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Federal Constitutional Court
- Second Chamber –
FAO President Prof. Dr. Andreas Voßkuhle
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By Fax: 0721/9101382

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2BvR73/17

In the Constitutional Complaints Procedure

Ingve Björn Stjerna

- 2 BvR 739/17 –

Dear President Prof. Dr. Voßkuhle,

On behalf of EPLIT, I would like to thank you for the opportunity provided in the letter dated 9 October 2017 to submit an opinion on the aforementioned constitutional complaint in accordance with Section 27a BVerfGG.

EPLIT is an association of European patent attorneys and attorneys at law founded in 2013 and headquartered in Paris. Its primary purpose in accordance with its statutes is the of supporting of patent litigation in Europe, above all before the Unified Patent Court. It does not serve any economic purpose.

EPLIT is refraining from giving an overall opinion on the constitutional complaint. The following statement – drafted in cooperation with RA Dr. Bracher – is limited to some selected topics that are discussed in the constitutional complaint.

1. The Complainant complains of a breach of its rights under Art. 38 Para. 1 (1), Art. 20 Para. 1 and Para. 2 in connection with Art. 79 Para. 3 GG among

other things on the grounds that the UPCA was breaching the "principles of the autonomy of Union law and the completeness of the systems of legal remedies", in that, contrary to the provisions of Art. 1 and Art. 21 UPCA, a court was created in the Unified Patent Court, which is not a common court of the member states that are a party to the convention. This opinion is not comprehensible. The Unified Patent Court is, contrary to the legal opinion of the Complainant, a common court of the member states as defined in the case law of the European Court of Justice (see b)). Even if this is evaluated in a different way, it still does not result in any breach of the rights of the Complainant under Art. 38 Para. 1 (1), Art. 20 Para. 1 and Para. 2 in connection with Art. 79 Para. 3 GG (see a)).

a) The question of whether the Unified Patent Court, as a common court of multiple member states as defined in the case law of the European Court of Justice referred to by the Complainant for its argument, complies with European law or not is not relevant to the rights of the Complainant under Art. 38 Para. 1 (1) GG.

Art. 38 Para. 1 (1) GG grants protection against approval acts to contracts under international law, which have a negative effect on the judicial principle of Art. 38 Para. 1 (1) GG as a result of surrender of sovereignity and equivalent international law obligations (in this respect Federal Constitutional Law 129, 124, 168; 135, 317, 348 f.). This, however, does not mean, as the Complainant obviously thinks, that the whole system of legal remedies within the European Union should be considered included in the scope of protection of Art. 38 Para. 1 (1) GG. "A claim to democracy equivalent to a fundamental right is provided by Art. 38 Para. 1 GG beyond ultra-vires situations (...) only to the extent that a process affects democratic principles, to which Art. 79 Para. 3 GG even removes access on the part of the legislator amending the constitution" (Federal Constitutional Law 135, 317, 336). The transfer of judicial roles to the European Union or to another institution created by international law does not already breach the principle of democracy guaranteed by Art. 79 Para. 3 in connection with Art. 38 Para. 1 (1) GG if it is not in line with the system of judicial remedies within the European Union. The transfer of judicial roles affects the claim to democracy only indirectly, namely insofar as the jurisprudence is necessary to guarantee the democratic structure. This includes at most key contents of Art. 19 Para. 4 GG and constitutional fundamental requirements (cf. also

as a summary Calliess in Maunz/Dürig, Basic Law, Art. 24 Para. 1 margin note 184).

b) The argument of the Complainant referring to the expert opinion 1/09 of the European Court of Justice and its judgement dated 06/14/2011 - C-196/09 on the question of whether the Unified Patent Court is to be considered a common court of multiple member states and as such is integrated into the legal protection system of the European Union is not supported by this case law.

The European Court of Justice has not defined necessary features of a common court of the member states but rather only casuistically affirms this feature for the Benelux court and negates it for the court provided for in accordance with the draft of the agreement for the creation of a European Patent jurisdiction, as well as for the board of appeal of European schools. In doing so, in each case it highlighted individual features of these institutions.

Of these features, the Complainant highlights the feature affirmed for the Benelux court and negated for the board of appeal of "connections to the court systems of the member states". This does not mean, contrary to the legal opinion of the Complainant, that this feature is an essential element of a common court of multiple member states. The European Court of Justice has not stated that this quality could not result also from other features that are characteristic of the court, which did not exist with regard to the board of appeal of European schools, e.g. from an obligation to apply uniform national law of the member states. In its opinion 1/09, the European Court of Justice did not highlight a lack of connections of the patent court planned at that time with the courts of the member states, but rather the fact that the draft of the agreement would take away the opportunity of submission to the European Court of Justice from the member state courts (margin notes 81, 83) and that the decisions of the intended patent court would not be subject to "suitable mechanisms to guarantee the full effectiveness of Union law" (margin notes 82, 86 to 88).

The UPCA therefore qualifies the Unified Patent Court correctly as a common court of the member states because it is responsible for making decisions on disputes about European patents with a uniform effect, because

the legal effects of these patents are based on the national law of the member states, because, in relation to the European Court of Justice, it is equivalent in every way to the national courts, and because it is subject to the same mechanisms for the guaranteeing of the full effectiveness of Union law as the latter.

The Unified Patent Court will be set up in accordance with Art. 1 UPCA among other things for the resolution of disputes about European patents with unitary effect. The legal effects of these patents are determined in accordance with Art. 5 Para. 3 and Art.7 Regulation (EU) No. 1257/2012 in accordance with national law. The European Court of Justice stated in its decision dated 05/05/2015 - C-146/13 – that through the determination of "a single national law applicable in the territory of all member states" it would be possible to "guarantee the uniform character of the protection provided in this way ". The uniformity of protection by the European patent with unitary effect would result from the application of Art. 5 Para. 3 and Art. 7 of Regulation (EU) No. 1257/2012, "which guarantee that the determined national law is applied in the territory of all participating member states, in which this patent has uniform effect" (margin note 46 f.). On the basis of this concept of Regulation No. 1257/2012, Art. 25 to 27 UPCA are also part of the national law of the member states which ratify the UPCA (correct in Yan, The material law in the uniform European patent system and its application by the Unified Patent Court, 2017, pg. 113). It is the duty of the Unified Patent Court to guarantee this uniform protection by uniform application of uniform national law.

As a result of the fact that the material law regulations of the UPCA are national law, the criticism fails according to which Art. 21 UPCA allegedly does not relate to the interpretation of this agreement (generally speaking, Jaeger also states the same, EuR 2016, 203, 217 f.). The responsibility of the Unified Patent Court for a reference for a preliminary ruling in accordance with Art. 267 AEUV corresponds without restriction to its responsibility for the application of European and national law for the guaranteeing of uniform patent protection in the member states which ratify the UPCA. Questions of the interpretation of uniform national law of multiple member states are not covered by Art. 267 TFEU.

The equal status of the Unified Patent Court with the national courts in order to guarantee the full effectiveness of Union law results from Art. 20 to

24 UPCA. In the same way as the national courts, it is part of the "court system of the Union" (with regard to this criterion see expert opinion 1/09 margin note 82). In order to guarantee the full effectiveness of European law nothing would be gained if, after the period stated in Art. 83 Para. 1 UPCA, the comprehensive resolution of disputes about European patents was transferred not to the Unified Patent Court, but rather to the national courts and if the Unified Patent Court only had to decide on questions of the interpretation of uniform material patent law in response to advance decision requests from national courts. This would unnecessarily complicate legal protection and have a significant negative effect on its effectiveness. The European Court of Justice is, as already stated, not responsible for the interpretation of uniform national patent law. If the application of this law were left to the national courts alone, in view of the varying legal traditions, it would not be able to achieve the aim of legal unity in effect.

The guarantee of effective legal protection in the field of material patent law serves the purpose of the protection of the constitutional rights of the participants in proceedings. This concern therefore deserves support also from the perspective of constitutional law, while the Complainant's argument tends to work against it. Beyond this, the guarantee of effective legal protection in the area of uniform material patent law is essential to realize the goals of Art. 118 Para. 1 AEUV. These goals for their part are a central element of the realization of the uniform internal market and therefore of the strengthening of the competitiveness of the European Union (see, in summary, Yan, in loco citato, pg. 42 ff.).

2. The Complainant is of the opinion that UPCA breaches Art. 3 Para. 2 AEUV.

This argument also lacks a sufficient connection with the rights of the Complainant under Art. 38 Para. 1 (1) GG for the reasons stated under 1. a).

The argument is admittedly inconclusive even irrespective of this. Art. 3 Para. 2 AEUV doubtless refers only to the conclusion of international agreements with third party states; this corresponds to the general opinion, which is also not attacked by the Complainant. The Complainant's statement that international agreements between the member states without the participation of third party states should not infringe the

priority of Union law and loyal cooperation is correct (margin no. 285 of the constitutional complaint). Contrary to the opinion of the Complainant, a breach of this kind, however, cannot be determined with regard to the UPCA. On the contrary, the UPCA makes a significant contribution to European integration (cf. also the first recital). The European Union therefore refers to this agreement in its secondary law, for example by including the Unified Patent Court in the scope of application of Regulation (EU) No. 1215/2012 (cf. Art. 71a ff. of Regulation (EU) No. 1215/2012 in the version of the Regulation (EU) No. 542/2014 and in detail Mankowski, GPR 2014, 330 ff.).

3. The Complainant complains that the UPCA does not provide legal protection through the Unified Patent Court against the rejection of an application for a European patent by the European Patent Office, although in accordance with Regulation (EU) No. 1257/2012 the European Patent Office is capable of providing the European patent with a unitary effect.

   This argument does not take into account that in accordance with the case law of the European Court of Justice based on Regulation (EU) No. 1257/2012 neither the provisions on the requirements for the granting of European patents nor the provisions on the procedure for the granting of European patents are integrated in the law of the European Union (judgment dated 05/05/2015 - C-146/13 – margin note 30). This means that deficits in legal protection against decisions of the European Patent Office are irrelevant with regard to European Union law (judgment dated 05/05/2015 - C-146/13 – margin notes 24, 32). These deficits can therefore not, as the Complainant claims, threaten “the principles of autonomy, unity and priority of Union law“ (margin note 318 of the constitutional complaint). In particular, these deficits cannot result in any infringement of the rights of the Complainant under Art. 38 Para. 1 (1), Art. 20 Para. 1 and Para. 2 in connection with Art. 79 Para. 3 GG by the approval law on the UPCA; because the UPCA does not change the legal position of affected parties with regard to the legal protection against decisions by the European Patent Court on the recognition of European Patents.

4. The statements made by the Complainant on the independence of judges in the Unified Patent Court also do not indicate the infringement of his rights under Art. 38 Para. 1 (1), Art. 20 Para. 1 and Para. 2 in connection Art. 79 Para. 3 GG that he asserts. Rule of law basic requirements with regard to the independence of the judges are not affected by the issues discussed by the Complainant.

The assumption that the potential participation of attorneys in the advisory committee of the Unified Patent Court could result in the judges selected "having an inappropriately close relationship with these patent professionals and their law firms" appears far-fetched. In any case, this would not affect their independence as judges. In the Federal Republic of Germany also attorneys often participate in committees for the selection of judges without this effect in the independence of the judges. In some cases, the participation of attorneys is even prescribed by law (cf. e.g. Section 18 Para. 1 Hamburg Law on Judges).

Neither is the independence of judges called into question by the limitation of the term of office with the possibility of re-election. Regulations of this kind are usual in many cases both in German and international courts. There was originally a possibility of selection even for the judges of the German Federal Constitutional Court. During the first election a portion of the judges were even only elected for a period of four years with the possibility of re-election (Art. 4 Para. 2 BVerfGG in the version dated 12/03//1951, BGBl. I., 242). An exclusion of re-election counteracts the appearance that decisions could be influenced by the prospect of re-election. It is, however, not warranted to guarantee the independence of judges. In case of short terms of office “both the capacity of the court to work and the reasonableness for those elected to accept the job may require re-election to be permitted “ (BVerfGE 40, 356, 364). In addition, the German Federal Constitutional Court has stated (ibid.):

> “Other aspects, in particular the independence of the judges (and the appearance of this) do not overrule the mutual conditionality of term of office and the re-election option, but rather are “decision aids” for the legislators regarding whether they decide on a shorter term of office with permissibility of re-election or a longer term of office with a prohibition on re-election“.

The fact that the UPCA does not explicitly regulate the legal protection of a judge against a discharge in accordance with Art. 10 of the Statute of the Unified Patent Court does not exclude legal protection. Legal protection could, for example, be guaranteed by means of corresponding application of Art. 13 Para. 1 EPC. Provisions on legal protection could also be adopted into the Statute on the basis of Art. 40 Para. 2 (2) UPCA.

5. The Complainant holds that interventions of the Unified Patent Court affecting fundamental rights are not sufficiently legitimized in a legal manner because Art. 41 UPCA is not

a sufficient basis for the issuing of the rules of procedure. This is incorrect.

In the opinion of the Complainant, the authorization for the issuing of the rules of procedure must correspond to the standards of Art. 80 Para. 2 GG. This opinion has no foundation either in Art. 38 Para. 1 (1), Art. 20 Para. 1 and Para. 2 in connection with Art. 79 Para. 3 GG nor in Art. 23 GG or Art. 24 GG. Rather, it is sufficient for the approval law to determine the rights transferred to the international organization and the intended integration program in a sufficiently identifiable manner (BVerfGE 89, 155, 187). Art. 59 Para. 2 (1) GG also does not result in the application of the requirements of the general legal reservation on regulatory density for contracts under international law (BVerfGE 77, 170, 231).

The UPCA contains detailed regulations in Art. 42 to 82 on the court proceedings. The rules of procedure are only intended to regulate additional details in accordance with Art. 41 Para. 1 and Para. 2 Subpara. 2 UPCA. The framework that is still available for these regulations is prescribed by Art. 41 Para. 3 UPCA and Art. 42 to 82 UPCA. The contents of these requirements far exceed an integration program. Art. 38 Para. 1 (1), Art. 20 Para. 1 and Para. 2 in connection with Art. 79 Para. 3 GG does not state that the approval law should include more detailed requirements for the content of the rules of procedure; the claiming of requirements of this kind would rather run counter to the authorization under constitutional law for the transfer of sovereign rights by Art. 23 and Art. 24 GG.

Contrary to the legal opinion of the Complainant, no transformation of the rules of procedure into domestic law by means of a statute or on a statutory basis in addition to the approval law is necessary. The domestic effect rest upon the constitutional transfer of sovereign rights to the international organization.

As a result of the fact that the Unified Patent Court, as the Complainant correctly states, has not yet been set up, it has not yet been possible to issue rules of procedure on the basis of Art. 41 UPCA. The draft created by the Preparatory Committee for the rules of procedure is based on an in-depth consultation of the stakeholders as defined in Art. 41 Para. 2 UPCA. Many drafts of the rules of procedure have been discussed over a period of several years (cf. the overview at the beginning of Annex VB 9).

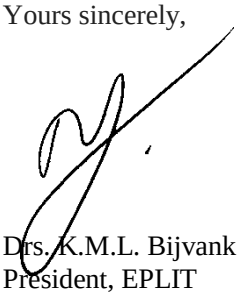
6. The Complainant objects, independently of its statements relating to the rules of

procedure, to the authorization in Art. 69 Para. 1 UPCA for the determination of an upper limit for the costs to be borne by the losing party. This determination must take place based on the wording of Art. 69 Para. 1 UPCA "in accordance with the rules of procedure". The Complainant thinks that responsibility for the determination of the upper limit should also have been regulated; in addition he claims that Art. 69 Para. 1 UPCA (in addition to Art. 41 UPCA) has not been specified sufficiently.

This submission also does not show any breach of Art. 38 Para. 1 (1), Art. 20 Para. 1 and Para. 2 in connection with Art. 79 Para. 3 GG. Irrespective of this, the words "in accordance with the rules of procedure" leave no doubt that the Administrative Committee responsible for adopting the rules of procedure is also responsible for the determination of the upper limit. Rule 152 Para. 2 of the draft of the rules of procedure (Annex VB 9) makes this entirely clear. It is also possible to incorporate the determination of the upper limit in the rules of procedure. As a result of the fact that the Unified Patent Court has not yet been set up, it was also not possible to make the resolution in accordance with Art. 69 Para. 1 UPCA previously. The draft by the Preparatory Committee that the Complainant has submitted (Annex VB 14) as well as the draft rules of procedure are based on intensive public consultations.

Of course, we are at your disposal for any further information and for any oral hearing.

Yours sincerely,



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