FEDERAL CONSTITUTIONAL COURT

- 2 BvR 2216/20 -

- 2 BvR 2217/20 -

IN THE NAME OF THE PEOPLE

In the procedures
on
the constitutional complaints

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

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

3. des F ... eV,
represented by the board of H ...,

- Authorized representative: ... -

against Article 1 and Article 3 Paragraph 1 of the Act on the Convention of February 19, 2013 on a Unified Patent Court (decision of the Bundestag of November 26, 2020, plenary protocol 19/195 p. 24661 <D>, decision of the Federal Council of December 18, 2020 , BTDrucks 19/22847)

here: Application for a preliminary injunction

- 2 BvR 2216/20 -,

II. of Dr. S ...,

against Article 1 and Article 3 Paragraph 1 of the Act on the Convention of February 19, 2013 on a Unified Patent Court (decision of the Bundestag of November 26, 2020, plenary protocol 19/195 p. 24677 <C>, decision of the Federal Council of December 18, 2020 , BTDrucks 19/22847)

here: Application for a preliminary injunction

- 2 BvR 2217/20 -

the Federal Constitutional Court - Second Senate -

with the participation of the judges

Vice President König,

Huber,

Hermanns,

Müller,

Kessal-Wulf,

Maidowski,

Langenfeld,

Wallrabenstein

decided on June 23, 2021:

1. The proceedings are combined for a joint decision.

2. The applications for an interim injunction are rejected.

Reasons :

A.

I.

With their constitutional complaints and requests for an interim injunction, the complainants are against the law on the Convention of February 19, 2013 on a Unified Patent Court, which came into effect on December 18, 2020 (hereinafter: UPGÜ-ZusatzG II; see Bundestag document 19 / 22847; BRDrucks 448/20), with which the prerequisites for the ratification of the aforementioned convention are to be created. 1

1. The Convention on a Unified Patent Court (hereinafter: Convention - UPCA; see OJ EU No. C 175 of June 20, 2013, p. 1 ff.) Is part of a more comprehensive European package of regulations on patent law, the core of which is the introduction of a European patent with unitary effect as a new property right at the level of the European Union, and which was decided by way of enhanced cooperation in accordance with Art. 20 TEU, Art. 326 ff. TFEU (see Bundestag printed paper 19/22847, p. 82). The convention is an international treaty between the participating member states of the European Union (contracting member states; cf. Art. 2 letters b and c UPCA) and is only open to member states of the European Union (cf. Art. 84 Paragraph 1 and Paragraph 4 in conjunction with Art . 2 letter b UPCA). With it, a Unified Patent Court (EPG) supported by the majority of the member states is to be established. The regulatory package also includes Regulation (EU) No. 1257/2012 of the European Parliament and of the Council of December 17, 2012 on the implementation of enhanced cooperation in the area of creating unitary patent protection (see OJ EU No. L 361 of December 31, 2012) December 2012, p. 1; No. L 307 of October 28, 2014, p. 83) as well as Council Regulation (EU) No. 1260/2012 of December 17, 2012 on the implementation of enhanced cooperation in the field of creation uniform patent protection with regard to the applicable translation regulations (see OJ EU No. L 361 of December 31, 2012, p. 89). These are not the subject of the present proceedings. 1257/2012 of the European Parliament and of the Council of December 17, 2012 on the implementation of enhanced cooperation in the area of creating unitary patent protection (see OJ EU No. L 361 of December 31, 2012, p. 1; No. L 307 of October 28, 2014, p. 83) as well as Council Regulation (EU) No. 1260/2012 of December 17, 2012 on the implementation of enhanced cooperation in the area of creating unitary patent protection with regard to the translation rules to be applied (cf. OJ EU No. L 361 of December 31, 2012, p. 89). These are not the subject of the present proceedings. 1257/2012 of the European Parliament and of the Council of December 17, 2012 on the implementation of enhanced cooperation in the area of creating unitary patent protection (see OJ EU No. L 361 of December 31, 2012, p. 1; No. L 307 of October 28, 2014, p. 83) as well as Council Regulation (EU) No. 1260/2012 of December 17, 2012 on the implementation of enhanced cooperation in the area of creating unitary patent protection with regard to the translation rules to be applied (cf. OJ EU No. L 361 of December 31, 2012, p. 89). These are not the subject of the present proceedings. L 307 of October 28, 2014, p. 83) and Regulation (EU) No. 1260/2012 of the Council of December 17, 2012 on the implementation of enhanced cooperation in the area of creating unitary patent protection with regard to the translation rules to be applied (see OJ EU No. L 361 of December 31, 2012, p. 89). These are not the subject of the present proceedings. L 307 of October 28, 2014, p. 83) and Regulation (EU) No. 1260/2012 of the Council of December 17, 2012 on the implementation of enhanced cooperation in the field of creating unitary patent protection with regard to the applicable translation rules (see OJ EU No. L 361 of December 31, 2012, p. 89). These are not the subject of the present proceedings. 2

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

2. The Convention provides for the establishment of the Unified Patent Court as a joint court of the contracting member states for disputes over European patents and European patents with unitary effect (Art. 1 UPCA). This should have its own legal personality in each contracting member state (Art. 4 Para. 1 UPC). According to Art. 32 (1) UPCA, the Unified Patent Court is to be given exclusive jurisdiction over an extensive catalog of disputes with regard to patents within the meaning of Art. 2 (g) UPCA - 4th

European patents and European patents with unitary protective effect. This includes, in particular, lawsuits for patent infringements, disputes about the existence of patents and actions against decisions of the European Patent Office in the exercise of the rights granted to it pursuant to Art.

II.

The now contested EPGÜ-ZusatzG II replaces the EPGÜ-ZusatzG I (see Bundestag document 18/8826) resolved by the German Bundestag on March 10, 2017, which the Senate declared null and void by resolution of February 13, 2020 (see BVerfGE 153 , 74 <74 ff.>). 5

III.

1. The Federal Government forwarded the government draft for the UPCA-Delivery Act II to the Federal Council on August 7, 2020 (see BRDrucks 448/20, p. 7). This did not raise any objections in its meeting on September 18, 2020 (see BR Plenary Protocol No. 993 of September 18, 2020, pp. 297, 338 et seq.). The Federal Government then introduced the draft law to the Bundestag on September 25, 2020 (see Bundestag printed paper 19/22847, p. 7). After the involvement of the responsible committees on November 26, 2020, the latter approved the UPCA Approval Act II in the third reading with a majority of two thirds of the members of the Bundestag (see BTPlenarprotokoll 19/195 of November 26, 2020, pp. 24668, 24677) . The approval resolution of the Federal Council was passed unanimously on December 18, 2020 (see BRDrucks 723/20 <B>; BR Plenary Protocol No. 998 of December 18, 2020, p. 498). 6th

2. The UPCA-Delivery Act II has the following wording (see Bundestag printed paper 19/22847, p. 9): 7th

> **article 1**
>
> (1) The agreement on a Unified Patent Court signed in Brussels on February 19, 2013 by the Federal Republic of Germany as well as the protocol to the agreement on a Unified Patent Court on provisional application signed in Luxembourg on October 1, 2015 are approved. The Convention and Protocol are published below.
>
> (2) The Federal Government is obliged to object to an amendment to the Convention by resolution of the Administrative Committee pursuant to Article 87 Paragraph 1 of the Convention pursuant to Article 87 Paragraph 3 of the Convention, unless it has previously been authorized by law to consent with regard to the amendment.
>
> **Article 2**
>
> The Federal Ministry of Justice and Consumer Protection shall publish the amendments to the Convention by resolution of the Administrative Committee in accordance with Article 87 Paragraph 2 of the Convention in the Federal Law Gazette.
>
> **Article 3**
>
> (1) This law comes into force on the day after its promulgation.
>
> (2) The day on which the Convention in accordance with Article 89 paragraph 1 and the Protocol in accordance with Article 3 enter into force for the Federal Republic of Germany shall be published in the Federal Law Gazette.

The justification for the draft of the UPC Delivery Act II is preceded by the following statement (see Bundestag printed paper 19/22847, p. 2 f.): 8th

> The law contains the approval of the convention and the protocol according to Article 59 paragraph 2 sentence 1 of the Basic Law, taking into account the qualified majority according to Article 23 paragraph 1 sentence 3 in conjunction with Article 79 paragraph 2 of the Basic Law.
>
> The wording of the law is unchanged; however, the justification contains necessary updates.
>
> The fact that the UK is leaving the agreement as a result of Brexit does not prevent its implementation:

The provisions on entry into force in the Convention and its protocols should ensure that all three states involved in the treaty, the Federal Republic of Germany, France and Great Britain, already participate in the court system when the Unified Patent Court starts. In this respect, it should be avoided, for example, that the treaty initially only comes into force with one or two of the three states due to the different duration of the ratification procedures. The purpose of referring to this is to coordinate the date of entry into force among those actually involved in the contract.

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

The agreement also expressly provides that, in addition to the headquarters of the central division of the court in Paris and the Munich location, a department is also located in London. However, it cannot be understood to mean that it wishes to establish or leave a chamber location in a non-contracting member state. If the London central chamber unit ceases to exist, the convention is to be interpreted in such a way that its competences at least temporarily increase to the (continued) existing central chamber in Paris and Munich. An express provision can be made in due course as part of a review of the functioning of the court provided for in Article 87 paragraphs 1 and 3 of the Convention.

A political declaration on these issues will be sought among the remaining Contracting Member States. Finally, the amicable implementation of the treaties would also be an exercise or agreement of the contracting states that is notable under international law under Article 31 paragraph 3 of the Vienna Convention on the Law of Treaties.

The justification for the UPCA-Delivery Act II states, among other things (see Bundestag document 19/22847, p. 10): 9

To Article 1

To paragraph 1

Article 59, Paragraph 2, Clause 1 of the Basic Law applies to the Convention and the Protocol, as they relate to subjects of federal legislation.

A law is also necessary because with the creation of the jurisdiction of the Unified Patent Court through the Convention, sovereign rights within the meaning of Article 23 Paragraph 1 Clause 2 and 3 of the Basic Law are transferred, since the Convention is particularly closely related to the law of the European Union. According to Article 23 paragraph 1 sentence 3 in conjunction with Article 79 paragraph 2 of the Basic Law, a majority of two thirds of the members of the Bundestag and two thirds of the votes of the Bundesrat is required.

In addition, the Bundesrat's approval requirement follows from Article 74 paragraph 2 in conjunction with paragraph 1 number 25 of the Basic Law, since Article 22 of the Convention on a Unified Patent Court stipulates the liability of the contracting member states for violations of the law by the court and thus state liability.

The consent of the Bundesrat is also required under Article 105 paragraph 3 of the Basic Law, since the tax exemption under Article 8 paragraph 4 of the statutes of the Unified Patent Court also affects taxes, the revenue of which is wholly or partially covered by Article 106 paragraph 2 and 3 of the Basic Law Flows into countries.

The Federal Constitutional Court based the nullity of the law passed on March 10, 2017 in its decision of February 13, 2020 (decision of the Second Senate - 2 BvR 739/17 -) solely on the violation of Article 23 paragraph 1 sentence 3 of the

> Basic Law. It also raised (see paragraph 166 of the judgment) whether a legal problem could arise from Article 20 of the Convention. Article 20 of the Convention reads: “The court shall apply Union law in its entirety and respect its primacy.” There is no conflict between this contractual clause and Article 79 (3) of the Basic Law. The clause serves to clarify that the international court has the same position as the national courts with regard to European Union law. The primacy of Union law is fundamentally undisputed and is also recognized by the Federal Constitutional Court (BVerfG, 2 BvE 2/08 et al. Of June 30, 2009 - Lisbon Treaty, Rn. 331 ff with further references). The precedence assumed by the Court of Justice of the European Union in its Opinion A-1/09 also for the European Patent Court - insofar as this Union law applies - is designed in Articles 1 and 20 of the Convention in such a way that it is based on the consistent case law of the Court of Justice of the European Union corresponds to the priority applicable to national courts. This settled case law is also referred to in Declaration 17 on priority annexed to the Final Act of the Intergovernmental Conference that adopted the Lisbon Treaty, signed on December 13, 2007. The provision in Article 20 of the Convention, which concerns the European Patent Court as a joint court of the member states, therefore does not affect the exercise of constitutionally given examination competencies by the Federal Constitutional Court, in particular if legal protection at Union level cannot exceptionally be obtained. In its Lisbon judgment (loc. Cit., Marginal no. 343), the Federal Constitutional Court found that it “does not matter whether the priority of application of Union law, which the Federal Constitutional Court has already recognized in principle for Community law (see BVerfGE 31 , 145, 174), in the Treaties themselves or in Declaration No. 17 annexed to the Final Act of the Lisbon Treaty.

3. The UPC-Delivery Act II includes the text of the convention (printed in BVerfGE 153, 74 <85 Rn. 23>), the statutes of the Unified Patent Court (hereinafter: UPC statutes), a declaration by the "contracting member states" and a Protocol concerning the provisional application (hereinafter: VA protocol) attached (see Bundestag printed paper 19/22847, pp. 14 ff., 58 ff., 73 f., 79 ff.). The protocol referred to in Art. 1 Para. 1 EPGÜ-BeschG II provides for the provisional application of mainly institutional and organizational provisions of the Convention and the Statute, which enables the establishment of the court before the Convention comes into force and its ability to function from the day of Entry into force is to be secured. 10

4. A memorandum attached to the draft law states on Art. 20 UPCA (see Bundestag printed paper 19/22847, p. 89): 11

> **Re Article 20 (primacy and respect for Union law)**
>
> This article of the Convention makes it clear that the Unified Patent Court, as the common court of the participating EU member states, has to fully respect the law of the European Union and its primacy over national law like any national court in the EU. This also includes the Charter of Fundamental Rights of the European Union of December 14, 2007 (OJ C 303, December 14, 2007, p. 1), namely the judicial right under Article 47 of the Charter to an effective remedy and an impartial court.

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

> **Explanation**
>
> from Minister of State **Dr. Florian Herrmann**
>
> (Bavaria)
>
> on **item 10 of** the agenda
>
> For the governments of the states of Bavaria, Baden-Württemberg, Hamburg and Mecklenburg-Western Pomerania, I am making the following statement on record:
>
> The agreement and the **patent protection** it guarantees are very important for the innovative German economy.

The consent is based on the following constitutional understanding of the law for clarification:

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

IV.

1. With their constitutional complaint, the complainants re I. complain of a violation of their fundamental rights under Article 38, Paragraph 1, Clause 1 in conjunction with Article 20, Paragraph 1 and Paragraph 2, Article 79, Paragraph 3 and Article 19, Paragraph 1 4 and Article 97, Paragraph 1 of the Basic Law. At the same time, they request the Federal President not to issue and announce the UPGC Delivery Act II until a decision has been made on the main issue or, alternatively, to prohibit him from issuing and promulgating the UPC Delivery Act II by way of a temporary injunction. 13th

a) The constitutional complaint is neither inadmissible nor obviously unfounded. The complainant re I.1. was entitled to appeal because the possibility of a violation of his right, which is equivalent to fundamental rights, exists from Article 38.1 sentence 1 in conjunction with Article 20.1 and 20.2 as well as Article 79.3 of the Basic Law. The guaranteed right to democratic self-determination there protects against a substantial reduction in the German Bundestag's creative power, against which the individual can defend himself as well as against sufficiently relevant overstepping of competencies by the European Union. The constitutional identity must not be violated. 14th

aa) The regulation of Art. 6 ff. UPCA concerning the election and legal status of the judges of the Unified Patent Court violates Art. 79.3 of the Basic Law. The judges' term of office is only six years and they can be reappointed. This violates their independence because they are exposed to subtle and psychological influences without protection if they do not endanger their reappointment and want to preserve their status. This is not compatible with either Article 97 of the Basic Law or Article 6 (1) of the ECHR. 15th

The regulations for the removal of a judge from office by the Presidium of the Unified Patent Court in Art. 10 EPG statutes did not meet the requirements of judicial independence either. Removal from office is already possible if the judge no longer fulfills the necessary requirements or no longer fulfills the obligations arising from his office after the judgment of the presidium. A more detailed specification of these criteria is lacking; the judge also has no legal remedy against his removal from office. 16

bb) Furthermore, it cannot be ruled out that the stipulation of unrestricted precedence of Union law in Art. 20 and Art. 21 sentence 2 UPCA violates Art. 79.3 of the Basic Law. The priority of application of Union law in Germany can only extend as far as the Basic Law and the respective Act of Approval to the Treaties allow or provide for this. The order to apply the law can (only) be issued within the framework of the constitution and is limited by the constitutional identity of the Basic Law laid down in Article 79.3 of the Basic Law. With Art. 20 and Art. 21 sentence 2 UPCA, however, an unrestricted priority of Union law is established and the individual's identity check before the Federal Constitutional Court is cut off. 17th

b) The complainant re I.2. develop computer programs and operate a production platform for artificial intelligence. The complainant re I.3. is a non-profit association that takes action against patents in the field of artificial intelligence and campaigns for free standards. Both complainants complained about a violation of their fundamental rights under Article 19.4 and Article 97.1 of the Basic Law. 18th

It is currently unclear whether programs based on artificial intelligence are patentable. However, hundreds of patents for computer programs based on artificial intelligence have been granted by the European Patent Office in recent years and also in favor of a competitor of the complainant re I.2. that could affect their programs. In future, she would have to challenge these patents before the Unified Patent Court and no longer before the national courts. Due to the lack of independence of the judges of 19th

the Unified Patent Court, the complainant re I.2. in any case, their right to effective legal protection under Article 19 (4) of the Basic Law is impaired. In a letter dated February 2, 2021, she announced that

c) The complainants re I. also suggest obtaining a preliminary ruling from the Court of Justice of the European Union in accordance with Art. 267 TFEU. There were doubts as to the compatibility of the Convention with EU law because it was unclear whether the Unified Patent Court should be classified as a court within the meaning of Art. 267 TFEU. In particular, it lacks integration into the national court systems. 20th

2. With his constitutional complaint, the complainant re II. Complains of the violation of his fundamental right under Article 38.1 sentence 1 in conjunction with Article 20.1 and Article 20.2 and Article 79.3 of the Basic Law. At the same time, he applies for a temporary injunction to be issued to prohibit the Federal President from executing the EPGÜ-ZusatzG II. 21

a) On the merits, citing Article 38.1 sentence 1 in conjunction with Article 20.1 and 20.2 as well as Article 79.3 of the Basic Law, he asserts a violation of the rule of law in a sufficient context stand with the principle of democracy. The central element of the principle of democracy is that every state action with a decision-making character as the exercise of state authority requires democratic legitimation, which is linked in terms of content to the constitutional order - and thus to the rule of law. The implicit condition and fundamental assumption when exercising the right to vote is that every act of the state organs complies with the requirements of the law, in particular constitutional law. Therefore, with his voting decision, the citizen does not legitimize any transfer of sovereign rights beyond the requirements of the Basic Law. 22nd

The EPGÜ-ZusatzG II is not compatible with Article 38.1 sentence 1, Article 20.1 and 2 as well as Article 79.3 GG because it is too vague in view of the Brexit and the independence of the judges of the Unified Patent Court is not guaranteed. Although Great Britain was originally a party to the agreement, it also withdrew from the agreement and the VA protocol after it left the European Union. A ratification of the convention despite this unclear situation - the convention and the VA protocol could not come into force without the participation of Great Britain (Art. 89 para. 1 UPCA) - would violate the essence of the rule of law. According to Art. 7 (2) UPCA in conjunction with Annex II, London is also intended as the location for one of the three central chambers. However, this cannot be established in a non-contracting state. This violates the guarantee of the legal judge (Article 101.1 sentence 1 GG). 23

The selection and appointment of judges by the advisory committee and the administrative committee impaired their impartiality, since the committee, made up of practitioners, compiled the list of eligible judges compulsorily and exclusively. It cannot be ruled out that members of the advisory committee may later appear before the judges they have selected, which makes indirect influence appear possible. In contrast to other international courts, the Unified Patent Court is a specialized court, so that the participation of lawyers who are members of the advisory committee must be considered almost certain. Due to the short term of six years with the possibility of reappointment, the judges also lack the necessary independence. In this respect, there is a risk that a judge will take into account irrelevant aspects in his decision-making in order not to jeopardize a possible re-election, for example if a party in patent proceedings is represented by a lawyer who is a member of the advisory committee. The judges' lack of legal protection against possible disciplinary measures (up to and including dismissal) are also incompatible with the rule of law. 24

b) The Convention also violates Article 4 (3) subparagraph 1 and Article 19 (1) TEU as well as Article 267 TFEU. With the Unified Patent Court, a separate court will be created from the courts of the member states, which affects the cooperation between the Court of Justice of the European Union and the courts of the member states. Incidentally, the latter lack the competence to conclude the agreement without the participation of the European Union itself. This also violates the EU law principle of the rule of law, protected rights of defense and the right to effective legal protection (Art 2 TEU, Art. 47 Paragraph 1, Paragraph 2, Art. 48 Paragraph 2 CFR). Finally, it violates the principle of the autonomy of Union law because Great Britain continues to be involved as a contracting state. 25th

V.

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

1. The Federal Government issued a statement received on January 7, 2021. She considers the applications for an interim injunction to be inadmissible and unfounded, since weighing up the consequences is at the expense of the complainant (a). The Federal Government considers the constitutional complaints to be inadmissible, but in any case to be obviously unfounded (b). 27

a) The complainants re I. and II. had not substantiated the serious disadvantages threatening them individually when the EPGC-Delivery Act II came into force. They had only submitted that the complainants' protection of fundamental rights came too late in view of the binding effect of international law on a treaty that had once been ratified. However, there is no concrete explanation of possible fundamental rights violations. The complainants also did not deal with whether and to what extent the Federal Constitutional Court could oblige state agencies after ratification to correct any complaints by making appropriate amendments to the contract. 28

In the context of the weighing of consequences required under Section 32 of the BVerfGG, arguments against the issuance of an interim order are that delaying ratification would result in considerable disadvantages. The entry into force of the Convention has already been postponed for several years. A further delay carries the risk that the other member states will lose confidence in Germany as a reliable contractual partner and the agreement will collapse. This would lead to considerable disadvantages for German industry. 29

b) In the main, the constitutional complaints are inadmissible, but in any case are obviously unfounded. 30th

aa) The complainant re I.1. have not presented a possible violation of fundamental rights in a sufficiently substantiated manner. He did not show to what extent the contested regulations on the selection and re-election of judges at the Unified Patent Court questioned their democratic legitimacy and to what extent they violated the principle of democracy, which can only be criticized under Article 38.1 sentence 1 of the Basic Law. The complainants re I. also had not given any further reasons why the appointment of judges for a period of time and the possibility of re-election violated the constitutional identity of the Basic Law. A possible violation of Article 19.4 of the Basic Law was also not substantiated in more detail. 31

The second complainant had also not adequately demonstrated that he was affected by fundamental rights. The complaint of a lack of legal protection against decisions of the European Patent Office cannot be upheld because this is not the subject matter of the Convention. With regard to the alleged unclear legal situation in Great Britain, the second complainant did not explain which fundamental rights position that could be objected to was violated as a result. With regard to a possible violation of the rule of law, a connection with the democratic principle that can be directly criticized under Article 38.1 sentence 1 GG was not substantiated, a violation of Article 101.1 sentence 2 GG was with a view to London as a location not visible in a central chamber. In particular, the complainant re II. Did not show that 32

bb) The constitutional complaints also turned out to be unfounded. Insofar as Art. 20 UPCA stipulates the unconditional precedence of Union law, this does not constitute a violation of Art. 20 Paragraph 1 and Paragraph 2 in conjunction with Art. 79 Paragraph 3 Basic Law. The regulation does not concern the Federal Constitutional Court and leaves its national law Constitutional control powers - as also stated in the explanatory memorandum to the UPCA-Delivery Act II (see Bundestag printed paper 19/22847, p. 19) - remain unaffected. 33

2. In a brief dated January 8, 2021, the German Bundestag commented on the procedure. He considers the applications for an interim injunction to be inadmissible (a). The applications are also largely unfounded due to the lack of prospects of success. The weighing of consequences must in any case be to the disadvantage of the complainant (b). 34

a) The applications for a temporary injunction are inadmissible due to the lack of authorization to apply. They are also not substantiated. It had not been adequately explained that the complainants were threatened with disadvantages of particular weight, the extent to which an irreversible loss of rights was to be feared and whether and how one could, if necessary, break away from the Convention. The blanket statements on the weighing of consequences would not correspond to the requirements for a substantiated presentation. With regard to the request to forbid the Federal President from drawing up the UPCA-Delivery Act II, there was no need for legal protection, because to safeguard the interests of the complainant it was sufficient to suspend the international law binding by not performing the ratification. 35

b) The applications for an interim order are in any case unfounded. The main constitutional complaints had no prospect of success; in any case, the weighing of consequences is at the expense of the applicant. 36

aa) The constitutional complaints are already inadmissible. The complainants failed to recognize that Article 38.1 sentence 1 GG could not criticize every contact with the constitutional identity protected by Article 79.3 GG, but only an impairment of the right to democratic self-determination. 37

(1) The complainant re I.1. assert such an infringement, but without presenting it in a manner corresponding to the requirements of Section 23 (1) sentence 2, Section 92 BVerfGG He neither commented on the minimum standards of the rule of law, which must be strictly observed, for the transfer of sovereign rights to an international court, nor did he explain why the standard for international courts would be undercut at the Unified Patent Court. 38

The objection that Article 20 UPCA is incompatible with Article 79.3 of the Basic Law cannot be accepted. The priority regulation of Union law is not aimed at overcoming the integration barriers that the national constitutional orders set up against Union law. Rather, the emphasis on the primacy of Union law in the Convention refers to the fact that Union law takes precedence over the international law provisions of the Convention. The relationship between Union law and national law is not changed in any way. Even if this regulation were understood differently, it would only be a constitutionally irrelevant attempt. The Federal Constitutional Court had already determined in its Lisbon judgment, that even safeguarding the primacy of Union law under primary law can never go further than has been constitutionally approved (see BVerfGE 123, 267 <402>). In this respect, the declaration could certainly not have any constitutive effect in an international agreement. 39

The applicants are not cut off the possibility of identity checks in the long term. In any case, an identity check could not be demanded within the framework of the specialized jurisdiction, since it was exclusively the responsibility of the Federal Constitutional Court. After the Convention came into force, this could oblige the state organs to take action against an application of Union law by the Unified Patent Court that affects the identity of the constitution, while exercising their responsibility for integration. As a last resort to protect the German constitutional identity, the withdrawal of the Federal Republic of Germany from the Convention would remain possible, regardless of whether this is permissible or provided for under international law. Also, decisions of the Unified Patent Court in Germany should not be enforced, 40

(2) As far as the complainants re I.2. and I.3. complained about a violation of Article 19.4 in conjunction with Article 97.1 GG, there was no substantiated lecture on the extent to which the alleged constitutional violation affected the complainants themselves, directly and currently. They limited their lecture to the abstract possibility of fundamental rights violations in the future. That is an inadmissible popular constitutional complaint. 41

(3) Complainant II. Finally based all the complaints on a violation of the right to democratic self-determination, but did not explain this in a substantiated manner. The lecture according to which the constitutional identity of the Basic Law was violated by the ratification because after the withdrawal from Great Britain the situation of the Convention is completely unclear, is incomprehensible. Even the consideration that Parliament is only legitimized to act lawfully does not lead to any further, because this amounts to a general review of legality, which the Senate excluded in the procedure for the UPCA-Approval Act I. Furthermore, the constitutional identity is not affected by the fact that the Convention provides for the establishment of a central division of the Unified Patent Court in London. The complainant re II. in this regard only the violation of Article 101, Paragraph 1, Sentence 2 of the Basic Law; to what extent this could violate the principle of democracy is unclear. For a direct violation of the right to the legal judge, however, the complainant re II does not have his own, current and direct fundamental rights. To the extent that he attacks the legal status of the judges of the Unified Patent Court, the relationship between the principle of democracy and the rule of law is not substantiated . Finally, the alleged violations of the Convention against Union law did not lead to a violation of the constitutional identity. The Senate had already decided that in its resolution of February 13, 2020. The complainant did not oppose this with any new points of view. 101 sec. 1 sentence 2 GG; to what extent this could violate the principle of democracy is unclear. For a direct violation of the right to the legal judge, however, the complainant re II does not have his own, current and direct fundamental rights. To the extent that he attacks the legal status of the judges of the Unified Patent Court, the relationship between the principle of democracy and the rule of law is not substantiated . Finally, even the alleged 42

violations of the Convention against Union law did not lead to a violation of the constitutional identity. The Senate had already decided that in its resolution of February 13, 2020. The complainant did not oppose this with any new points of view. 101 sec. 1 sentence 2 GG; to what extent this could violate the principle of democracy is unclear. For a direct violation of the right to the legal judge, however, the complainant re II does not have his own, current and direct fundamental rights. To the extent that he attacks the legal status of the judges of the Unified Patent Court, the relationship between the principle of democracy and the rule of law is not substantiated . Finally, even the alleged violations of the Convention against Union law did not lead to a violation of the constitutional identity. The Senate had already decided that in its resolution of February 13, 2020. The complainant did not oppose this with any new points of view. to what extent this could violate the principle of democracy is unclear. For a direct violation of the right to the legal judge, however, the complainant re II does not have his own, current and direct fundamental rights. To the extent that he attacks the legal status of the judges of the Unified Patent Court, the relationship between the principle of democracy and the rule of law is not substantiated . Finally, the alleged violations of the Convention against Union law did not lead to a violation of the constitutional identity. The Senate had already decided that in its resolution of February 13, 2020. The complainant did not oppose this with any new points of view. to what extent this could violate the principle of democracy is unclear. For a direct violation of the right to the legal judge, however, the complainant re II does not have his own, current and direct fundamental rights. To the extent that he attacks the legal status of the judges of the Unified Patent Court, the relationship between the principle of democracy and the rule of law is not substantiated . Finally, even the alleged violations of the Convention against Union law did not lead to a violation of the constitutional identity. The Senate had already decided that in its resolution of February 13, 2020. The complainant did not oppose this with any new points of view. For a direct violation of the right to the legal judge, however, the complainant re II does not have his own, current and direct fundamental rights. To the extent that he attacks the legal status of the judges of the Unified Patent Court, the relationship between the principle of democracy and the rule of law is not substantiated . Finally, the alleged violations of the Convention against Union law did not lead to a violation of the constitutional identity. The Senate had already decided that in its resolution of February 13, 2020. The complainant did not oppose this with any new points of view. For a direct violation of the right to the legal judge, however, the complainant re II does not have his own, current and direct fundamental rights. To the extent that he attacks the legal status of the judges of the Unified Patent Court, the relationship between the principle of democracy and the rule of law is not substantiated . Finally, even the alleged violations of the Convention against Union law did not lead to a violation of the constitutional identity. The Senate had already decided that in its resolution of February 13, 2020. The complainant did not oppose this with any new points of view. Insofar as he attacks the legal status of the judges of the Unified Patent Court, the relationship between the principle of democracy and the rule of law is not substantiated. Finally, even the alleged violations of the Convention against Union law did not lead to a violation of the constitutional identity. The Senate had already decided that in its resolution of February 13, 2020. The complainant did not oppose this with any new points of view. Insofar as he attacks the legal status of the judges of the Unified Patent Court, the relationship between the principle of democracy and the rule of law is not substantiated. Finally, even the alleged violations of the Convention against Union law did not lead to a violation of the constitutional identity. The Senate had already decided that in its resolution of February 13, 2020. The complainant did not oppose this with any new points of view.

bb) In any case, the weighing of consequences required under § 32 BVerfGG is to the disadvantage of the applicant. Even if the ratification of the convention threatens an irreversible loss of rights, the disadvantages that would result if an interim order were issued outweigh the consequences. The entry into force of the convention has failed for several years due to the lack of ratification by the Federal Republic of Germany. This means that there is a risk that the political compromise found between the contracting states for a unified European patent court system will be called into question. A failure of the agreement would lead to considerable damage in foreign policy for the Federal Republic of Germany and would call into question its ability to form an alliance and Europe. 43

VI.

On January 13, 2021, the Federal President - in accordance with constant state practice (cf.BVerfGE 123, 267 <304>; 132, 195 <195 ff. Rn. 1 ff.>; 153, 74 <131 Rn. 90>; cf. . Schneider, in: Burkiczak / Dollinger / Schorkopf, BVerfGG, 2015, § 32 Rn. 268 Fn. 478) - declared to the Federal Constitutional 44

Court not to apply the EPGÜ-ZusatzG II until the Federal Constitutional Court's decision on the applications for an interim order to be completed yet to be announced.

B.

The applications for an interim order pursuant to Section 32 BVerfGG must be rejected because the constitutional complaints are mainly inadmissible. This applies both insofar as the complainant complains about a violation of the rule of law, the fundamental right to effective legal protection or violations of Union law (I.), and insofar as the complainant re I.1. sees in the regulation of Art. 20 UPCA an inadmissible contact with the constitutional identity protected by Art. 79.3 of the Basic Law (II.). 45

I.

1. According to Section 32 (1) BVerfGG, the Federal Constitutional Court can provisionally regulate a situation by means of an interim order if this is urgently required to avert serious disadvantages, to prevent threatened violence or for another important reason for the common good. If the application is directed against the Act of Consent to an international treaty, it can be submitted before the Federal President is drafted and promulgated it (a). When examining whether the requirements of Section 32 BVerfGG for issuing an interim order are met, a strict standard must be applied. The reasons presented for the unconstitutionality of the challenged measure are generally disregarded, unless 46

a) Acts of consent to international treaties can be challenged with a constitutional complaint if the treaty contains provisions that directly intervene in the legal sphere of the individual (see BVerfGE 6, 290 <294 and 294>; 40, 141 <156>; 84, 90 <113>; 123, 148 <170>; 153, 74 <131 and para. 93>). Even if the consent to an international treaty is generally not divisible because the Consent Act fundamentally forms a unit that cannot be separated from the international treaty and both represent a single object of attack (cf.BVerfGE 103, 332 <345 et seq.>), Concludes this does not rule out a content-related restriction of the subject matter of the proceedings based on the legal protection request with regard to the provisions of the international treaty referred to (cf. BVerfGE 14, 1 <6>; 123, 148 <170, 185>; 142, 234 <245 ff. Para. 10 ff.>; 153, 74 <131 and paragraph 93>). However, an exact description of the regulations challenged by the constitutional complaint is also required in the case of consent laws for international treaties. 47

The Act of Approval to an international treaty (Article 59, Paragraph 2, Clause 1 of the Basic Law) can be the subject of a constitutional complaint before it enters into force, if the legislative process has been completed except for the execution by the Federal President and the promulgation (cf. <132 para. 94 with further references>; established case-law), because after the instrument of ratification has been deposited, a binding under international law occurs that may no longer be reversible, so that the legal protection in the main could then come too late (see BVerfGE 46, 160 < 164>; 111, 147 <153>; 132, 195 <233 para. 88>; 143, 65 <88 para. 36>). In this case, there would be a risk that Germany would enter into obligations under international law in violation of its constitution. Thus, the constitutional complaint could also fail to serve its purpose by clarifying the constitutional situation to serve legal peace and to avoid a divergence of international and constitutional ties (cf.BVerfGE 24, 33 <53 and 53>; 123, 267 <329>; 153, 74 <132 para. 94>). It therefore corresponds to the requirement of effective (basic) legal protection and state practice to enable a preventive examination of future regulations at this point in time (see BVerfGE 123, 267 <329>; 153, 74 <132 para. 94>). 48

b) In the context of an application in accordance with Section 32 (1) BVerfGG, the reasons put forward for the unconstitutional nature of the challenged measures must generally be disregarded, unless the main finding sought or the main application made proved to be inadmissible from the outset or obviously unfounded (see BVerfGE 89, 344 <345>; 92, 130 <133>; 103, 41 <42>; 118, 111 <122>; 132, 195 <232 para. 87> ; 143, 65 <87 para. 35>; 145, 348 <356 para. 28>; 150, 163 <166 para. 9>; 151, 58 <63 para. 11>; established case-law). 49

When examining whether the prerequisites of Section 32 (1) BVerfGG are met, a strict standard must be regularly applied because of the far-reaching consequences of an interim order (see BVerfGE 55, 1 <3>; 82, 310 <312>; 94, 166 <216 and 216>; 104, 23 <27>; 106, 51 <58>; 143, 65 <87 Rn. 34>). This applies in particular if the suspension of the implementation of a law is desired (see BVerfGE 55, 1 <3>; 82, 310 <312>; 94, 166 <216 and 216>; 104, 23 <27>; 106 , 51 <58>; 121, 1 <17 and 17>; 122, 342 <361>; 131, 47 <61>; 132, 195 <232 para. 86>; 140, 99 <106 and para. 12> ; established case-law), because in this or in preventing its entry into force there is a considerable interference with the original 50

competence of the legislature (see BVerfGE 131, 47 <61>; 140, 99 <106 f. >). If the reasons in favor of a provisional regulation usually weigh so heavily that they make the issuance of an interim order indispensable, they must also have special weight in such a case (cf.BVerfGE 104, 23 <27 and 27>; 117, 126 <135>; 122, 342 <361 and 361>; established case-law). In this respect, it is of decisive importance whether the disadvantages are irreversible or can only be revised with great difficulty (see BVerfGE 91, 70 <76 and 76>; 118, 111 <123>; 140, 211 <219 para. 13>; established case-law) to affirm the suspension interest. These requirements are made even more stringent if a measure with effects under international law or foreign policy is at issue (see BVerfGE 35, 193 <196 and 196>; 83, 162 <171 and 171>; 88, 173 <179>; 89, 38 <43>; 108, 34 <41>; 118, 111 <122>; 125, 385 <393>; 126, 158 <167>; 129, 284 <298>; 132, 195 <232 para. 86>; 143, 65 <87 paragraph 34>; Decision of the Second Senate of April 15, 2021 - 2 BvR 547/21 -, Rn. 67).

Against this background, the complainants have to explain in the justification of their application for a temporary injunction or their constitutional complaint with which constitutional requirements the challenged measure collides. To this end, they must show the extent to which the measure is intended to violate the stated fundamental rights (see BVerfGE 99, 84 <87>; 120, 274 <298>; 140, 229 <232 para. 9>; 142, 234 <251 para. 28> ; 149, 346 <359 para. 23>). If there is already case law of the Federal Constitutional Court on the constitutional issues raised by them, the alleged violation of fundamental rights must be justified in a dispute with the standards developed therein (cf.BVerfGE 99, 84 <87>; 101, 331 <346>; 123, 186 <234 >; 142, 234 <251 para. 28>; 149, 51

2. Measured against this, the complainants have the possibility of a fundamental right violation by the attacked convention in view of the extensive jurisprudence of the Senate on Article 23.1 of the Basic Law and in particular the decision of February 13, 2020 (BVerfGE 153, 74), which the disputed convention for Subject had not been adequately substantiated. This applies to both the complainant re I.1. and the right to democratic self-determination from Article 38.1 sentence 1 in conjunction with Article 20.1 and 2 as well as Article 79.3 of the Basic Law (a), which is complained about as being violated, as well as for the complainant's complaint I.2. and I.3., the Convention violates their fundamental right under Article 19.4 in conjunction with Article 97.1 GG and Article 6.1 ECHR (b). The presentation of the complainant re II. 52

a) The complainant re I.1. makes a violation of his right to democratic self-determination from Art. 38.1 sentence 1 in conjunction with Art. 20.1 and 20.2 as well as Art. 79.3 GG in essence (cf. on Art. 20 UPCA Related complaint Rn. 72 ff.) with the assertion that the Convention violates the rule of law anchored in Article 20.3 of the Basic Law because of the organizational structure of the Unified Patent Court and the legal status of its judges. However, it does not explain to what extent this affects the principle of democracy, which is only subjectified by Article 38.1 sentence 1 of the Basic Law and that is laid down in Article 20.1 and Article 20.2 of the Basic Law. 53

aa) According to Article 23, Paragraph 1, Sentence 3 of the Basic Law, a transfer of sovereign rights to the European Union must not result in the integral core of the Basic Law within the meaning of Article 79, Paragraph 3 of the Basic Law - its identity - being affected. Therefore, the Federal Constitutional Court examines in the context of the identity check whether a transfer of sovereign rights to the European Union or - as here - institutions that are in a complementary or special proximity to it, which have been declared inviolable by Article 79.3 of the Basic Law Principles are touched (see BVerfGE 142, 123 <195 Rn. 138> with reference to BVerfGE 123, 267 <344, 353 and 35>; 126, 286 <302>; 129, 78 <100>; 134, 366 <384 f. para. 27>). This concerns the safeguarding of the basic human dignity of the basic rights within the meaning of Art. 1 GG (see BVerfGE 140, 317 < 54

An identity check with reference to a violation of the right under Article 38 (1) sentence 1 in conjunction with Article 20 (1) and (2) and Article 79 (3) of the Basic Law (cf. BVerfGE 89, 155 <187>; 123, 267 <340>; 129, 124 <169, 177>; 132, 195 <238 para. 104>; 135, 317 <386 para. 125>; 151, 202 <286 para. 118>) is, however, stricter Conditions bound. The resulting right of citizens to democratic self-determination is strictly limited to the core of the principle of democracy, which is rooted in human dignity and which is also withdrawn from the constitution-amending legislature by Article 79.3 of the Basic Law. 55

If an identity check based on Art. 38.1 sentence 1 GG does not object to contact with the principle of democracy, but rather other state structure principles such as the rule of law, the complainant must, according to the now established case law of the Senate, the connection with the article 38.1 First sentence of the Basic Law to establish the principle of democracy that can be criticized directly 56

(cf.BVerfGE 123, 267 <332 and 332>; 129, 124 <177>; 132, 195 <238 marginal number 104>; 134, 366 <397 marginal number 53>; 135, 317 <386 para. 125>; 142, 123 <190 para. 126>; 146, 216 <249 and para. 44 et seq.>; 153, 74 <139 para. 107>). In this sense, the Senate admitted the complaint of a violation of the welfare state principle in Article 20.1 of the Basic Law with reference to Article 38.1 sentence 1 of the Basic Law because the complainants had submitted with sufficient certainty,

bb) The complainant re I.1. does not present the possibility of a violation of Article 38.1 sentence 1 of the Basic Law by the EPGÜ-ZusatzG II in a manner that satisfies the requirements of § 23.1 sentence 2, § 92 BVerfGG. In particular, it is not clear to what extent the Objections raised by him against the organizational design of the Unified Patent Court and the legal status of its judges are related to the principle of democracy that can only be criticized via Article 38.1 sentence 1 of the Basic Law. 57

It is true that the rule of law as such is closely linked to the principle of democracy because the democratic rule of the majority experiences the necessary moderation, limitation and control through its rule of law (cf. Böckenförde, in: Isensee / Kirchhof, HStR II, 3rd edition 2004, Section 24 marginal number 93). However, not every violation of the rule of law guarantees a violation of the principle of democracy. An impairment of its warranty content rather presupposes, for example, the demonstration that sovereign rights are transferred by the attacked convention in such a way that when they are used by the European Union or its organs, institutions and others Establish new sovereignty rights can be established, i.e. these are granted a so-called competence competence (cf.BVerfGE 89, 155 <187 f., 192, 199>; 123, 267 <349>; see also BVerfGE 58, 1 <37>; 104, 151 <210>; 132, 195 <238 para. 105>; 142, 123 <191 and paragraph 130>; 146, 216 <250 paragraph 48>; 151, 202 <287 marginal number 121>) that blanket authorizations to exercise official authority are granted without appropriate safeguards (see BVerfGE 58, 1 <37>; 89, 155 <183 f., 187>; 123, 267 <351 ff .>; 132, 195 <238 para. 105>; 135, 317 <399 para. 160>; 142, 123 <191 and para. 130>; 151, 202 <287 para. 121>) or rights of the Bundestag are essential reduced (cf.BVerfGE 123, 267 <341>; 142, 123 <190 para. 125>; 151, 202 <288 and para. 123>), in particular its budget rights (cf. BVerfGE 123, 267 <359>; 129 , 124 <177, 181>; 151, 202 <288 paragraph 123>) and its overall budgetary responsibility is impaired (see BVerfGE 123, 267 <359>; 129, 124 <177>; 132, 195 <239 marginal number 106>; 135, 317 <399 and 399 marginal numbers 161>; 142, 123 <195 paragraph 138>; 146, 216 <253 and paragraph 54>; 151, 202 <288 paragraph 123>). Also the statement that the right of all citizens to free and equal participation in the legitimation and influence of the sovereign power affecting them is impaired and they are subjected to political violence which they cannot avoid and which they do not in principle equal in terms of personnel and subject matter Be able to freely determine the share (cf.BVerfGE 123, 267 <341>; 142, 123 <191 para. 128>; 151, 202 <285 and 285 para. 117>), meet the requirements. It would be the same if it were stated 58

The complainant's submission to I.1. is limited to the presentation that Art. 6 ff. UPCA due to the appointment of the judges of the Unified Patent Court for six years, a possible re-appointment and the insufficient contestability of an impeachment against Art. 97.1 GG in conjunction with Art. 6 Paragraph 1 of the ECHR and violated the rule of law in Article 20 Paragraph 3 of the Basic Law. To what extent this affects the principle of democracy remains unclear. This also changes the general reference to the principle of separation of powers, which according to the submission of the complainant re I.1. should be rooted in the principle of democracy, nothing. 59

In addition, there is no adequate lecture on the minimum constitutional requirements for the election, repeated appointment and removal from office of judges. It is true that in its decision on temporary judges - albeit with a view to the constitutional principle of the rule of law (cf.BVerfGE 148, 69 <89 Rn. 53>) - possible reappointments of temporary judges as unconstitutional restrictions on judicial independence (BVerfGE 148, 69 <126 and nos. 140 et seq.>), but this is already restricted for the judges of the state constitutional courts and for honorary and lay judges (cf. BVerfGE 148, 69 <121 nos. 128 f., 129 f. Paragraph 148>). Particularly for international courts, special features apply in this respect, which must be taken into account when delegating judicial tasks to intergovernmental institutions and which can justify deviations from the requirements of the Basic Law to ensure the independence of judges. Time-limited terms of office for judges are the norm in international courts and are often associated with the possibility of re-election. At the level of the European Union, Art. 253 Paragraph 1 Clause 2 and Paragraph 4 as well as Art. 254 Paragraph 2 Clause 2 and Clause 4 TFEU expressly provide for six-year terms of office at the Court of Justice and the General Court of the European Union as well as the possibility of re-appointment (Critic. In this respect, however, Everling, DRiZ 1993, p. 5 <6>; Jacobs, in: Liber amicorum Lord Slynn of Hadley, 2000, p. 17 <24 f.>; Baltes, 60

Stürner, JZ 2017, p. 905 <906 f.>), While re-election for the judges of the European Court of Human Rights after a term of office of nine years with the entry into force of the 14th Additional Protocol on June 1, 2010 was expressly excluded (see Art 23 para. 1 sentence 2 ECHR).

There is also a lack of sufficient presentation to the extent that the complainant re I.1. complains about the lack of legal protection of the judges of the Unified Patent Court in the event of removal from office. It is true that effective legal protection is one of the basic requirements of the rule of law (cf.BVerfGE 149, 346 <363 et seq. Marginal no. 35>), whereby such protection is essential for judges to be removed from office. However, it can be left open which requirements result from this in detail. It is not clear to what extent the judges at the Unified Patent Court have not been able to protect themselves against the complainant's right to I.1. on democratic self-determination from Article 38.1 sentence 1 GG can be affected. 61

b) Also as far as the complainants re I.2. and I.3. assert that the Convention violates their fundamental right under Article 19 (4) in conjunction with Article 97 (1) GG and Article 6 (1) ECHR, the constitutional complaint does not meet the requirements of Article 23 (1) sentence 2, § 92 BVerfGG. 62

aa) If the legislature authorizes intergovernmental institutions or international organizations to exercise public authority directly against those affected in Germany, it must ensure effective legal protection in accordance with the objective value decision contained in Article 19 (4) of the Basic Law (see BVerfGE 58, 1 <40 ff.>; 59, 63 <85 ff.>; 73, 339 <376>; 149, 346 <364 para. 36>). This standard coincides with that of Art. 6 Para. 1 ECHR and the case law of the European Court of Human Rights, to which a convention state remains bound even if it transfers sovereign rights to intergovernmental institutions (see BVerfGE 149, 346 <364 et seq . 38> with further references). 63

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

If the effectiveness of judicial legal protection is in question, a violation of Article 19.4 of the Basic Law by the legislature can only be considered if the impairment is currently, i.e. currently and not only potentially, affecting the legal position of the complainant (cf. BVerfGE 140, 42 <58 para. 59>). The mere prospect that the complainant could be affected at some point in the future is not sufficient in this respect (see BVerfGE 114, 258 <277>; 140, 42 <48 para. 59>). Likewise, the complainant must be directly and directly concerned. This is the case if he is the addressee of the regulation and no further enforcement act is required that changes his legal position (see BVerfGE 1, 97 <101 et seq.>; 102, 197 <206 and 206>; 110, 141 <151 et seq .>). 65

bb) The complainants re I.2. and I.3. it has not been shown that they are currently and directly affected by the EPGÜ-ZusatzG II itself in terms of their fundamental right under Article 19 (4) of the Basic Law. 66

It is true that the complainant re I.2. suggest that, as a developer of computer programs in the field of artificial intelligence, she creates programs and that conflicting patents in this area could arise before the European Patent Office and subsequent legal disputes before the Unified Patent Court. In this respect, their right to effective legal protection could be affected, since the organization of the Unified Patent Court does not meet the rule of law. As a matter of fact, however, these are only vague statements on a potential future concern that does not fall within the scope of Article 19 (4) of the Basic Law. Whether the complainant re I.2. will come before the Unified Patent Court is uncertain. Neither is it certain that the complainant re I.2. feared patent applications will be filed at all, nor that the Unified Patent Court will decide in such a case. The further presentation of February 2, 2021 does not change this, according to which the complainant re I.2. has opposed a patent granted by the European Patent Office. 67

With regard to the complainant re I.3., A non-profit association that advocates free standards in software, there is also no substantiated explanation of the extent to which he could be party to a patent dispute before the Unified Patent Court. The statements on possible proceedings before the court are not sufficiently specific and are limited to the fact that the complainant re I.3. could even lead a legal 68

dispute before the Unified Patent Court. The connection between the alleged deficient legal position of the judges at the Unified Patent Court and a current and immediate violation of the complainants' right to effective legal protection from Article 19.4 of the Basic Law is not recognizable.

c) Also the submission of the complainant re II. on a possible violation of his right under Article 38.1 sentence 1 in conjunction with Article 20.1 and 20.2 as well as Article 79.3 GG does not meet the substantiation requirements from section 23 (1) sentence 2, section 92 BVerfGG. Complainant II. Raises numerous complaints against the Convention and the UPGC-Delivery Act II, which approves it. A specific reference to the constitutional standards, in particular to the question of the extent to which the right to democratic self-determination is affected by the stated constitutional deficiencies of the Convention, however, he does not manufacture. 69

aa) Insofar as the complainant re II. complains of violations of the Convention against Union law, a violation of Article 38.1 sentence 1 of the Basic Law is ruled out from the outset (see already BVerfGE 153, 74 <141 and 141 para. 114>). EU law does not result in any formal or material requirements which could call the validity of German laws into question (cf.BVerfGE 31, 145 <174 and 174>; 82, 159 <191>; 110, 141 <154 and 154>; 115 , 276 <299 and 299>; 153, 74 <141 and 141 para. 114>; BVerfG, decision of the Second Senate of April 27, 2021 - 2 BvR 206/14 -, para. 38). Against this background, the violation of Union law - apart from a violation of the fundamental rights of the Charter of Fundamental Rights (cf.BVerfGE 152, 152 <169 para. 42 f., 179 ff. Para. 63 ff.>; 152, 216 <236 para. 50 , 237 Rn. 52>; BVerfG, Decision of the Second Senate of December 1, 2020 - 2 BvR 1845/18 et al. -, Rn. 36; Decision of the Second Senate of April 27, 2021 - 2 BvR 206/14 -, Rn. 39 et seq.) - as a matter of principle, cannot be objected to with a constitutional complaint (cf.BVerfGE 153, 74 <141 f. Rn. 114 f.>). 70

bb) The complaint that the convention could not come into force when Great Britain leaves the European Union, on the other hand, concerns the concrete interpretation of the convention and not possible requirements of the Basic Law. In principle, it cannot be challenged with the constitutional complaint. 71

II.

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

1. a) According to the established case law of the Federal Constitutional Court, Article 23.1 sentence 1 GG also contains a promise of effectiveness and enforcement for Union law (see BVerfGE 126, 286 <302>; 140, 317 <335 para. 37>; 142, 123 <186 f. Rn. 117>), which also includes granting Union law priority over national law in the Consent Act according to Article 23, Paragraph 1, Sentence 2 of the Basic Law (see BVerfGE 73, 339 <375>; 123, 267 < 354>; 129, 78 <100>; 134, 366 <383 para. 24>). According to this case law, the priority of application of Union law over national law also applies in principle with a view to conflicting national constitutional law and, in the event of a conflict in a specific case, generally leads to its inapplicability (see BVerfGE 126, 286 <301>; 129, 78 <100> ; 140, 317 < 335 para. 38 and 38>; 142, 123 <187 para. 118>). The priority of application of Union law only exists by virtue of and within the scope of the constitutional authorization (cf.BVerfGE 73, 339 <375>; 75, 223 <242>; 123, 267 <354>; 134, 366 <381 et seq. Marginal no. 20 et seq .>). Therefore, the opening of the German legal system to Union law, made possible by the Basic Law and put into action by the integration legislature, finds its limits not only in the integration program for which the legislature is responsible, but also in the constitution's identity, which is both changeable and integrative (Art. 23 (1) sentence 3 in conjunction with Article 79 (3) GG). The priority of application only extends to the extent that the Basic Law and the Consent Act permit or provide for the transfer of sovereign rights (cf. BVerfGE 37, 271 <279 and 279>; 58, 1 <30 and 30>; 73, 339 <375 f.>; 75, 223 <242>; 89, 155 <190>; 123, 267 <348 ff., 402>; 126, 286 <302>; 129, 78 <99>; 134, 366 <384 paragraph 26>; 140, 317 <336 paragraph 40>; 142, 123 <187 and paragraph 120>; 154, 17 <89 and paragraph 109>). The application of Union law in Germany is only democratically legitimized to this extent (see BVerfGE 142, 123 <187 and 187 para. 120>). 73

The Federal Constitutional Court guarantees these limits in particular in the context of identity and ultra vires control. The constitutional or supreme courts of other member states are also aware of similar constitutional reservations (cf. for the Kingdom of Belgium: Constitutional Court, decision No. 62/2016 of April 28, 2016, marginal number B.8.7 .; for the Kingdom of Denmark: Højesteret, judgment of April 6, 1998 - I 361/1997 -, section 9.8 .; judgment of December 6, 2016 - I 15/2014 -; for the 74

Republic of Estonia: Riigikohus, judgment of July 12, 2012 - 3-4-1- 6-12 -, paras. 128, 223; for the French Republic: Conseil Constitutionnel, decision no. 2006-540 DC of July 27, 2006, para. 19; decision no 2011, Rn. 45; Decision No. 2017-749 DC of July 31, 2017, Rn. 9 ff .; Conseil d'État, Decision No. 393099 of April 21, 2021, para. 5; for Ireland: Supreme Court of Ireland, Crotty v. To Taoiseach, <1987>, IR 713 <783>; SPUC <Ireland> Ltd. v. Grogan, 1989, IR 753 765; for the Italian Republic: Corte Costituzionale, decision no. 183/1973, para. 3 ff .; Decision No. 168/1991, para. 4; Decision No. 24/2017, para. 2; for Latvia: Satversmes tiesa, judgment of April 7, 2009 - 2008-35-01 -, para. 17; for the Republic of Poland: Trybunał Konstytucyjny, judgments of May 11, 2005 - K 18/04 -, para. 4.1., 10.2 .; of November 24, 2010 - K 32/09 -, Rn.2.1. ff .; of November 16, 2011 - SK 45/09 -, Rn. 2.4., 2.5 .; for the Kingdom of Spain: Tribunal Constitucional, Declaration of December 13, 2004, DTC 1/2004; for the Czech Republic: Ústavní Soud, judgment of 31. January 2012 - 2012/01/31 - Pl. ÚS 5/12 -, Section VII; for Croatia: Ustavni Sud, decision of April 21, 2015 - U-VIIR-1158/2015 -, recital 60).

These reservations under European constitutional law preclude the unrestricted primacy of application of Union law (cf.BVerfGE 142, 123 <203 para. 153>; 153, 74 <163 para. 166>; 154, 17 <151 para. 234>). The requirements of the Basic Law on which they are based are binding on all constitutional organs of the Federal Republic of Germany and must neither be relativized nor undermined. 75

Against this background, the Treaty on European Union and the Treaty on the Functioning of the European Union do not contain any express determination of the primacy of Union law. It is true that the Subsidiarity Protocol to the Treaty of Amsterdam (see Protocol No. 30 on the application of the principles of subsidiarity and proportionality, OJ EC 1997 No. C 340 of 10 November 1997, p. 105 under No. 2) - however, more interpretable and in need of interpretation - reference to the case law of the Court of Justice on the primacy of Union law; however, an express recognition of the unrestricted and unconditional primacy of Union law was not approved. Such a regulation was also included in the Treaty of Lisbon - turning away from the failed constitutional treaty (cf.Art. I-6 Treaty establishing a Constitution for Europe of October 29, 2004, OJ EU No. C 310/12) - deliberately not included, but is only included in an attached declaration by the member states (see Declaration No. 17 to the Final Act of the Intergovernmental Conference which accepted the Treaty of Lisbon signed on December 13, 2007, OJ EU No. C 326 of October 26, 2012, p. 346). This states that the non-inclusion of priority in the text of the contract does not change the status quo ante. For this reason, from the point of view of the member states, there was nothing constitutionally to remind against Declaration No. 17 (see only BVerfGE 123, 267 <401 and 401>; also Conseil Constitutionnel, Decision No. 2004-505 DC of November 19, 2004, Rn. 9 ff .; Ruffert, in: Calliess / ders., EUV / AEUV, 5th edition 2016, Art. 1 TFEU Rn. 18). OJ EU No. C 310/12) - deliberately not included, but is only included in an attached declaration by the Member States (see Declaration No. 17 to the final act of the Intergovernmental Conference that adopted the Treaty of Lisbon signed on December 13, 2007, OJ EU No. C 326 of October 26, 2012, p. 346). This states that the non-inclusion of priority in the text of the contract does not change the status quo ante. For this reason, from the point of view of the member states, there was nothing constitutionally to remind against Declaration No. 17 (see only BVerfGE 123, 267 <401 and 401>; also Conseil Constitutionnel, Decision No. 2004-505 DC of November 19, 2004, Rn. 9 ff .; Ruffert, in: Calliess / ders., EUV / AEUV, 5th edition 2016, Art. 1 TFEU Rn. 18). OJ EU No. C 310/12) - deliberately not included, but is only included in an attached declaration by the Member States (see Declaration No. 17 to the final act of the Intergovernmental Conference that adopted the Treaty of Lisbon signed on December 13, 2007, OJ EU No. C 326 of October 26, 2012, p. 346). This states that the non-inclusion of priority in the text of the contract does not change the status quo ante. For this reason, from the point of view of the member states, there was nothing constitutionally to remind against Declaration No. 17 (see only BVerfGE 123, 267 <401 and 401>; also Conseil Constitutionnel, Decision No. 2004-505 DC of November 19, 2004, Rn. 9 ff .; Ruffert, in: Calliess / ders., EUV / AEUV, 5th edition 2016, Art. 1 TFEU Rn. 18). It is only contained in an attached declaration by the Member States (see Declaration No. 17 to the final act of the Intergovernmental Conference which adopted the Lisbon Treaty signed on December 13, 2007, OJ EU No. C 326 of October 26, 2012, p. 346). This states that the non-inclusion of priority in the text of the contract does not change the status quo ante. For this reason, from the point of view of the member states, there was nothing constitutionally to remind against Declaration No. 17 (see only BVerfGE 123, 267 <401 and 401>; also Conseil Constitutionnel, Decision No. 2004-505 DC of November 19, 2004, Rn. 9 ff .; Ruffert, in: Calliess / ders., EUV / AEUV, 5th edition 2016, Art. 1 TFEU Rn. 18). It is only contained in an attached declaration by the Member States (see Declaration No. 17 to the final act of the Intergovernmental Conference which adopted the Lisbon Treaty signed on December 13, 2007, OJ EU No. C 326 of October 26, 2012, p. 346). This states that the non-inclusion of precedence in the text 76

of the contract does not change the status quo ante. For this reason, from the point of view of the member states, there was nothing constitutionally to remind against Declaration No. 17 (see only BVerfGE 123, 267 <401 and 401>; also Conseil Constitutionnel, Decision No. 2004-505 DC of November 19, 2004, Rn. 9 ff .; Ruffert, in: Calliess / ders., EUV / AEUV, 5th edition 2016, Art. 1 TFEU Rn. 18). December 2007, signed the Treaty of Lisbon, OJ EU No. C 326 of October 26, 2012, p. 346). This states that the non-inclusion of priority in the text of the contract does not change the status quo ante. For this reason, from the point of view of the member states, there was nothing constitutionally to remind against Declaration No. 17 (see only BVerfGE 123, 267 <401 and 401>; also Conseil Constitutionnel, Decision No. 2004-505 DC of November 19, 2004, Rn. 9 ff .; Ruffert, in: Calliess / ders., EUV / AEUV, 5th edition 2016, Art. 1 TFEU Rn. 18). December 2007, signed the Treaty of Lisbon, OJ EU No. C 326 of October 26, 2012, p. 346). This states that the non-inclusion of priority in the text of the contract does not change the status quo ante. For this reason, from the point of view of the member states, there was nothing constitutionally to remind against Declaration No. 17 (see only BVerfGE 123, 267 <401 and 401>; also Conseil Constitutionnel, Decision No. 2004-505 DC of November 19, 2004, Rn. 9 ff .; Ruffert, in: Calliess / ders., EUV / AEUV, 5th edition 2016, Art. 1 TFEU Rn. 18).

77 b) According to this, Art. 20 UPCA must be understood in such a way that it is intended to dispel doubts regarding the compatibility of the Convention with Union law, but not to regulate the relationship between Union law and national constitutional law that goes beyond the status quo. For the interpretation of Art. 20 UPCA it is important that it goes back to Opinion 1/09 of the Court of Justice of the European Union of March 8, 2011, in which it emphasizes the primacy of Union law in its interpretation and the preservation of autonomy of the Union legal order as mandatory requirements for the Union law admissibility of a unitary European patent jurisdiction (see ECJ, expert opinion of March 8, 2011, 1/09, Coll. 2011, I-1143 <1168 marginal numbers 65, 67>), even if these statements were based on the version of the Convention at that time and Art. 14a of the draft Convention old version, which listed Union law only after the law of the Convention and which only referred to "directly applicable Union law" (cf. old version of the Convention: ECJ, Opinion of March 8, 2011, 1/09, Coll. 2011, I-1143 <1150 Rn. 9>). This understanding is also supported by the fact that not all member states of the European Union are contracting member states and Art. 20 UPC therefore does not affect the relationship between Union law and national constitutional law. who only listed Union law after the law of the Convention and who only referred to “directly applicable Union law” (cf. on the old version of the Convention: ECJ, Expert Opinion of March 8, 2011, 1/09, Coll. 2011, I -1143 <1150 para. 9>). This understanding is also supported by the fact that not all member states of the European Union are contracting member states and Art. 20 UPC therefore does not affect the relationship between Union law and national constitutional law. who only listed Union law after the law of the Convention and who only referred to “directly applicable Union law” (cf. on the old version of the Convention: ECJ, Expert Opinion of March 8, 2011, 1/09, Coll. 2011, I -1143 <1150 para. 9>). This understanding is also supported by the fact that not all member states of the European Union are contracting member states and Art. 20 UPC therefore does not affect the relationship between Union law and national constitutional law.

78 This also corresponds to the view of the Federal Government, which states in its explanatory memorandum to the draft of the UPC Approval Act II that Art. 20 UPC serves the "clarification" that the Unified Patent Court as an international court has the same position with regard to the law of the European Union that belongs to the national courts. In this context, she expressly emphasizes that Art. 20 UPCA does not affect the exercise of constitutionally given examination competences by the Federal Constitutional Court. In the Lisbon judgment, the Federal Constitutional Court found that it was irrelevant whether the priority of application of Union law was provided for in the Treaties themselves or in Declaration No. 17 attached to the Final Act of the Lisbon Treaty. The Federal Government therefore assumes

79 For this interpretation, the protocol declaration of the states of Bavaria, Baden-Württemberg, Hamburg and Mecklenburg-Western Pomerania given in the Bundesrat can be used, Art Constitutional guarantees, in particular the principles laid down in Article 1, Article 20 (1) and (2) in conjunction with Article 79 (3) of the Basic Law as well as the review competence of the Federal Constitutional Court with regard to compliance with the minimum constitutional standards when transferring sovereign powers to European or intergovernmental institutions remain unaffected (see BR Plenary Protocol No. 998 of December 18, 2020, p. 524).

The Federal Government has not communicated this understanding of Art. 20 UPCA to the other contracting member states. 80

2. The complainant re I.1. does not deal adequately with all of this, but restricts itself, with reference to the decision of the Senate of February 13, 2020, to the statement that Art. 20 UPC will cut off the identity check, which Art. 79.3 of the Basic Law does not is compatible. 81

king Huber Hermanns
Müller Kessal-Wulf Maidowski
Langenfeld Wallrabenstein