The Hungarian and German constitutional courts refused the ratification of the agreement on a Unified Patent Court. What's next?

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1. Introduction

International treaties have played a key role in the history of European integration,[1] as the constitutional foundations[2] of today's European Union (EU) were established on the basis of the founding treaties concluded under international law. The development of European integration has made the EU a unique example of 'cooperative federalism'[3] and 'multilevel governance'[4] and an important subject of international law with its treaty-making power.[5] Accordingly, the question whether the EU is competent[6] to enter into international agreements with third States and other international organizations has been subject to intense debates.[7]

As the last stop in this debate, the Treaty of Lisbon[8] has significantly reduced the problems in general in the field of external relations[9] and other contracting powers.[10]

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This article

- The Unified Patent Court is a supranational judicial forum for litigation concerning the infringement and validity of European patents, set up under the form of enhanced cooperation by a group of EU Member States.
- This form of cooperation is a special international treaty provided for in the founding treaties of the European Union.
- From a constitutional point of view, however, the dilemma might arise for these treaties individually as to whether they belong to the sphere of the European law or to the public international law. The constitutional assessment of the UPC Agreement delivered by constitutional courts of two Member States, Hungary and Germany, appears to be different in this respect.

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1 See Desmond Dinan, *Europe Recast: A History of European Union* (MacMillan Education, 2014). 1–357 especially 54–86, 231–50, 307–16.

2 See Armin von Bogdandy, 'Founding Principles' in Armin von Bogdandy and Jürgen Bast (eds) *Principles of European Constitutional Law* (2nd revised edn Hart Publishing & C.H. Beck, 2010); 11–54; Armin von Bogdandy, 'Grundprinzipien' in Armin von Bogdandy und Jürgen Bast (hrsg) *Europäisches Verfassungsrecht: Theoretische und dogmatische Grundzüge* (Springer, 2. voll. aktualisierte u. erw. Auflage 2009). 13–71.

3 For the content of the concept, see: Robert Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (Oxford University Press, 2009), 241–87.

4 See more: Allan Rosas and Lorna Armati, *EU Constitutional Law: An Introduction* (Hart Publishing, 2018). 53–55; Allan Rosas, 'The Status in EU Law of International Agreements Concluded by EU Member States' (2011) 34 *Fordham International Law Journal*, 1304–45, at 1304–1305.

5 See more Bart Van Vooren and Ramses A Wessel, *EU External Relations Law* (Cambridge University Press, 2018). 74–98.

6 Pieter-Jan Kuijper, 'Recent Tendencies in the Separation on Powers in EU Foreign Relations' in Eleftheria Neframi and Mauro Gatti (eds) *Constitutional Issues of EU External Relations Law* (Nomos, 2018) 199–230.

7 Ramses A Wessel, 'The EU as a party to international agreements: shared competences, mixed responsibilities' in A Dashwood and M Maresceau (eds) *Law and Practice of EU External Relations: Salient Features of a Changing Landscape* (Cambridge University Press, 2008) 152–87, at 152.

8 Treaty of Lisbon (2007) OJ C 306, 17.12.2007.

9 Marise Cremona, 'External Relations and External Competence of the European Union: The Emergence of an Integrated Policy' in Paul P Craig and Grainne de Búrca (eds) *The Evolution of EU Law* (2nd edn Oxford University Press, 2011) 217–68.

10 For the situation before the entry into force of the Lisbon Treaty, see Ramses A Wessel, 'The EU as a Party to International Agreements: Shared Competences, Mixed Responsibilities', in A Dashwood and M Maresceau (eds) *Law and Practice of EU External Relations: Salient Features of a Changing Landscape* (Cambridge University Press, 2008), 152–87.

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The Treaty Establishing the European Community[11] was replaced by the Treaty on the Functioning of the European Union (TFEU),[12] and the Treaty on European Union (TEU)[13] has also been amended. In terms of changes, the Treaty of Lisbon has declared the international legal personality of the EU (Art. 47 TEU), making it possible for the EU itself to conclude international treaties. In addition, Member States also retain their state features and are continuously able to conclude international agreements in their own names[14] together or without the participation of the EU.[15]

Nowadays, the main controversy behind the debate concerning international agreements is the status and the legal basis[16] of different types of international agreements[17] within the European legal order. These issues are not clarified by the founding treaties *expressis verbis,* and therefore the picture in this area is quite complex and sometimes inextricable.

Most recently, the Agreement on the Unified Patent Court (UPC Agreement) aiming at the creation of the European patent with unitary effect through enhanced cooperation[18] has revived the related debates and the assessments given by the Hungarian and the German constitutional courts concerning its ratification highlighted the difficulties of the theoretical debate. Considering that the UPC Agreement establishes a common court (Unified Patent Court, UPC) for the settlement of disputes relating to European patents with unitary effect, with exclusive competence on a number of issues, the UPC is intended to become part of the judicial system of the participating Member States. Nevertheless, the peculiarity of the UPC Agreement compared to other classical international agreements is that a transfer of competence and sovereignty takes place with the transfer of the most important patent-related judicial issues to the UPC. Therefore, it is useful to review some dogmatic points of this topic together with the reactions of the German and Hungarian Constitutional Courts.

As a common feature, both constitutional courts concluded that under the conditions examined, the UPC Agreement cannot be ratified. However, despite the congruent results, the reasoning of the two courts seems to be totally different: while the German court formulated procedural requirements, its Hungarian counterpart looked at the substantial aspects. In order to understand the constitutional challenges to the UPC Agreement, this article will first give an overview of the types of international treaties in EU law (Section 2), followed by the assessment of the enhanced cooperation form (Section 3). On this basis, Section 4 will review the characteristics of the UPC and Section 5 will contrast the evaluations given by the Hungarian and German constitutional courts.

2. Types of international treaties in EU law

International treaties related to the EU raise a specific dogmatic problem from the point of view of constitutional law. In contrast, from the point of view of European law, their characterization seems easier: according to the case law[19] of the Court of Justice of the European Union (CJEU), agreements concluded by the Union (with or without the participation of the Member States as contracting partners) are located between primary law and legislative acts in the hierarchy of European norms. However, several theoretical situations can be distinguished as the range of international treaties is very diverse: they can be concluded solely by the EU, or by both the EU and the Member States, or simply by the Member States. As a result, this variety leads to huge legal dilemmas concerning their constitutional evaluation.

First of all, some of the international agreements are concluded by the EU within its external competences based on the rules of classical international law. In this

11 Treaty establishing the European Community (consolidated version 2006) OJ C 321E, 29.12.2006 (hereinafter EC Treaty).

12 Treaty on the Functioning of the European Union (Consolidated version 2016) OJ C 202, 7.6.2016.

13 Treaty on European Union (Consolidated version 2016) OJ C 202, 7.6.2016.

14 Bruno De Witte, 'Exclusive Member States' Competences—Is There such a Thing?' in Sacha Garben and Inge Govaere (eds) *The Division of Competences between the EU and the Member States: Reflections on the Past, the Present and the Future* (Hart Publishing, 2017), 59–73.

15 Joni Heliskoski, 'Mixed Agreements: The EU Law Fundamentals' in Robert Schütze and Takis Tridimas (eds) *Oxford Principles of European Union Law—Volume I* (Oxford University Press, 2018), 1174–207.

16 Joni Heliskoski, 'The Exercise of Non-Exclusive Competence of the EU and the Conclusion of International Agreements' in Koen Lenaerts *et al.* (eds), *An Ever-Changing Union? Perspectives on the Future of EU Law in Honour of Allan Rosas* (Hart Publishing, 2019), 293–310.

17 Inge Govaere, 'To Give or To Grab: The Principle of Full, Crippled and Split Conferral of Powers Post-Lisbon' in Marise Cremona (ed) *Structural Principles in EU external relations law* (Hart Publishing, 2018), 71–91.

18 Bernd Martenczuk, 'Variable Geometry Union: How Differentiated Integration is Shaping the EU' (2013) 66(3) *Studia Diplomatica* 83–100.

19 The Union's international agreements cannot be contradictory to primary EU law. The CJEU under Article 218 (11) TFEU, ex ante may examine the compatibility of a proposed international agreement with the provisions of the Treaties (see: Opinion 2/94, EU:C:1996:140, 3. para; Opinion 1/08, EU:C:2009:739, 107. para; Opinion 1/09, EU:C:2011:123, 47. para; Opinion 2/13, ECLI:EU:C:2014:2454, 145. para). Consequently, these agreements rank in the hierarchy of EU legal sources is below the primary sources. However, from the experience of annulment proceedings and preliminary ruling proceedings (C-308/06, Intertanko and Others ECLI:EU:C:2008:312 45. para; C-344/04 - IATA and ELFAA, ECLI:EU:C:2006:10 39. para) before the CJEU we can conclude that the invalidity of a secondary source of EU law may be based on a conflict with an international treaty. Therefore, the international treaty is above the secondary law in the hierarchy.

case, only the EU as a separate entity concludes the international treaty with third countries.[20]

In such cases, the international treaty also prevails in the Member States as a European source of law. Such agreements are mainly concluded in cases where the area of law to be regulated falls within the exclusive competence of the EU. In addition, however, the situation may become more complicated by the fact that Member States may also conclude agreements if the EU authorizes them to do so. Therefore, it is difficult to separate this type of treaties from the so-called 'mixed agreements' where both the EU and the Member States are contracting parties. In order to understand the fine differences, one needs to concentrate on the type of the competence that the EU has exercised: an exclusive one or a shared one.

Nevertheless, most often, the EU has exclusive competence to conclude an international treaty. The EU's exclusive competence may be based on a provision of the TFEU[21] or a legislative act of the Union.[22] In addition, one can also draw conclusions from the case law of the CJEU: if the Union has the possibility to regulate an issue internally, it is also entitled to act in the related external relations in accordance with the principle of implied competence.[23] The EU shall have exclusive competence for the conclusion of an international agreement when its conclusion is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope[24] (AERTA-ERTA principle[25]).

Furthermore, the most complicated relationships arise when mixed agreements are reached. In this case, an international treaty is concluded by the EU together with one or more Member States, so both the EU and the Member States are contracting parties. However, it can also happen that the Member States are not contracting parties but ratify the treaty concluded by the EU.[26]

The mixed agreements can be divided into different subtypes. The distinction may be based on the exercised competences, the normative force of the legal source and the type of enforcement in Member State and EU law. These bilateral or multilateral international agreements create many complications in terms of the division of competences and responsibilities between the EU and its Member States,[27] and their legal position is unclear in connection with their transposition into national law, especially in Member States where the dualistic approach is accepted concerning the legal status of international treaties.

Last but not least, the category of the international treaties concluded only by the Member States cause dogmatic problems, too. At first glance, these agreements seem to be the furthest from European law and consequently, they are not relevant to European obligations. This might be true in generally, although in some cases they also have an impact on EU law.[28] For example, one may encounter the case where only the Member States conclude an international treaty to achieve or further develop certain EU objectives.[29] Such a special case is the issue of enhanced cooperation.[30]

3. Enhanced cooperation

A special case of the last-mentioned type of treaties is the so-called enhanced cooperation provided for in the treaties. From the EU's point of view, these treaties are in any case linked to the EU's objectives and to the deepening of the integration through a flexibility that allows Member States to decide whether to participate or not in the enhanced cooperation initiative. Enhanced cooperation is a procedure where a minimum of nine Member States are allowed to establish an advanced integration or cooperation in an area within EU structures but without the other EU countries being involved. Authorization to proceed with the enhanced cooperation is

20 International agreement with third country, see eg: Agreement between the European Union and the Government of the People's Republic of China on Cooperation on, and Protection of, Geographical Indications. OJ LI 408/3, 4.12.2020. (Bilateral agreement); International agreement with international organization see eg: Framework Agreement between the European Union and the United Nations for the Provision of Mutual Support in the context of their respective missions and operations in the field. OJ L 389/2, 19.11.2020 [legal basis Article 41(2) of TEU]; Arrangement between the European Union and the Swiss Confederation on the modalities of its participation in the European Asylum Support OJ L 65/22, 11.3.2016 (legal basis: secondary legislation); International agreement in opt out situation: Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters OJ L 195, 18.7.2013.

21 In generally: Article 3 (1) TFEU, in specific cases: Article 8 (2) TEU, Article 49 TEU, Article 217 TFEU.

22 On the basis of Article 3 (2) TFEU.

23 See Federal Republic of Germany and others v Commission of the European Communities, Joined cases 281, 283, 284, 285 and 287/85, ECLI:EU:C:1987:351 28-31 para.

24 Article 3(2) TFEU.

25 See Commission v. Council (AETR-ERTA), Case 22/70, ECLI:EU:C:1971:32. 15-16. para, and Opinion 1/94. ECLI:EU:C:1994:384, and Opinion 2/92. ECLI:EU:C:1995:83.

26 Blutman László, 'Az uniós nemzetközi szerződések alkotmányos helye' (2019) 74(7–8) *Jogtudományi Közlöny* 293–301, at 294.

27 Mohay Agoston, 'The Status of International Agreements Concluded by the European Union in the EU Legal Order' (2017) 33 *Pravni Vjesnik* 151–64, at 151.

28 See Article 34(2) TEU, Article 165(3), 166(3), 167(3), 168(3), 191(4), 209, 212(3) and (4) TFEU.

29 Blutman (n 22), 294.

30 Articles 20, 44-46 TEU, 82-83, 86-87, 326-334 TFEU.

granted by the Council, on a proposal from the Commission and after obtaining the consent of the European Parliament.

This form of cooperation is in a close relation with the concepts of 'variable-geometry Europe' or 'multi-speed Europe'[31] that describe the idea of a differentiated integration within the EU. That is to say, enhanced cooperation acknowledges that there may be irreconcilable differences among the visions of the Member States regarding the further deepening the cooperation within the EU and represents a flexible tool in order to overcome the different intentions. Therefore, it was not a surprise that it emerged that the EU recovery plan following the pandemic would have also been adopted in this form after the veto of Hungary and Poland.[32]

Nevertheless, international treaties concluded by the Member States among themselves seem to be an excellent way to further develop the EU, as such a cooperation will quite likely become part of the EU acquis in the future.[33] Moreover, the special form of enhanced cooperation has been used in the field of divorce law,[34] concerning the property regimes of international couples,[35] the European Public Prosecutor's Office, which seeks to protect the financial interests of the EU more intensively,[36] and it is approved for the field of a financial transaction tax. Yet, this mechanism was adopted for the European patent with unitary effect, too.[37]

From a constitutional point of view, however, the dilemma arises for each of these treaties individually as to whether they belong to the sphere of the European law or to public international law. Or, in other words, are they so closely linked to the European law that they should be classified under the constitutional clause dealing with European matters,[38] or they are only covered by the clause concerning international law? This question arose in the case of the UPC in two Member States of the EU, where the constitutional courts had to answer the issue whether the UPC Agreement fell under the scope of *Article E* or *Article Q* of the Fundamental Law of Hungary, and similarly, of Article 23 or Article 25 of the German *Grundgesetz* (GG).

4. What is at stake?

The UPC is a supranational judicial forum for litigation concerning the infringement and validity of European patents, set up under the form of enhanced cooperation by a group of EU Member States. This was preceded by the 1973 Munich Convention on European Patents, which already provided for the establishment of a common court. However, the Convention was not limited to EU Member States, so the CJEU ruled on the draft international agreement prepared for this wider range of participants to be incompatible with the EU law.[39]

Furthermore, the already existing European patent granted by the European Patent Office is rather a bundle of separate national patents which has to be validated in each participating country individually paying a separate fee for translation and renewals, and whereby legal disputes in one country do not have any impact in other states. To reduce costs and make the European market more competitive, the so-called European patent with unitary effect was created, with limited translation requirements and a single renewal fee for the whole territory of all contracting Member States. In this regard, the unitary effect goes together with the uniform protection provided by a single court with jurisdiction over the entire territory of the participating states, for legal disputes concerning patent infringement, revocation, declarations of non-infringement and damages.

In light of the views expressed in the opinion of the CJEU, the UPC Agreement was finally drafted in 2013. As a result, only Member States are allowed to become contracting parties. In addition, it was also required that the UPC's forum system shall initiate preliminary ruling procedures to ensure the coherence of EU law similarly to national courts.[40] That is to say, from the point of view of the EU law, the forum system is seen as a common court of the Member States[41] and qualifies as a national court.[42]

31 Giandomenico Majone, 'Unity in diversity: European Integration and the Enlargement Process' (2008) 33 *E.L. Review* 457–81, at 463–364.

32 Silvia Merler and Francesco Nicoli, 'Beyond the Veto of the EU Recovery Fund' *VerfBlog,* (2020/11/27), Available at https://verfassungsblog.de/beyond-the-veto-of-the-eu-recovery-fund/ (accessed 20 December 2021).

33 For example, the development of the *Shengen acquis,* the Prüm Convention or the European Stability Mechanism.

34 Council Regulation (EU) No. 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (Rome III Regulation).

35 Regulations EU 2016/1103 for married couples and EU 2016/1104 for registered partnerships.

36 Article 86 TFEU.

37 Regulation (Eu) No 1257/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection. 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.

38 Nóra Chronowski and Attila Vincze, 'Az Alkotmánybíróság az Egységes Szabadalmi Bíróságról – zavar az erőben' (2018) 73 *Jogtudományi Közlöny* 477–85, at 482.

39 Opinion 1/09, 8 March 2011, EU:C:2011:123.

40 Article 21 of the UPC Agreement.

41 Ld. C-196/09 Paul Miles v Écoles européennes. ECLI:EU:C:2011:388 p. 40; C-337/95 Parfums Christian Dior SA and Parfums Christian Dior BV v Evora BV. ECLI:EU:C:1997:517 p. 21.

42 Article 21 of the UPC Agreement.

Consequently, the CILFIT criteria[43] also apply in its case, ie it is optional in the proceedings at the first instance, while in the proceedings before the Court of Appeal it is mandatory to initiate a preliminary ruling procedure if the questions of interpretation of the EU law are not clear.

The question whether the UPC Agreement should be promulgated under the EU law or international law is in connection with the judicial monopoly of the countries. The purpose of the UPC Agreement is to establish a system of exclusive forums concerning the so-called litigation relating to European patents with unitary effects and European patents. This means that the system of national patents and European patents granted by the European Patent Office will continue to exist, but the patentee may apply for the registration of a unitary patent in the territory of all the Member States participating in the enhanced cooperation one month after obtaining the European patent. In addition, patents may be uniformly transferred, annulled or terminated in respect of those Member States.[44]

In terms of the structure of the forum system, the UPC is composed of local divisions that can be formed by any Member State or regional divisions at the initiative of several Member States. In addition, the Central Division consists of the Court of First Instance and the Court of Appeal. The Court of First Instance will be based in Paris, but in principle two specialized divisions would be set up in Munich and, in the original plans, in London,[45] while the Court of Appeal will be based in Luxembourg. In addition, the mediation and arbitration centre will be based in Ljubljana and Lisbon, while the judiciary training academy will be based in Budapest.[46]

The UPC will have internationally composed panels that also provide technical expertise. Judge candidates are nominated by a so-called Advisory Committee, from which the judges are appointed by the Administrative Commission.[47] In taking their decisions, they shall act in accordance with the UPC Treaty, the EU law, the Munich Convention, national law and other international agreements concluded by the Member States.[48]

5. Constitutional assessment

The entry into force of the UPC Agreement, on which the entry into force of two related EU regulations also depends,[49] requires ratification from at least 13 Member States, including the three Member States where most European patents were in force in 2012.[50] The reason for initiating the constitutional court proceedings in both Hungary and Germany was the issues arising from the ratification process.

5.1. The hungarian ruling

As regards the treaties concluded by the Member States, two such cases have been decided by the Constitutional Court of Hungary (HCC) both in the form of the so-called 'abstract interpretation of the constitution' proposed by the Government. The first case was Decision 22/2012. (V. 11.) CC on the European Stability Pact,[51] and the second was in connection with the ratification of the Agreement on a Unified Patent Court.[52] In Decision 22/2012. (V. 11.) CC, the HCC stated:

> 'any contract that leads to the further transfer of Hungary's powers specified in the Fundamental Law through the joint exercise of powers through the institutions of the European Union requires authorization by a two-thirds majority of the members of Parliament. In other words, *Article E* (2) and (4) apply not only to the Accession Treaty and the founding treaties, or to their amendment, but also to all treaties in the drafting of which Hungary is already participating as a member state in the reform of the European Union. […] The contract to be considered as such can be determined on a case-by-case basis by the subjects of the contract, its subject matter, the rights and obligations arising from the contract'.[53]

This decision of the HCC was in line with the decision given by the Constitutional Court of Germany (BVerfG)

43 C-283/81. Srl CILFIT és Lanificio di Gavardo SpA v Ministero della sanità ECLI:EU:C:1982:335. Katalin Gombos, 'Tudósítás az Európai Bíróság előtti Cartesio ügyről' (2009) 64 *Jogtudományi Közlöny* 234–40. Ernő Várnay, 'Az ACTE CLAIR-tan és a CILFIT-feltételek, avagy az előzetes döntéshozatalra irányuló előterjesztési kötelezettség korlátozott korlátozása' (2005) 52 *Magyar Jog* 95–108.

44 The three official languages are English, French and German. Under the Translation Regulation, a European patent with unitary effect does not require any translation other than the grant of the European patent and the publication of its description in one of the three official languages. Up to €500 will be provided for translation support for applicants who have not submitted an application in one of these three official languages but in another official language of the EU.

45 Following the withdrawal of the United Kingdom from the European Union, it was also announced on 27 February 2020 that the United Kingdom would not participate in the Unified Patent Court, despite the signing and ratification of the UPC Agreement.

46 Mihály Ficsor, 'Az Egységes Szabadalmi Bíróságról szóló megállapodás – alkotmányossági nézetben' (2017) 72 *Jogtudományi Közlöny* 1–15, at 4.

47 Articles 11-16 of the UPC Agreement.

48 Convention on the Grant of European Patents of 5 October 1973.

49 Regulation (EU) No 1257/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection. 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.

50 These are Germany, France and—after the Brexit—Italy. By the end of 2018 13 ratifications were done including from France and Italy.

51 Ficsor (n 37), 11–15.

52 OJ C 175, 20.6.2013, 1–40.

53 Decision 22/2012. (V. 11.) CC, Reasoning [50]–[51].

on the same topic.[54] Despite the existing clarification given in 2012, the Government of Hungary appealed again to the HCC for an abstract constitutional interpretation concerning the Unified Patent Court. At this time, the approach of the HCC seems to be different from the BVerfG's assessment.

In Decision 9/2018. (VII. 9.) CC (DecCC), the HCC established that such an international agreement created in the framework of enhanced cooperation which transfers to an international institution not included in the founding treaties of the EU the jurisdiction of adjudicating a group of private law disputes under Article 25 paragraph (2) point (a) of the Fundamental Law[55] is not allowed. In this regard, the HCC emphasized that such a transfer would subtract the adjudication of such legal disputes, as well as the constitutional review under Article 24 paragraph (2) points (c) and (d)[56] of the judicial decisions adopted in such disputes, from the jurisdiction of the Hungarian State, which cannot be accepted under the current constitutional framework.

The HCC ruled that one of the two abstract constitutional issues raised in the petition concerned whether the court considered enhanced cooperation to be part of the EU law or treated it as a treaty concluded under international law. As a consequence, the second issue to be decided was the validity requirements of the ratification of the signed international treaty. In order to answer these questions, the HCC first of all took into account the decision of the CJEU 1/09 and relied on the scope of its previous case law established in Decisions 22/2012. (V. 11.) CC and 22/2016. (XII. 5.) CC.[57] It quoted the 'presumption of sovereignty'[58] and also reviewed the rules on enhanced cooperation in the TFEU.

On the basis of all of the above, the HCC considered the form of enhanced cooperation to be subject to a special assessment in the sense of public law. According to the HCC, the presumption of reserved sovereignty requires a restrictive interpretation and 'until an international treaty concluded by the Member States becomes part of the EU acquis, it is necessary to examine whether *Article Q* of the Fundamental Law or *Article E* of the Fundamental Law provides it with a constitutional legal basis'.[59] According to the HCC, enhanced cooperation can be considered both part of EU law and international law: it can be considered part of EU law if its legal basis can be found in the founding treaties, which the Government must examine in the specific cooperation initiatives.[60]

The court added that, acting within the competence of abstract interpretation of the constitution, it cannot decide on the legal nature of the UPC Agreement. However, it stated in principle that 'a distinction should be made between the forms of cooperation that merely aim to implement the competences already listed in the founding treaty, and the forms of interstate cooperation that go beyond the above—with regard to their level of institutionalization—: when the international agreement to be ratified aims to set up an institution, which is not part of the Union's institutional structure but which exercises public authority and thus it may make decisions binding the Member States, the Government proposing the bill on promulgating the international agreement should examine whether the competence to set up the institution has already been specified in the founding treaties of the European Union'.[61]

If so, the legal basis for the promulgation of an international treaty implementing the founding treaty is *Article E* of the Fundamental Law according to Decision 22/2012. (V. 11.) CC. Accordingly pursuant to *Article E*, paragraphs (2) and (4), the international treaty may be promulgated by a two-third majority. That is to say, if the Government considers that the founding treaties of the EU have already determined the legal basis for the institution to be established in the framework of enhanced cooperation, the basis for promulgating an international treaty is *Article E* of the Fundamental Law, and in all other cases it is *Article Q* of the Fundamental Law.

Nevertheless, concerning the second question, the HCC also added to the promulgation under *Article Q* that it would be conditional as it requires the amendment of the Fundamental Law. The reason behind this statement is that no agreement may be promulgated, which affects the chapter of the Fundamental Law on domestic courts to such an extent. Such a transfer of powers under international law outside the EU structure can only

54 BVerfGE 131, 152.

55 'Courts shall decide on *a)* criminal matters, civil disputes, and on other matters specified in an Act […]'. Article 25 paragraph (2) of the Fundamental Law of Hungary.

56 Article 24 paragraph (2) points (c) and (d) of the Fundamental Law of Hungary define two competences of the HCC: point (c) specifies the constitutional complaint procedure addressed against the applied laws in a particular case, while point (d) provides the constitutional background for the so-called 'genuine constitutional complaint procedure', ie the HCC's power to review the conformity with the Fundamental Law of the ordinary court decisions themselves.

57 Decision 22/2016. (XII. 5.) CC represents a turning point in the jurisprudence of the HCC in relation to European law. Contrary to its previous, rather EU friendly approach, the HCC formulated three reservations *vis-á-vis* EU law ie a fundamental rights reservation, a sovereignty test that is basically an *ultra vires* reservation and a constitutional identity reservation. For a commentary, see: Beáta Bakó: 'The Recycling of the German Federal Constitutional Court's Case Law on Identity-, Ultra Vires- and Fundamental Rights Review of Hungary' (2018) 78(4) *ZaöRV* 863–902.

58 Decision 22/2016. (XII. 5.) CC, Reasoning [60].

59 DecCC. Reasoning [31].

60 DecCC. Reasoning [32].

61 Ibid.

be announced with an amendment to the Fundamental Law.[62] In this regard, the HCC took into account, on the one hand, that the UPC to be established would apply not only EU law in its proceedings but also international treaties ratified by Member States and national law. Thus, by ratifying the international treaty Hungary establishes a 'common court' that applies national law in a specific group of cases.[63] The operation of a such an international forum would complement the domestic court structure, which means that the decisions of the resulting international court are removed from the domestic system of legal remedies and thus also from the constitutional review procedures.[64]

On the other hand, the HCC also took into account that, although Hungary recognizes the jurisdiction of several international judicial forums, the common feature of these forums is that they typically examine an international or European legal issue, and if the case is decided on the merits and by binding force, signatory states themselves are also present as a party to the dispute.[65] In the present case, however, an international treaty confers binding exclusive jurisdiction on an international forum to hear direct actions between individuals.[66]

As a related argument, the HCC also pointed out that the typical case of international agreements establishing a judicial forum is that the established forum performs a special remedy function. In contrast, in the present situation, the peculiarity of the international special court established for a group of cases is that not only the legal remedy but also the main case is transferred to the special court, from which the HCC concluded that such a special system of judicial forum established by an international agreement necessarily affects the chapter of the Fundamental Law on domestic courts.[67] However, Article 25 (2) (a) of the Fundamental Law states, without exception, that all domestic private disputes are decided by domestic courts. In addition, Article 25 (7) of the Fundamental Law states that in certain disputes other bodies may decide the cases but, according to the assessment of the HCC, that paragraph does not allow an exception of an international nature but provides the constitutional basis for alternative dispute resolution procedures.[68]

Thus, the HCC concluded that an international treaty conferring jurisdiction to hear a group of private disputes under Article 25 (2) (a) of the Fundamental Law may not be promulgated under *Article Q*, to which as an additional argument it also added that this means that judicial decisions made before the international forum system are also excluded from the constitutional review that could be carried out by the Constitutional Court.[69]

5.2. The German ruling

In 2019, the BVerfG also had to rule on the constitutionality of the German law promulgating the UPC Agreement.[70] It is noteworthy that paragraph 17 of the decision briefly made a reference on the HCC's Decision 9/2018 as well.

Nevertheless, the BVerfG has maintained its previous practice[71] of assessing the ratification of international agreements that are linked to the EU's integration objectives on the basis of Article 23 (1) of the GG, that is to say, the EU clause.[72] Thus, this ruling clearly classified the enhanced cooperation concerning UPC under the European clause of the GG and—in contrast to its Hungarian counterpart—did not establish an institutional exception among the EU international agreements concluded by the Member States to be classified under Article 24 (1) of the GG on international law.

Concerning the involvement of EU law, the court noted that the UPC fits into the EU's integration agenda and strengthens EU law objectives whose incorporation into EU law has failed to find the necessary political majority so far. The UPC has a direct primary legal relationship with the Union through Article 262 TFEU. This provides for the transfer of jurisdiction over European intellectual property disputes to the CJEU but requires a unanimous decision by the Council and confirmation by the Member States. So far, there has not been enough political will to apply this. Now, there is an agreement that

62 The only parallel justification attached to the decision is noted by Béla Pokol, according to whom the HCC should have declared in principle that *Article Q* of the Fundamental Law 'does not allow for the transfer of sovereignty.' DecCC. Reasoning [57]. However, this solution would have caused serious dogmatic problems. To exemplify, it is enough to refer on the NATO Treaty, which strongly limits the sovereign powers of the member countries. See Decision 5/2001. (II. 28.) CC, ABH 2001, 86. Tamás Molnár—Gábor Sulyok—András Jakab, '7. § [Nemzetközi jog és belső jog; jogalkotási törvény]' in András Jakab (ed) *Az Alkotmány kommentárja* (Budapest: , 2009), 257–87. László Blutman, 'Törésvonalak az Alkotmánybíróságon: mit lehet kezdeni a nemzetközi joggal?' (2019) 12 *Közjogi Szemle* 1–9.

63 DecCC. Reasoning [45].

64 DecCC. Reasoning [46].

65 DecCC. Reasoning [49].

66 Interestingly, the HCC merely considered it important to highlight private law disputes under Article 25 (2) (a) of the Fundamental Law, while the UPC will have the power of reviewing acts as well, ie administrative court functions under Article 25 (2) (b) of the Fundamental Law, too.

67 DecCC. Reasoning [51].

68 Act no. LX of 2017 on Arbitration.

69 DecCC. Reasoning [53].

70 2 BvR 739/17.

71 BVerfGE 131, 152.

72 According to the three judges who wrote a concurring opinion (justices Maidowski, Königin and Langenfeld) under Article 24 of GG a federal law passed by a simple majority may also transfer rights within the scope of sovereignty (*Hoheitsrechte*). In their view, it does not follow from the GG that in matters close to the EU the stricter EU requirements (2/3) would be needed to transfer these rights.

is open only to the Member States of the EU. The fact that not all Member States of the EU are contracting parties does not call into question the particular proximity of the EU's integration agenda; the form of enhanced cooperation itself also supports this line of argumentation.

In addition, the BVerfG stated that, where those treaties amend or supplement the content of the Grundgesetz, or allow such amendments or additions, they require a two-third majority of the legislature. This is in sync with the line of reasoning of the HCC presented in Decision 22/2012. (V. 11.) CC. In the present case, according to the BVerfG, the UPC Act brings about a substantial change in the constitution (*eine materielle Verfassungsänderung*); therefore, the transfer of patent jurisdiction will result in a change of GG. Under Article 92 of the GG, judicial power is exercised by the Federal Constitutional Court, the federal courts and the courts of the federal states. The transfer of jurisdictional functions to intergovernmental courts will change the allocation of jurisdiction and thus constitute a fundamental change to the constitution.

As a result, the BVerfG annulled the law promulgating the UPC for a procedural constitutional reason arising from a specific factual situation. The reason behind this is that democratic legitimacy is guaranteed by the transfer of sovereign rights (*formelle Übertragungskontrolle*) in the process of European integration only in the forms set out in Articles 23 (1) and 79 (2) of the GG. However, without the effective transfer of sovereign rights, measures subsequently adopted by the EU or a supranational organization have no democratic legitimacy. The basis for this was derived by the BVerfG from the first paragraph of Article 38 (1) of the GG, which states that 'the representatives of the Bundestag shall be elected by universal, direct, free, equal and secret ballot. Representatives represent the whole people, are not bound by a mandate or instruction and are subject only to their conscience'. As a consequence, the BVerfG stated, as it had done in several previous cases, that this provision gives citizens the right to participate in the legitimacy of state sovereignty.

However, in the concrete case the enactment of the law did not meet these criteria, as the UPC was not adopted with the approval of two-thirds of the members of the Bundestag: although the turnout in the Bundestag was 100 per cent, it can be proved by video that only 35 MPs were present at the vote.[73] As a consequence, following the decision of the German Const. Court BVerfG, the Bundestag had to vote again about the UPC Agreement: on 26 November 2020, it was accepted with a huge majority (571 to 73 votes). The final acceptance was given by the Bundesrat on 18 December 2020.[74]

6. Evaluation and open questions

A Hungarian researcher, Mihály Ficsor, drew attention to Decision 143/2010. (VII. 14.) CC, where the HCC indicated as a constitutional expectation that 'in the case of such far-reaching reforms, it is desirable that the treaties to be concluded be subject to a preliminary norm control'.[75] Although ultimately this was done not in the form of an *ex ante* judicial review but indirectly as a 'constitutional problem'[76] of an abstract constitutional interpretation procedure, the UPC Agreement was brought before the HCC similarly to the Treaty on Stability, Coordination and Governance in Economic and Monetary Union.

The system of criteria required for the application of *Article E* (2) and (4) in Decision 22/2012. (V. 11.) CC is as follows. According to the HCC, whether an international treaty falls within the scope of *Article E* may be determined:

> 'on the basis of the object and the subjects of the Treaty as well as the rights and obligations deriving from the Treaty. It is a necessary condition that Hungary, as the Member State of the European Union, should be a party to the treaty together with other Member States. It is a precondition that the treaty should cause the joint exercising of further competences, or exercising them through the institutions of the European Union. At the same time, it should not necessarily take place already at the time of putting the treaty into force; it's enough if it is an obligation depending on a condition. Provided that it is based on an international treaty, the requirement of qualified majority is also applicable to the implementation of the founding treaties and their supervision: it means that the implementing measures based on the

73 The HCC faced with a similar procedural unconstitutional situation in connection with one of the attempts of the Hungarian lawmaker to change the administrative judiciary of Hungary, see Decision 1/2017. (I. 17.) CC.

74 See: 'UPC – Progress on German ratification' (26 November 2020.), Available at https://www.unified-patent-court.org/news/upc-progress-German-ratification (accessed 20 December 2021).

75 Ficsor (n 37), 15.

76 The HCC after its Decision 31/1990. (XII. 18.) CC practices abstract interpretation of the Constitution only in case the petition meets the following requirements: the petition must come from the entitled body or person; they must initiate the procedure from the aspect of a specific 'constitutional problem'; and they must seek an interpretation of a specifically designated provision of the Constitution. Finally, the given 'constitutional problem' must be directly deductible from the constitution without the intervention of any legislative acts. However, it is problematic that in the present case the constitutional problem is the text of an international treaty intended to be promulgated, and therefore, the procedure can also be understood as a kind of hidden norm control procedure.

founding treaties (adoption of secondary legal acts) are not sufficient any more, and therefore the implementation tools need to be amended, or new tools are needed. It is not a condition, however, that the treaty specify itself as the European Union's'.[77]

Based on the above, the HCC examined the 'essential features' of the Stability Pact and indicated that a decision as to whether an international treaty falls within the scope of *Article E* (2) and (4) of the Fundamental Law is primarily the duty of the Government who drafts the law promulgating the agreement and of the Parliament who does the promulgation itself. Nevertheless, contrary to the abstract nature of the abstract interpretation procedure, the HCC made it quite clear that it perceives the Stability Pact as being classifiable under *Article E*.[78]

In contrast with the Stability Pact, the HCC did not decide on the legal nature of the UPC Agreement. At the same time, it undoubtedly allowed room for the Government and the Parliament to treat the agreement establishing a new forum system in the framework of enhanced cooperation as international law. The HCC examined the UPC Agreement and clarified one of the conditions set out in the precedent-setting decision.[79] That is to say, while the Stability Pact has given new tasks to the EU institutions, the UPC Agreement creates a new judicial structure outside the Union. In this respect, the HCC has held that this may continue to fall under *Article E* of the Fundamental Law but only if there is an appropriate legal basis in the EU founding treaties. Again, the examination of the latter has to be carried out by the Government and the Parliament, which will subsequently submit the promulgating act.

From our part, we think that there is indeed a margin of discretion in this regard. On the one hand, strong arguments can be put forward in favour of the fact that an agreement in the form of enhanced cooperation provided for in the EU Treaties, which is intended to strengthen the objectives of the Union, falls within the scope of *Article E*. On the other hand, there are also strong arguments that the institutional aspects of the UPC Agreement are different from those of the Stability Pact,[80] which has in fact given the EU institutions new powers. In addition, the UPC Agreement itself uses the legal fiction that the forum system to be set up acts from the EU point of view as a national court attached to the community of Member States, ie does not presuppose itself as part of European law.[81]

Nevertheless, even in the case of falling under international law, it seems to be problematic that the HCC considers that only an amendment of the Fundamental Law could allow the ratification of the UPC Agreement. The multilayered private international law governed by classical international treaties, EU law and the law of the Member States provides excellent examples of the rules governing jurisdiction concerning the settlement of private disputes or a group of private disputes. Many such international treaties are known in the field of jurisdiction.[82] The dissenting opinions of Egon Dienes-Oehm[83] and István Stumpf[84] also contain such examples from which we can conclude that the agreement with an international treaty on jurisdictional issues is not excluded from the classical relationship of private international law in EU law either.

All in all, while the BVerfG clearly treated the UPC Agreement as a European legal issue along the lines of the Stability Pact, the HCC could not take a clear position on whether it considered the treaty as falling under the scope of the EU law or international law. One explanation for this hesitation is the short room for manoeuver in the so-called abstract interpretation of the constitution procedure. However, one has to admit that the same procedure was not an obstacle in the case of the Stability Pact, and therefore, this hesitation also carries the possibility of dogmatic chaos. As we understand it, if the treaty is an EU law treaty, it must be promulgated by a two-third majority following the Decision 22/2012. (V. 11.) CC, while, if it is an international treaty, it can be promulgated by simple majority under *Article Q*. In contrast, the final decision of the HCC stated that an amendment to the constitution is necessary for the ratification of the UPC Agreement, and this position seems to be—in light of other international agreements—an excessive protection of sovereignty.

77 Decision 22/2012. (V. 11.) CC, Reasoning [51].
78 Ibid [55]-[56].
79 Blutman (n 22), 297.
80 Ficsor (n 37), 14–15.

81 "…it is something of a legal fiction because the UPC is clearly an international tribunal, not a national court". Richard Gordon and Tom Pascoe, The Effect of 'Brexit' on the Unitary Patent Regulation and the Unified Patent Court Agreement Brick Court Chambers 12 September 2016, Available at http://www.cipa.org.uk/EasySiteWeb/GatewayLink.aspx?alId=10869 (accessed 20 December 2021), at 33.
82 There are international agreements within the framework of the United Nations Commission on International Trade Law (UNCITRAL), the International Commission on Civil Status (ICCS), the Council of Europe, or the Hague Conference on Private International Law (HCCH) and also within the International Institute for the Unification of Private Law (UNIDROIT).
83 In his concurring opinion, Egon Dienes-Oehm points out the 1963 Geneva Convention on International Commercial Arbitration and the Washington Convention establishing a Permanent International Dispute Settlement Body in Investment Protection Matters (ICSID).
84 In his concurring opinion, István Stumpf mentions the Brussels and Lugano Conventions on the rules of jurisdiction in civil and commercial matters.

Nevertheless, the UPC Agreement can enter into force even without the ratification of Hungary, as its entry into force requires ratification from at least 13 Member States, including the three Member States where most European patents were in force in 2012. This objective is now in sight, with the ratification by the Austrian parliament in December 2021[85] of the Protocol to the Agreement on a Unified Patent Court on provisional application (PPA)—the 13th EU Member State to do so. The path for Hungary, however, remains uncertain.

85 See https://www.epo.org/news-events/news/2021/20211203a_fr.html (accessed 20 December 2021).