

# The European Patent Reform – The Parliamentary UPCA ratification proceedings in Germany

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*Office translation of the original German language document, the article reflects the personal opinion of the author.*

**The Parliamentary proceedings on the ratification of the Agreement on a Unified Patent Court (“UPCA”) in Germany have revealed a state of political affairs which should cause concern to each citizen. It shows the practice of so-called “second class adoptions” in which legislative decisions are made by a materially inoperative Parliament, because nobody raises the objection necessary for the annulment of the session. It was in this manner that the legislative acts on the UPCA were unanimously adopted by 35 cheerful Members of Parliament (“MPs”) in the second and third reading in the early morning hours on 10/03/2017. Five further unanimous decisions add to this picture. After the vote, all groups represented in the German Parliament denied providing the names of the participating MPs, three of four contacted MPs also rejected talking about the matter. A report on German law-making in the year 2017, in which the institutions involved could not care less about the German Constitution.**

## **I. Proceedings and involved institutions**

This article deals with the Parliamentary proceedings on the ratification of the UPCA in Germany, i. e. with the activities in the German Parliament (“*Bundestag*”, “BT”) and the second chamber, the Federal Council (“*Bundesrat*”, “BR”). For readers without a deeper understanding of the German legislative process, this shall first be described in more detail.

An international Agreement relating to – as in case of the UPCA – a subject falling into Federal legislative powers needs the approval respectively the participation of the institutions responsible for Federal law-making, i. e. Parliament and the Federal Council, by way of a Federal Act of Parliament (Art. 59(2) of the German Grundgesetz (“GG”). The ratification of such Agreement in Germany is usually executed by two Acts of Parliament. While the first, the so-called “Ratification Act” (“*Vertragsgesetz*”) approves the Agreement as such, the so-called “Implementation Act” (“*Begleitgesetz*”) contains the amendments for bringing the ordinary law in line with the Agreement.

The ratification initiative is usually started by the Federal Government as the institution directly involved in the negotiations of the Agreement. As the first step, the Chancellor submits the Government’s drafts of the Ratification Act and the Implementation Act to the Federal Council which, in general, has six weeks to produce a statement on the drafts. Afterwards, the drafts are submitted to the German

Parliament together with said statement (Art. 76(1) and (2) GG).

The German Parliament conducts three readings on the draft Acts (sec. 78(1) of Parliament’s Rules of Procedure (“GO-BT”)), followed by the so-called final vote.

The first reading is often used solely for remitting the draft in question to the Parliamentary Committee assigned with its preparation for the second reading (sec. 80 GO-BT), a debate is only held as an exception (sec. 79 GO-BT). If the draft is assigned to more than one Committee, one of these is given the lead (sec. 63 GO-BT). After having concluded its deliberations, the (leading) Committee submits a report to Parliament, summarizing the results of all the Committees involved and providing a proposal for a decision. This report, which is the basis for the second reading, is sent to all MPs. In this second reading, a detailed debate is usually taking place in which each MP can submit amendment requests which are put to the vote in the Plenary (sec. 81 f. GO-BT). This is followed by the third reading (sec. 84 GO-BT), where amendment requests are admissible only under certain conditions. After the third reading, the final vote is being held (sec. 86 GO-BT). Should the drafts receive the necessary majority, they are next submitted – now as Acts of Parliament – to the Federal Council.

The latter’s options depend on the nature of the Act submitted to it. While a so-called “*Zustimmungsgesetz*” requires its assent, this is not the case for a so-called “*Einspruchsgesetz*”. Against the latter, it can only raise an objection which can afterwards be overruled by the Parliament. A “*Zustimmungsgesetz*” is needed only in a number of cases designated in the Grundgesetz, the standard is the “*Einspruchsgesetz*” (Art. 77(3) and (4) GG). In the proceedings on the ratification of the UPCA, the Ratification Act was submitted as a “*Zustimmungsgesetz*”,<sup>1</sup> the “Implementation Act” as an “*Einspruchsgesetz*”.

Once the Federal Council has declared its assent on the Act or has waived objecting it, it is then – after having been signed by the Chancellor or the responsible Federal Minister (Art. 58, Art. 82(1) GG) – submitted to the Federal President for execution. After that, the President orders the Federal Ministry of Justice to publish the Act in

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All cited Parliamentary sources are in German language. An English version of the Grundgesetz is available at [bit.ly/2f8XGJN](http://bit.ly/2f8XGJN).

<sup>1</sup> Cf. BT-Drucksache (“BT-Ds.”, Parliament printed matter) 18/8826, p. 8, on Art. 1(1), accessible at [bit.ly/2soHpRq](http://bit.ly/2soHpRq) and. BT-Ds. 18/11137, p. 8, on Art. 1(1), accessible at [bit.ly/2up89Tc](http://bit.ly/2up89Tc).

the Federal Law Gazette. Once published, the Act will enter into force on the date specified in it, absent such date on the 14<sup>th</sup> day after the Federal Law Gazette's relevant issue was published (Art. 82(2) GG). The ratification process is completed once the instrument of ratification has been filed with the depositary.

## II. The initiation of the legislative proceedings by the Federal Government on 27/05/2016

The Federal Government approved the implementation of the patent reform on 25/05/2016.<sup>2</sup> The ratification proceedings were started on 27/05/2016 when drafts of the Ratification Act<sup>3</sup> and Implementation Act<sup>4</sup> were submitted to the Federal Council. In terms of the Ratification Act, the Federal Government claimed a "special urgency",

*"in order to complete the ratification proceedings as quickly as possible as to allow the European Patent Court to commence its work at the beginning of 2017."* (translation from German)<sup>5</sup>

By way of an exception, such urgency allows a draft Act to be submitted to the Parliament before the Federal Council has provided its statement (Art. 76(2)4 GG). However, this was a surprising move since the Grundgesetz expressly forbids this procedure in Parliamentary proceedings involving – as in the case of the UPCA – the transfer of sovereignty rights (cf. Art. 76(2)5 GG).

## III. Parliament's first reading on 23/06/2017

Accordingly, on 20/06/2016 the Federal Government also submitted its drafts of the Ratification Act<sup>6</sup> and Implementation Act<sup>7</sup> to Parliament. The latter held its first reading on the drafts in its 170<sup>th</sup> session on 23/06/2016, the day of the British vote on the withdrawal from the EU, and passed them on to the Committees. Assigned were the Committee for Legal Affairs ("RA-BT", leading) and the Committee on Affairs of the European Union.<sup>8</sup> Subsequently, both drafts were additionally submitted to the Committee for Education, Research and Technology Assessment.<sup>9</sup>

### 1. Speeches by MPs

MP speeches placed on record gave a first impression about their views on the patent reform.

*Stephan Harbarth* of the Conservative party CDU said (translation from German, emphasis added):<sup>10</sup>

*"For proceedings on the infringement or the nullity of a patent, currently (...) a number of proceedings is necessary in the respective Contracting States. This can lead to contradicting judgments on the infringement or the validity of the protective right within the common market. This not only results in significant efforts and a lack of legal certainty, but also in a fragmentation of the market. The present reform solves these problems, leading to a welcome unitary European patent protection which, in the long run, is meant to replace the patchwork solutions by the nation states. (...)"*

*At the same time, the European patent reform aims at achieving systematic and procedural facilitation leading to a reduction of costs and an increase of legal certainty."*

Although logical from a political perspective, the echoed considerations of abolishing, in the long run, national patent protection in favor of the unitary European system should attract the attention in particular of those parts of the legal profession which today silently accept the obvious shortcomings of the patent reform in view of revenue expectations. Also in that regard, some may one day end up longing for the return of the status quo.

Entertaining is the speech given by *Christian Flisek* of the labor party ("SPD"), who, being its rapporteur on the patent reform, is an attorney at law and a certified specialist for intellectual property law in Passau with an alleged "working focus", amongst others, on patent law.<sup>11</sup> He said (translation from German):<sup>12</sup>

*"Particularly positive is that the reform, which we adopt today, will lead to immense cost savings especially for research organizations and small and medium-sized enterprises which, due to their limited resources, have the most urgent need for an effective protection of their inventions. (...)"*

*For patent owners, these innovations involve considerable cost savings, because the running costs, e. g. for translations or renewal fees, as well as the costs of legal enforcement are significantly reduced. For instance, when comparing the fees for the grant and renewal of national patents in all 26 participating EU countries with those for a unitary patent, which is as effective, the savings can be up to 80 percent."*

These ruminated platitudes and their lack of sustainability are well-known from the EU legislative proceedings.<sup>13</sup>

A little bizarre is the speech by *Klaus Ernst* (Parliamentary group Die Linke ("The Left")) parts of which appeared familiar to me. He said (translation from German):<sup>14</sup>

<sup>2</sup> Press statement of 25/05/2016, accessible at [archive.md/C8vLS](http://archive.md/C8vLS).

<sup>3</sup> BR-Drucksache ("BR-Ds.", Federal Council printed matter) 282/16, accessible at [bit.ly/2uJ3BWx](http://bit.ly/2uJ3BWx).

<sup>4</sup> BR-Ds. 280/16, accessible at [bit.ly/2tgsPy3](http://bit.ly/2tgsPy3).

<sup>5</sup> BR-Ds. 282/16 (fn. 2), p. 5.

<sup>6</sup> BT-Ds. 18/8826 (fn. 1).

<sup>7</sup> BT-Ds. 18/8827, accessible at [bit.ly/2uJneOy](http://bit.ly/2uJneOy).

<sup>8</sup> Cf. BT plenary protocol 18/179, p. 17735 (C) und (D), accessible at [bit.ly/2sFqNz](http://bit.ly/2sFqNz).

<sup>9</sup> Cf. BT plenary protocol 18/190, p. 18745 (A) and (B), accessible at [bit.ly/2speht7](http://bit.ly/2speht7).

<sup>10</sup> BT plenary protocol 18/179 (fn. 8), p. 17755 (D).

<sup>11</sup> Cf. his MP profile at [archive.md/iQYdC](http://archive.md/iQYdC).

<sup>12</sup> BT plenary protocol 18/179 (fn. 8), p. 17757 (B).

<sup>13</sup> *Stjerna*, The European Patent Reform – A poisoned gift for SMEs, accessible at [www.stjerna.de/smes/?lang=en](http://www.stjerna.de/smes/?lang=en).

<sup>14</sup> BT plenary protocol 18/179 (fn. 8), p. 17758 (C).

*“Effective measures for supporting SMEs are, on the granting side, a discount on the office fees and on the enforcement side the expansion of legal aid to legal persons and the creation of an appropriate litigation insurance scheme.”*

This statement seems to be copied from my article mentioned in fn. 13, where it can be found in identical form.<sup>15</sup> Mr Ernst does not appear to take the requirements for citations under copyright law too seriously.

## **2. Planned vote in the Parliament’s Legal Affairs Committee on a public consultation**

In its 107<sup>th</sup> session on 06/07/2016, the RA-BT intended to vote on whether a public consultation should be initiated on the Federal Government’s draft Acts,<sup>16</sup> the vote was, however, cancelled. Upon request for the reason, reference was made to the “Brexit” vote due to which there would be no further negotiations on the patent reform in the first place. Even after the negotiations had been resumed, there was not further vote on having a public consultation.

## **IV. Decision by the Federal Council and restart of the proceedings for the draft Ratification Act**

Due to said violation of Art. 76(2)5 GG, the Parliamentary proceedings on the draft Ratification Act had to be started anew at the end of 2016.

### **1. Federal Council decision on 08/07/2016**

In its 947<sup>th</sup> session on 08/07/2016, the Federal Council had decided not to raise objections against the draft Acts.<sup>17</sup> I thus wrote to the Legal Affairs Committee of the Federal Council (“RA-BR”), which was in charge of the negotiations, referring to Art. 76(2)5 GG and asking why the specified procedure had not been complied with. Initially, I did not receive a reply.

### **2. Re-submission of the draft Ratification Act by the Federal Government on 09/12/2016**

In a press statement of 30/11/2016, the Parliamentary group of CDU/CSU tried to capitalize on this embarrassing procedural error, prompting the Minister of Justice to submit a new draft Ratification Act (translation from German):<sup>18</sup>

*“We prompt Minister of Justice Maas to immediately introduce a new draft Act, thus creating the conditions for a ratification in Germany which is compliant with the Constitution.*

*On 25 May 2016, the Federal Government has presented under Article 59(2)1 GG draft legislation submitted by the Federal Minister of Justice and Consum-*

*er Protection, declaring it particularly urgent. In doing so, it has not been observed that in the case of draft legislation transferring sovereign rights to international organisations a designation as urgent is excluded and that the deadline for a statement by the Federal Council is longer than it is in case of ordinary draft legislation. Against this background, it is required that draft legislation be presented anew.”*

On 09/12/2016, the Federal Government submitted the draft Ratification Act<sup>19</sup> to the Federal Council anew in identical form, but no longer claiming a “special urgency”.

More than five months after my request the RA-BR informed me accordingly in a letter dating 22/12/2016.<sup>20</sup>

### **3. Federal Council decision on 10/02/2017**

In its 953<sup>th</sup> session on 10/02/2017, the Federal Council decided not to raise any objections against the newly submitted draft Ratification Act.<sup>21</sup>

## **V. Parliament’s first reading on the newly submitted draft Ratification Act on 16/02/2017 and the decision proposal by the Committees**

On 13/02/2017, the newly submitted draft Ratification Act<sup>22</sup> was sent to Parliament which held its first reading on 16/02/2017, now assigning the draft only to the RA-BT.<sup>23</sup>

The Committee discussed the draft Acts shortly before the final decision-making in Parliament in its 131<sup>st</sup> session on 08/03/2017, recommending – unanimously – their unanimous adoption.<sup>24</sup> The resolution proposed in their “report”, which is worth reading already for its lack of substance, was (translation from German):<sup>25</sup>

*“Unanimous adoption of the draft Acts in printed matters 18/11137, 18/8827 and 18/9238 in unaltered form.”*

All involved institutions complied with this advice, all following nine<sup>26</sup> (!) decisions on the draft Acts declared the unanimous approval of these! So far, such an extent of Parliamentary consensus was attributed rather to totalitarian political systems.

Beyond the RA-BT also the Committees on Affairs of the European Union and for Education, Research and Tech-

<sup>15</sup> Ibid., p. 9, l. col.

<sup>16</sup> Cf. agenda of 30/06/2016, items 5a) and b), accessible at [bit.ly/2uJotNL](http://bit.ly/2uJotNL).

<sup>17</sup> Cf. BR-Ds. 280/16 (B) and 282/16 (B), accessible at [bit.ly/2sLqkA8](http://bit.ly/2sLqkA8) and [bit.ly/2sphKrH](http://bit.ly/2sphKrH); BR plenary protocol 947, p. 316 (A), accessible at [bit.ly/2IntGHQ](http://bit.ly/2IntGHQ).

<sup>18</sup> Press statement “Great Britain’s announcement gives a fresh impetus to the UPC”, accessible at [archive.md/ArJBM](http://archive.md/ArJBM).

<sup>19</sup> BR-Ds. 751/16, accessible at [bit.ly/2tLbn5q](http://bit.ly/2tLbn5q).

<sup>20</sup> Letter by the RA-BR of 22/12/2016, accessible at [www.stjerna.de](http://www.stjerna.de).

<sup>21</sup> BR-Ds. 751/16 (B), accessible at [bit.ly/2tLn8IW](http://bit.ly/2tLn8IW); BR plenary protocol 953, p. 58 (C), accessible at [bit.ly/2tqtH5T](http://bit.ly/2tqtH5T).

<sup>22</sup> BT-Ds. 18/11137 (fn. 1).

<sup>23</sup> BT plenary protocol 18/218, p. 21815 (B), accessible at [bit.ly/2sLoYFL](http://bit.ly/2sLoYFL).

<sup>24</sup> Cf. the agenda of 03/03/2017, items 3a) and b), accessible at [bit.ly/2sU6tyX](http://bit.ly/2sU6tyX).

<sup>25</sup> BT-Ds. 18/11451, p. 2, accessible at [bit.ly/2spnWji](http://bit.ly/2spnWji).

<sup>26</sup> One decision by each of the involved Committees, four decisions in Parliament and two decisions in the Federal Council.

nology Assessment, additionally involved as to the Implementation Act, unanimously recommended its adoption.<sup>27</sup>

## **VI. Parliament's final deliberations on 10/03/2017**

Parliament's final deliberations on the two pieces of draft legislation were scheduled to take place in its 221<sup>st</sup> session on 09 and 10/03/2017.

### **1. The patent reform on the Agenda**

In the days prior to the session, the exact time of the matter was moved back and forth on the agenda. First, the drafts were scheduled to be dealt with on 09/03/2017 between 7:45 and 8:15 a.m. CEST<sup>28</sup>, then between 8:15 and 8:45 a.m. CEST<sup>29</sup>. Later, this was shifted to the morning of 10/03/2017 between 4:40 and 4:45 a.m. CEST<sup>30</sup>, before finally arriving at 1:35 to 1:45 a.m. CEST on the early morning of 10/03/2017<sup>31</sup>. Why it was suddenly deemed necessary to reduce the available time and to deal with the matter in the early morning hours remains unclear. It appears that a debate on the topic was never planned.

### **2. Parliament's decisions on the early morning of 10/03/2017**

Thus, on 10/03/2017 at 1:30 a.m. CEST a total of 35 MPs – equaling approx. 5.6 percent of the currently 630 statutory Members of Parliament – gathered in the Plenary to celebrate a moment of glory in the history of the German Parliament. Due to the fixed seating areas of the different Parliamentary groups, the session recording on Parliament TV<sup>32</sup> showed that the attendance was constituted by 14 MPs of the CDU/CSU group, 10 of the SPD group, 7 of Bündnis 90/Die Grünen (“Alliance 90/The Greens”) and 4 of Die Linke. Remarkable is the cheerful mood of the attending MPs as documented in the TV recording, who, in part laughing out loudly, were apparently of the opinion to accomplish something marvelous. They seem to either have not been aware of the external perception of their embarrassing appearance or not to care about it at all.

The two hearings and the final vote on each of the drafts of the Ratification Act and the Implementation Act ended with an unanimous approval by the MPs.<sup>33</sup> It is worth reproducing here the laconic comments made prior to the second vote on the draft Ratification Act by the Parliament's Vice President chairing the session, *Claudia Roth* (Bündnis 90/Die Grünen), the remarks have been omitted from the protocol for unknown reasons (translation from German).<sup>34</sup>

*“For those wanting to vote in favor of the draft Act, please raise your hands. Oh! Uhm, who votes against?”*

*Who abstains? You are sure? This was...good. Ok, this does not happen too often. Thus, the draft Act is unanimously adopted in the second reading.”*

Not part of the protocol on this vote – contrary to the usual practice – albeit clearly audible in the TV recording is the heckling by several unknown MPs who after the questions for abstentions and opposing voted shouted “*Niemand!*” (“Nobody!”) and “*Auch niemand!*” (“Again nobody!”). It appears that the different Parliamentary groups had reached an agreement on the outcome of the vote in advance.

### **3. Quorum of the Parliament and the practice of “second class adoptions”**

Having regard to the attendance of only 5.6 of the 630 statutory Members of Parliament, those wondering about its quorum can find out astonishing things.

The German Parliament is quorate if more than half of its members are present (sec. 45(1) GO-BT), i. e. currently at least 316 MPs. However, an assessment of quorum is only taking place after it has been objected by at least 5 percent of all the Parliament's MPs, i. e. currently 32 MPs, or by a Parliamentary group (sec. 45(2)1 GO-BT). (Only) Upon such objection will the attending MPs be counted and the session be annulled in case of an absence of quorum (sec. 45(3)1 GO-BT). If, however, such objection is omitted, sufficient quorum is feigned to exist even for an obviously inquorate Parliament. An adoption decision by such materially inquorate Parliament, sometimes called “second class adoption”,<sup>35</sup> is then valid.

Furthermore remarkable is that it is not possible to find out how many and which MPs have participated in any given session of Parliament, because this is not recorded in the protocol. Presence (and voting behavior) is only registered in case of a roll-call vote which needs to be requested by a Parliamentary group or by attending 5 percent of all of Parliament's MPs (sec. 52 GO-BT). Other than that, it is entered into the protocol only that “the approval by the necessary majority” has been obtained (sec. 48(3) GO-BT). Hence, whether a voting result is based on the votes of 630 or 35 MPs is not easy to find out.

Those regarding said practice of “second class adoptions” as a rare exception are wrong. According to the most recent version of the “*Datenhandbuch des Deutschen Bundestages*” (“Data handbook of the German Bundestag”)<sup>36</sup> of 26/09/2014 which contains the statistics for the last six legislative periods (1990 to 2013), the portion of roll-call votes during these six periods was between 5.8 and 8.0 percent, the average being roughly 6.9 percent. This means that during the last 23 years, on average more than 93 percent of all legislative proceedings took place without recording the attendance and thus at least potentially followed the pattern described above.

<sup>35</sup> *Böhme*, BzAR 2015, 167 ff., accessible at [bit.ly/2Rxxwi0](http://bit.ly/2Rxxwi0).

<sup>36</sup> Chapter 10.1 - Statistics on law-making, p. 10, accessible at [bit.ly/3bZYmsU](http://bit.ly/3bZYmsU).

<sup>27</sup> BT-Ds. 18/11451 (fn. 25), p. 2.

<sup>28</sup> Draft time schedule of 17/02/2017, cf. [xup.in/dl.20847421](http://xup.in/dl.20847421).

<sup>29</sup> Draft time schedule of 03/03/2017, cf. [xup.in/dl.14563117](http://xup.in/dl.14563117).

<sup>30</sup> Draft time schedule of 07/03/2017, cf. [xup.in/dl.67428331](http://xup.in/dl.67428331).

<sup>31</sup> Draft time schedule of 09/03/2017, cf. [xup.in/dl.88834233](http://xup.in/dl.88834233).

<sup>32</sup> Session recording, accessible at [bit.ly/2tgebHf](http://bit.ly/2tgebHf).

<sup>33</sup> BT plenary protocol 18/221, p. 22262 (B), accessible at [bit.ly/2sLV8Rk](http://bit.ly/2sLV8Rk).

<sup>34</sup> Session recording (fn. 32), from 1:00 min.

In this context, it is further remarkable that before a reform in 2006, an objection as to lack of quorum could be raised by at least 5 attending MPs (sec. 49(2)1 GO-BT of 1990). The increase to now 5 percent of all the Parliament's MPs, i. e. to 32 MPs, and the concomitant restriction on objections as to lack of quorum indicates that the legislator, responsible for its own Rules of Procedure due to its respective autonomy (Art. 40(1)2 GG), has now the practice of "second class adoptions" as the standard procedure. This would appear to be diametrically opposed to the understanding of the broad majority of the people, most of which will be completely unaware of this disconcerting practice.

The initial arrangement in sec. 49(2) GO-BT (1990) was deemed lawful by the German Constitutional Court ("BVerfG") in a decision from 1977,<sup>37</sup> this position was confirmed very briefly also for the current regulation in sec. 45(2) GO-BT in 2009.<sup>38</sup>

#### 4. Concealing the voters' names

Even more remarkable experiences ensue for those trying to find out the participants of the vote on 10/03/2017 from the Parliamentary groups. At the end of April 2017, I sent the following request to all four Parliamentary groups of the current *Bundestag* (translation from German):<sup>39</sup>

*"On the early morning of 10/03/2017, the German Bundestag has discussed the Act on the Agreement of 19 February 2013 on a Unified Patent Court (BT printed matter 18/11137) in its second and third reading and has unanimously approved it. This session at 1:30 a.m. was attended by approx. 35 MPs. Could you please let me know which MPs from your Parliamentary group participated in said vote?"*

Replies were obtained only from two of the groups, namely CDU/CSU and Die Linke.

##### a) Correspondence with the CDU/CSU group

For the CDU/CSU group replied its "consultant for citizen communication", *Axel Schlegtendal* (translation from German, emphasis added):<sup>40</sup>

*"I regret that I am unable to tell you which Members of our Parliamentary group participated in the vote on said Agreement.*

*As you can see from the attached excerpt of the Plenary protocol for that session of the German Bundestag, the vote took place by hand sign and standing up, the names of the participating MPs were not documented in the protocol. According to sec. 48 GO-BT, the vote is executed by hand sign or standing up and remaining seated respectively, unless a roll-call vote has been re-*

*quested. The final vote on draft legislation is made by standing up or remaining seated which is what happened also for the draft Act in question."*

Upon a further letter, now to the Parliamentary Chairman of the CDU/CSU group, *Michael Grosse-Brömer*, pointing out<sup>41</sup> that the few group members among the 35 attending MPs should be easily identifiable from the TV recording, I was told by the "head of citizen communication", *Claudia von Cossel* (translation from German, emphasis added):<sup>42</sup>

*"Please understand that I am unable to provide to you the names of the MPs who have participated in the vote.*

*This vote has not been a roll-call vote. In case of a roll-call vote, the decision of the single MPs is reviewable for the public, because the voting result is added to the stenographic protocol of the session in question as an attachment and is thus explicitly documented.*

*However, the voting style usually applied is casting the vote by standing up or reaming seated. This intends to confirm by a simple procedure whether the necessary majority has been achieved. This is the purpose of the vote. Therefore, beyond a TV recording not covering the whole Plenary anyhow, there is no reason to identify which MP has participated in the vote and what the individual vote was. As a consequence, according to the protocol, the President in charge has declared that 'the draft Act has been approved unanimously with the votes of all the Parliamentary groups in the house'."*

I had assumed that the decision for what there is "a reason" is made by the citizen in his enquiry, but apparently that was a misunderstanding. Particularly in case of a pitiful attendance of only 35 MPs, the TV recording covers all participating persons without a problem. According to the CDU/CSU group, the right of the public to know the participants of a vote is nonetheless limited to roll-call votes, no such right exists beyond. It is unknown why they are so eager to keep the names of the attending MPs a secret.

##### b) Correspondence with the group Die Linke

For the Parliamentary group Die Linke, their Parliamentary Chairman *Petra Sitte* informed me as follows (translation from German, emphasis added):<sup>43</sup>

*"Reconstructing the participation in votes which were taking place by hand sign is not possible for us as we do not keep respective lists. A retroactive determination of the participation of single MPs in a vote is only possible for us in case of a roll-call vote."*

<sup>37</sup> BVerfGE 44, 308.

<sup>38</sup> BVerfGE 123, 39.

<sup>39</sup> Letter of 25/04/2017, accessible at [bit.ly/3oFtlvk](http://bit.ly/3oFtlvk) (German language).

<sup>40</sup> Letter by the CDU/CSU group of 27/04/2017, accessible at [bit.ly/3ywQKJ5](http://bit.ly/3ywQKJ5) (German language).

<sup>41</sup> Letter of 04/05/2017, accessible at [bit.ly/2QEK0lf](http://bit.ly/2QEK0lf) (German language).

<sup>42</sup> Letter by the CDU/CSU group of 15/05/2017, accessible at [bit.ly/34hPo7r](http://bit.ly/34hPo7r) (German language).

<sup>43</sup> Letter by Die Linke group of 28/04/2017, accessible at [bit.ly/3yrJd9](http://bit.ly/3yrJd9) (German language).

I received no reply upon my remark<sup>44</sup> given here as well, that the identification should be easily possible on the basis of the TV recording.

#### **c) No reply by the groups of SPD and Bündnis 90/Die Grünen**

The Parliamentary groups of SPD and Bündnis 90/Die Grünen did not bother to reply to my request.

#### **d) The participants in the vote**

Of course, in case of a public session the secrecy apparently desired by all Parliamentary groups ultimately cannot be secured which makes this attitude all the more surprising. Especially in cases with only a few MPs attending as presently, those willing to invest the necessary time will mostly be able to achieve a clear identification by comparing the TV recording with the MP profiles on the Parliament website. The 35 MPs unanimously voting in favor of the draft Ratification Act and the draft Implementation Act on 10/03/2107 seem to have been the following:

##### Parliamentary group CDU/CSU, 14 MPs:

- *Günther Baumann* (chartered engineer, constituency 164 – Erzgebirgskreis I),
- *Stefan Heck* (attorney at law, 171 – Marburg),
- *Heribert Hirte* (professor in law at Hamburg University, 094 – Cologne II),
- *Alexander Hoffmann* (administrative lawyer, 249 – Main-Spessart),
- *Hendrik Hoppenstedt* (attorney at law, 043 – Hannover-Land I),
- *Jan-Marco Luczak* (attorney at law, 081 – Berlin Tempelhof Schöneberg),
- *Kerstin Radomski* (teacher, 114 – Krefeld II-Wesel II),
- *Iris Ripsam* (financial consultant (“*Finanzwirtin*”), elected via state list),
- *Kathrin Rösel* (graduate degree in education (“*Dipl.-Pädagogin*”), elected via state list),
- *Sabine Sütterlin-Waack* (attorney at law, 001 – Flensburg - Schleswig),
- *Volker Ullrich* (graduate degree in business administration (“*Diplom-Kaufmann*”) and Attorney at Law, 252 – Augsburg Stadt),
- *Arnold Vaatz* (graduate degree in mathematics (“*Dipl.-Mathematiker*”), 160 – Dresden II-Bautzen II),
- *Elisabeth Winkelmeier-Becker* (judge at County Court Siegburg, 097 – Rhein-Sieg-Kreis I), and
- *Marian Wendt* (graduate degree in public administration (“*Dipl.-Verwaltungswirt*”), 151 – Nordsachsen).

##### Parliamentary group SPD, 10 MPs:

- *Bettina Bähr-Losse* (attorney at law, 98 – Rhein-Sieg II),
- *Matthias Bartke* (administrative lawyer, 019 – Hamburg-Altona),

- *Bernhard Daldrup* (political scientist, 130 – Warendorf),
- *Johannes Fechner* (attorney at law, 283 – Emmendingen-Lahr),
- *Christina Jantz-Herrmann* (diploma in public administration (“*Verwaltungsfachwirtin*”), 034 – Osterholz-Verden),
- *Susanne Mittag* (police officer, 028 – Delmenhorst-Wesermarsch-Oldenburg-Land),
- *Sabine Poschmann* (industrial clerk, 143 – Dortmund II),
- *Christian Petry* (graduate degree in public administration (“*Dipl.-Verwaltungswirt*”), 208 – St. Wendel),
- *Petra Rode-Bosse* (graduate degree in public administration (“*Dipl.-Verwaltungswirt*”) and alternative practitioner for psychotherapy, 136 – Höxter-Lippe II), and
- *Axel Schäfer* (“secretary general” and municipal official, 140 – Bochum I).

##### Parliamentary group Bündnis 90/Die Grünen, 7 MPs:

- *Thomas Gambke* (physicist, 228 – Landshut),
- *Anja Hajduk* (graduate degree in psychology (“*Dipl.-Psychologin*”), 021 – Hamburg-Nord),
- *Renate Künast* (attorney at law, 081 – Berlin Tempelhof Schöneberg),
- *Irene Mihalic* (police officer, 123 – Gelsenkirchen-North),
- *Konstantin von Notz* (attorney at law, 010 – Herzogtum Lauenburg-Stormarn Süd),
- *Corinna Rütter* (A levels, 204 – Trier), and
- *Ulle Schauws* (media scientist, 114 – Krefeld II-Wesel II).

##### Parliamentary group Die Linke, 4 MPs:

- *André Hahn* (teacher (“*Dipl.-Lehrer*”), 158 – Sächsische Schweiz-Osterzgebirge),
- *Ralph Lenkert* (engineering technician, 194 – Gera-Jena-Saale-Holzland-Kreis),
- *Birgit Menz* (bookseller, elected via state list), and
- *Frank Tempel* (detective, 195 – Greiz - Altenburger Land).

17 of these 35 MPs are members of the RA-BT which led the the deliberations on the drafts, 12 are lawyers. It seems that the RA-BT has not only been in charge of deliberating the drafts, but also of the adoption decisions in Parliament.

#### **5. Denial of a personal discussion**

In the middle of May 2017, after the Parliamentary groups had denied any information on the participants in the vote, I asked the respective MPs of these groups responsible for Düsseldorf as my place of residence for a personal meeting during their “citizen’s consultations” in order to find out about the reasons for the secrecy. I sent respective requests to the MPs *Sylvia Pantel* (CDU/CSU, constituency 107 – Düsseldorf II), *Andreas Rimkus* (SPD, 107 – Düsseldorf II), *Ulle Schauws* (Bündnis 90/Die Grünen, 114 – Krefeld II-Wesel II) and *Sahra Wagenknecht* (Die Linke, 107 – Düsseldorf II).

<sup>44</sup> Letter of 02/05/2017, accessible at [bit.ly/3fGAuNk](http://bit.ly/3fGAuNk) (German language).

With the exception of Mrs *Pantel* who, however, could not name any reasons for the desired secrecy, all the other MPs denied a discussion. While the office of *Sahra Wagenknecht* did not even bother to answer to the two enquiries sent to her, the appointment first envisaged by Mr *Rimkus* later proved not to be feasible any longer, an alternative proposal could not be made.

Remarkable was the approach taken by Ms *Schauws* who – as opposed to the other MPs contacted – had participated in the votes on the patent reform. Her office initially told me that although Ms *Schauws* was “*readily prepared*” for a personal discussion, the subject of the vote was not her field of expertise which is why they offered establishing contact with a different MP of Bündnis 90/Die Grünen. So apparently Ms *Schauws* deems herself sufficiently competent to vote on the topic in Parliament while pleading incompetence when it comes to a discussion with a citizen on the same topic. After I insisted on having the discussion with Ms *Schauws*, her initial willingness quickly vanished. After repeated enquiries, I was informed at the end of May that they were currently planning appointments from the middle of August onwards, but were still “*facing uncertainties*” insofar. No further message was received since then.

## 6. Speeches by MPs

As regards the decision-making in Parliament on 10/03/2017, speeches were put on file, especially by the rapporteurs of the Parliamentary groups, which again demonstrate a striking lack of knowledge about the topic in question.

The CDU/CSU rapporteur, *Sebastian Steineke*, stated (translation from German, emphasis added):<sup>45</sup>

*“In the first place, the patent reform provides for a European unitary patent with effect in all the participating States. So far patent law was characterized by a parallel protection for inventions through the so-called mechanism of double protection. (...)*

*Our national system has been working effectively. In order to be able to provide a sustainable assessment on the continuation of the system of national patent protection, we think that it makes sense to wait for the further development before considering different models no longer comprising double protection.”*

Mr *Steineke* also addressed the cost aspect, the contradictions between his statements speak for themselves (translation from German):<sup>46</sup>

*“Furthermore, proceedings at the Unified Patent Court are much more expensive than at the Federal Patent Court, so that the option of using the national court system has clear financial advantages for the local patent owners. We have also discussed the cost situation at the European Patent Court. In court proceedings,*

*small and medium-sized enterprises are awarded a substantial discount. This allows for a significant facilitation of access to the patent judiciary for the backbone of our economy. (...)*

*Above all, the objective of this reform is an increase in legal certainty, a systemic and procedural facilitation and a reduction of costs. I believe we have achieved this with the present draft legislation.”*

As is known, small and medium-sized enterprises (“SMEs”) are given said “substantial discount” – when fulfilling the respective conditions – only on the court costs at the Unified Patent Court (“UPC”). These, however, by and large correspond to the court costs of respective German proceedings, making them a much smaller problem than the reimbursable representation costs.<sup>47</sup>

Once again noteworthy – not only due to its linguistic shortcomings – is the speech by the rapporteur of the Parliamentary group SPD, *Christian Flisek*, allegedly a legal practitioner in, amongst others, patent law. He explained (translation from German):<sup>48</sup>

*“[By the reform] Patent protection is significantly expanded and can be enforced in all participating Member States. Instead of many different flowers which had to be plucked at different Patent Offices up to now, now the whole bunch is available from one hand. This is a major improvement.”*

The task of the European Patent Office is apparently unknown to him.

His explanations on costs likewise miss the point (translation from German):<sup>49</sup>

*“It has been objected that the costs for a patent application in this system were too high. Indeed, the fees for the European patent are higher than the fees for national patent applications. Of course, the costs of the patent application are an important factor by which each patent system needs to be measured. However, the price needs to be measured with regard to the consideration received – and in the European patent system, protection is much broader than in the national systems. As a result, it is cheaper to obtain a European patent than a dozen of national patents.”*

He does not seem to understand that the largest part of the financial burden does not result from “*the costs of the patent application*”, but from the proceedings at the UPC.

His accumulated expertise is further underlined by his explanations on “*the German Patent Court*” (translation from German):<sup>50</sup>

*“The European Patent Court will not replace the German Patent Court. The German Patent Court is doing great work and, thanks to the participation of technical*

<sup>45</sup> BT plenary protocol 18/221 (fn. 33), p. 22341 (D) f.

<sup>46</sup> BT plenary protocol 18/221 (fn. 33), p. 22342 (A).

<sup>47</sup> *Stjerna* (fn. 13), cipher V.2.b), p. 5.

<sup>48</sup> BT plenary protocol 18/221 (fn. 33), p. 22342 (D).

<sup>49</sup> BT plenary protocol 18/221 (fn. 33), p. 22343 (A).

<sup>50</sup> BT plenary protocol 18/221 (fn. 33), p. 22343 (A).

*judges, it is one of the most modern and best patent courts in Europe. These strengths shall be maintained and used, and the German Patent Court will continue to decide on German patents.”*

Those not having had enough yet can proceed to a further highlight and read the MPs explanations on the European Patent Office and the alleged role of its Boards of Appeal as to the “*fair treatment of employees*” (!).<sup>51</sup>

The cost aspect was also addressed in the speech by *Harald Petzold*, rapporteur of the group Die Linke (translation from German):<sup>52</sup>

*“In the context of the intended consistency and cost reduction for the litigants, the planned creation of a Unified Patent Court is to be welcomed. Up to now, for the nullification and in case of infringement actions had to be commenced in the respective national courts, with the effect of the court decision being limited to the state territory in question. However, a number of issues remain unresolved for us. We truly regret that the capacity of small and medium-sized enterprises, SMEs, to bear the costs involved is doubtful. While the court costs are adequate, the representation costs are very high and, due to exceptions and discretionary arrangements, are unpredictable. Hence, they involve a huge risk.”*

This speech again contains parts which were apparently copied verbatim from my above-mentioned article<sup>53</sup>, without any indication of origin. Mr *Petzold* used<sup>54</sup> the statement already relied on in the speech<sup>55</sup> by *Klaus Ernst*

*“Effective measures for supporting SMEs are, on the granting side, a discount on the office fees and on the enforcement side the expansion of legal aid to legal persons and the creation of an appropriate litigation insurance scheme.”*

He also “borrowed” from said article<sup>56</sup> the statement<sup>57</sup> (translation from German):

*“Beneficiaries of the “unitary patent package” are those needing geographically broad patent protection and having the necessary financial resources to pay the costs announced for this and for enforcement in court.”*

However, Mr *Petzold* ultimately deemed the particular risks of the reform for SMEs described in the paper to be irrelevant, arriving at a striking conclusion (translation from German):<sup>58</sup>

*“Still, my Parliamentary group approves this draft Act and demands that an eye be kept on the aspects we*

*criticised and that the legal arrangements be corrected should our fears become a reality.”*

Thus, apart from its apparently ambivalent relationship to copyright law, the group Die Linke is remembered especially for its somehow paradox approach of, on the one hand, criticising the reform’s cost risk for SMEs, while, on the other, nonetheless approving it, thus deliberately exposing SMEs to exactly the objected risk.

The speech by the rapporteur of the Parliamentary group Bündnis 90/Die Grünen, *Renate Künast*, who is also chairing the RA-BT which had the lead responsibility for the draft Acts, likewise contains some interesting statements. Remarkable is her assessment of the cost situation (translation from German):<sup>59</sup>

*“All this sounds very positive, but there is a catch: It is expensive. Proceedings at the Unified Patent Court will presumably cost twice as much as proceedings before the German authorities. On the other hand, there is more value for money, since the legal effect of protection covers all the Contracting States. If the patent owner was required to start proceedings in a number of national courts, as it is currently the case for the bundle patent, costs can become even higher. We need to be careful to leave nobody behind and to avoid the unitary patent becoming a privilege of large corporations. (...) Because legal protection must be available for anyone, and the enforcement of legal rights must not be allowed to fail due to a lack of funds.”*

The basis of the allegation that the costs of proceedings at the UPC were (only) twice as high as in German proceedings remains unclear. As is known, the maximum limits of reimbursable representation costs at the UPC can – depending on the value in dispute – exceed those reimbursable under German law by up to around the factor six.<sup>60</sup> However, there is indeed one segment in the fee table in which the additional costs at the UPC are indeed “only” at a factor of 1.98: That is in the second highest band for proceedings with a value in dispute between EUR 30m and EUR 50m. Here, the maximum limit of reimbursable representation costs per instance is EUR 1.5m<sup>61</sup> (as opposed to a total of EUR 758,605 due under German law for an attorney at law and a patent attorney). Still, it can be doubted that this value is really suitable to demonstrate the alleged particular intrinsic value of the costs at the UPC.

Apart from that, it is worth mentioning that Ms *Künast* also seems to question the continuation of the German national patent system. She stated (translation from German, emphasis added):<sup>62</sup>

*“Up to now, it was not possible for a national patent to have effect in Germany in addition to a (European)*

<sup>51</sup> BT plenary protocol 18/221 (fn. 33), p. 22343 (B).

<sup>52</sup> BT plenary protocol 18/221 (fn. 33), p. 22343 (D).

<sup>53</sup> Fn. 13.

<sup>54</sup> BT plenary protocol 18/221 (fn. 33), p. 22344 (A).

<sup>55</sup> Fn. 14.

<sup>56</sup> Fn. 13, cipher VIII., p. 9, second last para.

<sup>57</sup> BT plenary protocol 18/221 (fn. 33), p. 22344 (A).

<sup>58</sup> BT plenary protocol 18/221 (fn. 33), p. 22344 (A).

<sup>59</sup> BT plenary protocol 18/221 (fn. 33), p. 22344 (C).

<sup>60</sup> *Stjerna* (fn. 13), cipher V.2.c), p. 6 f.

<sup>61</sup> Cf. the “Draft Decision of the Administrative Committee of the Unified Patent Court on the scale of recoverable cost ceilings” of 16/06/2016, p. 5, accessible at [bit.ly/2udTnS5](http://bit.ly/2udTnS5).

<sup>62</sup> BT plenary protocol 18/221 (fn. 33), p. 22344 (D).



*bundle patent. This is now intended to be changed with the unitary patent. (...) This means that in case of an infringement of their patent, patent owners can now chose which of two legal recourses offers them more protection. They either go to the Unified Court and assert a unitary patent or they chose the German Patent Court, for an infringement of their German patent. It is highly doubtful whether such freedom of choice is really necessary.*"

The speeches once again demonstrate that none of the persons involved has even the faintest realistic understanding of the contents of the patent reform. The high costs are qualified as a necessary evil and are willingly accepted, while, sometimes in the same breath, it is alleged that the reform would lower costs and lend support to SMEs. Particular attention should be paid to the comments on abolishing the national patent system. Still in the EU legislative proceedings it had been underlined that the reform meant to strengthen the users' freedom of choice. The rapporteur on the UPCA, *Klaus-Heiner Lehne*, said insofar (translation from German):<sup>63</sup>

*"Incidentally, this new system does not replace the old one, but it creates an additional option. This means that all the opportunities existing today, as regards national patents, as regards the European Patent Convention, will continue to exist. Simply a further option is created, this alone expands the corporate options on the internal market."*

In perspective, the opposite now seems to be planned.

## **VII. Federal Council decision on 31/03/2017**

Prior to its discussion of the Ratification and Implementation Acts on 15/03/2017, I again wrote to the RA-BR pointing out a potential problem (translation from German):

*"Said Agreement affects the judicial sovereignty enjoyed by Federal and State courts as stipulated in Art. 92 GG. In view of this – and contrary to the position of the Federal Government relying on Art. 23(1)2 GG as the legal base of its draft Act – would not Art. 23(1)3 GG have to be applied instead, so that, pursuant to Art. 79(2) GG, the draft Ratification Act needs the approval of two thirds of the statutory Members of Parliament?"*

Initially, I did not receive an answer.

In its 965<sup>th</sup> session on 31/03/2017, the Federal Council unanimously adopted the Ratification Act<sup>64</sup> and likewise unanimously decided not to raise objections against the Implementation Act.<sup>65</sup> These unanimous decisions no. 8

<sup>63</sup> *Stjerna*, The Parliamentary History of the European "Unitary Patent" (Tredition 2016), ISBN 978-3-7345-1742-6, para. 1417, cf. [bit.ly/3oGov6f](http://bit.ly/3oGov6f).

<sup>64</sup> BR-Ds. 202/17 (B), accessible at [bit.ly/2toGvW5](http://bit.ly/2toGvW5); BR plenary protocol 956, p. 174 (B), accessible at [bit.ly/2o2q4zt](http://bit.ly/2o2q4zt).

<sup>65</sup> BR-Ds. 203/17 (B), accessible at [bit.ly/2tHJD1P](http://bit.ly/2tHJD1P); BR plenary protocol 956 (fn. 64), p. 203 (D).

and 9 completed the Parliamentary proceedings on the ratification of the UPCA in Germany.

In reply to my enquiry and without any comment on it, in a letter dating 21/04/2017 the RA-BR briefly informed me of the Federal Council's adoption of the Acts, the proceedings were now complete.<sup>66</sup>

## **VIII. Assessment**

The importance of the described events from the Parliamentary proceedings on the ratification of the UPCA goes beyond technical issues.

First of all, it exemplifies the doubtful mechanisms used for law-making in the German Parliamentary democracy of the year 2017, thus painting a picture strongly contradicting that of the ideal-typical Parliamentary system commonly conveyed to the citizen and legitimized by him with his voting decision. In reality, politically desired legislation is rushed through the Parliamentary procedure with a series of unanimous decisions by ill-informed MPs, sometimes in the middle of the night and in an inordinate formation that is obvious for any participant. Towards the citizen, all Parliamentary groups afterwards treat the names of the participants in the final votes as "classified information", referring to the missing documentation in the protocol although an identification would easily be possible based on the TV recording. It is difficult to imagine legitimate reasons why, despite all ostensible transparency, in reality secrecy has been made the guiding principle of the Parliamentary proceedings.

Against this background, it does not come as a surprise that different references to possible risks from Constitutional law have been ignored by the operators, although in case of a transfer of sovereignty rights the settled case law of the BVerfG requires all constitutional bodies, authorities and courts to ensure that the respective requirements of the Grundgesetz are met. Apparently, not much regard has been paid to this despite the "reminder" in Art. 84(2) UPCA, demanding a ratification "in accordance with the respective constitutional requirements of the Member States", in order to be able to enact the reform as quickly as possible. Those recklessly pushing a project like the patent reform regardless of any obvious legal risks and without their proper assessment as if there was no tomorrow, as it has now happened repeatedly, are willingly accepting that precisely the latter might at some time become a reality – for the legislative project.

\* \* \*

For possibilities to support my work on the European patent reform please visit [www.stjerna.de/contact/?lang=en](http://www.stjerna.de/contact/?lang=en). Many thanks!

<sup>66</sup> Letter from the RA-BR of 21/04/2017, accessible at [www.stjerna.de/ratification-proceedings-upca/?lang=en](http://www.stjerna.de/ratification-proceedings-upca/?lang=en).