

Decision 9/2018 (VII. 9.) AB on the interpretation of Article E) paragraphs (2) and (4), Article Q) paragraph (3) and Article 25 of the Fundamental Law

The plenary session of the Constitutional Court, in the subject matter of the interpretation of the Fundamental Law – with concurring opinion by Judge *dr. Béla Pokol* and with dissenting opinions by Judges *dr. Egon Dienes-Oehm* and *dr. István Stumpf* – adopted the following

d e c i s i o n:

The Constitutional Court establishes: according to the provisions of the Fundamental Law in force, an international agreement created in the framework of enhanced cooperation, transferring to an international institution not included in the founding treaties of the European Union the jurisdiction of adjudicating a group of private law disputes under Article 25 paragraph (2) point a) of the Fundamental Law, thus drawing the adjudication of such legal disputes as well as the constitutional review under Article 24 paragraph (2) points c) and d) of the judicial decisions adopted in such disputes off the jurisdiction of the Hungarian State may not be promulgated.

This decision of the Constitutional Court shall be published in the Hungarian Official Gazette.

R e a s o n i n g

I.

- [1] 1. On behalf of the Government of Hungary, the Minister of Justice requested the Constitutional Court according to Section 38(1) of the Act CLI of 2011 on the Constitutional Court (hereinafter: ACC) to interpret Article E) paragraphs (2) and (4), Article Q) paragraph (3) and Article 25 of the Fundamental Law. In the context of the relevant provisions of the Fundamental Law, the Government raised the following concrete questions:
- [2] "I) Is the constitutional self-identity of Hungary – in particular Article 25 of the Fundamental Law on the judicial power – violated by promulgating, on the basis of Article E) paragraphs (2) and (4) of the Fundamental Law, an international treaty, which
- a) is not included among the founding treaties of the European Union and which is not considered a legal act of the Union, but the states parties of which can only be the Member States of the European Union,
 - b) is considered the precondition of effectively implementing an enhanced cooperation established in the framework of the EU law, and
 - c) sets up an international court structure, which
- ca) has exclusive jurisdiction in a specific group of cases delimited partly by EU law and partly by another international agreement with the intermediation of EU law,

cb) is empowered to interpret and apply the EU law, other international treaties concluded by the states parties – even with not states party Member States or with the participation of such states – and the national law, and

cc) offers legal remedies against its decisions solely within the court structure to be established.

[3] II) If the international treaty specified in point I) may not be promulgated on the basis of Article E) paragraphs (2) and (4) of the Fundamental Law, what are the conditions of promulgating it on the basis of Article Q) paragraph (3) of the Fundamental Law, in particular with regard to Article 25 of the Fundamental Law on judicial power?"

[4] 2. According to the petitioner, the interpretation of the relevant provisions of the Fundamental Law is necessary because of the potential ratification of the *Agreement on a Unified Patent Court* (hereinafter: "UPC Agreement").

[5] In the petition, the Government presented the background aimed at the European unification of national patents. In this context, it referred to the Munich Convention of 5 October 1973 on the Grant of European Patents, ratified by all Member States of the European Union, promulgated in the Act L of 2002 on the promulgation of the Munich Convention of 5 October 1973 on the Grant of European Patents (European Patent Convention). The convention was subsequently reviewed and promulgated in the Act CXXX of 2007 on the promulgation of the text reviewed in the year 2000 of the European Patent Convention (hereinafter: "EPC Agreement").

[6] Later on, the need for the development of a unified patent for the whole of the European Union emerged. The willingness to form cooperation in this respect was expressed in the Council Decision 2011/167/EU of 10 March 2011, authorising enhanced cooperation in the area of the creation of unitary patent protection. The aim of enhanced cooperation is to protect the interests of the Union and to strengthen the integration. For the purpose of implementing these aims the European Parliament and the Council adopted on 17 December 2012 the Regulation 1257/2012/EU implementing enhanced cooperation in the area of the creation of unitary patent protection and the Council adopted on 17 December 2012 the Regulation 1260/2012/EU implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements. The purpose of the regulations was to create a European patent of unified force effective in the territory of the Member States participating in the enhanced cooperation and the settlement of the linguistic issues related to the patents. As the regulations do not contain provisions on the adjudication of legal disputes, their entry into force is linked – for the purpose of securing their enforcement – to the entry into force of the UPC Agreement.

[7] With reference to the UPC Agreement, the petitioner explained that the Unified Patent Court (hereinafter: UPC) is a supranational judicial forum that shall act in the legal disputes relating to the infringement and validity of "traditional" European patents and European patents with

unitary effect. The UPC shall comprise a Court of First Instance and a Court of Appeal, and its decisions shall be enforceable in any Contracting Member State.

- [8] Although the Agreement has been signed by 25 Member States of the European Union – including Hungary –, still the UPC does not fall within the scope of Article 13 paragraph (1) of the Treaty on European Union (hereinafter: TEU) providing an exhaustive list of the institutions of the Union. Consequently the UPC is not an institution of the European Union and presumably it is an institution set up according to the general rules of international law. Nevertheless, according to Article 24 paragraph (1) of the UPC Agreement, the UPC shall act on the basis the EU law, the UPC Agreement, the EPC Agreement, other international agreements applicable to patents and binding all Contracting Member States, and the national law.
- [9] The entry into force of the UPC Agreement shall require the depositing of the instruments of accession (ratification) by at least 13 signatory States. As a further precondition of entry into force, the ratifying states shall include the three States in which the highest number of European patents was in force in the year preceding the year in which the signature of the UPC Agreement took place – i.e. the year 2012 – (these countries are Germany, France and the United Kingdom). The UPC Agreement shall enter into force on the first day of the fourth month calculated from the fulfilment of the above conditions, or on the first day of the fourth month after the date of entry into force of the amendments to Regulation of 12 December 2012 (EU) No 1215/2012 of the European Parliament and the Council on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters, concerning the relationship of this regulation with the UPC Agreement.
- [10] According to the Government, the concrete questions raised in the petition have a fundamental constitutional importance requiring the interpretation of the Fundamental Law, in particular the possibility to promulgate international treaties restricting or drawing off the powers of institutions listed in the Fundamental Law. In this respect, the legal character of the UPC Agreement is a preliminary question, i.e. whether the UPC Agreement is to be interpreted according to the international law or the law of the European Union. While the relevant regulations of the European Union set the entry into force of the UPC Agreement as a precondition of their own entry into force, the UPC Agreement is not considered a source of law of the European Union. Although the UPC Agreement has been concluded as an intergovernmental international treaty, only the Member States of the European Union may become its States parties. In this context, the Government makes a reference to the judicial practice of the Court of Justice of the European Union (hereinafter: CJEU), which interpreted the concept of the "institutions of the European Union" in the broad sense with regard to the damages caused by Union institutions, and it held that all institutions "acting on behalf and in the interest of the Union" should be considered bodies of the European Union. According to the petitioner, it is questionable whether Article 13 of TEU and Article E) of the Fundamental Law use the same phrasing; may a *sui generis* interpretation attributed to the term "through the institutions of the European Union" found in Article E) paragraph (2) of the Fundamental

Law, differently from the use of concepts in the founding treaties of the European Union; and whether the UPC Agreement falls under the force of Article E) paragraphs (2) and (4) of the Fundamental Law.

- [11] On the other hand, with account to the circumstances of the entry into force of the UPC Agreement, it is a question how can the term "jointly with other Member States" set forth in Article E) paragraph (2) be enforced, since ratification by only thirteen Member States would be sufficient for the entry into force of the UPC Agreement and actually only twenty-five Member States signed the Agreement.
- [12] Moreover, according to the petitioner, Article 118 of the Treaty on the Functioning of the European Union (hereinafter: TFEU) does not list the power to set up the Patent Court as it only refers to "the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union and for the setting up of centralised Union-wide authorisation, coordination and supervision arrangements" as well as to establish "language arrangements for the European intellectual property rights". According to the Government, where – on the basis of the above – the UPC Agreement should be interpreted not in the framework of Article E), it shall have a decisive effect on the conditions of the possibility of publication. However, if the UPC Agreement indeed fell within the scope of Article E) paragraphs (2) and (4) of the Fundamental Law, it would be necessary to carry out the test elaborated in the Decision 22/2016. (XII. 5.) AB (hereinafter: "CCDec 1") on affecting constitutional self-identity. In this framework, the interpretation of the Fundamental Law may ensure that the UPC Agreement's rules of procedure on deciding in legal disputes in patent cases do not infringe the order of constitutional institutions and values enshrined in the Fundamental Law. As noted by the petitioner, the examination of it may also be necessary if the UPC Agreement is considered a sovereignty-transfer based on an international treaty rather than on a treaty of the Union.
- [13] The Government holds that in addition to the legal nature of the UPC Agreement the constitutional problem results from the fact that the UPC Agreement may affect Article 25 of Fundamental Law on judicial power, as it would result in a change in Hungary's court structure, which would be deductible neither from the Fundamental Law nor from any regulation contained in a cardinal Act. Essentially, the judicial monopoly of Hungarian courts would be changed: the UPC Agreement would draw a significant group of cases off the international jurisdiction of Hungarian courts and it would transfer such cases into the competence of UPC, enjoying exclusive material jurisdiction. Accordingly, although Article 25 paragraph (1) of the Fundamental Law determines the structure of the Hungarian court system, the UPC Agreement would break it up.
- [14] According to the Government, there are cases when, in a specific case, a foreign substantive law is applicable or a foreign judicial forum is to act, but it happens with regard to the specific features of the individual cases, or it may not exclude, only supplement, the procedure by Hungarian fora. Nevertheless, an agreement that would result in terminating the possibility to proceed by the courts determined in the Fundamental Law with regard to certain groups of

cases might raise the issue of the violation of Hungary's constitutional self-identity. In this context, the petitioner made a reference to paragraph [65] of the reasoning of CCDec 1 that acknowledged the exercising of judicial power as a part of constitutional self-identity.

[15] Taking the aforementioned arguments into account, the Government holds it necessary to examine whether the international treaties similar to the UPC Agreement – if they fall within the scope of Article E) paragraphs (2) and (4) of the Fundamental Law – raise the issue of the violation of constitutional self-identity.

[16] If, nevertheless, the international treaties with a character similar to that of the UPC Agreement do not fall within the scope of Article E) paragraphs (2) and (4) of the Fundamental Law, concerns related to the nation state's sovereignty may arise, affecting Article Q) of the Fundamental Law. In the latter case, as held by the Government, the Fundamental Law should be interpreted concerning the conditions along which an international treaty, affecting the organisational and the competence structure of the court system as well as subject-matters to be regulated in a cardinal Act, can be promulgated.

[17] In this respect, the petitioner explained – by making a reference to the judicial practice of the Constitutional Court – that the international law's effect of restricting the national law is realised due to the state's self-restriction rather than by way of a legal order placed above the states. In the petitioner's opinion, the Fundamental Law provides guidelines related to the conditions of restricting sovereignty only in respect of the Union law in Article E) paragraphs (2) and (4). At the same time, the Fundamental Law contains no explicit provisions whether there are special conditions of promulgating an international treaty affecting the structures enshrined in the Fundamental Law. The Government holds that any international treaty, which implies a restriction of sovereignty to an extent that results in drawing off powers vested on certain constitutional institutions to the benefit of another state, a supranational organisation or an international cooperation mechanism, should not be treated differently, as far as the sovereignty-transfer is concerned, than the essential regulation pertaining to Article E) paragraph (4) of the Fundamental Law. In any case to the contrary, a judicial forum set up in the framework of cooperation within the European Union would require more constitutional guarantees and a higher level of legitimacy on the basis of Article E) paragraph (4) of the Fundamental Law, than setting up a cooperation based on *sui generis* international law. With regard to the transfer of sovereignty, only the "receiving sides" of the transfer are different in these two cases, while from the aspect of the extent of waived sovereignty the two scopes of cases seem to be identical. According to the Government, the special conditions of validity accompanied to the sovereignty-transfer affecting the constitutional identity should be deducible from the Fundamental Law. On the basis of the aforementioned arguments, the Government holds that it requires the interpretation of the Fundamental Law to establish how the legislature should secure the requirements of publication when the structures, competences and principles enshrined in the Fundamental Law are affected.

II

[18] The provisions of the Fundamental Law to be interpreted:

"Article E) (2) In order to participate in the European Union as a Member State, and on the basis of an international treaty, Hungary may, to the extent necessary to exercise the rights and fulfil the obligations set out in the founding treaties, exercise some of its competences deriving from the Fundamental Law jointly with other Member States, through the institutions of the European Union.

[...]

(4) The authorisation for expressing consent to be bound by an international treaty referred to in paragraph (2) shall require the votes of two-thirds of all Members of Parliament."

"Article Q) (2) In order to comply with its obligations under international law, Hungary shall ensure that Hungarian law be in conformity with international law.

(3) Hungary shall accept the generally recognised rules of international law. Other sources of international law shall become part of the Hungarian legal system by promulgation in legal regulations."

"Article 25 (1) Courts shall administer justice. The principal judicial organ shall be the Curia.

(2) The courts shall decide on

- a) criminal cases, private law litigations and on other matters defined by an Act;
- b) the legality of public administration decisions;
- c) whether a local government decree is contrary to another rule of law and on its annulment;
- d) the establishment of the failure of a local government to comply with its law-making obligation based on an Act.

(3) In addition to those specified in paragraph (2), the Curia shall ensure uniformity of the application of the law by the courts, and make decisions on the unity of law which shall be binding on the courts.

(4) The organisation of the judiciary shall have multiple levels. Special courts may be established for particular groups of cases.

(5) The central responsibilities of the administration of the courts shall be performed by the President of the National Office for the Judiciary. The National Council of Justice shall supervise the central administration of the courts. The National Council of Justice and other bodies of judicial self-government shall participate in the administration of the courts.

(6) The President of the National Office for the Judiciary shall be elected by the Parliament from among the judges for nine years on the proposal of the President of the Republic. The President of the National Office for the Judiciary shall be elected with the votes of two-thirds

of the Members of the Parliament. The President of the Curia shall be a member of the National Council of Justice further members of which shall be elected by judges, as laid down in a cardinal Act.

(7) An Act may authorise other organs to act in particular legal disputes.

(8) The detailed rules for the organisation and administration of courts, for the legal status of judges, as well as the remuneration of judges shall be laid down in a cardinal Act."

III

- [19] 1. Article 24 paragraph (2) of the Fundamental Law determines the material competence of the Constitutional Court without mentioning within the points from a) to h) the competence to interpret the provisions of the Fundamental Law. However, according to point g), the Constitutional Court may exercise further competences laid down in a cardinal Act. Accordingly, Section 38 of the ACC regulates the material competence of interpreting the Fundamental Law. The petitioner initiated the Constitutional Court's procedure on the basis of Section 38 paragraph (1) of the ACC. According to this provision, "On the petition of Parliament or its standing committee, the President of the Republic, the Government, or the Commissioner of the Fundamental Rights, the Constitutional Court shall provide an interpretation of the provisions of the Fundamental Law regarding a concrete constitutional issue, provided that the interpretation can be directly deduced from the Fundamental Law." Thus, on the basis of the text of the ACC, only certain bodies (persons) may initiate the interpretation of the Fundamental Law and they may do so only in a petition of specific content.
- [20] The Constitutional Court had to examine whether the petition comes from an authorised body/person, whether it is aimed at the interpretation of a concrete provision of the Fundamental Law, whether it is connected to a concrete constitutional issue and whether the interpretation can be directly deduced from the Fundamental Law {Decision 8/2014. (III. 20.) AB, Reasoning [20]–[27], CCDec1., Reasoning [23]–[27]}.
- [21] The Constitutional Court concluded that the petition can be examined on the merits. The petition has been submitted by the minister of justice on behalf of the Government, on the basis of an authorisation incorporated in a Government Decree. On the basis of the petition, in order to answer the questions posed by the Government, the Constitutional Court had to address two concrete constitutional issues by way of interpreting three concrete provisions of the Fundamental Law.
- [22] According to the content of the petition, the first constitutional issue was whether the Constitutional Court considered the so called "enhanced cooperation" included in the law of the European Union, as a part of the Union law [thus whether the agreement setting up the court structure complying with the criteria specified in the first question falls within the scope of Article E) and whether it may violate the constitutional self-identity of Hungary], or the Constitutional Court handles it as a treaty concluded on the basis of international law [i.e. it

falls under Article Q)]. Consequently, the second question to be answered concerned the conditions of validity associated with the ratification of the signed international treaty (enhanced cooperation).

[23] The possibility of direct deduction from the Fundamental Law, as the next precondition of interpreting the Fundamental Law, was examined by the Constitutional Court with regard to the fact that it has always interpreted this material competence in the narrow sense, as without such an approach the interpretations of the Fundamental Law might result in the Constitutional Court undertaking the responsibilities of both the legislative and the executive powers, leading to a kind of governance by the Constitutional Court {Decision 31/1990. (XII. 18.) AB, ABH 1990, 137, 138., reinforced in: Decision 17/2013. (VI. 26.) AB, Reasoning [10]}. Therefore the Constitutional Court makes consequent efforts to exercise the material competence of interpreting the Fundamental Law by keeping a distance on the one hand from any completely abstract and unlimited interpretation of a constitutional provision and on the other hand from making a decision in any concrete case or interpreting a rule of law by way of the Fundamental Law's interpretation. The latter condition also serves the purpose of keeping a distance between the Constitutional Court and the duties of other branches of power [Decision 21/1996. (V. 17.) AB, ABH 1996, 74, 75.].

[24] In the Constitutional Court's opinion, the answer to the two abstract questions posed according to the content of the petition, can be deduced directly by way of interpreting the Fundamental Law – without involving any rule of law. It means that in acting in the material competence of interpreting the Fundamental Law the Constitutional Court provides a set of criteria to be applied concretely to the UPC Agreement by the Government and by the Parliament. In any case to the contrary the Constitutional Court would step beyond the limits of interpretation and it would perform an abstract normative control.

[25] 2. First of all, the Constitutional Court refers to the fact that upon the request of the Council of the European Union the CJEU examined the draft of the UPC Agreement and in its opinion No. 1/09 delivered on 8 March 2011 it concluded that the draft agreement on establishing a unitary system for the settlement of legal disputes in patent matters was inconsistent with the provisions of TEU and TFEU. The background of this argument was that the former draft agreement, by conferring on an international court which is outside the institutional and judicial framework of the European Union an exclusive jurisdiction to hear a significant number of actions brought by individuals, would deprive courts of Member States of their powers in relation to the interpretation and application of European Union law and the CJEU of its powers to reply, by preliminary ruling, to questions referred to it by those courts. According to the CJEU, this would have altered the essential character of the powers which the Treaties confer on the institutions of the European Union and on the Member States and which are indispensable to the preservation of the very nature of European Union law. As the result of this decision, the UPC Agreement published on 20 June 2013 in the Official Journal of the European Union sets forth in its preamble that: "CONSIDERING that, as any national court, the Unified Patent Court must respect and apply Union law and, in collaboration with the Court of

Justice of the European Union as guardian of Union law, ensure its correct application and uniform interpretation; the Unified Patent Court must in particular cooperate with the Court of Justice of the European Union in properly interpreting Union law by relying on the latter's case law and by requesting preliminary rulings in accordance with Article 267 TFEU;" Accordingly, Article 20 of the UPC Agreement lays down the primacy of Union law and Article 21 regulates requests for preliminary rulings for the purpose of the correct application of the Union law.

[26] The Constitutional Court has already dealt with the issue of those international treaties that are not included among the founding treaties of the European Union and that are not considered legal acts of the Union, but the parties of which can only be the Member States of the European Union. In the Decision 22/2012. (V. 11.) AB (hereinafter: "CCDec 2") the Constitutional Court reiterated that "for any treaty resulting in the further transfer of Hungary's powers specified in the Fundamental Law by way of exercising some of its competences jointly with the institutions of the European Union shall require an authorisation granted by the votes of two-thirds of the Members of Parliament. Accordingly, Article E) paragraphs (2) and (4) shall be applicable not only to the Treaty of Accession and the founding treaties or their amendments, but also to all treaties in the drafting of which – in the reform of the European Union – Hungary participates as a Member State. [...] It should be established case-by-case on the basis of the treaty's subjects and its subject matter, as well as the rights and obligations deriving from the treaty, which treaties shall fall in the above category" (Reasoning [50]–[51]).

[27] CCDec 2 was adopted upon the motion for the interpretation of the Fundamental Law submitted by the minister of justice in the context of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union. The petition requested the interpretation of the Fundamental Law's provisions in the context of a concrete constitutional issue, which was deducible from the Fundamental Law similarly to the present petition, without involving any other rule of law. The Constitutional Court pointed out in CCDec 2: "In the material competence aimed at interpreting the Fundamental Law, the Constitutional Court may not interpret the provisions of the Treaty in itself. The Constitutional Court – as stated in the petition as well – shall determine in which case an international treaty falls within the scope of Article E) paragraphs (2) and (4) of the Fundamental Law. However, in the course of the above, the Constitutional Court may draw attention to certain essential features of the Treaty that should be taken into account in making this decision. It shall not be considered an interpretation of the Treaty, as it is merely the determination of the circumstances to be weighed during the interpretation of Article E) paragraphs (2) and (4) in the context of the Treaty (Reasoning [53]).

[28] In this respect CCDec 2 also referred to the fact that "the bill aimed at promulgating the international treaty shall be proposed by the Government. Therefore it is the primary duty of the Government, as the proposer of the bill, and of the Parliament, as the drafter of the Act promulgating the international treaty, to take a position whether a certain international treaty shall fall within the scope of Article E) paragraphs (2) and (4) of the Fundamental Law. This shall not exclude the Constitutional Court's possibility to examine the adopted but not promulgated

Act regarding its compatibility with the Fundamental Law [Article 24 paragraph (2) item a) of the Fundamental Law" (Reasoning [58]).

- [29] In the present case, the international treaty behind the petition is being made in the form of enhanced cooperation. Article 20 of the Treaty on European Union and Articles 326-334 of TFEU contain the rules on enhanced cooperation. Accordingly, the Council shall provide authorisation to engage in enhanced cooperation on the proposal made by the Commission, after the approval of the European Parliament. In the framework of enhanced cooperation at least nine Member States develop further their integration cooperation in a specific area that belongs to the Union's structure without the obligation to join this cooperation. The legal acts adopted in the framework of enhanced cooperation shall only be binding upon the participating Member States. This flexible framework allows the signatory Member States to engage in cooperation at a pace different from those ones who do not take part in the enhanced cooperation, however, the enhanced cooperation should be compatible with the founding treaties and the law of the European Union.
- [30] In CCDec 1, the Constitutional Court established that "Article E) paragraph (2) of the Fundamental Law allows Hungary to exercise some of its competences, as a Member State of the European Union, by way of the institutions of the European Union. However, exercising the competences jointly is not unlimited as Article E) paragraph (2) of the Fundamental Law provides both for the validity of Union law with respect to Hungary, and for the limitation of the transferred or jointly exercised competences" (Reasoning [53]). According to CCDec 1, "by joining the European Union, Hungary has not given up its sovereignty but it only allowed for the joint exercising of certain powers, accordingly, the maintaining of Hungary's sovereignty should be presumed in the course of assessing the joint exercising of powers additional to the rights and obligations specified in the founding treaties of the European Union (presumption of maintained sovereignty)" (Reasoning [60]).
- [31] The presumption of maintained sovereignty requires restrictive interpretation: as long as the international agreement concluded by the Member States has not become part of *acquis communautaire*, it is to be examined in the case of an international agreement to be concluded by Hungary whether Article Q) or Article E) of the Fundamental Law provides the constitutional legal basis for it. In this respect, the Constitutional Court emphasizes that the concept of sovereignty can be interpreted in the context of internal relations within the state (of supreme power) and of external, international relations (sovereign equality). In the context of international law "the norms, principles and fundamental values of *ius cogens* together form a standard that all subsequent modifications of the Constitution and all future Constitutions should comply with" {Decision 61/2011. (VII. 13.) AB, ABH 2011, 290, 321. c.p. Decision 45/2012. (XII. 29.) AB, Reasoning [118], Decision 12/2013. (V. 24.) AB, Reasoning [35]}. In addition to that, the Constitutional Court agrees with the petitioner's statement that the international law's effect of restricting the national law is realised due to the state's self-restriction rather than by way of a legal order placed above the states. This has been formulated in Article Q) paragraph (3) second sentence of the Fundamental Law, according to

which "Other sources of international law shall become part of the Hungarian legal system by promulgation in legal regulations." (See for example Act I of 1999 on the accession of the Republic of Hungary to the North Atlantic Treaty and the promulgation of the Treaty's text.) However, the sovereignty transfer under Article E) paragraph (2) of the Fundamental Law is separated from international law and it requires distinct handling due to the *sui generis* nature of Union law.

- [32] It needs to be underlined in this respect that the form of enhanced cooperation should enjoy special consideration under public law. While the Union acts that provide the authorisation to form such cooperation and to implement it – such as the Council decision 2011/167/EU and the Regulation 1257/2012/EU of the European Parliament and of the Council on implementing enhanced cooperation – clearly fall within the scope of Article E) paragraph (2), as the sources of Union law, it is questionable whether further international treaties to be concluded in the framework of enhanced cooperation fall in the framework of Union law or they remain outside of that, in the realm of international law. This is a decision that cannot be made by the Constitutional Court in its material competence of the abstract interpretation of the Fundamental Law – without the involvement of a legal regulation. However, it can be established on abstract level that all international agreements to be concluded as a Member State of the European Union – including an agreement to be concluded in the framework of enhanced cooperation – are aimed at strengthening the process of integration, but 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 institutionalisation –: 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. If the answer is positive, the legal basis of promulgating the international agreement implementing the founding treaty shall be Article E) of the Fundamental Law in accordance with the criteria and the respective requirements related to the rate of voting specified in CCDec 2, while in other cases the legal basis shall be Article Q) of the Fundamental Law. Thus Hungary is free to conclude an international treaty the only states parties of which are Member States of the European Union and which creates an institution that applies the law of the European Union, however, all this shall only become part of Union law according to Article E) of the Fundamental Law, if its legal basis can be found in the founding treaties.
- [33] The Constitutional Court notes that the above interpretation is in compliance with the judgement of CJEU adopted on 5 May 2015 in a procedure where ten Member States – including Hungary – supported the European Parliament and the Council of the European Union (C-146/13 *Spain v. Parliament and Council* ECLI:EU:C:2015:298). In the quoted case, the Kingdom of Spain requested the annulment of 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, but CJEU dismissed the action.

- [34] In the plea in law, the Kingdom of Spain submitted that preservation of the autonomy of the EU legal order requires that the essential character of the powers of the European Union and of its institutions should not be altered by any international treaty. However, according to Spain, that could not be said to be the case concerned. The Kingdom of Spain asserted that there was no substantial difference between the UPC Agreement and the draft agreement creating a court with jurisdiction to hear actions related to European and Community patents, which the Court had held to be incompatible with the provisions of the EU and FEU Treaties in its Opinion 1/09. Spain also argued that the UPC does not form part of the institutional and judicial system of the European Union and that in acceding to the UPC Agreement, the participating Member States are exercising a competence which is now a competence of the European Union, in breach of the principles of sincere cooperation and autonomy of EU law. Since the entry into force of the Treaty of Lisbon, the European Union has the exclusive competence to conclude international agreements in so far as their conclusion may affect common rules or alter their scope. Indeed, the UPC Agreement both affects and alters the scope of Regulation No 1215/2012 and the Convention on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters, signed at Lugano on 30-October 2007.
- [35] On the other hand, the European Parliament observed that the contested regulation and the UPC Agreement do not constitute a breach of EU law. The UPC Agreement fulfils the two essential conditions required to preserve the autonomy of the EU legal order given that, first, the essential character of the powers of the European Union and its institutions is not altered and, second, that agreement does not impose any particular interpretation of the EU legal provisions contained therein on the European Union or on its institutions in the exercise of their internal powers.
- [36] The Council contended that the policy choice made by the EU legislature had been to link the European patent with unitary effect to the functioning of a distinct judicial body (the Unified Patent Court), thereby both ensuring consistency of case-law and providing legal certainty. According to the Council, there was no legal obstacle to the creation of a link between the European patent with unitary effect and the Unified Patent Court, a link which is explained in recitals 24 and 25 of the contested regulation. Moreover, as argued by the Council, there are several examples in legislative practice of cases where the applicability of a Union act has been conditional upon the occurrence of an event outside the scope of that act.
- [37] The CJEB, first of all, reminded the parties of the action for annulment that in accordance with Article 263 of TFEU, the CJEU shall examine the legality of legislative acts as well as the legal acts of the Council, the Commission and the European Central Bank, with the exception of recommendations and opinions, and the acts of the European Parliament and the European Council that have a legal effect on third persons. CJEU shall also examine the legality of the legal acts, adopted by the bodies or offices of the Union, having a legal effect on third persons.

Accordingly, in the framework of an action brought under Article 263 of TFEU, the CJEU does not have jurisdiction to rule on the lawfulness of an international agreement concluded by Member States and nor does it have jurisdiction to rule on the lawfulness of a measure adopted by a national authority. Consequently the arguments of Spain were rejected by the CJEU as being inadmissible.

[38] Therefore, according to the position taken by CJEU, as in the framework of an action brought under Article 263 of TFEU the CJEU "does not have jurisdiction to rule on the lawfulness of an international agreement concluded by Member States" (paragraph 101), one may conclude that the CJEU has also taken – indirectly – a position concerning the legal nature of the UPC Agreement to be concluded by the Member States.

[39] 3. The second constitutional issue raised by the Government is aimed at establishing the conditions of validity of promulgating an international agreement setting up an international court structure, which enjoys exclusive jurisdiction for a specific group of cases and applies both Hungarian law and foreign law, and offers legal remedies against its decisions solely within the court structure to be set up.

[40] Article Q) paragraph (1) of the Fundamental Law enshrines as a constitutional rule Hungary's obligation of international cooperation: "In order to establish and maintain peace and security and to achieve the sustainable development of humanity, Hungary shall strive to cooperate with all the peoples and countries of the world." Article Q) paragraph (2) of the Fundamental Law – similarly to the former Article 7 paragraph (1) of the Constitution – describes the conformity of Hungarian law with international law as a constitutional order. The *ex ante* way of ensuring this conformity is the sovereign decision on the accession to international treaties, i.e. concluding an international agreement. Procedure(s) by the Constitutional Court can be regarded as the *ex post* level of ensuring the conformity according to Article Q) paragraph (2), on the basis of Article 24 paragraph (1) of the Fundamental Law, which lays down that the Constitutional Court shall be the principal organ for the protection of the Fundamental Law.

[41] According to Article Q) paragraph (3) of the Fundamental Law, Hungary shall accept the generally recognised rules of international law; other sources of international law shall become part of the Hungarian legal system by promulgation in legal regulations. Act L of 2005 on the Procedure relating to International Treaties (hereinafter: "Act") contains detailed regulations on concluding international treaties and on recognizing their mandatory force. According to Section 7 paragraph (1) of the Act, the mandatory force of an international treaty may be recognized when, in the knowledge of the treaty's text, a relevant authorisation is granted by the Parliament if the international treaty falls in the Parliament's scope of duty and competence, or by the Government in the case other international treaties. As regulated in Section 7 paragraph (3), the international treaty shall fall in the Parliament's scope of duty and competence if it a) is an international treaty under Article E) paragraph (2) of the Fundamental Law, b) regulates a subject matter regulated by an Act of Parliament or which should be regulated, according to the Fundamental Law, by a cardinal Act or another Act of the

Parliament, or c) affects another issue that falls in the Parliament's competence according to Article 1 paragraph (2) items a)-c) and e)-k) of the Fundamental Law.

- [42] According to Section 4 paragraph (3) of the Act, from the moment of starting to prepare the international treaty, the conformity of the treaty with the Fundamental Law, the rules of law and with the legal obligations under Union law and under international law shall be subject to continuous scrutiny. Conformity should be ensured by achieving the appropriate content of the contract, by the amendment or annulment of the rules of law, or by the amendment or termination, as applicable, the obligations under Union law or international law.
- [43] According to Section 23 paragraph (4) of the ACC, the Constitutional Court may carry out a preliminary review of the conformity of the international treaty with the Fundamental Law upon the motion of the President of the Republic or the Government. The Constitutional Court may also review an Act adopted by the Parliament but not yet promulgated, with regard to its potential collision with any undertaken international obligation [see: Decision 53/1993. (X. 13.) AB, ABH 1993, 326.]. Additionally, in its competences of normative control, the Constitutional Court may also review the conformity with the Fundamental Law of a legal regulation promulgating an international treaty, or of the international treaty itself [see: Decision 8/2005. (III. 31.) AB, ABH 2005, 102–106.].
- [44] Section 40 paragraph (3) and Section 42 of ACC serve the purpose of ensuring the conformity of international treaties with the national law as they set forth the legal consequences of the procedure of reviewing the conformity of an international treaty with the Fundamental Law and of the collision of an internal rule of law with an international treaty. According to Section 40 paragraph (3), if the Constitutional Court declares that a provision of an international treaty is contrary to the Fundamental Law, the binding force of the international treaty shall not be recognised until the States or other legal entities of international law having the right to conclude treaties under international law eliminate such conflict with the Fundamental Law or until Hungary, by making a reservation – if making a reservation is permitted by the international treaty – or by way of another legal instrument recognised in international law eliminates the conflict between the international treaty and the Fundamental Law. The latter may also be eliminated by way of the constitution-forming power amending the provisions of the Fundamental Law to make them allow the accession to the international treaty. When this has been done, the international treaty shall become part of the Hungarian legal system by virtue of its publication in a rule of law in accordance with Article Q) paragraph (3) of the Fundamental Law. Publication shall require an authorisation by the Parliament provided with simple majority if the international treaty falls within the Parliament's duty and scope of competence, or by the Government in any other case.
- [45] Based on the foregoing, to address the second question of the petition, the Constitutional Court, as the principal organ for the protection of the Fundamental Law, should take several aspects into account. In addressing this, the Constitutional Court first considered that the UPC to be set up shall apply in its procedure not only the Union law but also the international treaties ratified by the Member States and the national laws of the Member States. (c.p. Article

24 of the UPC Agreement). It means that by ratifying the international agreement, Hungary shall authorise a so called "court common to the Contracting Member States", "as part of [the Member States'] judicial system" (c.p. Articles 1 and 21 of the UPC Agreement) to apply, in a specific group of cases, the law of Hungary as well (c.p. Article 32 of the UPC Agreement, the exclusive competences of the Court).

- [46] At the same time, the functioning of an international forum supplementing the national court structure shall imply that the decisions of the international court created the above way shall be drawn off the national system of fora for legal remedies, including their constitutional review.
- [47] According to Article 24 paragraph (1) of the Fundamental Law, the Constitutional Court is the principal organ for the protection of the Fundamental Law. In accordance with Article 24 paragraph (2) items c) and d) of the Fundamental Law, the Constitutional Court shall review, on the basis of a constitutional complaint, the conformity with the Fundamental Law of the rules of law applied in a particular case or of a judicial decision.
- [48] As regulated in Article 25 of the Fundamental Law, courts shall administer justice in the framework of which they shall decide on criminal cases and private law litigations including patent cases as well. Article 25 paragraph (4) allows the setting up of special courts for particular groups of cases, and according to paragraph (7) an Act of Parliament may authorise other organs to act in particular legal disputes. With regard to the organisational system of courts, the Fundamental Law only provides in Article 25 paragraph (1) that the principal judicial organ shall be the Curia. In addition to that, according to paragraph (8), the detailed rules for the organisation and administration of courts, for the legal status of judges, as well as the remuneration of judges shall be laid down in a cardinal Act." Accordingly, the organisational system of courts is regulated in the Act CLXI of 2011 on the Organisation and Administration of Courts (hereinafter: AOAC).
- [49] The aforementioned regulations do not imply that only Hungarian courts are allowed to act in the case of certain domestic legal disputes, as Hungary has acknowledged the jurisdiction of several international judicial fora (see the European Court of Human Rights, ECJ, International Court of Justice etc.). The judicial fora mentioned above typically examine issues of international law or of Union law, and if they decide in a case on the merits and with binding force, the signatory State is present in the procedure as a party of the litigation.
- [50] However, the international treaties that empower, independently from the will of the parties, an international judicial forum with mandatory exclusive jurisdiction to judge upon direct actions between private individuals, should be evaluated differently, in particular when this judicial forum may apply in its procedure not only the international law or the Union law, but the rules of Hungarian law as well. In fact, in a case as described above, the concluding of the international treaty on the basis of the State's own decision is an issue that belongs to the external side of sovereignty, but the subject matter of the regulation belongs – in the opinion of the Constitutional Court – to the internal side of sovereignty. The internal side of sovereignty means that the State shall develop its constitutional architecture and its legal

system without any interference by the supreme power of other state(s), and that it shall exercise complete and exclusive supreme power, in the manner regulated by the constitution and the rules of law, over the persons living in the territory of the State.

- [51] It should be taken into account in this respect that the international agreements establishing judicial fora typically set up a forum with a special function of legal remedy. However, it is a peculiar feature of the international special court set up for specific case-group(s) that not only the appeal procedure but also the basic case shall be dealt with by the special court. Accordingly, in the latter case, a complete set of legal disputes between private parties is drawn off the jurisdiction of national courts. With account to the foregoing, the Constitutional Court holds that an international agreement setting up a system of special judicial fora, a special international court that entirely takes over a group of legal disputes, necessarily affects the Fundamental Law's chapter on national courts.
- [52] According to Article 25 paragraph (2) of the Fundamental Law, the national courts specified in the Fundamental Law shall decide on a) criminal cases, private law litigations and on other matters defined by an Act; b) the legality of public administration decisions; c) whether a local government decree is contrary to another rule of law and on its annulment; d) the establishment of the failure of a local government to comply with its law-making obligation based on an Act. As demonstrated above, Article 25 paragraph (2) item a) of the Fundamental Law provides by allowing no exception that the national courts shall decide on all domestic legal disputes of private law. In this respect, Article 25 paragraph (7) of the Fundamental Law, which provides that an Act of Parliament may authorise other organs to act in particular legal disputes, does not allow any exception of international character as it provides a constitutional ground for other domestic, so-called alternative dispute settlement procedures (c.p. Section 1:6 of the Civil Code and the Act LX of 2017 on Arbitration).
- [53] Based on the foregoing arguments, the Constitutional Court holds that Article 25 of the Fundamental Law lays down not only the separation of the courts from other constitutional bodies, thus it can be interpreted not only in the conceptual system of internal sovereignty, but also in the context of the external aspect of sovereignty. In the latter scope, delivering judgements in direct actions between private individuals is of primary importance, and, according to Article 25 paragraph (2) of the Fundamental Law, this duty is performed in a general manner by the domestic judicial fora. As Article 25 paragraph (2) of the Fundamental Law provides for no exceptions, the Constitutional Court concluded that an international agreement, which transfers to an international institution the jurisdiction of adjudicating a group of private law disputes under Article 25 paragraph (2) item a) and this way entirely draws the adjudication of such legal disputes and the constitutional review under Article 24 paragraph (2) items c) and d) of the Fundamental Law of the judicial decisions delivered in these disputes off the jurisdiction of the State of Hungary may not be promulgated on the basis of Article Q) paragraph (3) of the Fundamental Law.

[54] 4. The Constitutional Court ordered the publication of the Decision in the Hungarian Official Gazette on the basis of Section 44 paragraph (1) of the ACC.

Budapest, 26 June 2018

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[Concurring opinion by Judge *dr. Béla Pokol* and dissenting opinions by Judges *dr. Egon Dienes-Oehm* and *dr. István Stumpf* have been attached to the decision. These texts are not translated.]