints

I. 1. of Dr. W...,

2. of N... GmbH,
represented by the managing director Dr. W...,

3. of the F... e.V.,
represented by the Executive Board H...,

- Authorised representative: ... -

against Article 1 and Article 3, paragraph 1, of the Act on the Agreement of 19 February 2013 on a Unified Patent Court (Bundestag resolution of 26 November 2020, Plenary Record 19/195 p. 24661 <D>, resolution of the Bundesrat of 18 December 2020, BTDrucks 19/ 22847)

here: Application for a temporary injunction

- 2 BvR 2216/20 -,

II. of Dr. S…,

against Article 1 and Article 3, paragraph 1, of the Act on the Agreement of 19 February 2013 on a Unified Patent Court (Bundestag resolution of 26 November 2020, Plenary Record 19/195 p. 24661 <D>, resolution of the Bundesrat of 18 December 2020, BTDrucks 19/ 22847)

here: Application for a temporary injunction

- 2 BvR 2217/20 -

the Federal Constitutional Court - Second Senate –
with the participation of the judges

Vice-President König,
Huber,
Hermanns,
Müller,
Kessal-Wulf,
Maidowski,
Langenfeld,
Wallrabenstein

decided on 23 June 2021:

1. **The proceedings shall be joined for joint decision.**
2. **The applications for interim measures are dismissed.**

G r o u n d s:

A.

I.

1 With their constitutional complaints and applications for a preliminary injunction, the complainants object to the Act on the Agreement of 19 February 2013 on a Unified Patent Court (hereinafter: EPCJC II; see BTDrucks 19/22847; BRDrucks 448/20), which came into force on 18 December 2020 and is intended to create the conditions for the ratification of the aforementioned Agreement.

2 1. The Agreement on a Unified Patent Court (hereinafter: UPCA; see OJ EU No. C 175 of 20 June 2013, p. 1 et seq.) is part of a more comprehensive European regulatory package on patent law, the core of which is the introduction of a European patent with unitary effect as a new right of protection at the level of the European Union, and which is to be implemented by means of enhanced cooperation pursuant to Article 20 TEU, Article 326 et seq. TFEU (cf. BTDrucks 19/22847, p. 82). The Convention is an international treaty between the participating Member States of the European Union (Contracting Member States; cf. Article 2(b) and (c) UPCA) and is exclusively open to Member States of the European Union (cf. Article 84 (1) and (4) in conjunction with Article 2 (b) UPCA). It is intended to establish a Unified Patent Court (UPC) supported by the majority of the member states. 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 (see OJ EU No L 361 of 31 December 2012, p. 1; No L 307 of 28 October 2014, p. 83). October 2014, p. 83) and Council Regulation (EU) No 1260/2012 of 17 December 2012 on the implementation of enhanced cooperation in the area of the creation of unitary patent protection as regards the translation arrangements to be applied (see OJ EU No L 361 of 31 Dezember 2012, p. 89). These are not the subject of the present proceedings.

3 For further explanation, reference is made to the resolution of the Senate of 13 February 2020 (cf. BVerfGE 153, 74 <76 ff. para. 3 ff.>).

4 2. The Agreement provides for the establishment of the Unified Patent Court as a a common court of the contracting member states for disputes concerning European patents and European patents with unitary effect (Article 1 UPCA). This court shall have its own legal personality in each contracting member state (Article 4 (1) UPCA). According to Article 32 (1)

UPCA, the Unified Patent Court is to have exclusive jurisdiction over a wide range of disputes relating to patents within the meaning of Article 2 (g) UPCA - European patents and European patents with unitary effect. This includes, in particular, actions for patent infringement, disputes on the validity of patents and actions against decisions of the European Patent Office in the exercise of the tasks conferred on it under Article 9 Regulation (EU) 1257/2012.

II.

5 The EPCÜ-Custody Act II, which is now being contested, replaces the EPCÜ-Custody Act I adopted by the German Bundestag.on 10 March 2017 (cf. BTDrucks 18/8826), which the Senate declared null and void in its decision of 13 February 2020 (cf. BVerfGE 153, 74 <74 et seq.>).

III.

6 1. The Federal Government forwarded the government draft for the EPCÜ-Custody Act II to the Federal Council on 7 August 2020 (cf. BRDrucks 448/20, p. 7). In its session on 18 September 2020, the Bundesrat did not raise any objections (cf. BRPlenarprotokoll No. 993 of 18 September 2020, pp. 297, 338 f.). The Federal Government then introduced the draft bill in the Bundestag on 25 September 2020 (cf. Bundestag printed paper 19/22847, p. 7). Following the participation of the competent committees, the Bundestag approved the EPCÜ-Custody Act II in third reading on 26 November 2020 by a majority of two thirds of the members of the Bundestag (cf. Bundestag plenary record 19/195 of 26 November 2020, pp. 24668, 24677). The resolution of approval of the Bundestag of the Council was adopted unanimously on 18 December 2020 (cf. BRDrucks 723/20 <B>; BRPlenary Record No. 998 of 18 December 2020, p. 498).

7 2. The wording of the EPC-Custody Act II is as follows (cf. BTDrucks 19/22847, p. 9):

Article 1

(1) The Agreement on a Unified Patent Court signed by the Federal Republic of Germany in Brussels on 19 February 2013 and the Protocol to the Agreement on a Unified Patent Court on provisional application signed in

Luxembourg on 1 October 2015 are hereby approved. The Agreement and the Protocol are published below.

(2) The Federal Government is obliged to object to an amendment to the Convention by decision of the Administrative Committee under Article 87 (1) of the Convention, unless it has previously been authorised by law to give its consent to the amendment.

Article 2

Amendments to the Convention by decision of the Administrative Committee under Article 87 (2) of the Convention shall be published in the Federal Law Gazette by the Federal Ministry of Justice and Consumer Protection.

Article 3

(1) This Act shall enter into force on the day following its promulgation.

(2) The date on which the Convention enters into force for the Federal Republic of Germany in accordance with Article 89 (1) and the Protocol in accordance with Article 3 shall be published in the Federal Law Gazette.

8 The explanatory memorandum to the draft EPCÜ-Custody Act II is preceded by the following statement (cf. BTDrucks 19/22847, p. 2 f.):

The Act contains the approval of the Convention and the Protocol in accordance with Article 59 (2), first sentence, of the Basic Law, taking into account the qualified majority pursuant to Article 23 (1), third sentence, in conjunction with Article 79 (2) of the Basic Law.

The wording of the law is unchanged; however, the explanatory memorandum contains necessary updates.

The fact that the UK is leaving the Convention as a result of Brexit does not prevent its implementation:

The provisions on entry into force in the Agreement and its Protocols should ensure that all three states participating in the Treaty, the Federal Republic of Germany, France and the United Kingdom, already participate in the court system at the start of the Unified Patent Court. In this respect, it should be avoided that, for example, due to the different duration of the ratification procedures, the treaty initially enters into force with only one or two of the three states. The reference to them thus has the purpose of coordinating the time of entry into force among the actual participants in the treaty.

Irrespective of the fact that the British consent is currently available, the withdrawal of Great Britain has no influence on the applicability of the regulations on entry into force, because they are to be interpreted in such a way that the withdrawal of one of these three states, which cannot be foreseen by anyone, does not prevent the entire entry into force for the remaining participants.

The Convention also expressly provides that, in addition to the seat of the central division of the court of first instance in Paris and the Munich location, a division is also located in London. However, it cannot be understood as wanting to establish or retain a chamber in a non-contracting member state. In the event that the central chamber unit in London ceases to exist, the Convention is to be interpreted in such a way that its competences accrue, at least transitionally, to the (continuing) central chamber in Paris and Munich. An express provision may be made in due course in the context of a review of the functioning of the Court provided for in Article 87 (1) and (3) of the Convention.

A political declaration on these issues is being sought among the remaining States Parties. Finally, the consensual implementation of the treaties would also be a practice or agreement of the States Parties under international law in accordance with Article 31 (3) of the Vienna Convention on the Law of Treaties.

9 The justification for the EPCÜ-Custody Act II states, among other things (cf. BTDrucks 19/22847, S. 10):

> **Re Article 1**
> Re paragraph 1
>
> Article 59 (2), first sentence, of the Basic Law applies to the Convention and the Protocol, since they relate to subjects of federal legislation.
>
> A law is also required because the creation of the jurisdiction of the Unified Patent Court by the Agreement transfers sovereign rights within the meaning of Article 23 (1), sentences 2 and 3 of the Basic Law, since the Agreement is in a particularly close relationship to the law of the European Union. Pursuant to Article 23 (1), third sentence, in conjunction with Article 79 (2) of the Basic Law, a majority of two-thirds of the members of the Bundestag and two-thirds of the votes of the Bundesrat is required for this.
>
> In addition, the requirement for the Federal Council's consent follows from Article 74 (2) in conjunction with paragraph 1 (25) of the Basic Law, since Article 22 of the Agreement on a Unified Patent Court provides for the liability of the contracting member states for infringements of the law by the court and thus for state liability.
>
> The consent of the Bundesrat is also required under Article 105 (3) of the Basic Law, since the tax exemption under Article 8 (4) of the Statute of the Unified Patent Court also affects taxes whose revenue accrues in whole or in part to the Länder under Article 106 (2) and (3) of the Basic Law.
>
> The Federal Constitutional Court ruled that the law passed on 10 March 2017 was null and void in its decision of 13 February 2020 (Decision of the Second Senate - 2 BvR 739/17) and it based the nullity solely on the violation of the third sentence of Article 23 (1) of the Basic Law. It also addressed (see para. 166 of the judgment) whether a legal problem could arise from Article 20 of the Convention. Article 20 of the Convention states: "The Court shall apply Union law in full and respect its supremacy". There is no conflict

between this Treaty clause and Article 79(3) of the Basic Law. The clause serves to clarify that the international court has the same position with regard to European Union law as national courts. The primacy of Union law is in principle undisputed and is also recognised by the Federal Constitutional Court (BVerfG, 2 BvE 2/08 et al. of 30.6.2009 - Lisbon Treaty, para. 331 et seq. with the remainder). The primacy presupposed by the Court of Justice of the European Union in its Opinion A-1/09 also for the European Patent Court - insofar as the latter applies Union law - is structured in Articles 1 and 20 of the Convention in such a way that it corresponds to the primacy applicable to national courts on the basis of the established case law of the Court of Justice of the European Union. This established case law is also referred to in Declaration No. 17 on priority, annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon signed on 13 December 2007. The provision in Article 20 of the Convention concerning the European Patent Court now as a common court of the Member States therefore also does not affect the exercise of constitutionally given review competences by the Federal Constitutional Court, in particular if legal protection cannot exceptionally be obtained at the Union level. In its Lisbon judgment (loc. cit., para. 343), the Federal Constitutional Court stated that "it is of no significance whether the primacy of application of Union law, which the Federal Constitutional Court has already recognised in principle for Community law (cf. BVerfGE 31, 145, 174), is provided for in the Treaties themselves or in Declaration No. 17 annexed to the Final Act to the Treaty of Lisbon". This relationship of the legal systems to each other, which has already been clarified for a long time, is neither changed by Article 20 of the Convention nor by the reason for consideration referred to here with the formulation of a "full application of and respect for Union law".

10 The EPCÜ-Custody Act II contains the text of the Convention (printed in BVerfGE 153, 74 <85 para. 23>), the Statute of the Unified Patent Court (hereinafter: Statute of the EPC), a declaration of the "contracting member states" and a protocol on provisional application (hereinafter: Protocol on provisional application) (see Bundestag printed paper 19/22847, pp.

14 et seq., 58 et seq., 73 et seq., 79 et seq.). The Protocol referred to in Article 1 (1) of the EP ASCM II provides for the provisional application of mainly institutional and organisational provisions of the Convention and the Statute, which is intended to enable the Court to be established before the entry into force of the Convention and to ensure its ability to function from the date of entry into force.

11 4. In a memorandum attached to the draft law, it is stated with regard to Article 20 UPCA that (cf. BTDrucks 19/22847, p. 89):

> On Article 20 (Primacy of and respect for Union law)
> This Article of the Agreement clarifies that the Unified Patent Court, as a common court of the participating EU Member States, must fully respect the law of the European Union and its supremacy over national law, as any national court in the EU. This includes the Charter of Fundamental Rights of the European Union of 14 December 2007 (OJ C 303, 14.12.2007, p. 1), in particular the judicial right under Article 47 of the Charter to an effective remedy and an impartial tribunal.

12 5. As part of the resolution in the Federal Council on 18 December 2020, the following protocol declaration was made (cf. BRPlenary minutes no. 998 of 18 December 2020, p. 524):

Explanation

by Minister of State **Dr Florian Herrmann**

(Bavari)

on **item 10** of the agenda

On behalf of the Governments of Bavaria, Baden-Württemberg, Hamburg and Mecklenburg-Western Pomerania, I put the following statement on record:

The Convention and the **patent protection** it guarantees are very important for the innovative German economy.

For the sake of clarity, the approval is based on the following constitutional understanding of the law:

The primacy of Union law provided for in Article 20 of the Convention does not affect the guarantee of fundamental domestic constitutional guarantees, in particular the principles laid down in Article 1 and Article 20 (1) and (2) in conjunction with Article 79 (3) of the Basic Law. The Federal Constitutional Court's competence to review compliance with the minimum constitutional standards when transferring sovereign rights to European or intergovernmental institutions also remains unaffected.

IV.

13 1. With their constitutional complaint, the complainants re I. complain of an infringement of their rights equivalent to fundamental rights under Article 38 (1) sentence 1 in conjunction with Article 20 (1) and (2), Article 79 (3), Article 19 (4) and Article 97 (1) of the Basic Law are violated. At the same time, they request that the Federal President be ordered not to execute and promulgate the EPCÜ-Custody Act II until a decision has been reached on the merits, or, in the alternative, to prohibit him from executing and promulgating the EPCÜ-Custody Act II by way of an interim injunction.

14 a) The constitutional complaint was neither inadmissible nor manifestly unfounded. The complainant re I.1. was entitled to complain because there was the possibility of a violation of his right under Article 38 (1) sentence 1 in conjunction with Article 20 (1) and (2) and Article 79 (3) of the Basic Law. The right to democratic self-determination guaranteed there protected against a substantial diminution of the power of the German Bundestag, against which the

individual could defend himself just as against sufficiently relevant transgressions of competence by the European Union. The constitutional identity must not be violated.

15 aa) The provisions of Article 6 et seq. UPCA concerning the election and the legal position of the judges of the Unified Patent Court violates Article 79 (3) of the Basic Law. The judges' term of office was only six years, and they could be reappointed. This violates their independence because they are defenceless against subtle and psychological influences if they do not want to jeopardise their reappointment and preserve their status. This was neither compatible with Article 97 of the Basic Law nor with Article 6 (1) of the ECHR.

16 The rules on the removal of a judge from office by the Presidium of the Unified Patent Court in Article 10 of the EPC Statute did not meet the requirements of judicial independence. Removal from office was already possible if, according to the decision of the Presidium, the judge no longer fulfilled the necessary requirements or no longer fulfilled the duties arising from his office. A more detailed specification of these criteria was lacking; the judge also had no right of appeal against the removal from office.

17 bb) Furthermore, it could not be ruled out that the establishment of an unrestricted primacy of Union law in Article 20 and Article 21, second sentence, of the UPCA violates Article 79 (3) of the Basic Law. The primacy of application of Union law in Germany could only extend as far as permitted or provided for by the Basic Law and the respective law approving the treaties. The order to apply the law could (only) be issued within the framework of the Constitution and was limited by the constitutional identity of the Basic Law as laid down in Article 79 (3) of the Basic Law. Article 20 and Article 21 sentence 2 UPCA, on the other hand, establish an unrestricted primacy of Union law and cut off the individual's identity check before the Federal Constitutional Court.

18 b) The complainant re I.2. develops computer programmes and operates a a production platform for artificial intelligence. The complainant under I.3. was a non-profit association which took action against patents in the field of artificial intelligence and campaigned for free standards. Both complainants alleged a violation of their fundamental rights under Article 19 (4) and Article 97 (1) of the Basic Law.

19 Although it is still unclear whether programmes based on artificial intelligence can be patentable. However, hundreds of patents for computer programs based on artificial intelligence had been granted by the European Patent Office in recent years and had also been registered in favour of a competitor of the appellant in I.2, which could affect her programs. In future, it would have to challenge these patents before the Unified Patent Court and no longer before the national courts. Due to the lack of independence of the judges of the Unified Patent Court, the second complainant's right to effective legal protection under Article 19 (4) of the Basic Law was in any case impaired. In its statement of 2 February 2021, the appellant stated that it had filed an opposition against a European patent by letter of the same date.

20 c) The complainants re I. furthermore suggest obtaining a preliminary ruling from the Court of Justice of the European Union pursuant to Article 267 TFEU. There were doubts as to the compatibility of the Agreement with Union law because it was unclear whether the Unified Patent Court was to be classified as a court within the meaning of Article 267 TFEU. In particular, it lacked integration into the national judicial systems.

21 2. With his constitutional complaint, the complainant re II. complains that his right equivalent to a fundamental right under Article 38 (1), first sentence, in conjunction with Article 20 (1) and (2) and Article 79 (3) of the Basic Law is being violated. At the same time, he applies for a temporary injunction prohibiting the Federal President from issuing the EPCÜ-Custody Act II.

22 a) On the merits, he alleges a violation of the principle of the rule of law, which is sufficiently connected to the principle of democracy, on the basis of Article 38 (1) sentence 1 in conjunction with Article 20 (1) and (2) and Article 79 (3) of the Basic Law. The central element of the principle of democracy is that every state action of a decision-making nature, as the exercise of state power, requires a democratic legitimisation, the content of which is bound to the constitutional order - and thus to the principle of the rule of law. The implicit condition and basic assumption in the exercise of the right to vote is that every action of the state organs complies with the requirements of law, in particular constitutional law. Therefore, the citizen's decision to vote does not legitimise any transfer of sovereign rights beyond the provisions of the Basic Law. The exercise of judicial power is a central function of the state, the transfer of which is only possible within the framework of the constitution.

23 The EPCÜ-Custody Act II is incompatible with Article 38 (1), first sentence, Article 20 (1), Article 20 (2) and Article 23 (2) Article 79 (3) of the Basic Law, because it was too vague in view of the Brexit and the independence of the judges of the Unified Patent Court was not secured. Although the United Kingdom had originally been a contracting party to the Agreement, it had also withdrawn from the Agreement and the VA Protocol after its withdrawal from the European Union. Ratification of the Agreement despite this unclear situation - the Agreement and the VA Protocol could not enter into force without the participation of the United Kingdom (Article 89 (1) UPCA) - would violate the core content of the rule of law. According to Article 7 (2) EPC in conjunction with Annex II, London was also intended to be the location of one of the three central chambers. However, such a chamber could not be established in a non-contracting state. This would violate the guarantee of the statutory judge (Article 101 (1) sentence 1 of the Basic Law).

24 Through the selection and appointment of the judges by the Advisory Committee and the Administrative Committee would affect their impartiality, because the Committee, which is composed of practitioners, compulsorily and exclusively compiles the list of judges to be selected. It could not be ruled out that lawyer members of the Advisory Committee would later appear before the judges they had selected, which makes indirect influence seem possible. Unlike other international courts, the Unified Patent Court is a specialised court, so that the participation of lawyers who are members of the Advisory Committee must be considered almost certain. The judges also lack the necessary independence due to the short term of office of six years with subsequent possibility of reappointment. In this respect, there was a risk that a judge would take into account extraneous aspects in his decision-making in order not to jeopardise a possible re-election, for example, if a party in a patent case was represented by a lawyer who was a member of the Advisory Committee. The judges' lack of legal protection against possible disciplinary measures (up to and including dismissal) is also incompatible with the principle of the rule of law.

25 b) The Convention also violates Article 4 (3) subpara. 1 and Article 19 (1) TEU and Article 267 TFEU. The Unified Patent Court creates a court separate from the courts of the Member States, which impairs cooperation between the Court of Justice of the European Union and the courts of the Member States. The latter, moreover, lack the competence to conclude the Agreement without the participation of the European Union itself. Furthermore, this violates the principle of the rule of law under Union law, protected rights of defence and the right to effective

judicial protection (Article 2, first sentence, Article 19 (1), second subparagraph, TEU, Article 47 (1), (2), Article 48 (2) CFR). Finally, it violates the principle of the autonomy of Union law because the United Kingdom continues to be involved as a Contracting State.

V.

26 The Federal Government, the German Bundestag and the Bundesrat had the opportunity to comment on the applications for a temporary injunction. The Bundesrat has not made use of this option.

27 1. The Federal Government submitted its comments in a written submission received on 7 January 2021. It considers the applications for a temporary injunction to be inadmissible and unfounded, because a weighing of the consequences is to the detriment of the complainants (a). The Federal Government considers the constitutional complaints to be inadmissible, but in any case manifestly unfounded (b).

28 a) The complainants re I. and II. had the rights granted to them individually at the time of the entry into force of of the EPCÜ-Custody Act II in a substantiated manner. They had only argued that the protection of the complainants' fundamental rights came too late in view of the binding effect under international law of a treaty once ratified. However, the presentation of concrete possible violations of fundamental rights was lacking. Nor did the complainants address the question of whether and to what extent the Federal Constitutional Court could oblige state bodies, after ratification, to correct any objections by means of corresponding amendments to the treaty.

29 In the context of the weighing of consequences required under section 32 of the BVerfGG, the following spoke against the issuance of an interim injunction, that a delay in ratification would have considerable disadvantages. The entry into force of the agreement had already been postponed for several years. A further delay would entail the risk that the other Member States would lose confidence in Germany as a reliable contracting party and that the Convention would fail. This would lead to considerable disadvantages for German industry.

30 b) In the merits, the constitutional complaints were inadmissible, but in any event obviously unfounded.

31 aa) The complainant re I.1. did not sufficiently substantiated a possible violation of fundamental rights. The appellant had not shown to what extent the impugned rules on the selection and re-election of judges at the Unified Patent Court called into question their democratic legitimacy and to what extent they violated the principle of democracy, which is the only objectionable principle under Article 38 (1) sentence 1 of the Basic Law. The appellants re I. had also not further substantiated why the appointment of temporary judges and the possibility of re-election violated the constitutional identity of the Basic Law. A possible violation of Article 19 (4) of the Basic Law had also not been substantiated in more detail.

32 The complainant re II. had also not sufficiently demonstrated that his own fundamental rights were affected. The complaint of lack of legal protection against decisions of the European Patent Office was not valid because the European Patent Office was not the subject matter of the Convention. With regard to the alleged unclear legal situation of the United Kingdom, the second complainant had not explained which fundamental right position that could be complained of was thereby violated. With regard to a possible violation of the principle of the rule of law, a connection with the principle of democracy, which is directly challenged under Article 38 (1) sentence 1 of the Basic Law, had not been substantiated, and a violation of Article 101 (1) sentence 2 of the Basic Law was not apparent with regard to London as the location of a central chamber. In particular, the second complainant had not shown in what way the violations of Union law complained of by him affected his right to democratic self-determination under Article 38 (1) sentence 1 of the Basic Law.

33 bb) The constitutional complaints also proved to be unfounded. Insofar as Article 20 UPCA establishes the unconditional primacy of Union law, this does not constitute a violation of Article 20 (1) and 20 (2) in conjunction with Article 79 (3) of the Basic Law. The provision did not concern the Federal Constitutional Court and did not affect its supervisory powers under national constitutional law - as also stated in the explanatory memorandum to the EPCÜ-Custody Act II (see Bundestag printed paper 19/22847, p. 19).

34 2. The German Bundestag commented in its written submission of 8 January 2021 on the proceedings. It considers the applications for interim measures to be inadmissible (a). The applications are also unfounded due to a lack of prospects of success in the merits. The weighing of consequences must in any case be to the disadvantage of the complainants (b).

35 a) The applications for an interim injunction are already inadmissible for lack of standing. Moreover, they were not substantiated. It had not been sufficiently explained that the complainants were threatened with disadvantages of particular importance, to what extent an irreversible loss of rights was to be feared and whether and how it would be possible to withdraw from the agreement. The general statements on the weighing of consequences did not meet the requirements for a substantiated submission. With regard to the application to prohibit the Federal President from issuing the EPCÜ-Custody Act II, there was no need for legal protection because it was sufficient to safeguard the interests of the complainants to suspend the binding effect under international law by not ratifying it.

36 b) The applications for an interim injunction were in any case unfounded. The constitutional complaints in the merits had no prospect of success; in any case, the weighing of consequences was to the detriment of the applicants.

37 aa) The constitutional complaints were already inadmissible. The complainants failed to recognise that Article 38 (1) sentence 1 of the Basic Law could not be used to complain about every infringement of the constitutional identity protected by Article 79 (3) of the Basic Law, but only about an infringement of the right to democratic self-determination.

38 (1) The complainant re I.1. asserted such a violation, but without setting it out in a manner that complies with the requirements of section 23 (1) sentence 2 and section 92 of the BVerfGG. He does not comment on the minimum standards of the rule of law that must be complied with for the transfer of sovereign rights to an international court, nor does he explain why the standard that is customary for international courts is not met by the Unified Patent Court.

39 The objection that Article 20 UPCA is incompatible with Article 79 (3) of the Basic Law is not valid. The priority rule of Union law was not designed to override the barriers to integration which the national constitutional systems erected vis-à-vis Union law. The emphasis on the primacy of Union law in the Convention rather refers to the fact that Union law takes precedence over the international law provisions of the Convention. The relationship between Union law and national law was not changed in any way. Even if this provision were to be understood differently, it would only be a constitutionally irrelevant ineffectual attempt. The Federal Constitutional Court had already held in its Lisbon judgment that even a primary-law safeguarding of the primacy of Union law could never go further than it had been

constitutionally agreed to (see BVerfGE 123, 267 <402>). In this respect, the declaration in an international agreement could certainly not have any constitutive effect.

40 The applicants would also not be cut off from the possibility of identity checks in the long term. An identity check could not be demanded within the framework of the specialised courts anyway, as it was exclusively the responsibility of the Federal Constitutional Court. After the entry into force of the Agreement, the Federal Constitutional Court could oblige the state organs to intervene against an application of Union law by the Unified Patent Court that affects the constitutional identity, in the exercise of their responsibility for integration. As a last resort to protect Germany's constitutional identity, the Federal Republic of Germany could withdraw from the Agreement, irrespective of whether this was permissible or provided for under international law. Also, decisions of the Unified Patent Court may not be enforced in Germany if they affect the constitutional identity protected by Article 79 (3) of the Basic Law.

41 (2) Insofar as the complainants re I.2. and I.3. claim a violation of Article 19 (4) in connection with Article 97 (1) of the Basic Law, there was no substantiated submission as to how the alleged violation of the constitution affected the complainants themselves, directly and at present. They limited their submission to the abstract possibility of violations of fundamental rights in the future. This was an inadmissible popular constitutional complaint.

42 (3) Finally, the complainant re II. based all of his objections on a violation of the right to democratic self-determination, but did not substantiate this. The submission that the constitutional identity of the Basic Law would be violated by ratification because the situation of the Convention was completely unclear after the withdrawal of Great Britain was incomprehensible. The consideration that the Parliament is only legitimised to act lawfully does not lead any further either, because this amounts to a general review of legality, which the Senate had excluded in the proceedings on the EPCÜ-Constitutional Act I. Furthermore, the constitutional identity was not affected by the fact that the Agreement provided for the establishment of a central division of the Unified Patent Court in London. It is true that the second complainant in this respect only alleges a violation of Article 101 (1) sentence 2 of the Basic Law; it is unclear to what extent this could violate the principle of democracy. For a direct violation of the right to the lawful judge, however, the second complainant's own, present and direct fundamental rights were not affected. As far as he attacks the legal status of the judges of the Unified Patent Court, the relationship between the principles of democracy and the rule

of law is not substantiated. Finally, the alleged infringements of the Convention against Union law did not lead to a violation of the constitutional identity. The Senate had already decided this in its decision of 13 February 2020. The complainant did not counter this with any new points of view.

43 bb) In any event, the weighing of consequences required under section 32 of the BVerfGG was to the applicants' disadvantage. Even if there was a threat of an irreversible loss of rights through ratification of the Convention, the disadvantages that would occur outweighed the disadvantages, if a temporary injunction were to be issued. The entry into force of the Convention has failed for several years due to the lack of ratification by the Federal Republic of Germany. There was thus a risk that the political compromise found between the contracting states for a Unified European Patent Court System would be called into question. A failure of the agreement would lead to considerable foreign policy damage for the Federal Republic of Germany and would call into question its alliance and European capability. Furthermore, a further delay of the entry into force would lead to economic losses, as the economy would benefit from the simplifications contained in the Agreement.

VI.

44 On 13 January 2021, the Federal President – in accordance with established state pracitce (cf. BVerfGE 123, 267 <304>; 132, 195 <195 et seq. para. 1 ff.>; 153, 74 < para. 90>; cf. Schneider, in: Burkiczak/Dollinger/Schorkopf, BVerfGG, 2015, § 32 para. 268 fn. 478) - declared to the Federal Constitutional Court that he would neither issue nor promulgate the EPCÜ-Custody Act II until the Federal Constitutional Court had ruled on the applications for an temporary injunction.

B.

45 The applications for a temporary injunction pursuant to section 32 of the BVerfGG must be dismissed because the constitutional complaints are inadmissible on the merits. This applies both insofar as the complainants allege a violation of the principle of the rule of law, of the fundamental right to effective legal protection or violations of European Union law (I.), and insofar as the complainant under I.1. considers the provision of Article 20 UPCA to be an inadmissible infringement of the constitutional identity protected by Article 79 (3) of the Basic Law (II.).

I.

46 1. Pursuant to section 32 (1) of the BVerfGG, the Federal Constitutional Court may review a state by temporary injunction if this is urgently required to avert serious disadvantages, to prevent imminent violence or for another important reason for the common good. If the application is directed against the Act Approving an International Treaty, the application may already be filed before its execution and promulgation by the Federal President (a). When examining whether the requirements of section 32 of the BVerfGG for the issuance of a temporary injunction are met, a strict standard must be applied. The reasons put forward for the unconstitutionality of the challenged measure are, in principle, not taken into consideration, unless proceedings on the merits corresponding to the application prove to be inadmissible from the outset or manifestly unfounded (b).

47 a) Acts approving international treaties may be challenged by means of a constitutional complaint if the treaty contains provisions that directly encroach on the legal sphere of the individual (cf. BVerfGE 6, 290 <294 et seq.>; 40, 141 <156>; 84, 90 <113>; 123, 148 <170>; 153, 74 <131 f. para. 93>). Also if the consent to an international treaty is, as a rule, not divisible, because the law on consent fundamentally forms a unit that cannot be separated from the international treaty and both constitute, to that extent, a uniform object of attack (see BVerfGE 103, 332 <345 et seq.>), this does not preclude a substantive limitation of the subject matter of the proceedings with regard to the provisions of the international treaty that are referred to (see BVerfGE 14, 1 <6>; 123, 148 <170, 185>; 142, 234 <245 et seq. para. 10 ff.>; 153, 74 <131 f. para.. 93>). However, even in the case of laws approving international treaties, a precise description of the provisions challenged by the constitutional complaint is required.

48 The Act Approving an International Treaty (Article 59 (2) sentence 1 of the Basic Law) can already be a suitable subject of a constitutional complaint before it enters into force, if the legislative procedure has been completed except for the execution by the Federal President and the promulgation (see BVerfGE 153, 74 <132 para.. 94 with further references >; case-law), because after the deposit of the instrument of ratification, a binding effect under international law comes into effect which, if necessary, can no longer be reversed, so that legal protection in the merits could then come too late (cf. BVerfGE 46, 160 <164>; 111, 147 <153>; 132, 195 <233 para.. 88>; 143, 65 <88 para. 36>). In this case, there would be a danger that

Germany would enter into obligations under international law in violation of its constitution. As a result, the constitutional complaint could also fail to achieve its purpose of serving legal peace by clarifying the constitutional situation and avoiding a divergence of international and constitutional obligations (cf. <53 f.>; 123, 267 <329>; 153, 74 <132 para. 94>). It is therefore in line with the requirement of effective (fundamental) legal protection and state practice to enable a preventive examination of future regulations already at this point in time (cf. BVerfGE 123, 267 <329>; 153, 74 <132 para. 94>).

49 b) In the context of an application pursuant to section 32 (1) of the BVerfGG, the reasons for the unconstitutionality of the challenged measures, are in principle to be disregarded, unless the finding sought in the merits or the application filed in the merits proved to be inadmissible from the outset or manifestly unfounded (cf. BVerfGE 89, 344 <345>; 92, 130 <133>; 103, 41 <42>; 118, 111 <122>; 132, 195 <232 para. 87>; 143, 65 <87 para. 35>; 145, 348 <356 para. 28>; 150, 163 <166 para. 9>; 151, 58 <63 para. 11>; case law).

50 When examining whether the requirements of section 32 (1) of the BVerfGG are met, a strict standard is to be applied as a rule because of the far-reaching consequences of an interim injunction (cf. BVerfGE 55, 1 <3>; 82, 310 <312>; 94, 166 <216 f.>; 104, 23 <27>; 106, 51 <58>; 143, 65 <87 para. 34>). This applies in particular when the suspension of the execution of a law is requested (cf. BVerfGE 55, 1 <3>; 82, 310 <312>; 94, 166 <216 f.>; 104, 23 <27>; 106, 51 <58>; 121, 1 <17 f.>; 122, 342 <361>; 131, 47 <61>; 132, 195 <232 para. 86>; 140, 99 <106 f. para. 12>; established case-law), because this or the prevention of its entry into force constitutes a considerable encroachment on the original competence of the legislature (cf. BVerfGE 131, 47 <61>; 140, 99 <106 f.>). If the reasons speaking in favour of a provisional regulation must, as a rule, already be so serious that they make the issuing of a temporary injunction indispensable, they must, in addition, have special weight in such a case (cf. BVerfGE 104, 23 <27 f.>; 117, 126 <135>; 122, 342 <361 f.>; case-law). In this respect, it is of decisive importance whether the disadvantages are irreversible or only very difficult to revise (cf. BVerfGE 91, 70 <76 f.>; 118, 111 <123>; 140, 211 <219 para. 13>; case law) in order to affirm the interest in suspension. These requirements are even more stringent if a measure with effects under international law or foreign policy is at issue (cf. BVerfGE 35, 193 <196 f.>; 83, 162 <171 f.>; 88, 173 <179>; 89, 38 <43>; 108, 34 <41>; 118, 111 <122>; 125, 385

<393>; 126, 158 <167>; 129, 284 <298>; 132, 195 <232 para. 86>; 143, 65 <87 para. 34>; Order of the Second Senate of 15 April 2021 - 2 BvR 547/21 -, para. 67).

51 Against this background, the complainants, must explain in the grounds for their application for a temporary injunction or their constitutional complaints with which constitutional requirements the challenged measure conflicts. For this purpose, they must show to what extent the measure is intended to violate the designated fundamental rights (see BVerfGE 99, 84 <87>; 120, 274 <298>; 140, 229 <232 para. 9>; 142, 234 <251 para. 28>; 149, 346 <359 para. 23>). If there is already case-law of the Federal Constitutional Court on the constitutional issues raised by them, the alleged violation of fundamental rights is to be substantiated by addressing the standards developed therein (cf. BVerfGE 99, 84 <87>; 101, 331 <346>; 123, 186 <234>; 142, 234 <251 margin no. 28>; 149, 346 <359 para. 23>).

52 2. Measured against this, the complainants have not sufficiently substantiated the possibility of a violation of fundamental rights by the challenged Convention in view of the Senate's extensive case-law on Article 23 (1) of the Basic Law and, in particular, the decision of 13 February 2020 (BVerfGE 153, 74), which dealt with the Convention at issue. This applies both to the complainant re I.1. and the right to democratic self-determination from Article 38 (1) sentence 1 in conjunction with Article 20 (1) and (2) as well as Article 79 (3) of the Basic Law (a), which is alleged to have been violated, and to the complaint of the complainants re I.2. and I.3. that the Convention violates their fundamental right from Article 19 (4) in conjunction with Article 97 (1) of the Basic Law as well as Article 6 (1) of the ECHR (b). The submission of the complainant re II. on a possible violation of his right under Article 38 (1) sentence 1 in conjunction with Article 20 (1) and 20 (2), as well as Article 79 (3) of the Basic Law does not satisfy the requirements of section 23 (1) sentence 2 and section 92 of the BVerfGG substantiation requirements (c).

53 a) The complainant re I.1. claims that the Convention violates his right to democratic self-determination under Article 38 (1), first sentence, in conjunction with Article 20 (1) and (2) and Article 79 (3) of the Basic Law (see recital 72 et seq. for the claim relating to Article 20 UPCA), claiming that the Convention violates the principle of the rule of law enshrined in Article 20 (3) of the Basic Law because of the organisational structure of the Unified Patent Court and the legal status of its judges. However, he does not explain to what extent this also affects the

principle of democracy, which is solely subjectivised by Article 38 (1) sentence 1 of the Basic Law and laid down in Article 20 (1) and (2) of the Basic Law.

54 aa) According to Article 23 (1) sentence 3 of the Basic Law, a transfer of sovereign rights to the European Union does not lead to the integration-proof core of the Basic Law within the meaning of Article 79 (3) of the Basic Law - its identity - being affected. Therefore, within the framework of the identity review, the Federal Constitutional Court examines whether, in the event of a transfer of sovereign rights to the European Union or - as is the case here - to institutions that have a complementary or special relationship of proximity to it, the principles declared inviolable by Article 79 (3) of the Basic Law are affected (see BVerfGE 142, 123 <195 para. 138> with reference to BVerfGE 123, 267 <344, 353 f.>; 126, 286 <302>; 129, 78 <100>; 134, 366 <384 f. para. 27>). This concerns the Preservation of the core of human dignity of fundamental rights within the meaning of Article 1 of the Basic Law (cf. BVerfGE 140, 317 <341 para. 48>) as well as the fundamental rights laid down in Article 20 of the Basic Law principles (cf. BVerfGE 142, 123 <195 para. 138>).

55 An identity check on the basis of a violation of the right under Article 38 (1), first sentence, in conjunction with Article 20 (1) and (2), and Article 79 (3), of the Basic Law (cf. BVerfGE 89, 155 <187>; 123, 267 <340>; 129, 124 <169, 177>; 132, 195 <238 para. 104>; 135, 317 <386 para. 125>; 151, 202 <286 para. 118>) is, however, bound to strict conditions. The resulting right of citizens to democratic self-determination is strictly limited to the core of the principle of democracy rooted in human dignity, which is also withdrawn from the grasp of the legislature amending the constitution by Article 79 (3) of the Basic Law. On the other hand, it does not grant a claim to a control of the lawfulness of democratic majority decisions that goes beyond its safeguarding and, in particular, does not serve to control the content of democratic processes, but is directed towards enabling them (cf. BVerfGE 129, 124 <168>; 134, 366 <396 et seq para. 52>; 142, 123 <190 para. 126>; 151, 202 <286 para. 118>).

56 If an identity check based on Article 38 (1) sentence 1 of the Basic Law does not challenge the principle of democracy, but rather other structural principles of the state, such as the principle of the rule of law, the complainant must, according to the now established case-law of the Senate, establish the connection with the principle of democracy, which can be directly complained of via Article 38 (1) sentence 1 of the Basic Law (cf. BVerfGE 123, 267 <332 f.>; 129, 124 <177>; 132, 195 <238 para. >; 134, 366 <397 para. 53>; 135, 317 <386 para. 125>;

142, 123 <190 para. 126>; 146, 216 <249 f. para. 44 ff.>; 153, 74 <139 para. 107>). In this sense, the Senate admitted the complaint of a violation of the principle of the welfare state in Article 20 (1) of the Basic Law by invoking Article 38 (1) sentence 1 of the Basic Law, because the complainants had submitted in a sufficiently definite manner that the democratic possibilities of the German Bundestag to shape social policy were so limited by the competences of the European Union under the Treaty of Lisbon that the German Bundestag could no longer fulfil the minimum requirements of the principle of the welfare state resulting from Article 79 (3) of the Basic Law (cf. BVerfGE 123, 267 <332 et seq.>).

57 bb) The complainant re I.1. does not substantiate the possibility of a violation of Article 38 (1) sentence 1 of the Basic Law by the EPCÜ – Custody Act II in a matter that satisfies the requirements of Article 23 (1) second sentence, and section 92 of the BVerfGG. In particular, it is not apparent to what extent the objections raised by the applicant against the organisational structure of the Unified Patent Court and the legal position of its judges are connected with the principle of democracy, which alone is subject to appeal under Article 38 (1) sentence 1 of the Basic Law.

58 The principle of the rule of law as such is closely linked to the principle of democracy because the democratic rule of the majority experiences the necessary moderation, limitation and control through its containment by the rule of law (cf. Bökenförde, in: Isensee/Kirchhof, HStR II, 3rd ed. 2004, § 24 para. 93). However, not every violation of the guarantees of the rule of law also constitutes a violation of the principle of democracy. Rather, an impairment of its guarantee content requires, for example, the demonstration that the challenged convention transfers sovereign rights in such a way that, when they are claimed by the European Union or its organs, institutions and other bodies, new sovereign rights can be established, i.e. they are granted a so-called competence competence (cf. BVerfGE 89, 155 f., 192, 199); 123, 267 <349>; cf. also BVerfGE 58, 1 <37>; 104, 151 <210>; 132, 195 <238 para. 105>; 142, 123 <191 f. para. 130>; 146, 216 <250 para. 48>; 151, 202 <287 para. 121>), that blanket authorisations to exercise official authority are granted without corresponding safeguards (cf. BVerfGE 58, 1 <37>; 89, 155 <183 f., 187>; 123, 267 <351 et seq.>; 132, 195 <238 para. 105>; 135, 317 <399 para. 160>; 142, 123 <191 et seq. para. 130>; 151, 202 <287 para. 121>) or substantially diminish the rights of the Bundestag (cf. BVerfGE 123, 267 <341>; 142, 123 <190 para. 125>; 151, 202 <288 et seq. para. 123>), in particular its budgetary right (cf. BVerfGE 123, 267 <359>; 129, 124 <177, 181>; 151, 202 <288 para. 123>) and its overall

budgetary responsibility. (cf. BVerfGE 123, 267 <359>; 129, 124 <177>; 132, 195 <239 para. 106>; 135, 317 <399 f. para. 161>; 142, 123 <195 para. 138>; 146, 216 <253 f. para. 54>; 151, 202 <288 para. 123>). The argument that the right of all citizens to participate freely and equally in legitimising and influencing the sovereign power that affects them is also impaired and that they are subjected to a political power that they cannot avoid and that they are not in principle able to determine in equal measure in terms of personnel and subject matter (cf. BVerfGE 123, 267 <341>; 142, 123 <191 para. 128>; 151, 202 <285 et seq. para. 117>), would meet the requirements. It would be equivalent if it were shown that the organisational structure of the Unified Patent Court and its organs fails to meet the minimum level of democratic legitimation and control derived from Article 23 (1), third sentence, in conjunction with Article 79(3) in conjunction with Article 20 (1) and (2) of the Basic Law (see BVerfGE 89, 155 <208>; 134, 366 <389 f.). para. 32>; 142, 123 <220 para. 189>; 151, 202 <290 ff. para. 127 ff.>).

59 The complainant's submission under I.1. is, however, limited to the description that Article 6 et seq. UPCA violates Article 97 (1) of the Basic Law in conjunction with Article 6 (1) of the ECHR and the rule of law principle of Article 20 (3) of the Basic Law due to the appointment of the judges of the Unified Patent Court for a term of six years, a possible reappointment and the insufficient contestability of a removal from office. To what extent this affects the principle of democracy remains unclear. The general reference to the principle of separation of powers, which according to the complainant's submission under I.1. is supposed to be rooted in the principle of democracy, does not change this.

60 Moreover, there is a lack of sufficient argumentation as to which constitutional legal minimum requirements are to be imposed on the election, repeated appointment and removal from office of judges. Although the Senate, in its decision on the temporary judge - albeit with a view to the constitutional principle of the rule of law (cf. BVerfGE 148, 69 <89 para. 53>) - regarded possible reappointments of temporary judges as an unconstitutional restriction of judicial independence (cf. BVerfGE 148, 69 <126 f. para. 140 ff.>), but already restricted this for judges of the Land constitutional courts and for honorary and lay judges (cf. BVerfGE 148, 69 <121 para. 128 f., 129 f. para. 148>). Particularities apply in this respect, especially to international courts, which must be taken into account when transferring judicial tasks to intergovernmental bodies and which may justify deviations from the requirements of the Basic Law to ensure the independence of judges. Limited terms of office for judges are the rule at international courts and are often also linked to the possibility of re-election. At the level of the European Union,

Article 253 (1), second half-sentence and (4), as well as Article 254 (2), second sentence and fourth sentence TFEU expressly provide for six-year terms of office at the Court of Justice and the General Court of the European Union, as well as the possibility of reappointment (criticised in this respect, however, by Everling, DRiZ 1993, p. 5 <6>; Jacobs, in: Liber amicorum Lord Slynn of Hadley, 2000, p. 17 <24 et seq,.>; Baltes, Die demokratische Legitimation und die Unabhängigkeit des EuGH und des EuG, 2011, p. 32 et seq, 203 et seq.; Stürner, JZ 2017, p. 905 <906 et seq.>), while re-election for the judges of the European Court of Human Rights after a term of nine years was expressly excluded with the entry into force of the 14th Additional Protocol on 1 June 2010 (cf. Article 23 (1) sentence 2 ECHR).

61 There is also a lack of sufficient submission insofar as the complainant re I.1. complains about the lack of legal protection for the judges of the Unified Patent Court in the event of removal from office. It is true that effective legal protection is one of the basic requirements of the rule of law (see BVerfGE 149, 346 <363 et seq., para. 35>), whereby such protection against the removal of judges from office is essential for their independence. However, it can be left open which requirements result from this in detail. It is not apparent to what extent the right of the appellant under I.1. to democratic self-determination under Article 38 (1) sentence 1 of the Basic Law can be affected by the lack of legal protection for judges at the Unified Patent Court.

62 b) Also, insofar as the complainants under I.2. and I.3. claim that the Convention violates their fundamental right under Article 19 (4) n conjunction with Article 97 (1) of the Basic Law and Article 6 (1) of the European Convention on Human Rights the constitutional complaint does not meet the substantiation requirements of section 23 (1) sentence 2 and section 92 of the BVerfGG.

63 aa) If the legislature authorises intergovernmental bodies or international organisations to exercise public authority directly against the persons concerned in Germany, it must ensure effective legal protection in accordance with the objective value decision contained in Article 19 (4) of the Basic Law (cf. BVerfGE 58, 1 <40 et seq.>; 59, 63 <85 et seq.>; 73, 339 <376>; 149, 346 <364 para. 36>). This standard is consistent with that of Article 6 ()1 of the ECHR and the case-law of the European Court of Human Rights, to which a Convention state also remains bound when it transfers sovereign rights to intergovernmental bodies (see BVerfGE 149, 346 <364 f. para. 38> with further references).

64 Effective legal protection requires both control of sovereign action by factually and personally independent and impartial judges as well as access to a court or a quasi-judicial body, which in any case enables the most complete and timely review possible of state or governmental action (cf. BVerfGE 8, 274 <326>; 51, 176 <185>; 54, 39 <41>; 58, 1 <40>; 96, 27 <39>; 101, 106 <122 f.>; 101, 397 <407>; 103, 142 <156>; 104, 220 <231>; 149, 346 <363 f. para. 35>). The personal and factual independence of the judges (Article 97 of the Basic Law) is an essential characteristic (cf. BVerfGE 103, 111 <140>; 133, 168 <202 para. 62>).

65 If the effectiveness of judicial protection is at issue, a violation of Article 19 (4) of the Basic Law by the legislature can only be considered if the impairment has a current, i.e. actual and not only potential, effect on the legal position of the complainant (cf. BVerfGE 140, 42 <58 para. 59>). The mere prospect that the complainant might be affected at some time in the future is not sufficient in this respect (see BVerfGE 114, 258 <277>; 140, 42 <48 para. 59>). Likewise, the complainant himself must be directly affected. This is the case if he or she is the addressee of the regulation and no further act of execution is required that would change his or her legal position (cf. BVerfGE 1, 97 <101 ff.>; 102, 197 <206 f.>; 110, 141 <151 f.>).

66 bb) Measured against these standards, the complainants to I.2. and I.3. have not shown that their fundamental right under Article 19 (4) of the Basic Law is affected by the EPCÜ-Custody Act II itself, currently and directly.

67 Admittedly, the complainant to I.2. submits that as a developer for computer programs in the field of artificial intelligence she produces programs and that conflicting patents in this field could arise before the European Patent Office and subsequent litigation before the Unified Patent Court. In this respect, their right to effective legal protection could be affected, as the organisation of the Unified Patent Court did not satisfy the principles of the rule of law. In substance, however, these are only vague statements about a potential future concern which does not fall within the scope of protection of Article 19 (4) of the Basic Law. It is uncertain whether the complainant under I.2. will ever be involved in a concrete legal dispute before the Unified Patent Court. Neither is it certain that the patent applications filed by the complainant at I.2. are filed at all, nor that the Unified Patent Court will decide in such a case. This is not changed by the further submission of 2 February 2021, according to which the complainant re I.2. has filed an opposition against a patent granted by the European Patent Office.

68 With regard to the complainant to I.3., a non-profit association that is for free standards in software, there is also no substantiated explanation of how he could be a party to patent litigation before the Unified Patent Court. The statements on possible proceedings before the court are not sufficiently concrete and are exhausted by the fact that the appellant under I.3. could conduct litigation before the Unified Patent Court at all. In this context, the connection between the asserted deficient legal position of the judges at the Unified Patent Court and a present and direct violation of the appellants' right to effective legal protection under Article 19 (4) of the Basic Law is not recognisable.

69 c) The submission of the complainant re II. regarding a possible violation of his right under Article 38 (1) sentence 1 in conjunction with Article 20 (1) and (2) as well as Article 79 (3) of the Basic Law does not satisfy the substantiation requirements of section 23 (1) sentence 2, section 92 of the BVerfGG. The second complainant raises numerous objections against the Convention and the EPCÜ-Custody Act II, which approves it. However, he does not make a concrete reference to the constitutional standards, in particular to the question of the extent to which the right to democratic self-determination is affected by the cited constitutional deficiencies of the Convention.

70 aa) Insofar as the complainant re II. complains about a violation of European Union law, a violation of Article 38 (1) sentence 1 of the Basic Law is excluded from the outset (cf. on this already BVerfGE 153, 74 <141 f. para. 114>). From Union law there are no formal or substantive requirements that could call into question the validity of German laws (cf. BVerfGE 31, 145 <174 f.>; 82, 159 <191>; 110, 141 <154 f.>; 115, 276 <299 f.>; 153, 74 <141 f. para. 114>; BVerfG, decision of the Second Senate of 27 April 2021 - 2 BvR 206/14 -, para 38). Against this background, the violation of Union law - apart from a violation of the fundamental rights of the Charter of Fundamental Rights (cf. BVerfGE 152, 152 <169 para. 42 et seq., 179 et seq. para. 63 et seq.>; 152, 216 <236 para. 50, 237 para. 52>; BVerfG, Order of the Second Senate of 1 December 2020 - 2 BvR 1845/18 et al. April 2021 - 2 BvR 206/14 -, para. 39 et seq.) - cannot in principle be challenged by means of a constitutional complaint (cf. BVerfGE 153, 74 <141 et seq. para. 114 et seq.>).

71 bb) The complaint that the Convention would be terminated with the withdrawal of Great Britain from the European Union could not be brought into force, on the other hand, concerns the

concrete interpretation of the Convention and not possible requirements of the Basic Law. In principle, it cannot be challenged by means of a constitutional complaint.

II.

72 The constitutional complaint of the complainant to I.1. is also not sufficiently substantiated insofar as it is directed against Article 20 UPCA.

73 1. a) According to the established case-law of the Federal Constitutional Court, Article 23 (1) sentence 1 of the Basic Law also contains a requirement of effectiveness and enforcement for Union law (cf. BVerfGE 126, 286 <302>; 140, 317 <335 para. 37>; 142, 123 <186 et seq. para. 117>), which also includes granting Union law priority of application over national law in the law of consent pursuant to Article 23 (1) sentence 2 of the Basic Law (cf. BVerfGE 73, 339 <375>; 123, 267 <354>; 129, 78 <100>; 134, 366 <383 para.. 24>). According to this case-law, the primacy of application of Union law over national law also applies in principle with regard to conflicting national constitutional law and, in the event of a conflict in the concrete case, generally leads to its inapplicability (see BVerfGE 126, 286 <301>; 129, 78 <100>; 140, 317 <335 para. 38 f.>; 142, 123 <187 para. 118>). However, the primacy of application of Union law exists only by virtue of and within the framework of the constitutional authorisation (cf. BVerfGE 73, 339 <375>; 75, 223 <242>; 123, 267 <354>; 134, 366 <381 f. para.. 20 f.>). Therefore, the opening of the German legal order to Union law, which is made possible by the Basic Law and implemented by the integration legislature, finds its limits not only in the integration program for which the legislature is responsible, but also in the identity of the Constitution, which is as resistant to amendment as it is to integration (Article 23.1 sentence 3 in conjunction with Article 79.3 of the Basic Law). The primacy of application only extends as far as the Basic Law and the Act Approving the Constitution permit or provide for the transfer of sovereign rights (cf. BVerfGE 37, 271 <279 f.>; 58, 1 <30 f.>; 73, 339 <375 f.>; 75, 223 <242>; 89, 155 <190>; 123, 267 <348 et seq., 402>; 126, 286 <302>; 129, 78 <99>; 134, 366 <384 para. 26>; 140, 317 <336 para. 40>; 142, 123 <187 f. para. 120>; 154, 17 <89 f. para. 109>). Only to this

extent, the application of Union law in Germany is democratically legitimised (cf. BVerfGE 142, 123 <187 f. para. 120>).

74 The Federal Constitutional Court guarantees these limits in particular in the framework of the of identity and ultra vires control. The constitutional or supreme courts of other member states also know similar constitutional reservations (see in this respect for the Kingdom of Belgium: Constitutional Court, Decision No. 62/2016 of 28 April 2016, para. B.8.7.; for the Kingdom of Denmark: Højesteret, Judgment of 6 April 1998 - I 361/1997 -, para. 9.8.; Judgment of 6 December 2016 - I 15/2014 -; for the Republic of Estonia: Riigikohus, Judgment of 12 July 2012 - 3-4-1-6-12 -, para. 128, 223; for the French Republic: Conseil Constitutionnel, Decision No. 2006-540 DC of 27 July 2006, para. 19; Decision No. 2011-631 DC of 9 June 2011, para. 45; Decision No. 2017-749 DC of 31 July 2017, para. 9 et seq.; Conseil d'État, Decision No. 393099 of 21 April 2021, para. 5; for Ireland, Supreme Court of Ireland, Crotty v. An Taoiseach, <1987>, I.R. 713 <783>; S.P.U.C. <Ireland> Ltd. v. Grogan, <1989>, I.R. 753 <765>; for the Italian Republic: Corte Costituzionale, Decision No. 183/1973, para. 3 et seq; Decision No. 168/1991, para. 4; Decision No. 24/2017, para. 2; for Latvia: Satversmes tiesa, Judgment of 7 April 2009 - 2008-35-01 -, para.No. 17; for the Republic of Poland: Trybunał Konstytucyjny, Urof 11 May 2005 - K 18/04 -, para. 4.1., 10.2.; of 24 November 2010 - K 32/09 -, para. 2.1 ff; of 16 November 2011 - SK 45/09 -, para. 2.4, 2.5; for the Kingdom of Spain: Tribunal Constitucional, declaration of 13 December 2004, DTC 1/2004; for the Czech Republic: Ústavní Soud, judgment of 31. January 2012 - 2012/01/ 31 - Pl. ÚS 5/12 -, para. VII; for Croatia: Ustavni Sud, decision of 21 April 2015 - U-VIIR-1158/2015 -, para. 60).

75 These reservations of control under European constitutional law stand in the way of an unrestricted primacy of application of Union law (cf. BVerfGE 142, 123.<203 para. 153>; 153, 74 <163 para. 166>; 154, 17 <151 para. 234>). The requirements of the Basic Law are binding on all constitutional bodies of the Federal Republic of Germany and may neither be relativised nor undermined.

76 Against this background, the Treaty on European Union and the Treaty on the Functioning of the European Union do not contain an explicit provision on the primacy of Union law. Although the subsidiarity protocol to the Treaty of Amsterdam (cf. Protocol No. 30 on the Application of the Principles of Subsidiarity and Proportionality OJ EC 1997 No. C 340 of 10 November 1997, p. 105 under No. 2) contains a reference to the case-law of the Court of Justice on the primacy

of Union law - one that is open and in need of to interpretation, however, an explicit recognition of an unrestricted and unconditional supremacy of Union law did not meet with approval. Such a provision was also not included in the Treaty of Lisbon - in a departure from the failed Constitutional Treaty (cf. Article I-6 Treaty establishing a Constitution for Europe of 29 October 2004, OJ EU No. C 310/12) - but is merely contained in an annexed declaration of the Member States (cf. Declaration No. 17 to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon signed on 13 December 2007, OJ EU No. C 326 of 26 October 2012, p. 346). This states that the non-inclusion of primacy in the text of the treaty does not change the status quo ante. For this reason, from the point of view of the Member States, there was nothing constitutionally to recall against Declaration No. 17 (cf. only BVerfGE 123, 267 <401 f.>; furthermore Conseil Constitutionnel, Decision No. 2004-505 DC of 19 November 2004, para. 9 et seq.; Ruffert, in: Calliess/ders., EUV/ TFEU, 5th ed. 2016, Article 1 TFEU para. 18).

77 b) According to this, Article 20 UPCA must be understood in such a way that it is intended to eliminate doubts as to the compatibility of the Convention with Union law, but it is not a matter of clarifying the relationship between Union law and national constitutional law beyond the status quo. For the interpretation of Article 20 UPCA, it is important that it is based on Opinion 1/09 of the Court of Justice of the European Union of 8 March 2011, in which the Court described the primacy of Union law, as interpreted by it, and the preservation of the autonomy of the Union legal order as mandatory requirements for the admissibility of a unified European patent jurisdiction under Union law (see ECJ, Opinion of 8 March 2011, 1/09, [2011] ECR I-0000). 2011, I-1143 <1168 para. 65, 67>), even if these statements were directed at the then version of the Convention and Article 14a of the old version of the draft Convention, which listed Union law only after the law of the Convention and which only referred to "directly applicable Union law" (cf. on the old version of the Convention: ECJ, Opinion of 8 March 2011, 1/09, [2011] ECR I-1143 <1150 para.. 9>). This understanding is also supported by the fact that not all Member States of the European Union are contracting states and Article 20 UPCA therefore does not concern the relationship between Union law and national constitutional law.

78 This also corresponds to the view of the Federal Government, which states in its opinion on the draft EPCÜ-Custody Act II that Article 20 UPCA serves to "clarify" that the Unified Patent Court, as an international court, has the same position in relation to the law of the European Union as the national courts. In this context, it expressly emphasises that Article 20 UPCA

does not affect the exercise of constitutionally given examination competences by the Federal Constitutional Court. In its Lisbon ruling, the Federal Constitutional Court had stated that it was irrelevant whether the priority of application of Union law was provided for in the Treaties themselves or in Declaration No. 17 annexed to the Final Act to the Treaty of Lisbon. Therefore, the Federal Government assumes that the "long-established relationship between the legal orders" is neither changed by Article 20 UPCA nor by the recital referring to it with the wording "full application of and respect for Union law" (cf. BTDrucks 19/22847, p. 10).

79 This interpretation can also be supported by the protocol declaration submitted to the Federal Council of the federal states Bavaria, Baden-Württemberg, Hamburg and Mecklenburg-Vorpommern that Article 20 of the UPCA in conjunction with the EPCÜ-Custody Act II to be understood in conformity with the constitution in such a way that the guarantee of the fundamental domestic constitutional guarantees, in particular the principles laid down in Article 1, Article 20 (1) and (2) in conjunction with Article 79 (3) of the Basic Law, as well as the competence of the Federal Constitutional Court to review compliance with the minimum standards of constitutional law in the transfer of sovereign rights to European or intergovernmental institutions remain unaffected (cf. BRPlenary Protocol No. 998 of 18 December 2020, p. 524).

80 This understanding of Article 20 UPCA has not been notified by the Federal Government to the other Contracting Member States.

81 2. The complainant re I.1. does not sufficiently deal with all this but limits itself, with reference to the Senate's decision of 13 February 2020, to stating that Article 20 UPCA cuts off its control of identity, which is not compatible with Article 79 (3) of the Basic Law.

König Huber Hermanns

Müller Kessal-Wulf Maidowski

Langenfeld Wallrabenstein

Federal Constitutional Court, Decision of the Second Senate of 23 June 2021 - 2 BvR 2216/20, 2 BvR 2217/20

Suggested citation BVerfG, Decision of the Second Senate of 23 June 2021 – 2 BvR 2216/20, 2 BvR 2217/20 - para. (1 - 81), http://www.bverfg.de/e/rs20210623_2bvr221620.html

ECLI ECLI:DE:BVerfG:2021:rs20210623.2bvr221620