Deckblatt Übersetzung

Daten der Übersetzung:

Court/Gericht:	Bundesverfassungsgericht
Date of Decision / Datum der Entscheidung:	2020-02-13
Docket Number / Aktenzeichen:	2 BvR 739/17
Name of Decision / Name der Entscheidung:	Einheitliches Patentgericht

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Arbeitskreis
Patentgerichtswesen
in Deutschland e.V.

Headnotes

to the Order of the Second Senate of 13 February 2020

- 2 BvR 739/17 -

1. The protection afforded by Article 38(1) first sentence of the German Constitution entails a right that the requirements for a transfer of sovereign powers laid down in Article 23(1) German Constitution be observed. In order to safeguard their democratic influence on the process of European integration, citizens are afforded a right that, in principle, sovereign powers be transferred only in the ways provided for in the Constitution, specifically in Article 23(1) second and third sentence in conjunction with Article 79(2) German Constitution (*formelle Übertragungskontrolle*). (paras. 97 and 98)

2. The domestic act of approval to an international treaty that supplements or is otherwise closely tied to the European Union's integration agenda must be measured against Article 23(1) German Constitution. (para. 118)

3. The act of approval to an international treaty adopted in violation of Article 23(1) third sentence in conjunction with Article 79(2) German Constitution does not provide democratic legitimation for the exercise of public authority by institutions, bodies, offices and agencies of the European Union or by an international organisation supplementing or otherwise closely tied to the European Union; it therefore violates the right of citizens under Article 38(1) first sentence in conjunction with Article 20(1) and (2) and Article 79(3) German Constitution, which is a right equivalent to a fundamental right. (para. 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 of Approval to the Agreement on a Unified Patent Court of 19 February 2013 in conjunction with the Agreement on a Unified Patent Court

and on the application for a preliminary injunction

the Federal Constitutional Court – Second Senate –

with the participation of Justices

President Voßkuhle,

Huber,

Hermanns,

Müller,

Kessal-Wulf,

König,

Maidowski,

Langenfeld

ordered on 13 February 2020 that:

1. Article 1(1) sentence 1 of the Act on the Agreement of 19 February 2013, on a Unified Patent Court (Bundestag resolution of 10 March 2017, Plenary Record 18/221, p. 22262, Bundestag Printed Paper 18/11137) violates the complainant's fundamental right under Article 38(1) sentence 1, in conjunction with Article 20(1) and (2) in conjunction with Article 79(3) German Constitution.

2. The first sentence of Article 1(1) of the Act on the Agreement of 19 February 2013 on a Unified Patent Court (Bundestag printed paper 18/11137, resolution of the Bundestag of 10 March 2017, plenary record 18/221, p. 22262) is incompatible with the third sentence of Article 23(1) in conjunction with Article 79(2) German Constitution and is null and void.

3. This disposes of the application for a temporary injunction.

4. The Federal Republic of Germany shall reimburse the complainant for his necessary expenses.

Grounds of the order:

A.

I.

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

2 The Agreement on a Unified Patent Court (hereinafter: UPCA) is an international treaty open only to Member States of the European Union (cf. Art. 84(1) and (4) in conjunction with Art. 2(b) UPCA). It is intended to establish a Unified Patent Court supported by the majority of the member states. It 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 IP right at the level of the European Union by way of enhanced cooperation pursuant to Art. 20 TEU, Art. 326 et seq. TFEU (cf. BTDrucks 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. 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 (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 the traditional (German) understanding, patents are subjective exclusion rights granted by the state (cf. Ann, in: Kraßer/Ann, Patentrecht, 7th ed. 2016, Sec. 1(1) et seq.; Bacher, in: Benkard, Patentgesetz, 11th ed. 2015, Sec. 1(2)) for new technical inventions which are based on an inventive step and are industrially applicable (cf. Sec. 1(1) Patent Act). They are granted by administrative act in an administrative procedure and, once granted, constitute absolute rights comparable to property (cf. Bacher, in: Benkard, Patentgesetz, 11th ed. 2015, Sec. 1 para. 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 has effect only there (cf. BGHZ 49, 331 <333 f.>).

5 b) In addition to national patents, there has been a European patent for several decades, which is based on the European Patent Convention of 5 October 1973 - EPC (cf. BGBl 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 Art. 63 EPC of 17 December 1991 <BGBl 1993 II p. 242> and revising the Convention on the Grant of European Patents of November 29, 2000 <BGBl 2007 II p. 1083>) and is granted by the European Patent Office. Its executing agency, the European Patent Organisation, is an intergovernmental institution

within the meaning of Art. 24(1) German Constitution to be distinguished from the European Union, the task of which is the maintenance of an independent and autonomous patent law system (cf. Haedicke, in: Schulze/Zuleeg/Kadelbach, Europarecht - Handbuch für die deutsche Rechtspraxis, 3rd ed. 2015, Sec. 21 marginal no. 79). However, the European Patent Office does not grant a unitary property right, but provides a unitary granting procedure for the participating contracting states. Legal effects and infringement consequences of a European patent are essentially governed by the law of the contracting states for which it is granted (cf. Art. 64 EPC; Kolle, in: Benkard, Europäisches Patentübereinkommen, 3rd ed. 2019, Art. 2 marginal no. 2 f., 15). In this respect, the European patent is also referred to as a "bundled patent" (see, for example, Ullmann/Tochtermann, in: Benkard, Patentgesetz, 11th ed. 2015, Internationaler Teil marginal no. 104; Arntz, EuZW 2015, p. 544 <544>). For certain products that are accessory to an already granted patent, patent protection can be extended in time by means of "supplementary protection certificates" (cf. Regulation <EG> No. 469/2009 of the European Parliament and of the Council of 6 May 2009 concerning the supplementary protection certificate for medicinal products, OJ EU No. L 152 of 16 June 2009, p. 1; Regulation <EG> 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 strived for since the 1960s (cf. BTDrucks 18/11137, p. 79; historical overview in Augen-stein/Haertel/Kiefer, in: Fitzner/Lutz/Bodewig, BeckOK PatR, EPGÜ, marginal no. 9 et seqq. <January 15, 2020>; Jaeger, IIC 2017, p. 254 <255 et seq.>).

7 a) Already 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, pursued from the year 2000 onwards, to introduce a Community patent under secondary law (cf. Proposal for a Council Regulation on the Community Patent, COM<2000> 412 final; cf. Ann, in: Kraßer/Ann, Patentrecht, 7th ed. 2016, § 7

marginal no. 90 ff; Adam/Grabinski, in: Benkard, Europäisches Patentübereinkommen, 3rd ed. 2019, Vor Präambel marginal no. 33 ff). The proposal provided for the establishment of a judicial panel (Art. 225a ECT <Court of Experts in the sense of Art. 257 TFEU>) for patent disputes, but did not lead to success (cf. Tochtermann, in: Benkard, Patentgesetz, 11th ed. 2015, Internationaler Teil Rn. 154).

8 In parallel, attempts were made 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 aimed at an agreement of the contracting states of the EPC (European Patent Litigation Agreement - EPLA) (cf. Adam/Grabinski, in: Benkard, Europäisches Patentüberein-kommen, 3rd ed. 2019, Vor Präambel Rn. 36, 39 ff.).

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 PatR, EPGÜ, marginal no. 27 <January 15, 2020>). On 20 March 2009, the European Commission recommended to the Council, on the basis of the discussions held until then, to authorize it to negotiate the conclusion of an agreement creating a unified patent litigation system (cf. SEC<2009> 330 final). In this respect, the aim was to conclude a mixed agreement of Member States, the European Union and third countries on a patent jurisdiction linked to the EPC (cf. Council document 7928/09 of 23 March 2009, p. 2).

10 At the same time, the project of a Community patent - now patent of the European Union - was also pursued (cf. Proposal for a Council Regulation on the patent of the European Union, Council document 16113/09 Add. 1 of 27 November 2009). At the political level, both projects were combined into a single "legislative package", which is collectively referred to as the "European Patent Reform" (cf. BTDrucks 18/8827, p. 15) or the "European Patent Package" (cf. Augenstein/Haertel/Kiefer, in: Fitzner/Lutz/Bodewig, BeckOK PatR, EPC, marginal no. 5 <15 January 2020>).

11 c) The draft of an international agreement establishing a European and Community Patent Court (GEPEUP) was submitted to the Court of Justice of

the European Union (ECJ) for its opinion (OJ EU No. C 220 of 12 September 2009, p. 15). In its opinion of 8 March 2011, the Court of Justice found that the planned agreement was incompatible with the European Treaties (see ECJ, Opinion of 8 March 2011, Opinion 1/09, EU:C:2011:123, para. 89). It is true that Art. 262 and Art. 344 TFEU do not preclude the transfer of jurisdiction 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., para. 61 et seq.). However, the formation of a new judicial structure fails due to the fundamental elements of the legal order and the court system of the European Union. Even if the court in question is to be established outside the court system of the European Union (see ECJ, loc. cit., para. 71), the envisaged convention provides that it must interpret Union law and takes the place of the national courts of the Member States, thereby depriving the latter of the possibility of referral (see ECJ, loc. cit., para. 72 et seq.). Nor is it a joint court of several Member States comparable to the Benelux Court, created to interpret the Convention that establishes it and integrated into the court system of the Member States (see ECJ, loc. cit., para. 82). Moreover, there was no possibility of making an infringement of Union law by the court the basis of a pecuniary liability of the Member States or the subject of infringement proceedings (see ECJ, loc. cit., para. 82 et seq.). In summary, the Court found that the envisaged Convention would confer exclusive jurisdiction on an international court standing outside the institutional and judicial framework of the Union to rule on a substantial number of actions brought by individuals in relation to the Community patent and to interpret and apply Union law in this area. This would deprive the courts of the Member States of their jurisdiction to interpret and apply Union law and the Court of Justice of its jurisdiction 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 were essential to safeguarding the nature of Union law (see ECJ, loc. cit., para. 89).

12 d) In response to the Court's opinion, the patent package was amended to the effect that only Member States of the European Union were to become contracting states to the UPCA, and not the European Union itself or other contracting states to the UPCA. In order to safeguard the autonomy of Union law and to enable the Unified Patent Court to interact with the Court of Justice,

further provisions were included in the drafts, in particular a provision according to which the Unified Patent Court would explicitly be a court common to the Member States, Art. 1(1) and Art. 2(b) UPCA (cf. Tochtermann, in: Benkard, Patentgesetz, 11th ed. 2015, Internationaler Teil marginal no. 155).

13 In the parallel legislative procedure for the unitary patent, no agreement could be reached due to objections to the language or translation regulation on the part of Italy and Spain. Therefore, the procedure was continued within the framework of enhanced cooperation (see Decision 2011/167/EU authorizing 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 in late 2012, Regulation (EU) No. 1257/2012 and Regulation (EU) No. 1260/2012 were adopted by the European Parliament and Council in December 2012. The European Parliament called on the contracting states to conclude the international agreement on a Unified Patent Court on 11 December 2012 (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 by 25 Member States - but not by Spain, Poland and Croatia - on 19 February 2013 (see Council document 6572/13).

15 According to its Art. 89(1), the Agreement will enter into force when at least 13 of the 25 Contracting States have ratified it and deposited the instrument of ratification. Mandatory ratification is required by the member states (within the meaning of Art. 2(b) EPC) in which there were the most European patents in the year preceding the year of signature. These are Germany, France and the United Kingdom (see BTDrucks 18/11137, p. 94).

16 Currently, the UPC 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; cf. the listing at http://www.consilium.europa.eu/de/documents-publications/agreements-conventions/agreement/?aid=2013001 <last accessed on January 29, 2020>).

17 The Hungarian Constitutional Court, in a decision of 26 June 2018, declared the

Hungarian Consent Act unconstitutional 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: https://hunconcourt.hu/uploads/sites/3/2018/07/dec-on-unified-patentcourt.pdf). The integration authorization in Art. E para. 2 and para. 4 Hungarian Constitution only applies to acts of enhanced cooperation 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 is to be clarified by the government in the context of ratification (cf. Hungarian Constitutional Court, Decision 9/2018, para. 32). A consent law under the general rules of the Constitution on Hungary's obligations under international law would violate the provisions of the Hungarian Constitution 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, as well as 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 unitary effect to a European patent granted by the European Patent Office (cf. BTDrucks 18/8827, p. 11). The "European patent with unitary effect" provides uniform protection in all participating member states and has the same effect there (Art. 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 for 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 that Convention which have determined in a "special agreement" that European patents shall be unitary for their territories may provide that they may only be granted jointly for all States. The Regulation is understood as a "special agreement" in this sense (Art. 1(2) Regulation <EU> No. 1257/ 2012). Under Part IX of the EPC, common administrative tasks may be entrusted to the European Patent Office, which thus acts in substance as the granting office for European patents with unitary effect.

19 The translation regulations required for the implementation of unitary patent protection are contained in Regulation (EU) No. 1260/2012 (cf. BTDrucks 18/ 8827, p. 11). It is based on the language regime of the European Patent Office (cf. 6th and 15th recital) with the official languages German, English and French. Additional translations are generally not required (Art. 3(1) Regulation <EU> No. 1260/2012), but are provided for in case of litigation and for a transitional period (Art. 4 and Art. 6 Regulation <EU> No. 1260/2012). In the future, applications shall be possible in the official languages of the European Union (cf. 10th and 11th recital) 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 shall be provided (Art. 5 Regulation <EU> No. 1260/2012).

20 The effectiveness of both regulations depends on the establishment of the Unified Patent Court. According to Article 18(2)(1) of Regulation (EU) No 1257/2012 and Article 7(2) of Regulation (EU) No 1260/2012, respectively, the respective Regulations 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 Court of Justice. In these, Spain had alleged, in addition to competence issues, violations of rule of law principles and legal protection requirements, in particular the principles of unity and autonomy of Union law. The Court dismissed both plaintiffs (see ECJ, Judgments 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 unitary patent, he denied a violation of rule of law principles by linking the unitary patent to the grant of the patent by the European Patent Office, even if the latter was not subject to legal protection by Union courts. This is because the grant of European patents is not regulated by the contested regulation and the grant procedure is also not integrated into Union law by the accessory link (see ECJ, Judgment of 5 May 2015, Spain v Parliament and Council, C-146/13, EU:C:2015:298, para. 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 does not require full harmonization. It is not an abuse of discretion and also does not constitute a violation of the requirements for the delegation of competences to independent agencies or Member States (cf. ECJ, loc. cit., paras. 33 et seq., 54 et seq., 60 et seq.). Furthermore, the regulation does not violate the autonomy of Union law. Moreover, the Court of Justice had no jurisdiction to rule on the legality of the UPCA or its ratification by the Member States by way of an action for annulment; the link between the Regulation and the UPCA was not objectionable, since the Union legislature had left implementation to the Member States by means of measures under the UPCA (see ECJ, loc. cit., paras. 89 et seq., 101, 106). In the judgment on Regulation (EU) No. 1260/2012, the Court of Justice also denied discrimination on the basis of the language regime as well as a violation of the principle of legal certainty due to insufficient translations into all official languages (see ECJ, 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 relating to European patents and European patents with unitary effect (Art. 1 UPCA). It is to have its own legal personality in each contracting member state (cf. Art. 2(b) and (c) UPCA) (Art. 4(1) UPCA). Pursuant to Art. 32(1) UPCA, it is to be given exclusive jurisdiction in respect of patents within the meaning of Art. 2(g) UPCA - European patents and European patents with unitary effect - for an extensive catalog of disputes. This includes, in particular, actions for patent 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 Regulation (EU) No. 1257/2012.

23 The EPCA provides - in extracts - the following in this respect:

> 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 amendments.

(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 469/20093 ([3]) or under Regulation (EC) No 1610/964 ([4]).

(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.

([3]) 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 (OJ L 152, 16.6.2009, p. 1) including any subsequent amendments.

([4]) 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 (OJ 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.

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 fulltime 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 1260/20127([7]);

(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.

([7]) 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 (OJ L 361, 31.12.2012, p. 89) including any subsequent amendments.

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 patent.

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 purposes;

(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/EC8 or Article 10(6) of Directive 2001/83/EC9 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([10]), 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([11]);

(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([12]), in particular, by its provisions on decompilation and interoperability; and

(l) the acts allowed pursuant to Article 10 of Directive 98/44/EC([13]).

([8]) 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 (OJ L 311, 28.11.2001, p. 1) including any subsequent amendments.

([9]) 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 (OJ L 311, 28.11.2001, p. 67) including any subsequent amendments.

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

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

any subsequent amendments.

([12]) Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (OJ L 111, 5.5.2009, p. 16) including any subsequent amendments.

([13]) Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions (OJ 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)([14]).

([14]) 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 earing.

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 2 000 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 pursuant to Article 2(i) UPCA and is annexed thereto pursuant to Article 40(2) sentence 1 UPCA. It contains, in particular, provisions on the appointment and legal status of the judges and on the Presidium.

25 5. a) On 20 June 2016, the Federal Government initiated the ratification procedure of the UPC and submitted to the Bundestag the "Draft Law on the Agreement of 19 February 2013 on a Unified Patent Court" (see Bundestag printed paper 18/8826) and the "Draft Law on the Adaptation of Patent Law Provisions due to the European Patent Reform" (see Bundestag printed paper 18/8827). Both bills had previously been forwarded to the Bundesrat as particularly urgent under Article 76(2) sentence 4 German Constitution (see BRDrucks 280/16 and 282/16).

26 b) The draft bill on the impugned treaty law was again forwarded to the Bundesrat on 9 December 2016 - as the complainant submits, in response to his indication that due to the transfer of sovereign rights the treatment of the bill as particularly urgent pursuant to Article 76(2) sentence 5 German Constitution was not permissible (cf. BRDrucks 751/16). The letter from the Federal Chancellor accompanying the newly submitted draft now contained the note "Sovereign rights are transferred here in accordance with Article 23(1) sentence 2 German Constitution".

27 The Bundestag unanimously adopted the draft Consent Act (BTDrucks 18/11137) at its third reading on 10 March 2017 (cf. PlenProt of the 221st session of the 18th legislative period of 9 March 2017, p. 22262). Present, as

the complainant submits uncontradicted with reference to a video recording, were about 35 deputies. According to the corresponding video file, up to 38 Members of Parliament can be identified, including the acting President and the Clerk (cf. the video file available from the Bundestag Media Library at http://www.bundestag.de/mediathekoverlay?videoid=7083109&mod=mod442356 <last accessed on 29 January 2020>). A quorum within the meaning of Sec. 45(2) of the Rules of Procedure of the Bundestag was not established, nor was the President of the Bundestag that the Consent Act had been passed by a qualified majority (Sec. 48(3) of the Rules of Procedure of the Bundestag).

28 The Bundesrat unanimously approved the Act at its meeting on31 March 2017 (cf. BRDrucks 202/17; Minutes of the 956th meeting of the Bundesrat of March 31, 2017, p. 174).

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

> Article 1
>
> (1) The Convention on a Single European Sky signed in Brussels on 19 February 2013 by the Federal Republic of signed by the Federal Republic of Germany in Brussels on 19 February 2013 Patent Court and the Protocol to the Convention on a Unified signed in Luxembourg on 1 October 2015 to the Agreement on a Unified Patent Court concerning provisional application are hereby approved. The Agreement and the Protocol shall be published below.
>
> (2) The Federal Government shall be obliged to submit to an amendment of the Agreement by decision of the Administrative Committee under Article 87, paragraph 1, of the Agreement under Article 87, paragraph 3 of the Convention, unless it has been previously authorized by law to consent to the previously authorized by law to give its consent to the amendment. by law.
>
> Article 2

> The amendments to the Convention by decision of the Administrative Committee in accordance with Article 87(2) of the Convention shall be published by the Federal Ministry of Justice and Consumer Protection in the Federal Law Gazette.
>
> Article 3
>
> (1) This Law shall enter into force on the day following its promulgation.
>
> (2) The day on which the Convention becomes effective in accordance with its Article 89 paragraph 1 and the Protocol under Article 3 thereof shall enter into force for the Federal Republic of Germany. Germany shall be published in the Federal Law Gazette. announced.

30 The text of the Agreement as well as its annexes, a declaration of the "contracting member states on the preparations for the commencement of the operation of the Unified Patent Court" and a protocol concerning provisional application are attached to the Act as annexes. The protocol referred to in Art. 1(1) UPC-Consent Act provides for the provisional application of mainly institutional and organizational provisions of the UPCA and the Statute (hereinafter: EPC Statute), which is intended to enable the establishment of the Unified Patent Court already before the entry into force of the Convention and to ensure its operability as from the date of entry into force (cf. BTDrucks 18/11137, p. 1, 83 f.). 6.

31 6. The contracting member states established a "Preparatory Committee" in March 2013 in preparation for the commencement of the activities of the Unified Patent Court (BTDrucks 18/11137, p. 70 f.), which was to prepare the work and decisions necessary for the establishment of the Unified Patent Court within the framework of the provisional application of the UPCA (cf. Tochtermann, in: Benkard, Patentgesetz, 11th ed. 2015, Internationaler Teil, marginal no. 187). This included, inter alia, the preparation of the Rules of Procedure, the Rules of Chancery, the Rules of Arbitration and the Rules of Mediation, the Rules of Procedure of the Committees, representation regulations for patent attorneys, a

staff statute as well as the calls for tenders for filling the judges' positions 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 of the future Rules of Procedure, which has been available in a "final" (18th) version since 15 July 2015, but which has still 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 should already be adopted during the provisional application of the UPCA by the Administrative Committee, and the bodies responsible for the selection of judges should also be filled, so that the Unified Patent Court will be operational on the date of entry into force of the Agreement (cf. BTDrucks 18/11137, p. 94 et seq.). The Preparatory Committee has also prepared draft decisions of the Administrative Committee with respect to court fees and reimbursable costs (cf. 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 29 January 2020>) and with respect to maximum amounts of reimbursement of costs (cf. draft of 16 June 2016, https://www.unified-patent-court.org/sites/default/files/recoverable_costs_2016.06.pdf <last accessed 29 January 2020>).

33 7. On 29 June 2016, a "Protocol on the Privileges and Immunities of the Unified Patent Court" was additionally signed by the contracting member states (cf. the communication at https://www.unified-patent-court.org/news/protocol-privileges-and-immunities), which is to concretize the regulation currently contained in Art. 8 UPC Statute (cf. BTDrucks 18/11238, p. 58, 82 f.).

34 The Bundestag passed the Act Approving this Protocol on 27 April 2017 (cf. PlenProt of the 231st session of the 18th legislative period of 27 April 2017, p. 23229 f.).

II.

35 With his constitutional complaint of 31 March 2017, the complainant complains of the violation of his right 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) German Constitution by the Act Approving the UPCA. In addition, he considers the UPCA to be contrary to Union law and suggests that a preliminary ruling be obtained from the Court of Justice under Article 267 TFEU.

36 1. The constitutional complaint is admissible.

37 a) The constitutional complaint is 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 has been completed except for its execution and promulgation by the Federal President.

38 b) He was also entitled to appeal. Article 38(1) sentence 1, Article 20(1) and Article 20(2) in conjunction with Article 7(3) German Constitution give citizens a right to democratic self-determination which allows them to defend themselves against a substantial diminution of the Bundestag's power to shape policy and against sufficiently relevant transgressions of competences by organs of the European Union. International agreements which provide for a transfer of sovereign powers have been subjected by the Federal Constitutional Court to substantive review, whereby the limits for the transfer of sovereign powers are marked by the constitutional identity of the German Constitution (Article 23(1) sentence 3 in conjunction with Article 79(3) German Constitution) and by the integration program laid down in the Approval Act (Article 23(1) sentence 2 German Constitution). The Approval Act could therefore issue a legal application order for supranational law only in accordance with the constitution. This concerned the preservation of the core of human dignity of the fundamental rights as well as the principles laid down in Article 20 German Constitution. 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 or the obligation of the administration and the judiciary to comply with the law, is part of this constitutional identity. In particular, citizens have a right to demand that sovereign rights be transferred only in the forms provided for by the German Constitution.

39 The constitutional requirements for the transfer of sovereign rights correspond to a claim of the citizen against the state organs to preserve and protect the integrity of state power and to prevent the impairment of the constitutional identity or of the core of the constitution, which is resistant to amendment, by a transfer of sovereign rights. In this respect, the transfer of sovereign rights to the European Union or other supranational institutions affects the right under Article 38(1) sentence 1, Article 20(1) and (2) in conjunction with Article 79(3) German Constitution.

40 As a result of their responsibility for integration, the constitutional bodies were obliged to ensure compliance with the provisions of Article 23 German Constitution when transferring sovereign rights.

41 c) This case law must also apply to the UPCA, since in the view of the Federal Government it also belongs to the affairs of the European Union. It is true that the UPCA is not a treaty within the meaning of Art. 48 TEU and that the Unified Patent Court is formally not an institution of the European Union, but a supranational institution with its own legal personality (cf. Art. 4(1) UPCA). However, it is closely interlinked with the European Union. In this respect, the Federal Constitutional Court had already ruled in the context of the duty to provide information under the first sentence of Article 23(2) German Constitution that the affairs of the European Union also include international treaties which are in a supplementary or particularly close relationship to Union law. Such a relationship of proximity also existed here: The agreement was deliberately negotiated within the framework of the European Union and as part of the "legislative package" for the European patent reform, the circle of states entitled to participate was limited to member states of the European Union and the Unified Patent Court was subject to Union law.

42 2. The constitutional complaint is also well-founded. The UPCA infringes the constitutional identity of the German Constitution, since the requirement of a qualified majority pursuant to Article 23(1) sentence 3, in conjunction with Article 79(2) German Constitution was not complied with during its ratification. In the context of the European Union, Article 23(1) sentence 3 German Constitution requires that the procedural requirement of a two-thirds majority laid down therein be observed in the case of a transfer of sovereign rights, while Article

38(1) sentence 1 German Constitution also conveys to the individual citizen a right to compliance with these procedural requirements in order to safeguard democratic possibilities of influence. Respecting these requirements was the object of the responsibility for integration.

43 a) The transfer of jurisdiction constituted a transfer of sovereign rights. This was constitutionally relevant, since a contractual basis for the transfer of jurisdiction was not apparent in this respect; materially, therefore, it was a matter of a constitutional amendment which, according to the record of the meeting, had not been adopted by the Bundestag with the required majority.

44 b) The constitutional identity of the German Constitution was further violated by the inadequate legal status of the judges. There is no legal basis for the selection and appointment of judges, nor for the authorization to interfere with fundamental rights through judicial activity. The selection and appointment procedure was inadequate, since a close relationship could arise with the patent practitioners represented on the Advisory Committee. The Advisory Committee draws up the list of candidates, and it is not excluded that members of the Committee or their law firms appear as attorneys-at-law and patent attorneys before the judges they select. The independence of the judges was also jeopardized by the shortness of the term of office of only six years and the possibility of reappointment, as well as by the lack of legal protection against interference with their position. The complainant sees his statements confirmed by the decision of the Second Senate of 22 March 2018, on the temporary judge (see BVerfGE 148, 69 et seq.).

45 c) Article 38(1) sentence 1 in conjunction with Article 20(1) and (2) in conjunction with Article 79(3) German Constitution are also violated by the fact that the Convention allows encroachments on fundamental rights without a sufficiently specific basis for authorization. Thus, the Rules of Procedure are issued by the Administrative Committee, whereas Art. 41 UPCA, as the relevant legal basis in this respect, does not provide for parliamentary participation and does not contain an explicit authorization to interfere with fundamental rights by the judges of the Unified Patent Court. In any case, Art. 41(2) UPCA was too vague. In this respect, it is a blanket authorization inadmissible according to the case law of the Federal Constitutional Court. Since the provision also lacks the

necessary transformation into domestic law, the principle of the reservation of the law (Article 20(3) German Constitution) is also affected. The same applies to the inadequate regulation of the maximum reimbursement amounts for representation costs (Art. 69(1) UPCA). The regulation was arbitrary, not justified and its extent was not recognizable for the parties involved.

46 The complainant was also presently, directly and self-concerned by the Treaty Act. The fact that the complainant was himself affected resulted from his capacity as holder of the right equivalent to a fundamental right under Article 38(1) sentence 1, Article 20(1) and (2) in conjunction with Article 79(3) German Constitution. It was already foreseeable without further ado that the above-described legal involvement would occur with the conclusion of the ratification proceedings. A further act of implementation or execution was not required for this.

47 3. In a further written submission of 31 March 2017, the complainant filed an application for the issuance of a temporary injunction pursuant to Sec. 32 Federal Constitutional Court Act, by which the Federal President should be ordered not to execute and promulgate the UPC-Consent Act until the decision of the Federal Constitutional Court in the main matter and not to ratify the UPCA.

48 4. With regard to the question of the conformity of the UPCA with Union law, the complainant also proposes a preliminary ruling before the Court of Justice. The UPCA violates Union law and thus at the same time violates the constitutional identity of the German Constitution. Since the principle of loyal cooperation prohibits the Member States from ratifying agreements that are contrary to Union law, transfers of sovereignty are also permissible only 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, Union law does not give rise to any constitutional requirements for national laws does not preclude this, because the cases decided dealt with the question of the primacy of application or validity of Union law, but here the question must be answered as to whether the transfer of sovereign rights may be permitted by conventions that are contrary to Union law. The case-law of the Court of Justice and the principle of the German Constitution’s friendliness towards European law were opposed to this.

49 According to the case-law of the Court of Justice, the transfer of jurisdiction to an international court requires that the latter is limited to the application of the agreement, does not replace the national courts and interacts with the Court of Justice. The Unified Patent Court does not meet these requirements, so that the UPCA interferes with the autonomy of Union law and the system of remedies.

50 Furthermore, the UPC infringes Article 3(2) TFEU, the principle of the rule of law (Article 2 sentence 1 TEU) and the right to an effective defense (Article 47(2), Article 48(2) CFR).

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 Land 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 Intellectual Property (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 Federal Constitutional Court Act. The Bundesrat, the state governments and the Federation of German Industries did not make use of the opportunity to comment.

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

53 a) The complainant has not sufficiently substantiated that a violation of fundamental rights appears possible. The guarantee contents of Article 38 German Constitution could not be violated by the Convention. These included protection against an excessively far-reaching transfer of sovereignty with regard to democratic legitimacy, the safeguarding of constitutional content of the German Constitution under the aspect of identity control, the assumption of budgetary obligations that threaten democracy, and protection against the handling of sovereignty rights already transferred beyond the scope of

competence ("ultra vires"). In this respect, a distinction must be made between the standards to be applied before and after a transfer of sovereignty. Before the transfer, control can only relate to whether the Bundestag is left with tasks of sufficient weight or whether constitutional content that is resistant to amendment is impaired by the transfer of sovereignty; with regard to Article 38 German Constitution, the latter is only relevant if the transfer of sovereignty is related to democracy.

54 An impairment of the aforementioned guarantees is out of the question from any conceivable point of view. There was no danger of the democratic substance of the Bundestag being emptied, since the areas referred to in the Lisbon judgment were not affected; there was no concern that the institutions to be established by the Agreement would become independent, since it was ensured that amendments to the Agreement by the Administrative Committee would not be made without the consent of the Bundestag and the norm-setting powers of the Administrative Committee with regard to the Statute and the Rules of Procedure were defined and limited thematically.

55 Furthermore, the constitutional identity was not violated by the alleged illegality of the Agreement under Union law by the complainant, by procedural errors in the legislative procedure or by an insufficient guarantee of judicial impartiality and independence in the scope of application of the UPCA. Irrespective of the fact that the allegation of violation of Union law against the Unified Patent Court is not true, the assertion that this violates the constitutional identity of the German Constitution fails to recognize that the observance of Union law itself is not part of the constitutional identity and that violations of Union law cannot be directly challenged by means of a constitutional complaint.

56 Nor did the failure to comply with the qualified majority requirement constitute a violation of the constitutional identity of the German Constitution, since this was directed at identifying the non-transferable. A transfer of sovereignty that is permissible in principle cannot violate the constitutional identity of the German Constitution. Nothing to the contrary could be inferred from the case law of the Federal Constitutional Court. Article 79(2) German Constitution, as a rule of objective constitutional law, did not confer any subjective rights, since the substance of the right to vote was not affected by the majorities of a resolution

in the Bundestag. Insofar as a violation of the principle of popular sovereignty, which is part of the constitutional identity, is asserted, it must be taken into account that the individual's right to democratic self-determination is strictly limited to the core of human dignity of the principle of democracy, a general right to a general review of the constitutionality of legislative decisions is ruled out and only structural changes in the legal structure of the state can be reviewed.

57 Finally, to the extent that the constitutional complaint counts judicial impartiality and independence as well as cost and procedural regulations of the Unified Patent Court as part of the principle of the rule of law, it is also not to be followed. Here, too, it did not provide the necessary specific reference to democracy. If the bridge built by the constitutional complaint beyond Article 38 German Constitution with the help of the principle of the rule of law were sufficient for the right of appeal, international agreements could be put up for review by anyone without being affected by their own fundamental rights. In substance, this would then be a review of a statute.

58 b) The complainant's constitutional objections also proved to be unfounded. The UPC-Consent Act was not a case of application of Article 23(1) sentence 3 German Constitution. It was true that it transferred sovereign rights; because of the obvious proximity to Union law, Article 23 German Constitution was also to be applied with priority. However, Article 23(1) sentence 3 German Constitution requires a qualified transfer of sovereign rights with structural constitutional relevance. According to the explanatory memorandum to Article 23 German Constitution, a decisive factor was, in particular, whether an event was involved which was comparable in importance to the founding of the European Union and, in this respect, affected the basis of primary law. The process must be a substantive constitutional amendment which is not bound to any further act of approval. This was not the case with the UPC-Consent Act. It did not have the quality of a constitutional amendment because, although jurisdiction and legislative powers were transferred, the jurisdiction was a selective, narrowly defined transfer of sovereign rights, the normative powers of the Administrative Committee were narrowly defined and therefore did not achieve a significance comparable to an amendment of primary law, either in terms of the breadth or the quality of the powers transferred. Nothing to the contrary follows from the

allocation of judicial power to judges in Article 92 German Constitution. This only governs the domestic judicial function, but not the establishment of courts in an international context. This follows from the openness of the German Constitution to international cooperation and, in particular, from Article 24(3) German Constitution, which even expressly provides for Germany's accession to general international arbitration. No participation by Germany in existing courts under international law had so far given rise to the idea of a breach of the Constitution.

59 Moreover, the rules on the selection and legal status of judges do not constitute a violation of the principle of the rule of law. They followed established and proven procedures, as they had existed in other European courts for a long time. A threat to the independence of the judges through the participation of individual lawyers (presumably meaning members of the legal advisory professions) in the Advisory Committee does not appear to be comprehensible in view of the structure of the procedure. The examination of professional aptitude followed the approach tried and tested at the Civil Service Tribunal of the European Union. The specific selection of candidates was left to the Administrative Committee. Judicial independence was guaranteed, and a lifetime appointment was not necessary for this.

60 The requirements for a referral under Article 267 TFEU were not met. Since the infringements of Union law complained of by the complainant were constitutionally irrelevant, the questions of interpretation were not relevant to the decision and a referral was therefore inadmissible. Moreover, the questions had been sufficiently clarified and a violation of Union law was not apparent.

61 2. The German Bundestag commented on the proceedings in its written statement of 22 January 2018. It considers the constitutional complaint to be likewise inadmissible (a), and in any event unfounded (b), for lack of standing and sufficiently substantiated grounds.

62 a) A substantiated statement of the right to appeal is already lacking. The conclusion of an - assumed - international treaty that is contrary to Union law could constitute a violation of Article 38(1) sentence 1 German Constitution, since Union law and domestic constitutional law represent different standards; nothing to the contrary can be derived from the principle of friendliness towards

Union law. Even if one were to take a different view, this would not constitute a violation of the constitutional identity of the German Constitution. The claim to validity and primacy of Union law could not, on the one hand, be part of the constitutional identity and, on the other hand, at the same time mark the outermost limits of Union law in the German constitutional area. This would create a situation of collision within the identity, as a result of which Article 79(3) German Constitution would lose its absoluteness and the complaints based on its violation would lose their factual limitation. In any case, such a complaint would no longer have anything to do with the right to democracy under Article 38(1) sentence 1 German Constitution. A corresponding connection was not plausibly asserted, since any justification for a reference to the breaking of the legitimation connection was lacking. The case groups of the "right to democracy" developed in the case law were not relevant; a further development in the direction of a right to general review of legality would dissolve the boundaries between democratic legitimacy and legality and make any violation of the law subject to a complaint under Article 38(1) German Constitution. However, the Senate had always emphasized that the "fundamental right to democracy" was not about a general review of the legality of political processes. In this respect, there was no complete correspondence between the limits of integration under Article 79(3) German Constitution and the area that could be objected to on the basis of Article 38(1) sentence 1 German Constitution. An expansion of the right to democracy to a "fundamental right to the preservation of identity" was far-fetched, since then no connection to the principle of democracy could be established. This connection would also not result from the Senate's case law; a corresponding further development of the law would also shift the balance of powers between the Federal Constitutional Court and the other constitutional organs. Moreover, there was no need for such an extension of the possibilities of complaint, since a possible gap in protection could be closed via Article 2(1) German Constitution.

63 The complaint that the quorum required for the UPC-Consent Act was violated is also inadmissible. It is true that Art. 23(1) sentence 2 German Constitution applies to the present case, since sovereign rights are transferred to the Unified Patent Court and the UPCA is in a special relationship of proximity to the European Union. However, Article 23(1) sentence 3 German Constitution is not

applicable to the present constellation of the transfer of sovereign rights to another supranational institution. This is supported by the legislative history, which refers solely to extensions of the integration program without formal amendments to the treaty - in particular, evolutionary clauses.

64 The application of the second sentence of Article 23(1) German Constitution to associations under international law such as the present one is suggested by an understanding of Article 23(2) German Constitution according to which a project that is separate from the European Union in terms of international law and institutions can nevertheless be a matter of the European Union within the meaning of Article 23(2) German Constitution. This understanding of paragraph 2 is based on a special need for information and participation of the legislative bodies, is inherent in the open concept of the affairs of the European Union and is consistent with historical and systematic arguments. The fact that it also suggests the application of Article 23(1) sentence 2 German Constitution as a basis for consent is based on the idea that there must be concurrence between the informed participation of the Bundestag in the run-up to the conclusion of the treaty and the substantive basis of the consent law, i.e. a uniform legal framework for the exercise of the Bundestag's responsibility for integration. The same applies to the participation of the Bundesrat. In contrast, Article 23(1) sentence 3 German Constitution, compared with Article 24(1) German Constitution, does not lead to any additional substantive requirements, but it does 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 subjected to the requirement of constitutional amending majorities merely because there was a specific proximity to Union law. In such cases, no additional sovereign rights of the European Union would be created and its legal foundations would not be changed. This is shown particularly clearly by the fact that in Art. 262 TFEU the possibility of a transfer of sovereignty to the European Union is already provided for, but instead it was decided to establish a patent court on the basis of international law, which will stand outside the institutional framework of the European Union. Against this background, Article 23(1) sentence 3 German Constitution, as the more specific provision in relation to Article 24(1) German Constitution, could not apply to international law associations in a close

relationship to the European Union. The Federal Constitutional Court had also rejected such automatism in its decision on Article 23(2) German Constitution (with reference to BVerfGE 131, 152 <199>).

65 In any case, the complainant's "right to democracy" was not violated by the failure to meet constitutional majority requirements. Article 38(1) sentence 1 German Constitution cannot be impaired by the fact that the German Bundestag itself takes a decision that is within its competence, as in the case of the UPCA. It is true that the question of the required majority also has legitimatory content; however, this relates exclusively to the representative, internally effective legitimation, not to the linking of the law back to the citizens. This is 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) German Constitution, but also stated that in this respect it could not be asserted that a particular decision had to be taken by a majority that would amend the constitution. In the judgment on the European Stability Mechanism - ESM (with reference to BVerfGE 135, 317 <387 f.>), the Senate had held that Article 79(2) German Constitution in general - also in conjunction with Article 23(1) sentence 3 German Constitution - did not confer any subjective rights, since the substance of the right to vote did not depend on the majority with which the Bundestag passed its resolutions. The claim formulated in the judgment on the OMT program for compliance with the forms of Article 23(1) sentence 2 and sentence 3 German Constitution is inadmissibly detached from its context by the complainant. In this respect, the Senate had in mind transfers of sovereignty in the area protected by Article 79(3) German Constitution and the opening of a competence of the European Union. In other respects, the grounds of the constitutional complaint fall short of the statutory requirements for grounds.

66 The complaint that the right to vote is violated by the structuring of the legal relationships and the appointment of the judges of the Unified Patent Court is inadmissible. Affecting the "right to democracy" by deficits of the Unified Patent Court due to the rule of law is excluded from the outset. In this respect, there was also no sufficiently substantiated argument both for a specific legitimation reference to the legal position of the judges and for an infringement of Article 79(3) German Constitution. There was no discussion of the question of which

standards of the rule of law were to be applied when transferring sovereign rights to an international court. Due to the different legal traditions of the Member States, it could at any rate not be expected that all the requirements of the rule of law which the German Constitution placed on the judicial power would also have to be complied with at supranational level. In this respect, the constitutional complaint lacks the necessary differentiation between the usual constitutional requirements and the "core content". It is true that the complaint that there is no legal basis for the selection and appointment of judges has a democratic content. However, the complainant does not explain what level of legitimacy the sovereignty of a supranational organization must satisfy, nor does he explain how democratic legitimacy can generally be conveyed in such an organization. However, this would have been necessary in view of the Maastricht and Lisbon judgments of the Federal Constitutional Court. The complainant based the fact that the legitimacy of the UPCA was not sufficient in this respect solely on the requirements of certainty under Article 80(1) German Constitution, which, however, did not apply to treaties under international law.

67 The complainant had not shown that the right equivalent to a fundamental right under Article 38(1) sentence 1 German Constitution was affected, even with regard to the competences of the Administrative Committee. Insofar as the complainant asserts a violation of the prohibition of arbitrariness, a substantiated statement is lacking.

68 b) The constitutional complaint was in any case unfounded. With his constitutional complaint, the complainant seeks access to the Court of Justice on the merits, which is not provided for in the applicable law.

69 aa) The assertion that a majority was required to amend the Constitution is not valid because the transfer of sovereign rights in question is not a substantive amendment of the Constitution. It is incorrect that every transfer of sovereign rights to the European Union requires a majority to amend the Constitution; otherwise the requirement of a two-thirds majority could have been regulated in Article 23(1) sentence 2 German Constitution. The German Constitution had permitted the transfer of sovereign rights by simple statute in Article 24(1) German Constitution from the outset. The legislative history of Article 23(1) sentence 2 and sentence 3 German Constitution did not provide a clear picture

in this respect. However, it proves that an automatism was rejected. Constitutional practice also does not assume such a link. The correct approach was to focus on whether - directly or indirectly - there was a change in the content of the German Constitution. A treaty amendment or comparable provision must be examined to determine whether it deviates from substantive provisions of the German Constitution, as is the case, for example, with the communitarization of the right of asylum in accordance with principles that deviate from Article 16a German Constitution, the integration of the Bundesbank into the European System of Central Banks, or the extension of fundamental German rights to citizens of other Member States.

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

71 According to these standards, even if Article 23(1) sentence 3 German Constitution were applicable, the UPC-Consent Act did not have to be adopted by a constitutionally amending majority. The changes in the constitutional framework brought about by the UPCA were incidental to any transfer of sovereignty which did not constitute a substantive amendment of the German Constitution. Nor does such a change result from the transfer of judicial power (with reference to Article 24(3) German Constitution). According to the case law of the Federal Constitutional Court, the German Constitution does not in principle preclude such a transfer, as has already occurred in other cases. The Federal Constitutional Court had approved the Moselle Shipping Courts and the Moselle Commission's Appeals Committee just as it had approved the International Criminal Court or the Seabed Disputes Chamber 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) Insofar as the constitutional complaint alleges a violation of minimum standards of the rule of law, it is also unfounded. There was no violation of the core content of the principle of the rule of law encompassed by Article 79(3) German Constitution. Irrespective of how far the protection of Article 79(3) German Constitution extends, the partial guarantees of the rule of law are at

most protected in their core content and not comprehensively. Therefore, only substantial reductions that impair the legal position of judges in such a way that it is no longer possible to speak of a judiciary based on the rule of law as a whole could lead to a violation of Article 79(3) German Constitution. However, there could be no question of such an encroachment. The fact that members of the Advisory Committee could appear before the Unified Patent Court did not in any case constitute an impairment of the judges' impartiality and was not sufficient to affect the constitutional identity of the German Constitution. Moreover, the Committee was not ultimately responsible for the selection of the judges and it was not apparent to them to whom they owed their appointment. In the national context, moreover, there are comparable constellations (with reference to Section 7 of the Judges' Election Act).

73 Art. 17 UPCA guarantees the independence of the judges in the sense of freedom from instructions and the avoidance of conflicts of interest. Their appointment was based on an invitation to tender and they enjoyed immunity. Reappointment possibilities were common in the international context, for example, at the Court of Justice of the European Union, 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 impeachment proceedings, which were sufficiently restricted by concrete prerequisites, the requirement of a hearing and procedural requirements.

74 cc) The principle of democracy is also not affected by the UPCA in its core, which is protected by Article 79(3) German Constitution. Democratic legitimation is conveyed to the judges by the parliamentary approval of the UPCA and by the indirect recourse to the German representatives acting in the institutional structure of the UPCA.

75 3 The Federal Bar Association considers the constitutional complaint inadmissible for lack of standing. It argues that Article 38(1) German Constitution merely protects against a loss of substance of the constitutionally founded power of rule through a transfer of tasks and powers of the Bundestag, which would lead to an emptying of the right to vote. The complainant had not substantiated such an emptying.

76 The standard of review was Article 24(1) German Constitution. This was apparent from the history of the UPCA and from its meaning and purpose in the context of the European Patent Organisation. The UPCA also meets the requirements of Art. 23 German Constitution because it is not a "comparable regulation" within the meaning of Art. 23(1) sentence 3 German Constitution. It was merely a very narrowly limited transfer of judicial power in a narrowly limited area of law.

77 The transfer of exclusive jurisdiction for certain patent disputes did not cause a structural shift in the constitutional structure guaranteed by the German Constitution. 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 would be made possible, with an opt-out option for the patent owners. The independence of the judges of the Unified Patent Court is guaranteed to the necessary extent, the intended appointment procedure is appropriate, possible conflicts of interest are prevented; a participation of the Bundestag in the appointment of judges is not constitutionally 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 Art. 13 EPC, which establishes jurisdiction of the Administrative Court of the International Labour Organization (ILO) for disputes between employees of the European Patent Office and the European Patent Organization. The EPC Statutes meet the requirements for the definiteness of the integration program also with regard to the competences of the Administrative Council to amend them. The contractual provisions for the Rules of Procedure of the Unified Patent Court as well as the provisions on the bearing of costs were sufficiently defined. Finally, the compatibility of the UPC with European Union law is irrelevant for the constitutionality of the UPC Custody Act.

78 The German Bar Association also considers the constitutional complaint to be inadmissible, or at least unfounded. It is true that the right under Article 38(1) sentence 1 in conjunction with Article 20(1) to (3) German Constitution, which is equivalent to a fundamental right, permits a constitutional review of identity on the basis of Article 79(3) German Constitution, whereby the transfer not only of

legislative but also of other sovereign rights can be measured against the core principles guaranteed there, in particular the principle of the rule of law. However, there was no evidence of a violation of these core principles; in particular, it was not necessary that the UPCA was in every respect in conformity with constitutional law and Union law.

79 The UPCA is 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, giving the unitary effect a dual legal character at international and European level. Even if the Court of Justice had approved this construction, this did not change the fact that the international law character of the agreement under Art. 142 EPC remained intact. As an international treaty, the UPCA is not close to Union law, so that there is no special relationship of proximity within the meaning of the case law of the Federal Constitutional Court.

80 An infringement of the UPC-Consent Act against Article 23(1) sentence 3 in conjunction with Article 79(2) German Constitution cannot be complained of in the context of a constitutional complaint. In this respect, it was merely a matter of a sentence of objective constitutional law. In substance, the UPC-Consent Act also did not require a majority to amend the constitution, because the necessary complementary or other close relationship to Union law was lacking. The fact that the preparatory work was 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 these regulations was just as insufficient for this as the restriction of the participating states to member states of the European Union. This was merely a reaction to Opinion 1/09 of the Court of Justice, whereas the obligation of the Unified Patent Court to make a reference under Article 267 TFEU already results from general Union law. It does not establish a special proximity relationship any more than the application of the Protocol on Privileges and Immunities on the Premises of the European Union.

81 The constitutional complaint was also unsuccessful in other respects. It is true that the control of identity encompasses all three powers and is relevant in the event of a fundamental abandonment of the principle of democracy and/or the rule of law. However, it was limited to the core area of Article 79(3) German

Constitution. It was not evident that the core area was affected, since any deficiencies in the procedure for the appointment and dismissal of the judges of the Unified Patent Court with regard to the rule of law and democracy were at any rate not so serious as to entail a fundamental abandonment of the principle of democracy or the rule of law. The independence of the judges is unconditionally guaranteed under Art. 17 UPCA; the limitation of the term of office to six years with the possibility of reappointment is common in the European and international field. Moreover, the UPCA contains sufficient provisions to ensure independence, since the Advisory Committee - according to the interpretation of the German Bar Association - only participates in the initial appointment of judges (reference to Art. 16 UPCA). In the case of a reappointment, the majority requirement ensures that no determining influence of individuals on the list of nominations arises, that the candidates cannot recognize who has voted in their favor, and that the final decision remains reserved for the Administrative Committee. By specifying a minimum number of candidates to be nominated, a possibility of selection was ensured. Although the lack of a legal remedy against the dismissal of a judge was questionable, this did not constitute a violation of Article 38(1) in conjunction with Article 20(1) to (3) German Constitution.

82 Whether the UPCA is also compatible with Union law is of no constitutional relevance. Moreover, the provisions of the UPCA take into account earlier concerns of the Court of Justice about the participation of third states, about the lack of claims for damages under Union law and infringement proceedings, and about the original lack of a possibility of referral under Art. 267 TFEU.

83 The European Patent Office submitted its opinion in a written statement dated 18 December 2017. It considers the constitutional complaint inadmissible. Article 79(2) German Constitution, also in conjunction with Article 23(1) sentence 3 German Constitution, constitutes a rule of objective constitutional law and does not establish any right of appeal of third parties. The complainant had not shown that he himself was directly and presently affected by the provisions of the UPCA.

84 In any event, the constitutional complaint was unfounded. Article 23 German Constitution was not applicable to the UPCA and the requirements for a qualified

majority were not met. The TEU and the TFEU do not provide for the establishment of a Unified Patent Court by intergovernmental agreement of the Member States. Rather, this represents an alternative to the transfer to specialized technical courts provided for in primary law. The fact that Art. 262 TFEU does not provide for the transfer also for bundle patents is irrelevant, since Art. 118 TFEU also allows a replacement of the bundle patent by unitary EU patents.

85 Judicial independence under Article 97 German Constitution and the court organization prescribed by Article 92 German Constitution were not among the principles of the rule of law encompassed by Article 20 German Constitution and could therefore not be invoked as a violation of Article 38(1) sentence 1 German Constitution. Moreover, there was no requirement of structural congruence.

86 Nor was there any danger of the competences of the Bundestag being undermined, since the patent disputes concerned accounted for only 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.) commented in a written submission dated 21/27 December, 2017, pointing out that the UPC is an essential step on the way to international harmonization of patent law. It considerably extends the legal protection in connection with European patents.

88 7. The European Patent Lawyers Association filed a statement in a written submission dated 13 November 2017, which is limited to comments supplementing the facts with regard to 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 written statement 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 Court of Justice does not affect the rights of the appellant under Article 38(1) sentence 1 German Constitution. According to the case law of the Court of

Justice, any deficiencies in the legal protection against decisions of the European Patent Office were irrelevant under Union law and had no relation to the fundamental rights of the appellant. Basic requirements of the rule of law with regard to the independence of judges were not violated. Legal protection of the judges against the dismissal was not excluded and could be opened by analogy to Art. 13(1) EPC. Article 41 UPCA was a sufficient basis for the adoption of the Rules of Procedure, since the Convention already contained detailed procedural provisions in Article 42 et seq. and the Rules of Procedure merely regulated the details. It did not follow from the German Constitution that a corresponding integration program 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 has no connection with Article 38(1) sentence 1 German Constitution.

IV.

90 On 3 April 2017, the Federal President - in accordance with established state practice - declared to the Federal Constitutional Court that he was prepared neither to execute nor to promulgate the UPC-Consent Act pending the decision of the Federal Constitutional Court on the merits of the case, nor to ratify the UPCA (cf. BVerfGE 123, 267 <304>; on BVerfGE 132, 195 et seq. cf. Schneider, in: Burkiczak/Dollinger/ Schorkopf, BVerfGG, 2015, Sec. 32 marginal no. 268 fn. 478). A decision on the application for a temporary injunction was therefore not required.

B.

91 The constitutional complaint is admissible insofar as it alleges a violation of the complainant's right under Article 38(1) sentence 1 in conjunction with Article 20(1) and (2), Article 79(3) German Constitution by violation of the requirement of a qualified majority for the UPC-Consent Act under Article 23(1) sentence 3 in conjunction with Article 79(2) German Constitution (I.). In all other respects, it is inadmissible (II.).

I.

92 Acts approving international treaties may be challenged by means of a

constitutional complaint if the treaty contains provisions which directly encroach on the legal sphere of the individual (1.). The complainant has substantiated a possible violation of Article 38(1) sentence 1 German Constitution by infringement of the requirement of a qualified majority under Article 23(1) sentence 3 in conjunction with Article 79(2) German Constitution (2.). In this respect, the other requirements for admissibility are also met (3.).

93 1. a) Acts approving international treaties may be challenged by means of a constitutional complaint if the treaty contains provisions that directly encroach upon the legal sphere of the individual (see BVerfGE 6, 290 <294 et seq.>; 40, 141 <156>; 84, 90 <113>; 123, 148 <170>). Even if consent to an international treaty is as a rule not divisible, because the act of consent in principle forms a unit that cannot be separated from the international treaty and both in this respect constitute a uniform object of attack (cf. BVerfGE 103, 332 <345 f.>), this does not preclude a restriction of the subject matter of the proceedings in terms of content, oriented to the request for legal protection, with regard to the provisions of the surplus income referred to (cf. BVerfGE 14, 1 <6>; 123, 148 <170, 185>; 142, 234 <245 ff. marginal no. 10 ff.>). In this respect, a precise description of the provisions challenged by the constitutional complaint is also required in the case of laws approving international treaties.

94 b) The Act Approving an International Treaty is already a suitable subject of a constitutional complaint before it enters into force if the legislative procedure has been completed except for its execution by the Federal President and its promulgation (see BVerfGE 1, 396 <411 et seq.>; 24, 33 <53 et seq.>; 112, 363 <367>; 123, 267 <329>; 132, 195 <234 et seq. marginal no. 92>; 134, 366 <391 f. marginal no. 34>; 142, 123 <177 marginal no. 91>), because otherwise there would be a danger that Germany could fulfill obligations under international law only in violation of its constitution. The constitutional complaint could thus fail to achieve its purpose of serving legal peace by clarifying the constitutional situation and avoiding a discrepancy between international and constitutional obligations (see BVerfGE 24, 33 <53 f.>; 123, 267 <329>). It is therefore in line with the requirement of effective (fundamental) legal protection and state practice to enable a preventive review of future regulations already at this stage. The legislative procedure must, however, be completed except for the execution

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>). This stage has been reached in the present case.

95 2. The complainant has substantiated a possible violation of Article 38(1) sentence 1 German Constitution 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 (3) German Constitution).

96 a) Article 38(1) sentence 1 German Constitution protects citizens entitled to vote from a transfer of sovereign rights under Article 23(1) German Constitution which, in violation of Article 79(3) in conjunction with Article 23(1) sentence 3 German Constitution, abandons the essential content of the principle of the sovereignty of the people (Article 20(1) and (2) German Constitution). This is examined by the Federal Constitutional Court within the framework of the identity check (see most recently Federal Constitutional Court, Second Senate Judgment of 30 July 2019 - 2 BvR 1685/14 et al.) Article 38(1) sentence 1 in conjunction with Article 20(1) and (2) sentence 1 German Constitution further grants those entitled to vote a claim against the Bundestag, the Bundesrat and the Federal Government that they, in the exercise of their responsibility for integration, monitor compliance with the integration program laid down in the Act Approving the Constitution and, in the event of obvious and structurally significant transgressions of competences by organs, institutions and other bodies of the European Union, actively work towards compliance with the limits of the integration program laid down in the Act Approving the Constitution and its observance. This is examined by the Federal Constitutional Court within the framework of ultra vires review (cf. most recently Federal Constitutional Court, judgment of the Second Senate of 30 July 2019 - 2 BvR 1685/14 et seq.).

97 In addition, the protection of the right under Article 38(1) sentence 1 German Constitution, which is equivalent to a fundamental right, also extends to compliance with the requirements of Article 23(1) German Constitution for an effective transfer of sovereign rights. The scope of guarantee of Article 38(1) sentence 1 German Constitution covers structural changes in the legal structure of the state, such as may occur when sovereign rights are transferred to the

European Union or other supranational institutions (cf. BVerfGE 129, 124 <169>; 142, 123 <190 marginal no. 126>). Competences that are transferred to another subject of international law cannot, in contrast to a constitutional amendment, be "taken back" 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) German Constitution serves to guarantee a special level of legitimacy for decisions which weaken the substance of the right to vote in elections to the Bundestag and which may permanently withdraw the democratic guarantees of the German Constitution up to the limit protected by constitutional identity. In this context, the integration legislature, which is called upon to make substantive constitutional amendments without the direct participation of the people, should have to overcome a substantial hurdle (see Hobe, in: Friauf/Höfling, Berliner Kommentar zum Grundgesetz, Art. 23 Rn. 49 <September 2011>; Wendel, Permeability in European Constitutional Law, 2011, p. 246; Michael, in: Bonner Kommentar zum GG, Art. 146 Rn. 396, 512 <November 2013>). In contrast to constitutional amendments, Article 38(1) sentence 1 German Constitution 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 insofar as this is not accompanied by a constitutional amendment, so that acts linked to such a "transfer" are to be regarded as ultra vires acts.

98 Against this background, in order to safeguard their democratic opportunities to exert influence in the process of European integration, citizens have a fundamental right to ensure that a transfer of sovereign rights only takes place in the forms provided for this purpose by the German Constitution in Article 23(1) sentence 2 and sentence 3, Article 79(2) German Constitution (cf. BVerfGE 134, 366 <397 marginal no. 53>; 142, 123 <193 marginal no. 134>; 146, 216 <251 marginal no. 50>). In the case of Article 23(1) sentence 2 German Constitution, therefore, the absence of a federal law requiring consent may be complained of, and in the case of Article 23(1) sentence 3 German Constitution, the absence of the qualified majority under Article 79(2) German Constitution.

99 This is not contradicted by the fact that in its judgment on the ESM of 18 March 2014, the Senate denied a possible violation of Article 38(1) sentence 1 German

Constitution with regard to compliance with a formal requirement in the legislative procedure. The case was different insofar as the ESM Financing Act did not concern a non-reversible transfer of sovereign rights (see BVerfGE 135, 317 <386 marginal no. 125>). Furthermore, insofar as the Senate also considered the complaint that the Bundestag and the Bundesrat would have to decide on special measures of the ESM, such as a capital increase, with a two-thirds majority in view of the overall budgetary responsibility of the Bundestag, to be inadmissible because Article 79(2) German Constitution, also in conjunction with Article 23(1) sentence 2 German Constitution, 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 ultra vires constellations (cf. BVerfGE 135, 317 <387 f. marginal no. 129>). It would be meaningless if it were not understood as a reservation for the constellation of an ineffective transfer of sovereign rights which is to be decided here and which would result in countless ultra vires acts.

100 b) With his constitutional complaint, the complainant complains that the integration legislator has not complied with the constitutional requirements for a transfer of sovereign rights to the Unified Patent Court, above all because, contrary to Article 23(1), third sentence, in conjunction with Article 79(2) German Constitution, the UPC-Consent Act was not adopted with the required two-thirds majority. Thus, he has sufficiently substantiated a possible violation of Article 38(1) sentence 1 German Constitution. He problematizes in detail and with reference to the literature the applicability of Article 23(1) German Constitution to the challenged consent law as well as the factual requirements of Article 23(1) sentence 3 German Constitution and, with reference to the case law of the Senate, establishes a connection to 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 German Constitution were not complied with in the present case.

101 The fact that the complainant has not dealt with all conceivable variants of interpretation of Article 23(1) sentence 3 German Constitution does not call into

question the sufficiency of the substantiation. Since there is no directly relevant case law of the Senate in this respect (cf. BVerfGE 129, 124 <171 f.>) and the opinions represented in the literature on the relationship between Article 23(1) sentence 2 and sentence 3 German Constitution disintegrate into ramifications that are hardly manageable anymore (cf. on this Wollenschläger, NVwZ 2012, p. 713 <715>), it is sufficient to satisfy the substantiation requirements if, with regard to sentence 3, the complainant subscribes to the predominant view in the literature, which, in the case of a transfer of sovereign rights with an effect of encroaching on the domestic legal order, attributes to every integration law a substantive constitutional amendment content (cf. for example Rathke, in: v. Arnauld/Hufeld, SK-Lissabon, 2nd ed. 2018, Sec. 7 marginal no. 43 et seq.; Hillgruber, in: Schmidt-Bleibtreu/Hofmann/Henneke, GG, 14th ed. 2018, Art. 23 marginal no. 35). Moreover, it is sufficiently clear from his submissions that the complainant sees a significant and structurally important shift in the constitutional structure in the interruption of the allocation of jurisdiction in Article 92 German Constitution. Irrespective of the persuasiveness of these remarks, he thus in any case also takes account of the view expressed in the literature, according to which the application of Article 23(1) sentence 3 German Constitution depends on an evaluative consideration of the effects on the constitutional order (see, for example, Wollenschläger, in: Dreier, GG, vol. 2, 3rd ed. 2015, Article 23 marginal no. 57).

102 The other requirements for admissibility are also fulfilled. The transfer of sovereign rights to the Unified Patent Court provided for by the UPC-Consent Act takes effect immediately with its commencement of work, without any further act of execution by the German public authority being required (cf. also BVerfGE 142, 234 <245 f. marginal no. 12>). Insofar as the complainant substantiates the possibility of a violation of fundamental rights, he is therefore himself and currently affected in his right under Article 38(1) sentence 1 German Constitution, which is threatened to be impaired by the UPC-Consent Act which is specifically pending for execution. The affectedness is also direct because the UPC-Consent Act would diminish the right to democratic self-determination conveyed via the Bundestag after its enactment without a further act of implementation (cf. BVerfGE 1, 97 <101 f.>; 53, 366 <389>; 126, 112 <133>; case law).

II.

103 On the other hand, the constitutional complaint is inadmissible for lack of standing insofar as the complainant derives a possible violation of his right under Article 38(1) sentence 1 in conjunction with Article 20(1) and (2) in conjunction with Article 79(3) German Constitution on the grounds that the UPC-Consent Act violates the constitutional identity because the legal position of the judges is insufficiently regulated under the rule of law (1.), interferences with fundamental rights by the Unified Patent Court are not sufficiently legitimated by law (2.) and the UPCA violates Union law (3.).

104 1. Insofar as the constitutional complaint alleges that the procedure for the selection and appointment of the judges of the Unified Patent Court as well as their legal status do not meet the requirements of the rule of law, the substantiated statement of a possible violation of the right under Article 38(1) sentence 1 German Constitution (Sec. 23(1) sentence 2, Sec. 92 Federal Constitutional Court Act) is lacking. 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 a fundamental right in his or her case (see BVerfGE 99, 84 <87>; 101, 331 <346>; 123, 186 <234>; 130, 76 <110>; 142, 234 <251 marginal no. 28>; 149, 346 <359 marginal no. 23>). This also applies within the framework of the identity check under Article 23(1) sentence 3 in conjunction with Article 79(3) German Constitution (on the requirements for substantiation, see also BVerfGE 129, 124 <167 et seq.>; 132, 195 <235 marginal no. 92>). The constitutional complaint does not meet these requirements.

105 a) Admittedly, the complaints concerning the provisions of the UPCA on the appointment and legal position of the judges at the Unified Patent Court also address their democratic legitimacy (Article 20(1) and (2) sentence 1 German Constitution), which can be directly challenged via Article 38(1) sentence 1 German Constitution. To the extent that the complainant asserts that there is a lack of a sufficiently specific legal basis for the appointment of judges and a lack of parliamentary involvement in order to legitimize encroachments on fundamental rights caused by the judicial activity, this could be understood in substance as an assertion of insufficient democratic legitimacy 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) German Constitution. In addition to the substantive legitimation of the judicial activity by the UPC-Consent Act, the judges of the Unified Patent Court also have a personal legitimation from the perspective of the German Constitution. 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 in view of the fact that Germany's participation in supranational courts has so far never been called into doubt by the Federal Constitutional Court (cf. BVerfGE 73, 339 <366 et seq.>; 149, 346 <364 et seq. marginal no. 36 f.; 366 marginal no. 41, 43>), a more detailed discussion of the requirements for the democratic legitimacy of judicial functions in the supranational context and the relevant case law of the Federal Constitutional Court would have been necessary. However, the reference to the case law of the Federal Constitutional Court is evidently exhausted in a simple transfer of the requirements of certainty developed for the domestic sphere. The fact that an international treaty, which must be negotiated with other contracting parties, cannot be subject to the same requirements of definiteness and regulatory density as a statute (see BVerfGE 77, 170 <231 f.>; 89, 155 <187 f.>) is not addressed by the constitutional complaint. Nor is there any specific justification in the constitutional complaint as to why the provisions on the procedure for the appointment of judges and, in particular, the requirement of the 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 (cf. Article 24 UPCA).

107 b) Insofar as on the basis of Art. 38(1) sentence 1 German Constitution the violation of other principles of state structure, such as here the principle of the rule of law, are complained of, it is required according to the case law of the Federal Constitutional Court that the complainant establishes a connection to the principle of the rule of law which is not applicable by virtue of Art. 38(1) sentence 1 German Constitution (see BVerfGE 123, 267 <332 f.>; 129, 124

<169, 177>; 132, 195 <238 marginal no. 104>; 134, 366 <397 marginal no. 53>; 135, 317 <386 marginal no. 125>; 142, 123 <190 marginal no. 126>; 146, 216 <249 et seq. Rn. 44 ff.>).

108 The constitutional complaint does not comment on this requirement. With regard to the legal position of the judges of the Unified Patent Court, it is limited in the result to showing a conflict with provisions of - partly simple - national law.

109 2. The constitutional complaint is further inadmissible insofar as the complainant alleges an infringement of his right under Article 38(1) sentence 1 German Constitution from the powers of the Unified Patent Court provided for in Article 41 and Article 69(1) UPCA to adopt rules of procedure of the Unified Patent Court and to determine maximum amounts for reimbursable representation costs on the grounds that the Unified Patent Court is thus enabled to interfere with the legal positions of voters in Germany protected by fundamental rights without a sufficiently specific parliamentary authorization being available for this purpose.

110 a) Admittedly, the Senate ruled out blanket authorizations in its judgments on the Treaties of Maastricht (cf. BVerfGE 89, 155 <187 f.>) and Lisbon (cf. BVerfGE 123, 267 <351, 353>) and in its judgment on the Free Trade Agreement between the European Union and Canada (CETA) of 13 October 2016 considered that a too vague design of the committee system provided for in CETA could affect the principles of the democratic principle as part of the constitutional identity of the German Constitution (see BVerfGE 143, 65 <95 et seq. Rn. 59, 65> with reference to BVerfGE 142, 123 <183 f. Rn. 110 f.>). In this respect, Article 38(1) sentence 1 in conjunction with Article 20(1) and (2) German Constitution may be violated if sovereign rights are transferred to an institution that has no or only weak democratic legitimacy without a sufficient limitation (cf. BVerfGE 89, 155 <187>; 123, 267 <351>; 142, 123 <193 f. marginal no. 134>).

111 However, these remarks are made in the context of a trade agreement of the European Union, where it is not guaranteed that the Member States are represented in the committees provided for in the agreement and can exert a determining influence on their decisions. The constitutional complaint does not

substantiate why something comparable should apply to the Unified Patent Court to be established by an international treaty of the Federal Republic of Germany under Article 59(2) German Constitution. The mere reference to the judgment of the Senate of 13 October 2016 in the matter of CETA is insufficient in this respect already because Germany's participation in the decisions of the Administrative Committee on an equal footing is in principle ensured (Article 41(2) UPCA) and these decisions require a majority of three quarters of the votes (Article 12(3) UPCA). The constitutional complaint also does not address the fact that the Federal Republic of Germany has a right of veto in the case of revisions of the Agreement pursuant to Art. 87(3) UPCA and that the activities of the Administrative Committee are furthermore subject to parliamentary feedback via Art. 23(2) and (3) German Constitution in conjunction with the Law on the Cooperation of the Federal Government and the German Bundestag in European Union Affairs (EUZBBG) of 4 July 2013 (Federal Law Gazette I p. 2170).

112 The assertion of an insufficient democratic legitimacy of the administrative committee, based solely on the domestic requirements for an ordinance authorization following from Article 80(1) German Constitution, also fails to meet the substantiation requirements under Section 23(1) sentence 2, Section 92 Federal Constitutional Court Act. Typically, an integration law can only outline the program within the limits of which a political development may take place, but cannot predetermine it in every point (cf. BVerfGE 123, 267 <351>; 135, 317 <429 marginal no. 236>). In this respect, the complainant already does not argue that the provisions contained in Art. 52 et seq. EPC and the decision-making powers of the Unified Patent Court cannot be amended by the Administrative Committee, but are limited to the regulation of the "details of the proceedings". In particular, Art. 41 UPCA does not allow to extend the competences of the Unified Patent Court.

113 b) Furthermore, the appeal argument is unsubstantiated insofar as it concerns the fixing of an upper limit for the reimbursement of costs in Art. 69(1) in conjunction with Art. 41(2) EPC. According to Art. 69(1) UPCA, the costs to be reimbursed must be "reasonable and appropriate", whereas the Rules of Procedure must ensure a fair balance between the interests of the parties,

according to Art. 41(3), second sentence, UPCA. From this, at least starting points for the concretization of the upper limit can be derived.

114 3. Insofar as the constitutional complaint alleges violations of Union law by the UPCA, a violation of the complainant's right under Article 38(1) sentence 1 German Constitution is excluded from the outset. Union law does not impose any formal or substantive requirements on national laws, the violation of which could call their validity into question or even violate the constitutional identity of the German Constitution. In addition, according to the established case law of the Federal Constitutional Court, Union law only takes precedence over German law in terms of application and not in terms of validity, so that a breach of Union law does not lead to the nullity of the national provision. Nor does an infringement of Union law automatically constitute an infringement of the German Constitution. If a legal principle of German law satisfies the domestic legal provisions, it remains effective even if it violates Union law (see BVerfGE 31, 145 <174 f.>; 82, 159 <191>; 110, 141 <154 f.>; 115, 276 <299 f.>; Federal Constitutional Court, Order of the 3rd Chamber of the Second Senate of 4 November 2015 - 2 BvR 282/13 -, para. 19).

115 Nothing else follows from the principle of the German Constitution’s friendliness to European law (see BVerfGE 123, 267 <354>; 126, 286 <303>; 129, 124 <172>). Admittedly, this constitutionally obliges German bodies to comply with Union law (cf. BVerfGE 129, 124 <172>). These must avoid infringements of Union law insofar as this is possible within the framework of methodically justifiable interpretation and application of national law (cf. BVerfGE 127, 293 <334>; Federal Constitutional Court, Order of the 3rd Chamber of the Second Senate of 4 November 2015 - 2 BvR 282/13 -, marginal no. 20). However, this alone does not result in Union law itself becoming a constitutional standard. Its validity and application in Germany are based - in accordance with Article 23(1) sentence 2 German Constitution - on the order to apply the law issued by the Act Approving the Treaties, which itself does not have constitutional quality (see BVerfGE 22, 293 <296>; 31, 145 <173 f.>; 37, 271 <277 f., 301>; 75, 223 <244>; 89, 155 <190>; 123, 267 <398, 400, 402>; 129, 78 <99>). This cannot be glossed over by recourse to the principle of European law friendliness (cf. Federal Constitutional Court, Order of the 3rd Chamber of the Second Senate

of 4 November 2015 - 2 BvR 282/13 -, para. 21).

116 On the other hand, 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 program, something else could apply with regard to the fundamental rights regulated in the Charter of Fundamental Rights of the European Union (CFR) (cf. in this respect Federal Constitutional Court, Order of the First Senate of 6 November 2019 - 1 BvR 276/17 -, which leaves this question open). This is because the UPC-Consent Act is intended to establish the Unified Patent Court as an independent supranational institution beyond the European Union. There are no specific Union law requirements for this.

C.

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

I.

118 Acts approving international treaties which are supplementary to or otherwise particularly close to the integration program of the European Union must be measured against Article 23(1) German Constitution (1.). If they amend or supplement the substance of the German Constitution or make such amendments or supplements possible, they require a two-thirds majority in the legislative bodies under the third sentence of Article 23(1) in conjunction with Article 79(2) German Constitution (2). An obligation under international law entered into in violation of these requirements, which opens the door to the influence of a supranational public authority on citizens in Germany, violates the citizens' rights equivalent to their fundamental rights under Article 38(1) sentence 1, Article 20(1) and (2) in conjunction with Article 79(3) German Constitution (3). In addition, the substantive limits to the transfer of sovereign rights arising from Article 79(3) German Constitution must always be observed

(4).

119 (1) Article 23(1) German Constitution is the primary, because more specific, provision for European integration than Article 24(1) German Constitution, and its second sentence contains a special legal reservation (cf. BVerfGE 123, 267 <355>; Scholz, in: Maunz/Dürig, GG, Article 23, marginal no. 4 <October 2009>; Uerpmann-Wittzack, in: v. Münch/Kunig, GG, vol. 1, 6th ed. 2012, Art. 23 marginal no. 2; Simon, Grenzen des Bundesverfassungsgerichts im europäischen Integrationsprozess, 2016, p. 52 f. with further references; Streinz, in: Sachs, GG, 8th ed. 2018, Art. 23 marginal no. 9; Jarass, in: Jarass/Pieroth, GG, 15th ed. 2018, Art. 23 marginal no. 4). The provision is based on a broad understanding of the term European Union, which can also include intergovernmental bodies beyond the institutional framework of the European Union (a). The transfer of sovereign rights to independent intergovernmental bodies is subject to Article 23(1) German Constitution if these bodies have a complementary or other special relationship of proximity to the integration program of the European Union (b).

120 a) With Article 23(1) German Constitution, the legislature amending the constitution in 1992 intended to give Germany's European integration a new basis and to bring together its various institutions and procedures in a comprehensive regulation (see Bundestag Printed Paper 12/3338, pp. 1, 4 et seq.; 12/6000, p. 19 et seq.). This has found expression in the wording of Article 23(1) German Constitution insofar as Article 23(1) sentence 1 German Constitution speaks in general terms of the development of the European Union for the purpose of achieving a united Europe, while Article 23(1) sentence 2 German Constitution allows for a transfer of sovereign rights whose addressee need not necessarily be the European Union; rather, the specific addressee of the transfer is left open ("to this end"). Finally, Article 23(1) sentence 3 German Constitution is intended to cover not only the amendment of the treaty foundations of the European Union, but also "comparable regulations".

121 The purpose of Article 23(1) sentence 3 German Constitution is to subject an extension of the European Union's integration program to increased procedural requirements in view of the scope already achieved. In this respect, the constitution-amending legislature took up a proposal by the Legal Affairs

Committee and the Special Committee on the European Union of the Bundestag, which intended to cover all extensions of the European Union's competences (cf. BTDrucks 12/3896, p. 14). The legislature amending the Constitution had in mind above all the evolution and bridging clauses (cf. BTDrucks 12/3896, pp. 14, 18 f.; BVerfGE 123, 267 <385 ff.>), but did not want to limit itself to these. It would therefore be contrary to the intention of the constitution-amending legislature to withdraw parts of the dynamic and multifaceted development process within the framework of and in connection with the European Union from the scope of application of Article 23(1) German Constitution (cf. 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 consideration of the state of European integration which this implies, to permit the creation of isolated but functionally equivalent satellite institutions.

122 Article 23(1) German Constitution therefore proceeds - as does its paragraph 2 - from a broad understanding of the concept of the European Union, which in principle encompasses its entire organization and integration program and, under certain conditions, also applies to intergovernmental bodies and international organizations that are to be distinguished from it (cf. BVerfGE 131, 152 <199 ff., 217 f.>). It claims validity for all legal acts which regulate, define in more detail, secure or supplement the membership of the Federal Republic of Germany in the European Union and does not require 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 bodies is subject to Article 23(1) German Constitution if this amounts to a de facto treaty change (see Schorkopf, in: Bonner Kommentar zum GG, Art. 23 marginal no. 79 <August 2011>; id, Staatsrecht der internationalen Beziehungen, 2017, § 3 Rn. 189, 203; Möllers/Reinhardt, JZ 2012, p. 693 <695 f.>; Wollenschläger, in: Dreier, GG, vol. 2, 3rd ed. 2015, Art. 23 marginal no. 54; Streinz, in: Sachs, GG, 8th ed. 2018, Art. 23 marginal no. 90; Heintschel v. Heinegg/Frau, in: Epping/Hillgruber, BeckOK GG, Art. 23 marginal no. 29.1 <December 2019>). This is to be assumed if the integration law and/or the international treaty functionally replace a treaty amendment or supplement the treaty. Such

"substitute union law" (cf. Lorz/Sauer, DÖV 2012, p. 573 <573 et seq.>) is, for example, the case with the ESM Treaty and the Act on the ESM Treaty, with which no sovereign rights have been transferred, but with which a fundamental transformation of the original economic and monetary union has been set in motion (cf. BVerfGE 135, 317 <407 marginal no. 180> with reference to BVerfGE 129, 124 <181 f.>; 132, 195 <248 marginal no. 128>; a.A. ECJ, Judgment of 27 November 2012, Pringle, C-370/12, EU:C:2012:756, marginal no. 73 ff.), so that the Senate has classified them as a matter of the European Union within the meaning of Article 23(2) German Constitution (cf. BVerfGE 131, 152 <219>).

124 Such primary law equivalence presupposes a complementary or other special relationship of proximity to the integration program of the European Union (cf. Scholz, in: Maunz/Dürig, GG, Art. 23 para. 63 <October 2009>; Schorkopf, in: Bonner Kommentar zum GG, Art. 23 Rn. 64 <August 2011>; Calliess, NVwZ 2012, p. 1 <3>; Hölscheidt/Rohleder, DVBl 2012, p. 806 <807 f.>; Kube, WM 2012, p. 245 <247 f.>; Wollenschläger, NVwZ 2012, p. 713 <715>; id, in: Dreier, GG, vol. 2, 3rd ed. 2015, Art. 23 Rn. 41; Schmahl, DÖV 2014, p. 501 <507 f.>; Classen, in: v. Mangoldt/Klein/Starck, GG, vol. 2, 7th ed. 2018, Art. 23 Rn. 6, 12; Jarass, in: Jarass/Pieroth, GG, 15th ed. 2018, Art. 23 Rn. 3; Streinz, in: Sachs, GG, 8th ed. 2018, Art. 23 Rn. 56a, 90; Wolff, in: Hömig/Wolff, GG, 12th ed. 2018, Art. 23 Rn. 4, 24; Heintschel v. Heinegg/Frau, in: Epping/Hillgruber, BeckOK GG, Art. 23 Rn. 5 <December 2019>). Whether such a relationship exists cannot be determined on the basis of a single conclusive and at the same time selective characteristic, but only on the basis of an overall consideration of the circumstances, regulatory objectives, contents and effects (cf. on Article 23(2) German Constitution BVerfGE 131, 152 <199>).

125 A complementary or other special relationship of proximity may be indicated, for example, by the fact that the planned institution is anchored in primary law, the project is provided for in provisions of secondary or tertiary law, or there is another qualified connection with the integration program of the European Union. This also applies if the project is (also) promoted by organs of the European Union or their involvement in the realization of the project - e.g. by way of inter-organ loan - is provided for. Furthermore, a qualified

complementary and close relationship exists if an international 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 transferred to the European Union and, in particular, if the path of coordination under international law is chosen because efforts of the same kind to anchor it in Union law have not found the necessary majorities (cf. BVerfGE 131, 152 <199 f.>).

126 2. Insofar as integration laws and/or international treaties which are complementary to or otherwise particularly close to the integration program of the European Union amend or supplement the German Constitution in terms of their content, or make such amendments or supplements possible, they not only require the consent of the Bundesrat (Article 23(1) sentence 2 German Constitution), but must be passed by the Bundestag and Bundesrat with the majority provided for in Article 79(2) German Constitution. According to Article 23(1) sentence 3 German Constitution, not only the establishment of the European Union and the amendment of its treaty foundations have such constitutional relevance - in this case it is established by virtue of a constitutional order - but also "comparable regulations".

127 In this respect, the wording of Article 23(1) sentence 3 German Constitution refers to an amendment of the German Constitution "in terms of its content" and thus obviously ties in with the distinction taken from the case law of the Senate between formal constitutional amendments within the meaning of Article 79(1) sentence 1 German Constitution and substantive constitutional amendments without changes to the text of the Constitution (cf. BTDrucks 12/6000, p. 21; BVerfGE 58, 1 <36>; 68, 1 <114>). Moreover, Article 23(1) sentence 3 German Constitution speaks not only of substantive amendments to the German Constitution, but also of "additions" and the mere "enabling" of amendments and additions. This speaks for a broad understanding of "constitutional relevance." From a systematic-teleological point of view, it should be added that the provision is intended to constrain the integration legislature more strongly than Article 24(1) German Constitution, both procedurally and substantively, which - apart from the requirement of the Bundesrat's consent - is done primarily by the reference to Article 79(2) and (3) German Constitution contained in the third

sentence of Article 23(1) German Constitution.

128 The historical interpretation underlines this result. Article 23(1) German Constitution was part of an overall package that resolved the doubts that existed at the time as to the constitutional admissibility of the Maastricht Treaty (see, for example, Representative Verheugen and Senator Peschel-Gutzeit at the 3rd meeting of the Joint Constitutional Commission on 12 March 1992, Stenographic Report pp. 12, 20; BVerfGE 37, 271 <279 f.>; 58, 1 <40 f.>; 59, 63 <86>; 73, 339 <375 f.>) and its possible continuation (cf. Di Fabio, Der Staat 32 <1993>, p. 191 <195>) should be eliminated, but at the same time subject further integration steps to higher hurdles. The legislature amending the Constitution obviously assumed that any further transfer of sovereign powers to organs, institutions and other bodies of the European Union would only be possible with a majority vote amending the Constitution. The Federal Council expressly contradicted the Federal Government's interpretation to the contrary in the draft bill. In this respect, the final report of the Joint Constitutional Commission states that Article 23(1) sentence 2 German Constitution permits transfers of sovereignty up to the limit "where, for constitutional reasons, a new treaty or an amendment of the treaty foundations would be necessary" (cf. BTDrucks 12/6000, p. 28). This is expressed even more clearly in the report of the Special Committee on the European Union (Maastricht Treaty) of the German Bundestag, on which the final report of the Joint Constitutional Commission is based. There it is expressly stated that "a transfer of sovereignty (...) 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" (cf. BTDrucks 12/3896, p. 18). Against this background, the final report cites encroachments on "the constitutionally defined order of competences" (cf. BTDrucks 12/6000, p. 21) as an example of a transfer of sovereign powers entailing a substantive amendment of the constitution.

129 The legislature amending the Constitution proceeded from the idea that any transfer of sovereign rights "beyond existing authorizations" constitutes a constitutional amendment (cf. the reference to BVerfGE 58, 1 <36> in BTDrucks 12/6000, p. 21). The report of the Special Committee also makes it clear that this decision was consciously taken in the light of the openness to integration of

the German Constitution (cf. BTDrucks 12/3896, p. 18). The alternative interpretation offered - on an identical textual basis - by the Federal Government in its explanatory memorandum to the draft could not prevail against the view unanimously held in the legislative bodies (cf. BTDrucks 12/6000, p. 28; Bothe/Lohmann, ZaöRV 58 <1998>, p. 1 <10 ff.>). However, the German Constitution is not amended or supplemented in terms of its content every time sovereign rights are transferred to the European Union or to institutions in a complementary or other special relationship of proximity to it, nor are such amendments or supplements made possible. In particular, transfers which are sufficiently specified ("covered") in the integration program and which have already been approved by a two-thirds majority do not constitute a (further) substantive amendment of the German Constitution. Only Article 23(1) sentence 2 German Constitution applies to them.

130 In contrast, the transfer of new competences to the European Union or the establishment of new intergovernmental institutions that have a complementary or other special relationship of proximity to it regularly leads, due to their lack of commitment to the fundamental rights of the German Constitution and the further development of its integration program, which is difficult to predict, to the fact that the transfer of sovereign rights also "enables" amendments to the German Constitution within the meaning of the provision (cf. Classen, in: v. Mangoldt/Klein/Starck, GG, vol. 2, 7th ed. 2018, Art. 23 marginal no. 14; in the result also Scholz, NJW 1992, p. 2593 <2599>; id, NVwZ 1993, p. 817 <822>; cf. also ders, in: Maunz/Dürig, GG, Art. 23 marginal no. 118 et seq. <October 2009>). This is above all the case if the integration law and/or the international treaty - conceived as domestic law - establishes an exclusive competence of the European Union or enables a complete displacement of the federal legislature (Articles 73 et seq., 105 German Constitution), permits encroachments on the legislative competence of the States (Articles 30, 70 German Constitution) or impairs the administrative (Articles 83 et seq., 108 German Constitution) and judicial (Article 92 German Constitution) competences of the Federation and the States. Furthermore, a Europeanization of constitutional requirements is to be assumed if the integration law and/or the international treaty alters or reshapes the constitutional requirements for local self-government (Article 28(2) German Constitution), the Bundesbank (Article

88 German Constitution) or the court structure (Articles 92 et seq., 96 German Constitution).

131 That the transfer of judicial functions to a newly created intergovernmental body constitutes a substantive constitutional change is obvious - even detached from the associated, methodologically indispensable power of judicial further development of the law (cf. BVerfGE 75, 223 <241 ff.>; 126, 286 <305 f.>).

132 3) A law approving an international treaty that was passed in violation of Article 23(1) sentence 3 in conjunction with Article 79(2) German Constitution cannot legitimize the exercise of official authority by organs, institutions and other bodies of the European Union or by an intergovernmental body which has a complementary or other special relationship of proximity with the European Union (a) and therefore violates the citizens' rights under Article 38(1) sentence 1, Article 20(1) and Article 20(2) in conjunction with Article 79(3) German Constitution (b).

133 a) If sovereign rights are not transferred in the procedure provided for by the Constitution, they are not (effectively) transferred at all. There is no opening of the German legal system to the influence of supranational law. By using sovereign rights that have not been (effectively) transferred, supranational organizations would therefore be using sovereign power without being democratically legitimized to do so. Corresponding measures of organs, institutions and other bodies of the European Union or of the intergovernmental body in a complementary or other special relationship of proximity to it are necessarily ultra vires and thus violate the principle of the sovereignty of the people from Article 20(2) sentence 1 German Constitution (cf. BVerfGE 83, 37 <50 f.>; 89, 155 <182>; 93, 37 <66>; 130, 76 <123>; 137, 185 <232 f. marginal no. 131>; 139, 194 <224 marginal no. 106>; 142, 123 <174 marginal no. 82>; 146, 216 <252 f. marginal no. 52 f.; 255 marginal no. 57>; Federal Constitutional Court, judgment of the Second Senate of 30 July 2019 - 2 BvR 1685/14 et al. -, marginal no. 120).

134 b) If an integration law does not effectively authorize organs, institutions and other bodies of the European Union or intergovernmental bodies that have a complementary or other special relationship of proximity with the European

Union to adopt measures, this violates the citizens of Germany in their right under Article 38(1) sentence 1, Article 20(1) and Article 20(2) in conjunction with Article 79(3) German Constitution, which is equivalent to a fundamental right.

135 According to the settled case-law of the Federal Constitutional Court, the right to vote for the German Bundestag guaranteed to the individual in Article 38(1) sentence 1 German Constitution is not exhausted by a formal legitimation of (federal) state power, but also encompasses the citizen's claim to be exposed only to a public power which he or she can legitimize and influence (see BVerfGE 123, 267 <341>; 142, 123 <191 marginal no. 128>). As a fundamental right to participate in the democratic self-rule of the people, Article 38(1) sentence 1 German Constitution does not in principle confer any right of appeal against parliamentary resolutions, in particular legislative resolutions. However, its scope of guarantee covers structural changes in the legal structure of the state, such as may occur when sovereign rights are transferred to the European Union or other supranational institutions (see BVerfGE 129, 124 <169>; 142, 123 <190 marginal no. 126>).

136 Article 38(1) sentence 1 German Constitution therefore protects citizens entitled to vote from a transfer of sovereign rights under Article 23(1) German Constitution which, by exceeding the limits of Article 79(3) in conjunction with Article 23(1) sentence 3 German Constitution, materially surrenders the essential content of the principle of popular sovereignty (Article 20(1) and (2) German Constitution). The Federal Constitutional Court examines this within the framework of identity review, as was the subject of the judgments on the Maastricht Treaty (cf. BVerfGE 89, 155 et seq.), the Lisbon Treaty (cf. BVerfGE 123, 267 et seq.) and the ESM Treaty (cf. BVerfGE 132, 195 et seq.; 135, 317 et seq.). Furthermore, Article 38(1) sentence 1 in conjunction with Article 20(1) and (2) sentence 1 German Constitution enables ultra vires review by the Federal Constitutional Court in the event of obvious and structurally significant overstepping of competences by organs, institutions and other bodies of the European Union (cf. most recently Federal Constitutional Court, Second Senate Judgment of 30 July 2019 - 2 BvR 1685/14 et seq.

137 In the scope of application of Article 23(1) German Constitution, Article 20(1) and (2) in conjunction with Article 79(3) German Constitution further protect the

electorate from the fact that the formal requirements of Article 23(1) German Constitution for a transfer of sovereign powers, which were intended to constrain the legislature in the process of European integration also procedurally more than under Article 24(1) German Constitution (see above marginal no. 119 et seq.), are not met (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, as a rule, "lost" and cannot easily be "retrieved" on their own. In the context of the European Union, there is also the fact that Article 4(3) TEU can result in an obligation not to withdraw consent once it has been given (see, for example, Advocate General Bot, Opinion of 18 November 2014, C-146/13, EU:C:2014:2380, para. 175 et seq.), which could result in an additional specific risk situation for the future content of the right to democratic self-determination. Above all, however, without an effective transfer of sovereign rights, any measure nevertheless adopted by organs, institutions and other bodies of the European Union or a supranational organization would lack democratic legitimacy.

138 This affects the core of the right to democratic self-determination enshrined in Article 38(1) sentence 1, Article 20(1) and (2) in conjunction with Article 79(3) German Constitution, which is subject to a constitutional complaint and which is not at issue. Without the possibility of having the objective principles of Article 20(1) and (2) German Constitution reviewed in their core protected by Article 79(3) German Constitution, the democratic core content of Article 38(1) sentence 1 German Constitution would lose its meaning (see Simon, Grenzen des Bundesverfassungsgerichts im europäischen Integrationsprozess, 2016, p. 108).

139 4. Finally, in any transfer of sovereign rights, the substantive limits resulting from the constitutional identity of the German Constitution must be observed. Even in the case of a transfer of sovereign rights to an intergovernmental body in a complementary and other special relationship of proximity to the European Union, the integration legislator must ensure that the principles of Article 1 and Article 20 German Constitution are not affected (Article 23(1) sentence 3 in conjunction with Article 79(3) German Constitution). Within the framework of the identity check, the Federal Constitutional Court therefore examines whether the

principles declared inviolable by Article 79(3) German Constitution are affected by an integration law and/or an international treaty (cf. BVerfGE 123, 267 <344, 353 f.>; 126, 286 <302>).

140 With a view to the democratic principle of Article 20(1) and (2) German Constitution, it must be ensured, inter alia, that the German Bundestag retains its own tasks and powers of substantial political weight in the event of a transfer of sovereign powers under Article 23(1) German Constitution (cf. BVerfGE 89, 155 <182>; 123, 267 <330, 356>) and that it remains in a position to exercise its overall budgetary responsibility (cf. BVerfGE 123, 267 <359>; 129, 124 <177>; 132, 195 <239 marginal no. 106>; 135, 317 <399 f. Rn. 161>). Article 20(1) and (2) German Constitution also prohibit blanket authorizations (cf. BVerfGE 58, 1 <37>; 89, 155 <183 f., 187>; 123, 267 <351>; 132, 195 <238 marginal no. 105>; 142, 123 <192 marginal no. 130 ff.>) and is therefore violated if the integration legislature does not specify the intended integration program in a sufficiently definable manner. In particular, the Bundestag may not evade its responsibility for integration by conferring indeterminate powers on other actors or by allowing itself to be externally determined by organs, institutions or other bodies of the European Union, by intergovernmental institutions that have a complementary or other special relationship of proximity with it, or by other Member States, and thus no longer remain "master of its decisions" (cf. BVerfGE 129, 124 <179 f.>; 132, 195 <240>; 135, 317 <401 marginal no. 163 f.>).

II.

141 According to these standards, Article 1(1) sentence 1 UPC-Consent Act violates the complainant's right under Article 38(1) sentence 1, Article 23(1) sentence 3 in conjunction with Article 79(2) German Constitution because the UPC-Consent Act was not adopted with the consent of two thirds of the members of the Bundestag (Article 79(2) German Constitution) (1.). It is therefore not necessary to decide whether the establishment of an unconditional priority of Union law in Article 20 and Article 21 sentence 2 of the UPCA violates Article 20(1) and (2) in conjunction with Article 79(3) German Constitution (2).

142 1. The UPCA transfers sovereign rights to the Unified Patent Court (a), has a

complementary or other special relationship of proximity to the integration program of the European Union (b) and causes a substantive constitutional amendment (c). However, it was not adopted by the Bundestag with the two-thirds majority required under Article 23(1) sentence 3 in conjunction with Article 79(2) German Constitution (d) and therefore violates the complainant's right under Article 38(1) sentence 1 in conjunction with Article 20(1) and (2) in conjunction with Article 79(3) German Constitution (e).

143 a) The UPCA transfers jurisdictional tasks to a supranational court and legislative tasks to its administrative bodies and thus opens up the German legal order in such a way that the Federal Republic of Germany's exclusive claim to sovereignty in the area of application of the German Constitution is withdrawn to this extent and room is left for the direct validity and applicability of European law (see BVerfGE 37, 271 <280>; 58, 1 <28>; 59, 63 <90>; 73, 339 <374 f.>). Art. 32 UPCA assigns certain legal disputes to the Unified Patent Court for exclusive adjudication and thus confers on it the power to make binding decisions on disputes. This "archetype of sovereign activity" (cf. Roellecke, VVDStRL 34 <1976>, p. 7 <25>; Classen, in: v. Mangoldt/Klein/Starck, GG, vol. 3, 7th ed. 2018, Art. 92 marginal no. 1) is an elementary prerequisite for the enforcement of the state's monopoly on the use of force (cf. BVerfGE 54, 277 <291>) and is indispensable for the peaceful coexistence of people. By Art. 82(1) sentence 1 UPCA, the decisions and orders of the Unified Patent Court are furthermore determined to be enforceable titles. In addition, Art. 40(2) and Art. 41(1) and (2) UPCA provide, inter alia, 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 complementary or otherwise particularly close relationship to the integration programme of the European Union (cf. draft bill of the Federal Government BTDrucks 18/11137, p. 8) and in substance replaces Union law provisions whose anchoring in the law of the European Union has not found the necessary majorities (cf. BVerfGE 131, 152 <200>).

145 aa) The UPC finds a direct link 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 included in the integration program. In this

respect, Article 262 TFEU provides for a transfer of jurisdiction to the Court of Justice for disputes concerning European intellectual property rights, but ties this to a unanimous Council decision (first sentence) and to ratification by the Member States (second sentence). There has been insufficient support for either to date. Irrespective of the question whether an establishment of the Unified Patent Court on the basis of international law undermines this requirement of Art. 262 TFEU, the provision nevertheless shows that the Unified Patent Court is intended to be only a functional equivalent for a "proper" union patent jurisdiction.

146 bb) Furthermore, the UPC is closely interwoven with secondary legislation adopted on the basis of Art. 118 TFEU (cf. also 4th recital to the UPC). It develops its regulatory content only in interaction with these regulations, which provide for the creation of a uniformly effective European property right for patents. Thus, it links to 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 UPC (cf. Art. 18(2)(1) of Regulation <EU> No 1257/2012 and Art. 7(2) of Regulation <EU> No 1260/2012), so that the effectiveness of the UPC is at the same time a prerequisite 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 (cf. Art. 2(f) and (h), Art. 3(a) and (b) in conjunction with Art. Art. 32 UPCA), the unitary effect of which is only ensured by the provisions contained in the UPCA (Art. 25 to 28, 30 UPCA).

147 The close interlocking of the UPCA with the integration program of the European Union is also expressed in the fact that the Unified Patent Court, despite its qualification as an independent supranational body to be distinguished from the European Union, is directly bound by Union law (Art. 24(1)(a) UPCA). The UPC also commits it to the primacy of Union law (Art. 20 UPC), whereby the contracting member states express 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 conferred by that law on individuals" (cf. 9th recital).

148 cc) Furthermore, the Agreement was significantly (co-)promoted by organs of

the European Union (cf. Augenstein/Haertel/Kiefer, in: Fitzner/Lutz/Bodewig, BeckOK PatR, EPCIP, marginal no. 5 <15 January 2020>). The project of a unified European patent jurisdiction has long been considered a necessary part of a unified patent law, advocated 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 centralization of judicial protection in this area (cf. 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, Europäisches Patentübereinkommen, 3rd ed. 2019, Vor Präambel Rn. 36 et seq.) and thus also referred the matter to the Court of Justice. It is true that the original draft of a European patent jurisdiction was rejected by the Court of Justice in the opinion of 8 March 2011 (see ECJ, Opinion 1/09, EU:C:2011:123, para. 71 ff.). However, the regulations provided for there were incorporated into the "European Patent Package", which, in addition to the UPC, also includes Regulation (EU) No. 1257/2012 and Regulation (EU) No. 1260/2012 (cf. Advocate General Bot, Opinion of 18 November 2014, C-146/13, EU:C:2014:2380, para. 3) and - detached from questions of competence - has been emphatically promoted by the European Parliament (cf. Resolution of the European Parliament of 11 December 2012, 2011/2176<INI>, OJ EU No. C 434 of 23 December 2015, p. 34 et seq.).

149 dd) The institutions of the European Union are involved in the implementation of the UPCA to varying degrees. The General Secretariat of the Council is called upon as depositary of the instruments of ratification (Art. 84(2), second sentence and (4), Art. 85 UPCA), the European Commission is to be involved in the adoption and amendment of the Rules of Procedure and to ensure their compatibility with Union law (Art. 41(1) and (2) UPCA). It is also represented as an observer at the meetings of the Administrative Committee (Art. 12(1), second sentence, UPCA). Finally, the European Patent Court itself may or must obtain preliminary rulings from the Court of Justice under Article 267 TFEU if the conditions are met (Article 21 UPCA).

150 ee) Furthermore, the Agreement is exclusively open 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", whereby the term contracting member state, according to Art. 2(b) and (c) UPCA, means 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 1st 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 establishment of an internal market within the European Union characterised by the free movement of goods and services and to the realisation 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 to accession by any Member State of the European Union". This limitation is ultimately rooted in the - generalizable - case law of the Court of Justice (see ECJ, Opinion of 8 March 2011, Opinion 1/09, EU:C:2011:123, para. 77 et seq, 89), which, with a view to 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 rule on a substantial number of actions brought by individuals in connection with the Community patent and on the interpretation and application of Union law in this area" (cf. ECJ, 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 States to the UPCA does not call into question the complementary or other special proximity relationship to the integration program of the European Union. On the contrary, this is explicitly legitimized 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 is subject to the requirements of Article 23(1) sentence 3 in conjunction with Article 79(2) German Constitution because it Europeanizes provisions of the German Constitution and, in substance, brings about a substantive constitutional amendment.

153 aa) The UPCA has constitutional relevance and constitutes a comparable provision within the meaning of Article 23(1) sentence 3 German Constitution because it contains a functionally equivalent provision 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 this 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 on the basis of 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 (Article 262 sentence 1 TFEU), but also that this act shall enter into force only after the consent of the Member States in accordance with their respective constitutional requirements (Article 262 sentence 2 TFEU). The creation of a jurisdiction of the Court of Justice for industrial property rights has obviously been regarded by the Member States as a serious encroachment on national jurisdiction and has been designed as an act requiring ratification.

155 The German legislature - following the Lisbon judgment (cf. BVerfGE 123, 267 <387 f.>) - has classified this as a special treaty amendment procedure, as evidenced by Sec. 3(2) of the Act on the Exercise of the Integration Responsibility of the Bundestag and the Bundesrat in European Union Affairs (IntVG). With the UPC 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 Court of Justice provided for in Art. 262 TFEU, for which there was obviously no legal basis so far. In doing so, they have changed the integration program of the Treaty of Lisbon, de facto withdrawn 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 unanimity required for the path of Art. 262 TFEU set out in the Treaty nor for an amendment pursuant to Art. 48 TEU.

156 From the perspective of Article 23(1) sentence 3 German Constitution, this is an amendment of the treaty 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, Staatsrecht III, 5th ed. 2018, Sec. 4 marginal

no. 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 an international treaty provision that removes disputes from the jurisdiction of the Member States requires the consent of the Member States (see ECJ, Opinion of 16 May 2017, Opinion 2/15, EUSFTA, EU:C:2017:376, para. 89).

157 bb) Irrespective of the concrete design of patent jurisdiction, a transfer of judicial functions displacing German courts causes a substantive amendment of the German Constitution within the meaning of Article 23(1) sentence 3 German Constitution. According to Article 92 German Constitution, judicial power is exercised by the Federal Constitutional Court, the federal courts and the courts of the States. Any transfer of judicial functions to intergovernmental courts modifies this comprehensive allocation of judicial power and, to that extent, constitutes a substantive constitutional amendment. It not only affects the fundamental rights guarantees of the German Constitution because German courts can no longer grant fundamental rights protection in this respect (see Federal Constitutional Court, Order of the First Senate of 6 November 2019 - 1 BvR 276/17 -, paras. 42 et seq., 54), but also affects the concrete design of the separation of powers under Article 20(2) sentence 2 German Constitution. In its judgment on the Treaty of Lisbon, the Senate has therefore already clarified that the responsibility for the administration of justice - in particular with regard to the judiciary - must as a rule remain with the Member States (cf. BVerfGE 123, 267 <415 f.>; cf. also ECJ, Judgment of 24 May 2011, C-54/08, Commission v. Germany, EU:C:2011:339, para. 83 et seq.; Judgment of 12 December 1996, C-3/95, Reisebüro Broede/Sandker, EU:C:1996:487, para. 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 disposal, unless actions are still brought before the national courts during a transitional period of seven years (Art. 83 UPCA). Its judgments are readily enforceable under the second sentence of Art. 82(3) UPCA. Orders for the production of evidence by the opposing party or third parties (Art. 59 UPCA), the seizure of objects (Art. 60, para. 2 UPCA) or the "inspection" of premises

(Art. 60, para. 3 UPCA) constitute interference with fundamental rights and have direct effect in the jurisdiction of the contracting member 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 - as intended by the member states (7th recital to the UPCA) - part of the domestic jurisdiction (cf. Art. 1(2), Art. 82(3), second sentence, UPCA).

160 (2) Ultimately, the UPCA leads to a considerable modification of the court organization provided for by the German Constitution for matters of industrial property protection. Article 96(1) German Constitution allows for the establishment - which has actually taken place - of an independent Federal Court, for which Article 96(3) German Constitution designates 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 system. In this sense, the UPCA contains a substantive constitutional amendment in the sense outlined above.

161 Article 24(1) UPCA gives the Convention precedence over national law and the comprehensive claim to validity of the German Constitution is withdrawn to this extent.

162 d) The UPCA-Consent Act had to be adopted by the legislative bodies with the qualified majority required by Article 79(2) German Constitution.

163 In view of the particular importance of the majority requirement for the integrity of the constitution and the democratic legitimacy of interventions in the constitutional order, a law that fails to obtain the majority required by Article 79(2) German Constitution does not come into force. In this respect, nothing else applies than in the case of a law that fails to achieve the majorities required under Article 42(2) or Article 121 German Constitution (see Klein, in: Maunz/Dürig, GG, Article 121 marginal no. 23 <June 2017>; Magiera, in: Sachs, GG, 8th ed. 2018, Article 121 marginal no. 1; Brocker, in: Epping/Hillgruber, BeckOK GG, Article 121 marginal no. 15 <December 2019>). It is no coincidence that state practice therefore indicates a qualified majority in the opening formula in the same way as a granted consent of the Bundesrat.

164 The qualified majority of Article 79(2) German Constitution was indisputably not achieved in the German Bundestag. The statement in the minutes of an effective "unanimous" adoption of the bill and its transmission to the Bundesrat cannot change this (cf. also Sec. 48 para. 2 and para. 3 GO-BT; BVerfGE 106, 310 <329 f., 336>). Therefore, the UPC-Consent Act has not been validly adopted by the German Bundestag.

165 e) According to all the above, the UPC-Consent Act violates the complainant's fundamental right to democratic self-determination under Article 38(1) sentence 1 in conjunction with Article 20(1) and (2) in conjunction with Article 79(3) German Constitution. After the resolution by the legislative bodies, its entry into force depends only on the execution by the Federal President, who has no political discretion in this respect (cf. Brenner, in: v. Mangoldt/Klein/Starck, GG, vol. 2, 7th ed. 2018, Art. 82 marginal no. 24 with further references; also Butzer, in: Maunz/Dürig, GG, Art. 82 marginal no. 209 f. <December 2014> with further references). The concrete danger of a (fundamental) right impairment is equivalent to the (fundamental) right violation in this respect (cf. BVerfGE 136, 277 <303 marginal no. 70; 307 f. marginal no. 85>; cf. also marginal no. 140).

166 (2) Insofar as there are indications that the establishment of an unconditional priority of Union law in Article 20 UPCA violates Article 20(1) and (2) in conjunction with Article 79(3) of the German Constitution, the Federal Constitutional Court shall in principle comprehensively review the measure in question as to its compatibility with Article 20(1) and (2) in conjunction with Article 79(3) of the German Constitution (see Federal Constitutional Court, Judgment of the Second Senate of 30 July 2019 - 2 BvR 1685/14 and others -, marginal no. 206). However, a final decision can be dispensed with in the present case, because the invalidity of the UPC-Consent Act already results from other reasons.

D.

167 The decision on expenses is based on Sec. 34a(2) Federal Constitutional Court Act.

E.

168 The decision was reached by 5 : 3 votes.

Voßkuhle Huber Hermanns

Müller Kessal-Wulf König

Maidowski Langenfeld

Dissenting opinion of Judges König and Langenfeld and of Judge Judge Maidowski

on the decision of the Second Senate of February 13, 2020

- 2 BvR 739/17 -

1 We are unable to agree with the Senate's assumption that the "right to democracy" in Article 38(1) sentence 1, Article 20(1) and (2) in conjunction with Article 79(3) German Constitution gives rise to a right, which can be challenged by means of a constitutional complaint, to compliance with the formal requirements for the transfer of sovereign rights provided for in Article 23(1) sentence 2 and sentence 3 in conjunction with Article 79(2) German Constitution (so-called formal transfer control).

2 The question of how the participation of the Federal Republic of Germany in the development of the European Union, legitimized by Article 23 German Constitution, can be realized within the framework of constitutionally guaranteed scope for decision-making and without encroaching on the identity of the constitution protected by Article 79(3) German Constitution, has occupied the case law of the Federal Constitutional Court intensively and for a long time. This case law is based on the - correct - recognition that the transfer of sovereign powers in particular entails risks: on the one hand, the transfer of sovereign powers inevitably entails structural changes in the domestic constitutional space, which are based on the constitutional mandate to help shape European integration and must therefore be accepted. On the other hand, the constitution has established safeguards against the abandonment of constitutional elements which constitute the identity of the constitutional order and which are therefore not up for disposal either domestically through constitutional change or as a consequence of integration into European or international structures. The control reservations of identity control and ultra vires control developed by Senate jurisprudence have the task of giving practical effect to these safeguards.

3 A central question in the realization of effective control of compliance with constitutional limits in the fulfillment of the constitutional mandate to participate

constructively in European integration is by whom proceedings can be initiated before the Federal Constitutional Court with the aim of having it examined whether the constitutional organs have fulfilled their responsibility for integration or whether they have overstepped the limits imposed on the integration process. Irrespective of disputes between organs and constitutional complaints by persons whose fundamental rights may be specifically affected by ultra vires sovereign acts or by sovereign acts enacted in a manner that violates their identity, any person entitled to vote may appeal to the Federal Constitutional Court on the grounds of a violation of the "right to democracy" by lodging a constitutional complaint based on Article 38(1) sentence 1 German Constitution. All citizens entitled to vote thus have a right, equivalent to a fundamental right, to protection against a drain on the German state power that they have democratically legitimized. This protection relates equally to the transfer of sovereign power and to the defense against measures taken by organs, institutions and other bodies of the European Union which are ultra vires within the meaning of the Senate's case law. Article 38(1) German Constitution thus includes a claim to the exercise of responsibility for integration by the constitutional bodies responsible for it. According to its scope of protection and reason for application, the provision aims - exclusively - at the realization of democratic rights of participation, but not at a comprehensive control of the legality of democratic majority decisions; it does not serve to control the content of democratic processes, but is aimed at enabling them (see BVerfGE 129, 124 <168>; 134, 366 <396 f. marginal no. 52>; 142, 123 <190 marginal no. 126>).

4 The new type of formal transfer control based on Article 38(1) sentence 1 German Constitution differs in principle from the control reservations in the form of identity control and ultra vires control derived in the previous case law of the Federal Constitutional Court from the "right to democracy" to safeguard the democratic influence of those entitled to vote in the process of European integration (I.). The extension of the right under Article 38(1) sentence 1 German Constitution underlying the formal transfer control fails to recognize its substance and limits. There is no room for a violation of the substance of the right to vote, understood as the core of the principle of democracy rooted in the dignity of the human person, in a case involving non-compliance with formal requirements of the Consent Act (II.). Contrary to the Senate's intentions, the

formal transfer control could, as is shown in the present case, ultimately lead to a situation in which the political process in the context of European integration is not enabled and secured, but rather narrowed and hindered (III.). The constitutional complaint at issue was therefore to be rejected as inadmissible in its entirety for lack of the complainant's right of appeal.

I.

5 1. In the judgment on the banking union, the Senate summarized the content of the "right to democracy" under Article 38(1) sentence 1 German Constitution (Federal Constitutional Court, judgment of the Second Senate of 30 July 2019 - 2 BvR 1685/14, 2 BvR 2631/14 -, paras. 91-94):

> Article 38(1) sentence 1 German Constitution guarantees citizens political self-determination and guarantees them free and equal participation in the legitimation of the state power exercised in Germany (see BVerfGE 123, 267 <340>; 132, 195 <238 marginal no. 104>; 135, 317 <399 marginal no. 159>; 142, 123 <190 marginal no. 126>; 146, 216 <249 f. Rn. 46>). This right, which is equivalent to a fundamental right, is not exhausted in a formal legitimation of the (federal) state power, but also conveys to the individual a claim to be able to influence the formation of political will and to bring about something with their election decision. Within the scope of application of Article 23 German Constitution, it protects citizens against the legitimation of state power brought about by the election and the influence on its exercise being so emptied by the transfer of tasks and powers of the German Bundestag to the European Union that the principle of democracy is violated (cf. BVerfGE 89, 155 <172>; 123, 267 <330>; 134, 366 <396 marginal no. 51>; 142, 123 <173 f. Rn. 81>; 146, 216 <249 Rn. 45>).
>
> Article 38(1) sentence 1 German Constitution conveys to citizens, in its core protected by Article 20(1) and (2) in conjunction with Article 79(3) German Constitution, not only protection against a substantial erosion of the German Bundestag's power to shape

policy, but also a right to ensure that organs, institutions and other bodies of the European Union exercise only those competences which have been transferred to them in accordance with Article 23 German Constitution (cf. BVerfGE 142, 123 <173 margin 80 et seq.>; 146, 216 <251 margin 50>). This right is violated if the limits of Article 79(3) German Constitution are not observed in the transfer of sovereign rights or in the execution of the integration program (cf. BVerfGE 123, 267 <353>; 126, 286 <302>; 133, 277 <316>; 134, 366 <382 marginal no. 22, 384 ff. marginal no. 27 ff.>; 140, 317 <336 ff. marginal no. 40 ff.>; 142, 123 <203 marginal no. 153>; 146, 216 <253 marginal no. 54>), or organs, institutions and other bodies of the European Union (within the limits of Article 79(3) German Constitution) take measures that are not covered by the integration program (cf. BVerfGE 75, 223 <235, 242>; 89, 155 <188>; 123, 267 <353>; 126, 286 <302 ff.>; 134, 366 <382 ff. marginal no. 23 ff.>; 142, 123 <203 marginal no. 153>; 146, 216 <252 f. Rn. 52 f.>). Article 38(1) sentence 1 German Constitution thus conveys a "claim to democracy" insofar as democratic principles are affected by a process, which Article 79(3) German Constitution also withdraws from the grasp of the constitution-amending legislature, and vis-à-vis obvious and structurally significant transgressions of competences by the European institutions (cf. BVerfGE 89, 155 <171>; 129, 124 <168>; 134, 366 <396 marginal no. 51>; 135, 317 <386 marginal no. 125>; 142, 123 <219 marginal no. 185>).

Nor may the legislature authorize the Federal Government to approve an ultra vires act by organs, institutions and other bodies of the European Union. Otherwise, the democratic decision-making process guaranteed by Article 23(1) in conjunction with Article 20(1) and (2) in conjunction with Article 79(3) German Constitution would be undermined. The Parliament is obliged to decide in a formal procedure on the transfer of competences within the framework of European integration so that the principle of limited individual power is upheld (cf. BVerfGE 134, 366 <395

marginal no. 48>). With regard to obvious and structurally significant transgressions of competences by the European institutions, Article 38(1) sentence 1 German Constitution has not only a substantive but also a procedural component. In order to safeguard his or her democratic possibility of exerting influence in the process of European integration, the citizen entitled to vote has a right to ensure that a transfer of sovereign powers takes place only in the forms provided for this purpose in Article 23(1) sentence 2 and sentence 3, Article 79(2) German Constitution (cf. BVerfGE 134, 366 <397 marginal no. 53>).

In addition, the constitutional bodies are under an obligation, on account of the responsibility for integration incumbent upon them, to oppose measures by organs, institutions and other bodies of the European Union which have the effect of violating identity, as well as ultra vires acts, even if they do not concern the area which is subject to integration pursuant to Article 23(1) sentence 3 in conjunction with Article 79(3) German Constitution (cf. BVerfGE 142, 123 <20 f. marginal no. 163 et seq.>). The Federal Government and the Bundestag must monitor compliance with the integration program and, in the event of obviously and structurally significant transgressions of competences by organs of the European Union, refrain from acts of cooperation and implementation and actively work towards compliance with the integration program (cf. BVerfGE 134, 366 <395 marginal no. 49>; 142, 123 <209 f. marginal no. 167>).

6 2. The formal objection to transfer now admitted by the Senate goes beyond the Senate's previous statements on Article 38(1) sentence 1 German Constitution and joins the objection to identity and the ultra vires objection. These objections therefore remain unaffected. The novelty of the formal objection to transfer lies in the fact that it also covers the failure to observe the formal requirements for an effective transfer of sovereign rights to the European Union and to such intergovernmental bodies as have a complementary or other special relationship of proximity to the integration program of the European Union by means of a

statutory act of transfer under Article 23(1) German Constitution adopted by the Bundestag and the Bundesrat. A law approving an international treaty which has been enacted in violation of Article 23(1) in conjunction with Article 79(2) German Constitution cannot legitimize the exercise of official authority by the organs, institutions and other bodies of the European Union or by an intergovernmental body which has a complementary or other special relationship of proximity with the European Union and - according to the Senate - violates the citizens' rights under Article 38(1) sentence 1, Article 20(1) and Article 20(2) in conjunction with Article 79(3) German Constitution, which are equivalent to fundamental rights. As a consequence, the constitutional complaint based on Article 38(1) sentence 1 German Constitution is to be able to complain, for example, in the case of Article 23(1) sentence 2 German Constitution, of the absence of a federal law requiring consent and, in the case of Article 23(1) sentence 3 German Constitution, of the absence of a qualified majority pursuant to Article 79(2) German Constitution (cf. marginal no. 98 of the decision). Since the Senate focuses on the invalidity of the transfer act and thus of the transfer of sovereignty, this must also apply to any other formal defect in the legislative procedure, insofar as this leads to the invalidity of the transfer act.

7 3. a) The formal transfer control leads to a further subjectification of objective constitutional law, namely the formal prerequisites of a transfer of sovereign rights pursuant to Article 23(1) German Constitution. Up to now, the "entitlement to democracy" enshrined in Article 38(1) sentence 1 German Constitution has given citizens the opportunity to have compliance with the principles of the democratic principle reviewed by means of a constitutional complaint pursuant to Article 79(3) German Constitution on the review of the law approving a transfer of sovereign rights or an international treaty which affects the core of the democratic principle. According to settled case law, this is also possible as a preventive measure, i.e. before the transfer or consent law enters into force, when the legislative procedure has been completed except for its execution by the Federal President and its promulgation (cf. only BVerfGE 123, 267 <329>; 132, 195 <234 et seq. marginal no. 92>; 134, 366 <391 f. marginal no. 34>; 142, 123 <177 marginal no. 91>). Such constellations were, for example, the basis of the judgments on the Treaties of Maastricht and Lisbon (BVerfGE 89, 155

<171>; 123, 267 <329>) as well as on the Treaty of 2 February 2012 establishing the European Stability Mechanism (hereinafter: ESM Treaty; BVerfGE 135, 317 <384 f. marginal no. 122>). According to previous case law, however, only those losses of competence for the German Bundestag that threaten to surrender the essential content of the principle of popular sovereignty and thus affect the electoral law in its substance are subject to appeal. Specifically, the proceedings on the Maastricht and Lisbon Treaties were primarily concerned with the question of whether the envisaged transfer of sovereignty threatened to empty the competences of the Bundestag, either because of the abundance and/or weightiness of the transferred competences or because of any blanket powers enshrined in Union law that would allow uncontrolled further development of the integration program contrary to the principle of limited individual authorization. Another variant of the objection of exhaustion was raised in the rulings on the ESM Treaty. The complaint here was that the German Bundestag's overall budgetary responsibility was impaired by its approval of the establishment of the European Stability Mechanism and the corresponding accompanying legislation, thereby exceeding the limits of Article 79(3) German Constitution.

8 b) The connecting factor for a subjective right to respect for the principles of the democratic principle as a component of constitutional identity is the right to vote in Article 38(1) sentence 1 German Constitution, to which a substantive content was attributed for the first time in the judgment on the Maastricht Treaty (see BVerfGE 89, 155 <171 et seq.>). Therefore, a prerequisite for the admissibility of the constitutional complaints was and is - also and especially with regard to complaints relating to the impairment of other principles of state structure, such as the principle of the rule of law or the principle of the welfare state - logically the presentation of the necessary connection to the principle of democracy, which can be directly criticized via Article 38(1) sentence 1 German Constitution. This necessary connection to the democratic possibilities of the legislature becomes particularly clear in the Lisbon judgment when it is stated there (BVerfGE 123, 267 <332 f.>):

> Insofar as the complainants (...) complain of the violation of other principles of state structure on the basis of Article 38(1) sentence

1 German Constitution, the constitutional complaints are admissible only with regard to the alleged violation of the principle of the welfare state.

The complainants (...) establish the necessary connection to the principle of democracy that can be directly challenged on the basis of Article 38(1) sentence 1 German Constitution by stating in a sufficiently specific manner that the democratic options of the German Bundestag in the area of social policy would be restricted by the competences of the European Union under the Treaty of Lisbon to such an extent that the German Bundestag would no longer be able to fulfill the requirements of the principle of the welfare state arising from Article 23(1) sentence 3 in conjunction with Article 79(3) German Constitution.

Insofar as the complainants (...) assert the violation of the principle of the rule of law and the principle of separation of powers, they do not show a comparable connection. The constitutional complaints are inadmissible in this respect.

9 c) On the merits, the judgments on the Maastricht and Lisbon Treaties as well as on the European Stability Mechanism were concerned with the compatibility of the respective consent laws with the substantive core content of the right to vote as protected in Article 38(1) sentence 1 in conjunction with Article 1(1) and Article 79(3) German Constitution. The subject of the constitutional review of the consent laws was, in particular, the question of whether the transfer of sovereign powers to the European Union brought about by them or the restriction of Parliament's budgetary sovereignty brought about by the ESM Treaty leads to an emptying of the tasks and powers of the Bundestag and thus to a violation of the core of the principle of democracy as absolutely protected in Article 79(3) German Constitution. Those entitled to vote are to be allowed to counter such an emptying, which can be realized in different constellations, by means of a constitutional complaint, invoking the "right to democracy" rooted in Article 38(1) sentence 1 German Constitution (cf. BVerfGE 129, 124 <169 f.>). The Federal Constitutional Court examines this within the framework of the identity check (cf. paras. 96, 136 of the order).

10 4. a) Protection against the loss of autonomous democratic power is also the central content of the ultra vires complaint based on Article 38(1) sentence 1 German Constitution, which is concerned with protecting those entitled to vote against the exercise of sovereign power which they cannot legitimize and influence (cf. BVerfGE 142, 123 <189 margin 123; 194 margin 135>). In this respect, the identity complaint and the ultra vires complaint have the same constitutional root, namely the "claim to democracy" enshrined in Article 38(1) sentence 1, Article 20(1) and (2) in conjunction with Article 79(3) German Constitution (see Federal Constitutional Court, Second Senate Judgment of 30 July 2019 - 2 BvR 1685/14, 2 BvR 2631/14 -, marginal no. 205). However, ultra vires control on the one hand and identity control on the other hand are each based on a different examination approach. Thus, the subject of ultra vires review is whether the actions of the institutions, bodies and other agencies of the European Union and of the intergovernmental bodies that have a complementary or other special relationship of proximity to the European Union are covered by the requirements of the integration program contained in the Act Approving the European Union pursuant to Article 23(1) German Constitution or whether the measures break out of the framework set by the parliamentary legislature (see BVerfGE 89, 155 <188>; 123, 267 <353>; 126, 286 <302 ff.>; 134, 366 <382 ff. marginal no. 23 ff.>; 142, 123 <198 ff. Rn. 143 ff.>), while the identity check does not concern compliance with the scope of the transferred competence, but the "absolute limit" of Article 79(3) German Constitution (see BVerfGE 123, 267 <343, 348>; 134, 366 <386 Rn. 29>; 142, 123 <203 Rn. 153>; Federal Constitutional Court, judgment of the Second Senate of 30 July 2019 - 2 BvR 1685/14, 2 BvR 2631/14 -, Rn. 204). Those entitled to vote are to be able to defend themselves by means of the constitutional complaint based on Article 38(1) sentence 1 German Constitution against an arbitrary use of sovereign power by supranational bodies.

11 b) So far, the procedural component of ultra vires review, which has been repeatedly emphasized by the Senate, has also been solely in this context (cf. BVerfGE 134, 366 <397 marginal no. 53>; 142, 123 <174 marginal no. 82; 193 marginal no. 134>; 146, 216 <251 marginal no. 50>; Federal Constitutional Court, Judgment of the Second Senate of 30 July 2019 - 2 BvR 1685/14, 2 BvR 2631/14 -, marginal no. 93). According to this, in order to secure their democratic

possibility of influence in the process of European integration, citizens entitled to vote have from Article 38(1) sentence 1 German Constitution "in principle a right to ensure that a transfer of sovereign rights only takes place in the forms provided for this purpose by Article 23(1) sentences 2 and 3, Article 79(2) German Constitution. The democratic decision-making process which these provisions guarantee, in addition to the required definiteness of the transfer of sovereign rights (...), is undermined in the case of an arbitrary assumption of competence by organs and other bodies of the European Union" (BVerfGE 134, 366 <397 marginal no. 53>). Accordingly, "arbitrary usurpation of competences" refers to constellations in which organs, institutions or other bodies of the European Union, by their actions, exceed the competences conferred on them by the Act Approving the Statute in an obvious and structurally significant manner and thus depart from the principle of conferral. By contrast, constellations in which the German Act Approving the Statute of the European Union was void under Article 23(1) German Constitution for formal reasons, e.g. because the required two-thirds majority was not reached, and in which a transfer of sovereign powers would therefore be ineffective, were not previously covered. The Senate now also speaks of ultra vires acts (cf. paras. 97, 99 and 133 of the decision), which must be prevented.

12 5. In the judgment on the European Stability Mechanism, the Senate made it clear in unmistakable terms that "Article 79(2) German Constitution - also in conjunction with Article 23(1) sentence 3 German Constitution - is a rule of objective constitutional law which concerns the formation of wills within the Bundestag and the Bundesrat. It does not convey any rights to those entitled to vote (...) - apart from the cases of an ultra vires constellation (cf. BVerfGE 134, 366 <383 f. marginal no. 25>) - because the scope of the decision-making powers of the Bundestag, consequently the substance of the right to vote, does not depend on the majority with which the Bundestag passes its resolutions" (BVerfGE 135, 317 <386 f. marginal no. 129>). Both the reference to the OMT preliminary ruling in the 134th volume, which concerned an ultra vires constellation in the sense of an obvious and structurally significant overstepping of competences, and the justification for the necessity of ultra vires review, namely the review of compliance with the limits of competences that have already been effectively transferred (see, for example, BVerfGE 142, 123 <198

margin 143>), indicate that the reservation does not relate to a constellation such as that at issue here. In contrast, the Senate - with reference to the express reservation for ultra vires constellations (BVerfGE 135, 317 <387 f. marginal no. 129>) - sees itself in continuity with previous case law in cases of transfer of sovereign rights (cf. marginal no. 99 of the decision). For other threats to constitutional identity, such as those underlying the judgments on the European Stability Mechanism, which can also be challenged under Article 38(1) sentence 1 German Constitution, it would then remain the case, however, that the formal objection of transfer is not open, since Article 79(2) in conjunction with Article 23(1) sentence 3 German Constitution constitutes a rule of objective constitutional law which does not affect the substance of the right to vote. In our view, the Senate's argumentation in favor of a (further) extension of the right of appeal under Article 38(1) sentence 1 German Constitution departs from the clear statement in the judgment on the European Stability Mechanism (BVerfGE 135, 317) on the ability to complain about the lack of a two-thirds majority, for which, however, the better reasons speak.

II.

13 1. a) The extension of the right to democratic self-determination under Article 38(1) sentence 1 German Constitution, on which the formal transfer control is based, fails to recognize its substantive substance and thus goes beyond the immanent limits of the provision. For this right is also to be affected in constellations in which the German Bundestag is concerned precisely with establishing democratic legitimacy for a transfer of sovereign rights by law that is permissible in principle, i.e. the German Bundestag has exercised the responsibility for integration incumbent upon it within the framework of a democratic process - albeit possibly formally incorrectly. With the Senate's extension of the "claim to democracy" to compliance with the formal prerequisites for the effectiveness of a transfer of sovereign rights, this claim loses its specific material substance, which is directed at the preservation of democratic self-determination, as protected by the identity and ultra vires review. For a "claim to democracy" is "conveyed by Article 38(1) sentence 1 German Constitution beyond ultra vires constellations (...) only to the extent that democratic principles are affected by a process, which Article 79(3) German

Constitution also withdraws from the grasp of the constitution-amending legislature (...)" (BVerfGE 135, 317 <386 marginal no. 125>). Failure to observe the requirement of constitutionally amending majorities or other formal prerequisites in the transfer of sovereign powers neither falls under the ultra vires constellations recognized to date, nor does it affect the principles of the principle of democracy that are resistant to amendment in Article 79(3) German Constitution. The result of admitting the formal objection to transfer is that the scope of protection of Article 38(1) sentence 1 German Constitution completely loses its contours in the context of European integration.

14 b) This is not altered by the fact that the Senate now assumes that Article 38(1) sentence 1 German Constitution - unlike in the case of constitutional amendments - is always affected in its substance, which is protected by Article 79(3) German Constitution, when sovereign rights are transferred (cf. marginal no. 97 of the decision), and concludes from this that their formal effectiveness must be subject to the constitutional court's review program based on Article 38(1) sentence 1 German Constitution. In our view, the substantive substance of the right to vote, which is protected by Article 79(3) German Constitution - the amendment-proof principles of the democratic principle - is not affected in every transfer of sovereign rights, which the Senate also expressly refers to in determining a violation (see paras. 134, 138 of the decision). For the substance of the right to vote, which is protected by Article 79(3) German Constitution, is about preserving sufficient democratic leeway for the German Bundestag, which, according to previous case law, is threatened either by an emptying of the tasks and powers of the Bundestag due to overly far-reaching transfers of sovereign powers, by blanket authorizations, by the creation of liabilities which make it impossible for the Bundestag to exercise overall responsibility for the budget, or by ultra vires acts. In all these cases - in contrast to a failure to meet the formal requirements of a transfer or consent act under Article 23(1) sentence 2 and sentence 3 German Constitution - there is a danger that the democratic process will be undermined or subverted and that those entitled to vote will be exposed to a sovereign power which they do not legitimize and on which they cannot exert any influence in freedom and equality (cf. BVerfGE 142, 123 <194 marginal no. 135>).

15 c) Moreover, the non-observance of democratic procedural and majority rules - and it is their isolated assertion that is at issue in the context of the formal objection to transfer - in the course of parliamentary participation cannot affect the substance of the right to vote, if only because the "claim to democracy" cannot in principle be turned against the democratic process as such. Otherwise, the right under Article 38(1) sentence 1 German Constitution would be transformed into a right of every elector to a general review of the legality of democratic majority decisions that goes beyond the safeguarding of democratic processes. The danger of opening the door to a general law enforcement claim to each and every person entitled to vote via Article 38(1) sentence 1 German Constitution has already been pointed out elsewhere (cf. BVerfGE 134, 366, 430 <432 marginal no. 138>, Special Opinion of Judge Gerhardt, referring to the admission of an ultra vires review based on the allegation of a violation of Article 38(1) German Constitution). With the new extension of the possibility to complain about the disregard of formal requirements of the transfer or consent law via Article 38(1) sentence 1 German Constitution, the Senate has once again opened this door wider. However, the claim to a general review of the legality of laws that thus arises in practice cannot be derived from Article 38(1) sentence 1 German Constitution, if only because this provision - as the Senate has repeatedly stated - serves solely to enable, but not to control the content of democratic processes (cf. BVerfGE 129, 124 <168>; 134, 366 <396 f. marginal no. 52>; 142, 123 <190 marginal no. 126>; 146, 216 <249 f. marginal no. 46>; Federal Constitutional Court, judgment of the Second Senate of 30 July 2019 - 2 BvR 1685/14, 2 BvR 2631/14 -, marginal no. 118). As a fundamental right to participate in the democratic self-rule of the people, Article 38(1) German Constitution therefore does not in principle confer any right of appeal against parliamentary resolutions, in particular legislative resolutions (see BVerfGE 129, 124 <168>; 142, 123 <190 marginal no. 126>; 146, 216 <250 marginal no. 46>; Federal Constitutional Court, Judgment of the Second Senate of 30 July 2019 - 2 BvR 1685/14, 2 BvR 2631/14 -, marginal no. 118). This must also apply - beyond the protection of the principles of the democratic principle enshrined in Article 79(3) German Constitution - to transfer or consent laws in the context of the European integration process.

16 d) The necessary reference to the core of the democratic principle and thus to

the "entitlement to democracy" under Article 38(1) sentence 1 German Constitution cannot be established either by pointing out that no electorate may be subjected to supranational sovereign power which is based on a formally unconstitutional and thus ineffective act of transfer. However, this is a core argument of the Senate for the formal transfer objection: It focuses on the fact that the necessary democratic legitimacy is lacking if the transfer act is formally unconstitutional and ineffective and consequently cannot support the exercise of the transferred sovereignty (see paras. 133 and 137 of the decision). This consideration makes it clear that the formal transfer review is no longer about protecting the substance of the electoral law against "disempowerment" of the German Bundestag, but about a general review of legality. This is because the absence of the democratic legitimation context as a result of the ineffectiveness of the transfer of sovereignty for formal reasons does not represent a substantial threat to the democratic process itself, which could result in a violation of the corresponding "claim to democracy" (cf. also 2. a). There is therefore no room for the Federal Constitutional Court to intervene via Article 38(1) sentence 1 German Constitution to protect precisely this democratic process.

17 2. a) Nor is the right to vote affected in its substance, which is protected by Article 79(3) German Constitution, because, in the event of a transfer of sovereign rights to another subject of international law, such as the European Union, or to an intergovernmental institution which has a complementary or other special relationship of proximity with the European Union, competences are, as a rule, "lost" and - unlike in the case of a constitutional amendment - "cannot be 'retrieved' without further ado" (cf. paras. 97 and 137 of the decision). In the Senate's view, the fact that such structural changes in the legal structure of the state can no longer be easily eliminated means that those entitled to vote must - as a preventive measure - be granted a right of appeal under Article 38(1) sentence 1 German Constitution. This is probably the Senate's central motive for still rejecting comprehensive formal and substantive review, in other words general review of legality, in the domestic sphere with regard to parliamentary and in particular legislative resolutions, but now permitting it for comparable resolutions in the context of the European integration process and thus creating a "special right" for this area. However, it is not clear - in contrast to the control of identity and ultra vires - why this aspect should affect the substance of the

right to vote in the sense described above and, as a result, necessitate a formal transfer control for all transfers of sovereignty in the context of European integration (Article 23(1) German Constitution). This is because ensuring compliance with the formal requirements of Article 23(1) sentence 2 and sentence 3 German Constitution is neither about enabling nor about keeping open a democratic process that would otherwise be endangered or even prevented. This is illustrated by the present case: the German Bundestag has carried out a legislative process, it has transferred competences in the transferable area, i.e. within the limits of Article 79(3) German Constitution. Its decision-making powers are also not diminished against or without its will, the integration program accepted by it is not exceeded by the Unified Patent Court in the case of the entry into force of the Agreement on a Unified Patent Court.

18 b) The concern of the Senate is admittedly understandable. If the act of transfer later proves to be formally unconstitutional and thus ineffective, countless measures of the holder of the transferred sovereignty are to be classified as ultra vires acts in the diction of the Senate due to the lack of required statutory consent (cf. paras. 97, 99 and 133 of the decision). It is precisely the avoidance of such a situation that the formal transfer control is intended to serve. It is also true that the invalidity of the national act of transfer does not affect the existence of a supranational body established on the basis of an act of international or Union law, with the consequence that supranational sovereignty can continue to be exercised within the framework of the existing integration program. However, the German (integration) legislature itself can remedy this situation by enacting a formally constitutional transfer law. The possibility of remedying the procedural error and thus the constitutional violation (exercise of sovereign power without a legal basis) thus lies within the domestic sphere. In contrast, such a remedy is precisely not available to the legislature in the case of an identity violation or an ultra vires violation, and not in the case of an identity violation, because the legislature has no power beyond the constitutional identity protected in Article 79(3) German Constitution, and in the case of the conventional ultra vires violation, not because the obvious and structurally significant overstepping of competences by Union or treaty bodies (and the resulting constitutional violation) cannot be eliminated by unilateral action of the competent constitutional bodies. If the two-thirds majority in the Bundestag and

Bundesrat required in the case of Article 23(1) sentence 3 German Constitution cannot be achieved, the constitutional bodies are required to exercise their responsibility for integration with the aim of resolving the contradiction between what is required under international/Union law and what is permitted under constitutional law, and to eliminate the constitutional violation in this way.

19 3. Furthermore, there are possibilities for asserting the formal unconstitutionality of the Act Approving the Agreement on a Unified Patent Court even after its entry into force. Insofar as the enforcement of decisions of the Unified Patent Court is at issue, which is governed by the national law of the respective member state according to Art. 82 UPCA, there is the possibility of legal protection against the national enforcement measures before the specialized courts. In these proceedings, the formal unconstitutionality of the Assent Act could also be challenged, since the prerequisite for the validity and enforceability of the judgments of the Unified Patent Court in Germany is the validity of the Assent Act and thus of the transfer of sovereignty. In this respect, a constitutional review of the Assent Act could be achieved both by way of a specific review of a statute under Article 100(1) German Constitution and by way of a constitutional complaint directed against a judgment of a court of last instance. However, in contrast to a complaint about a violation of the "right to democracy" under Article 38(1) sentence 1 German Constitution, it is always a prerequisite that the plaintiff or complainant is concretely affected in a fundamental right by the challenged measure in the individual case, for example, that he or she is defending himself or herself against enforcement measures. In this respect, these cases involve specific fundamental rights being affected.

III.

20 It is to be expected that the broad opening of access to the Federal Constitutional Court via the possibility of formal transfer control in the case of virtually every transfer of competences within the scope of application of Article 23(1) German Constitution will cause the German Bundestag and the Bundesrat to strive for a two-thirds majority in order to be on the "safe side" and not to expose themselves to the risks of formal transfer control. The need for a constitutional majority thus becomes the de facto rule, not only for transfers of

sovereignty to organs, institutions or other bodies of the European Union, but also to all bodies established by international treaty which have a complementary or other special relationship of proximity to it. This is neither the intention of the constitutional legislator, who in Article 23(1) sentence 1 German Constitution obliged the Federal Republic of Germany to participate in the process of European integration and accordingly opened up the constitutional order in principle to the exercise of supranational sovereign power, nor is it necessary or even conducive to enabling the democratic process protected in Article 20(1) and (2) German Constitution, because it must also be possible to decide by narrow majorities. The broad opening of access to the Federal Constitutional Court via Article 38(1) sentence 1 German Constitution could in the future prejudice the democratic process in the Bundestag and Bundesrat in a problematic way and delay further integration steps, if not prevent them, at least considerably. The inclusion in Article 23(1) German Constitution of intergovernmental bodies which have a complementary or other special relationship of proximity to the European Union and a rather broad understanding of Article 23(1) sentence 3 German Constitution considerably extend the scope of application of the requirement of a two-thirds majority into an area which was previously assigned to Article 24(1) German Constitution. The latter requires only a simple federal law for the transfer of sovereign rights.

21 Against the background of the development of the European integration process and in view of the growing scope of the European Union's competences, we do not wish to reject in principle a broad understanding of the scope of application of Article 23(1) German Constitution. Nonetheless, we would like to point out that, in view of the value-dependent and in many cases ambiguous delimitation of Article 23(1) sentence 2 and sentence 3 German Constitution, the admission of formal transfer control opens up a further field of constitutional disputes. This will have the effect of narrowing Parliament's necessary scope for political action in the process of European integration, contrary to the intentions of the constitution-amending legislature, and could thus turn the protection of the democratic process intended in Article 38(1) sentence 1 German Constitution into its opposite.

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