

[Office translation of the original German language document]

**By fax in advance (without exhibits)
to 030 - 227 - 36878**
FDP Parliamentary Group
Platz der Republik 1
11011 Berlin

Düsseldorf, 21/09/2020

Ratification of the Agreement on a Unified Patent Court, 2nd attempt

Dear Madams and Sirs,

the Federal government is preparing to make a renewed attempt to ratify the agreement on a Unified Patent Court (“UPCA”). To this end, it has submitted draft legislation¹ to the Federal Council [“Bundesrat”], to which the latter raised no objections at its 993rd session on 18/09/2020 (agenda item 55). Ratification of the UPCA in its current form would be unconstitutional and would also have serious disadvantages, in particular for medium-sized companies. Some considerable deficits of the UPCA are explained in more detail below, together with the suggestion to ask the Federal government for clarification in this respect (cf. section II., paras. 8 ff.).

In detail:

I.

The first attempt to ratify the UPCA in 2017

1. As you are probably aware, the Federal Constitutional Court [“BVerfG”] declared null and void the first Ratification Act [“Vertragsgesetz”] for the UPCA by decision of 13/02/2020 upon the undersigned’s constitutional complaint of 31/03/2017 (docket no. 2 BvR 739/17). Its decision was based on the circumstance that this legislation, which causes a material amendment to the Grundgesetz, violates the qualified majority requirement required under Art. 23 (1) 3 and Art. 79 (2) of the Grundgesetz [“GG”], as it was adopted by only 35 of the then 630 statutory members of the German Parliament [“Bundestag”]. The new draft UPCA Ratification Act is largely identical to the previous

¹ Federal Council printed matter 448/2 of 07.08.2020.



unconstitutional one; now the qualified majority necessary to amend the constitution is being sought.²

2. Prior to the final vote on 31/03/2017, the undersigned had pointed out to the Bundesrat that the draft would require a qualified majority due to its impact on the jurisdictional sovereignty of the Federation and the Federal States (Art. 92 GG).³ The Bundesrat ignored this and merely declared, after the corresponding vote, that the legislative procedure was “*now complete*”.⁴
3. At the time, the undersigned had repeatedly written to all Parliamentary groups, pointing out the constitutional problems of the UPCA; no reply was ever received. The respective responsible Legal Affairs Committees of Bundestag and Bundesrat were also comprehensively informed about the constitutional risks involved. These identical letters are enclosed for your information (Exhibits 1 and 2); the deficits described therein also apply to the new draft legislation of the Federal government.
4. In the meantime, it became known that the Bundestag Legal Affairs Committee had originally planned to hold a public consultation on UPCA ratification; with the participation of *Stephan Harbarth*, then chairman of the CDU/CSU group and now BVerfG President, the vote scheduled for the 107th session on 06/07/2016 was cancelled⁵ for unknown reasons and never made up for. Mr *Harbarth* is an avowed advocate of the European patent reform.⁶ In the past, he had already voted for the cancellation of a public hearing on the so-called “VW scandal”, his law firm representing VW at that time.⁷
5. The undersigned had reported on the legislative process in 2017 in an article⁸ (also attached as Exhibit 3). The requested personal dialogue was refused by the Members of Parliament responsible for my constituency from all Parliamentary groups with the exception of CDU/CSU.
6. The shortcomings of the UPCA set out in the attached letters to the Legal Affairs Committees of Bundestag and Bundesrat are still valid. Some of them were also addressed in the constitutional complaint of 31/03/2017, but were not taken up by the BVerfG in its decision of 13/02/2020, since the Ratification Act was void already for lack of the necessary qualified majority in the Parliamentary vote. These shortcomings continue to exist and could – in a further substantiated form – be asserted again in a new constitutional

² Federal Council printed matter 448/20, p. 2.

³ A copy of the letter is accessible at www.stjerna.de/files/170313-Brief-RA-BR-blk.pdf.

⁴ A copy of the letter is accessible at www.stjerna.de/files/170421_BR_blk.pdf.

⁵ Cf. the excerpts of the agenda and the protocol of the Committee’s 107th meeting, accessible at www.stjerna.de/files/RA-BT_107_AP.pdf.

⁶ Cf. his speech submitted in the first Bundestag deliberation on the ratification of the UPCA on 23/06/2016, Plenary protocol 18/179, p. 17755 (D), accessible at bit.ly/2QvM2nP.

⁷ Cf. the press reports “SZA-Anwalt Harbarth im Interessenskonflikt?” [“SZA lawyer Harbarth in a conflict of interest?”], lto.de on 27/11/2015, accessible at bit.ly/2L3qQYK; “Doppelrolle in der VW-Affäre” [“Dual role in the Volkswagen affair”], stuttgarter-zeitung.de on 21/02/2016, accessible at bit.ly/2L5UsVv.

⁸ *Stjerna*, “Einheitspatent“ und Gerichtsbarkeit – Das parlamentarische Verfahren zur Ratifikation des EPGÜ in Deutschland” [“Unitary patent and court system – The Parliamentary UPCA ratification proceedings in Germany”], article of 17/07/2017, accessible at www.stjerna.de/ratifikationsverfahren-epgu/.



complaint with prospects of success. In addition, there are further constitutional deficits, as the BVerfG has itself indicated.⁹

7. Should the UPCA be ratified, the filing of a new constitutional complaint has already been announced, e. g. by the “Foundation for a Free Information Infrastructure e. V.” (“FFII”).¹⁰

II.

Questions to the Federal government

8. In order to further inform the public about the European patent reform it is suggested to ask the Federal government to answer the following questions on the UPCA by way of a Parliamentary interpellation.

1.

Lack of a cost-benefit analysis regarding the European patent reform

9. The necessity for creating a unified European patent jurisdiction has been justified by its proponents mainly on the grounds of an allegedly high savings potential and a very advantageous cost-benefit ratio. As proof, one single study¹¹ commissioned and paid for by the EU Commission was presented, which worked with assumptions and forecasts that have in the meantime turned out to be wrong or exaggerated. Studies commissioned at the national level of the EU Member States – e. g. one in Poland¹², the negative results of which led the Polish government to refrain from participating in the UPCA, the same happened in 2019 in the Czech Republic¹³ – were not taken into account in the EU legislative process. The same applies to studies from 2011 and 2013 which questioned the assumptions used by the Commission investigation, including an investigation by the Commission itself.¹⁴ In addition, reference is made to the undersigned’s article “The European Patent Reform – The prearranged affair”¹⁵ of 07/03/2018 in which the details are described in more depth.

⁹ BVerfG, 2 BvR 739/17, decision of 13/02/2020, para. 166.

¹⁰ Article “FFII threatens constitutional complaint if Germany ratifies UPC Agreement”, bristows-upc.com of 17/06/2020, accessible at bit.ly/2RzanMv.

¹¹ Harhoff, “Economic Cost-Benefit Analysis of a Unified and Integrated European Patent Litigation System” (2009), accessible at bit.ly/3iCzPwt.

¹² Cf. Deloitte, “Analysis of the potential economic impact from the introduction of Unitary Patent Protection in Poland”, accessible at bit.ly/35O8mEj.

¹³ Article “Legal and financial concerns: Czech Republic will not ratify UPCA any time soon”, Kluwer Patent Blog on 13/09/2019, accessible at bit.ly/32BeX2Y.

¹⁴ EU Commission, “Preliminary Findings of DG Internal Market and Services – Study on the Caseload and financing of the Unified Patent Court” (2011), accessible at bit.ly/2HcywXj.

¹⁵ Stjerna, “Die europäische Patentreform – Das abgekartete Spiel” [“The European Patent Reform – The prearranged affair”], article of 07/03/2018, accessible at www.stjerna.de/abgekartetes-spiel/.



10. So the question arises:

- a) Why has the German government so far not had any independent scientific cost-benefit analysis carried out with regard to the European patent reform, especially the UPCA?

2.

The cost burden of the Unified Patent Court is prohibitive for medium-sized businesses

11. In an article from 2016 titled “Unitary patent and court system – A Poisoned Gift for SMEs”¹⁶ the undersigned had pointed out that the costs at the Unified Patent Court will in most cases be prohibitively high for small and medium-sized enterprises (“SMEs”) and that, according to the EU Commission, SMEs will need a legal expenses insurance which, however, does not exist.¹⁷ Previously, in the year 2012, the European Scrutiny Committee of the British House of Commons had published the study “The Unified Patent Court: help or hindrance?”¹⁸, in which it stated that the costs of the UPC would represent a considerable burden, in particular for SMEs.¹⁹ It is undisputed in professional circles and the scientific community that the European patent with unitary effect and the Unified Patent Court (“UPC”) will only be advantageous over the status quo for those companies seeking patent protection for an invention in all Member States of the EU which, however, is only a small percentage of economic operators, almost exclusively from large industry, especially from the chemical/pharmaceutical and telecommunications sectors.²⁰ The vast majority of economic operators, especially SMEs, generally do not need such broad patent protection simply because their activities do not cover all EU Member States; it is therefore just as oversized and uneconomical for them as a UPC.
12. The European patent reform, especially the UPCA, is rather primarily geared to the needs of large-scale industry. Accordingly, it is almost always the same representatives from the same companies, mostly Bayer, BASF, Ericsson, Novartis, Siemens and Nokia, raising their voices in the corporate press.²¹ This tailoring to the needs of large industry is also reflected in the fact that the “Preparatory Committee of the Unified Patent Court” (“PC-UPC”), which is supposed to make the court operational, has convened an “Expert Panel”²² consisting of 15 practitioners of patent law. The undersigned has examined this

¹⁶ *Stjerna*, “Einheitspatent“ und Gerichtsbarkeit – Ein vergiftetes Geschenk für KMU” [“Unitary patent and court system – A poisoned gift for SMEs”], article of 28/04/2016, accessible at www.stjerna.de/kmu/.

¹⁷ *Stjerna* (fn. 16), p. 8.

¹⁸ Accessible at bit.ly/2FyLvSO.

¹⁹ Help or hindrance? (fn. 18), p. 27, para. 121.

²⁰ Cf., for instance, the study by *McDonagh*, “Exploring Perspectives of the Unified Patent Court and Unitary Patent within the Business and Legal Communities” (2014), p. 23, second para., p. 41, accessible at bit.ly/32Gn3YI; also *Pagenberg*, GRUR 2012, 582 (583, r. col. and 585, l. col.).

²¹ Cf. the article “Wie eingefroren” [“Like frozen”], *Juve Rechtsmarkt*1/2018, p. 43 ff.; “Die große Versuchung” [“The great temptation”], *Juve Rechtsmarkt* 2/2014; “European industry reacts to German UPC judgment”, *juve-patent.de* on 02/04/2020, accessible at bit.ly/2FOR3bg.

²² Cf. “Chairman invites new Expert Panel to advise Preparatory Committee”, *unified-patent-court.org* on 16/09/2014, accessible at bit.ly/3hM6WfT.



“panel” and its establishment in more detail and has written an article about it.²³ In addition to various (former) patent judges, this body, which is staffed according to the discretion of the Executive, also includes two “Business Representatives”, both of whom are members of large industry, namely BASF and Nokia, as well as legal advisors frequently acting for large industry. There is no SME representative in this body.

13. An article²⁴ by the undersigned from 2018 shows that the costs of legal representation in proceedings before the UPC can exceed those currently incurred under national law – depending on the amount in dispute – by up to almost 600 percent.²⁵ Initially – in violation of European law – legal entities, as which almost all market participants, especially SMEs, normally act, were even excluded from obtaining legal aid in proceedings before the UPC, it was subsequently tried to correct this.²⁶ As documents recently obtained by the undersigned on the basis of the German Federal Freedom of Information Act (“IFG”) show, the aforementioned PC-UPC – in agreement with the representatives of large industry in the aforementioned “Expert Panel” – has also deliberately refrained from lending specific support to SMEs on a number of issues where such support is necessary and has always been promised by politicians.²⁷ For further detail, reference is made to the undersigned’s article “The European Patent Reform - The Preparatory Committee of the UPC, its ‘Expert Panel’ and their ‘support’ of SMEs”.²⁸
14. Although the costs for the economy, especially for small and medium-sized enterprises, are to be described in draft legislation (cf. sec. 43 (1) no. 5, 44 (1) 5 no. 1 of the Joint Rules of Procedure of the Federal Ministries [“GGO”]), neither the initial draft Ratification Act on the UPCA nor the one now submitted contains any information insofar.
15. Despite all this, the Federal government praises the UPCA almost mantra-like as beneficial to small and medium-sized enterprises, as evidenced, for example, by the responses of the German Ministry of Justice and Consumer Protection [“BMJV”] to a question from a journalist.²⁹
16. The following questions arise in this respect:
 - a) In view of the proven facts, the risks for SMEs as admitted by the EU Commission and the lack of a cost-benefit analysis, how does the German

²³ *Stjerna*, “Einheitspatent” und Gerichtsbarkeit – Die „Expertengremien“ des Vorbereitenden Ausschusses” [“Unitary patent and court system – The ‘expert teams’ of the Preparatory Committee”], article of 16/06/2016, accessible at www.stjerna.de/expert-teams/.

²⁴ *Stjerna*, “Die europäische Patentreform – Der Einsatz des BMJV für das Einheitliche Patentgericht” [“The European Patent Reform – The dedication of the German Ministry of Justice to the UPC”], article of 27/03/2018, accessible at www.stjerna.de/bmjv-epg/.

²⁵ *Stjerna* (fn. 24), comparison of costs at the UPC with the situation under current German law on p. 10.

²⁶ *Stjerna*, “Die europäische Patentreform – Heimliche Korrekturversuche” [“The European Patent Reform – Silent correction attempts”], article of 19/11/2018, accessible at www.stjerna.de/legaid/.

²⁷ *Stjerna*, “Die europäische Patentreform – Der Vorbereitende Ausschuss des EPG, sein ‚Expert Panel‘ und deren ‚Förderung‘ von KMU” [“The European Patent Reform – The Preparatory Committee of the UPC, its ‘Expert Panel’ and their ‘support’ of SMEs”], p. 4 ff., article of 08/03/2020, accessible at www.stjerna.de/vaepg-kmu/.

²⁸ *Stjerna* (fn. 27).

²⁹ *Stjerna* (fn. 24), p. 5 ff.



government come to the conclusion that the European patent reform, in particular the UPCA, is advantageous for SMEs?

b) Which measures has the German government taken to ensure that the special needs of small and medium-sized enterprises are taken into account in the design of the European patent reform, especially the procedures at the UPC?

c) Which measures has the Federal government undertaken to enable medium-sized enterprises to operate on an equal footing in proceedings before the UPC and to avoid their structural inferiority to economically stronger competitors caused already by the cost situation at the UPC?

d) Has the German government made efforts to ensure that the special interests of small and medium-sized enterprises are represented in the "Expert Panel" of the Preparatory Committee of the Unified Patent Court? If so: When and how did this happen? If not: Why not?

3.

Inadequate legal examination of the UPCA and the draft legislation on its ratification for compatibility with the Grundgesetz and Union law

17. Before draft legislation can be introduced into the Parliamentary procedure, German law, as is well known, stipulates that it must be subjected to a comprehensive legal examination, particularly by the BMJV, especially with regard to its compatibility with the Grundgesetz and Union law (cf. sec. 45 (1), 46 (1) GGO). The BMJV must certify in writing that this legal examination has been conducted with a positive result (sec. 51 no. 2 GGO). In case of an international Agreement such as the UPCA, the BMJV and the Federal Ministry of the Interior ["BMI"] must be involved in the preparatory work for the purpose of constitutional review (sec. 72 (4) GGO). According to the research of the undersigned, based, among other things, on the BMJV's answers to several IFG applications, while compatibility of the UPCA with the Grundgesetz was apparently examined only very selectively, compatibility with Union law was examined not at all. The latter is all the more remarkable since, in 2011, the CJEU had rejected an earlier version of the UPCA as incompatible with Union law.³⁰ Also missing in the new draft of the UPCA Ratification Act is the presentation of the relation to and the compatibility with Union law, which is mandatory under sec. 43 (1) no. 8 GGO. This was omitted in the first draft as well. For details, reference is made to the article "The European Patent Reform – The German Ministry of Justice and the legal scrutiny of the UPCA and the draft legislation for its ratification"³¹.

³⁰ CJEU, Opinion 1/09 of 08/03/2011, accessible at bit.ly/3muU1CN.

³¹ *Stjerna*, "Die europäische Patentreform – Das BMJV und die Rechtsprüfung des EPGÜ und der Gesetzentwürfe zu dessen Ratifikation" ["The European Patent Reform – The German Ministry of Justice and the legal scrutiny of the UPCA and the draft legislation for its ratification"], article of 21/10/2019, accessible at www.stjerna.de/bmjv-gg/.



18. This raises the question:

- a) Has the Federal government examined the compatibility of the UPCA with the Grundgesetz, in particular with the fundamental rights, as well as with Union law, and if so, with regard to which aspects has this been done in each case?

4.

Considerable skepticism regarding ratification in the public consultation

19. Even before its publication on the internet on 10/06/2020³², the BMJV sent the draft UPCA Ratification Act³³ to about 90 “associations and institutions interested in patent law” by email on 08/06/2020, asking for their comments by 03/07/2020.³⁴ As a result, the BMJV received 16 comments, which are available on the BMJV website.³⁵ Of these 16 responses, six were from industry associations and five from (in the broadest sense) legal professional associations. The statements by the industry associations, primarily on the part of the chemical and pharmaceutical industries benefiting from the European patent reform, are mostly limited to the more or less wordy repetition of the reform’s legal history and the short and sweeping affirmation of their support for the UPCA and the European patent reform without addressing the existing deficits.³⁶ However, a large proportion of the respondents, in particular the associations of the legal profession, namely BRAK and DAV, which have always been unreservedly in favour of the UPCA, have expressed skepticism. It was pointed out that the UPCA would have to be revised anyway in view of the withdrawal of the United Kingdom, and it was suggested that no new attempt at ratification should be made prior to this revision, in particular in view of the still unresolved constitutional issues.³⁷

20. The following question therefore arises:

- a) Before undertaking a new ratification attempt, would it not be advisable to first make the undoubtedly necessary changes to the UPCA which, in turn, would themselves require ratification?

5.

Personal consequences for the Federal Ministries involved

21. In connection with the ratification of the UPCA, very fundamental constitutional omissions have come to light repeatedly. The legislative proceedings had to be restarted al-

³² Statement “Gesetzes [sic] zu dem Übereinkommen vom 19. Februar 2013 über ein Einheitliches Patentgericht” [“Act on the Agreement in a Unified Patent Court of 19/02/2013”] on bmjv.de, accessible at bit.ly/3hDmvqg.

³³ A copy of the e-mail is accessible at www.stjerna.de/files/200608-E-Mail-BMJV.pdf.

³⁴ A copy of the e-mail is accessible at www.stjerna.de/files/200608-Schreiben-BMJV.pdf.

³⁵ Cf. fn. 32.

³⁶ Cf. the statements by VDMA/ZVEI, VFA, VCI and BDI.

³⁷ BRAK Statement, p. 4/5; DAV Statement, p. 7 ff., esp. p. 13.



ready at the first ratification attempt – after a corresponding indication by the undersigned –³⁸ since the Federal government had claimed a special urgency for the Ratification Act under Art. 76 (2) 4 GG, although the Grundgesetz expressly excludes such a procedure for legislation involving – as in the case of the UPCA – the transfer of sovereign rights (cf. Art. 76 (2) 5 GG).³⁹ Likewise, it would usually have to be obvious to qualified lawyers that UPCA ratification, due to its obvious encroachment on the jurisdictional sovereignty of the Federation and the States (Art. 92 GG), would, pursuant to Art. 23 (1) 3 and Art. 79 (2) GG, require a qualified majority in Bundestag and Bundesrat, as it had been pointed out to the Bundesrat in advance (see above para. 2) and due to the absence of which the first Ratification Act was nullified by the BVerfG (see above para. 1). In business, no one can afford such repeated fundamental professional mistakes without having to fear considerable disadvantages.

22. This raises the following question:

- a) The first attempt to ratify the UPCA repeatedly revealed serious constitutional deficits on part of the institutions involved. Did this result in personal consequences and, if so, which ones? If not: Why not?

It seems urgently necessary to work with the Federal government to clarify the issues raised and to address the relevant aspects in the upcoming deliberations in the German Bundestag. The undersigned is available to answer any questions that may arise.

With kind regards

Dr. Ingve Björn Stjerna
Rechtsanwalt
Fachanwalt für gewerblichen Rechtsschutz

Exhibits:

- Letter of 21/02/2017 to the Committee on Legal Affairs and Consumer Protection of the Bundestag (Exhibit 1),
- Letter of 14/01/2017 to the Committee on Legal Affairs of the Bundesrat (Exhibit 2),
- *Stjerna*, “Unitary patent” and court system – The Parliamentary UPCA ratification proceedings in Germany, article of 17/07/2017 (Exhibit 3).

³⁸ A copy of the letter is accessible at www.stjerna.de/files/160711-Brief-RA-BR-blk.pdf.

³⁹ A copy of the letter is accessible at www.stjerna.de/files/161224_BR_blk.pdf.