The European Patent Reform – The German state powers in constitutional complaint proceedings 2 BvR 739/17 (Part 1 of 2)

Rechtsanwalt Dr. Ingve Björn Stjerna, LL.M., Certified Specialist for Intellectual Property Law, Düsseldorf

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

The author of this article has obtained comprehensive documents on the European Patent Reform on the basis of the German Federal Freedom of Information Act ("IFG"), in particular from the Federal Ministry of Justice and Consumer Protection ("BMJV"). Some of these documents have already been published.[1] Among the most revealing of these documents are the BMJV's files on the first constitutional complaint proceedings against the ratification of the Agreement on a Unified Patent Court ("UPCA") (docket no. 2 BvR 739/17), which the author initiated on 31/03/2017 and in which, in March 2020, the German Constitutional Court ("BVerfG") declared the ratification of an international Agreement by the Federal Republic of Germany null and void for the first time ever. The BMJV has made accessible substantial parts of their files, which reflect its activities throughout the entire duration of the proceedings. Some of these documents will be presented in more detail in this article. The article is continued and concluded in part 2.

I. Making accessible official information on the European Patent Reform under the German Freedom of Information Act

In general, it cannot be assumed here, as elsewhere, that recognizably controversial statements will become part of the files at all or will be made accessible on the basis of freedom of information laws. In case of the European Patent Reform in particular, the BMJV has repeatedly refused to make documents accessible, citing allegedly relevant grounds for exclusion, e.g. the threat of adverse effects on international relations (sec. 3 no. 1 a) IFG) or the necessary confidentiality of international negotiations (sec. 3 no. 3 a) IFG). The author of this article had this reviewed in two cases before the German Federal Administrative Court, which, however, granted the Federal government a largely free reign, referring to an executive prerogative of assessment and evaluation that can be judicially reviewed only to a limited extent.[2]

This article presents some of the documents made available by the BMJV from its files on the constitutional complaint proceedings 2 BvR 739/17, some of which allow a revealing look behind the scenes.

Official information made accessible on the basis of the IFG is available for inspection by anyone; interested persons can access the relevant documents at www.stjerna.de. Redactions in grey contained in the documents originate from the author and generally refer to contact details.

The positions of the persons involved on the BMJV side can be found in its organizational chart[3] from 01/10/2017.

I. The service of the constitutional complaint and the BMJV's exchange of information with third parties

First of all, it is noteworthy that the "European Patent Lawyers Association" ("EPLAW") apparently received the constitutional complaint even before the German Federal government. In an e-mail from Irene Pakuscher from BMJV Division ("Referat") III B 4, responsible for the European Patent Reform, dated 22/08/2017 to Dr Thomas Barth, BMJV Division IV A 3 (responsible for constitutional jurisdiction and judicial constitutional law), it says (translation from German language):[4]

> *„Dear Mr Barth,*
>
> *in the following e-mail to Mr Karcher,* [redacted by BMJV] *states that the Federal Constitutional Court has sent the above-mentioned constitutional complaint to the European Patent Lawyers Association (EPLAW) for comments by 30 October 2017.* [Redacted by BMJV] *assumes that the Federal government has also been invited to comment and requests a copy of the complaint for personal use.*
>
> *I ask you to ensure that the Federal government (BMJV) now also receives the constitutional complaint as quickly as possible."*

The BMJV was keen to keep the source of this information to itself. However, the request to submit a pleading "for personal use" had already played a role in the past, namely in the proceedings before the CJEU concerning Spain's nullity actions against the "unitary patent" regulations (proceedings C-146/13 and C-147/13). At that time, the BMJV had provided Prof. Tilmann with Spain's statement of claim, who then published and commented on its contents in an article.[5]

---

[1] Cf. www.stjerna.de/foia/?lang=en/.
[2] Cf. Administrative Court Berlin, 2 K 72.18 and Federal Administrative Court, 20 F 4.20; Administrative Court Berlin, 2 K 73.18 and Federal Administrative Court, 20 F 5.20.
[3] Cf. www.stjerna.de/files/171001_BMJV_Organisationsplan.pdf.
[4] Cf. document 20061.1.pdf, p. 8.
[5] Cf. *Stjerna*, The European Patent Reform – Prof. Tilmann, the old Roman god Janus and the requirements of Article 118(1)

In 2015, Ms Pakuscher had the BMJV consider legal action against the author of this article because he had published his correspondence with Dr Stefan Walz, then Head of the Patent Law Division at the BMJ, in this regard.[6]

In an e-mail sent the following day to Cornelia Knapp, BMJV Division IV A 3, Ms Pakuscher said (translation from German language):[7]

> *"Mr UAL III B just called me about yesterday's e-mail from* [redacted by BMJV] *on the constitutional complaint's provision to EPLaW for comment by 30 October.*
>
> *Mr UAL III B asks to ensure that the constitutional complaint is now also served on the Federal government and that it is asked for a statement by the Federal Constitutional Court."*

"Mr UAL III B" is the head of BMJV sub-Directorate ("Unterabteilung") III B, Dr Christoph Ernst. How it can be arranged that the constitutional complaint is *"now also served on the Federal government"* and that it is asked for a statement by the court is not known here. The understanding at the time was that the BVerfG is the master of the proceedings and decides on this alone. However, this does not necessarily have to be the case. At least the message in question sounds as if such opportunities to comment could be forced.

The BMJV received the BVerfG letter with the constitutional complaint on 23/08/2017, together with the opportunity to comment in accordance with sec. 27a BVerfGG, initially by 31/10/2017.[8] At the request of the Federal government, which referred to the *"considerable scope of the constitutional complaint and the complexity of the matter"*, the deadline was finally extended to 31/12/2017.[9]

The Federal Chancellery assigned the constitutional complaint to the BMJV for lead processing in agreement with the Federal Ministry of the Interior ("BMI"), the Federal Foreign Office ("AA") and the Federal Ministry of Economics ("BMWi").[10] The project was headed by Dr Thomas Barth, BMJV Division IV A 3.

Also noteworthy in this context is an e-mail from Prof. Mayer, the Federal government's subsequent representative in proceedings 2 BvR 739/17, dated 07/09/2017 to Alfred Bindels, Head of BMJV Directorate ("Abteilung") IV (responsible for constitutional and administrative law, international and European law), in which he stated that the German Bundestag had never received notification of the constitutional complaint from the BVerfG (translation from German language):[11]

> *"I hear from the Bundestag that they never received the letter from the BVerfG, they apparently only found out after a request by the Bundesrat."*

A letter from the then Chair of the Committee on Legal Affairs and Consumer Protection, Renate Künast (parliamentary group of Bündnis 90/Die Grünen), to the BVerfG President dated 28/09/2017, states that the letter with the constitutional complaint had been lost *"in the mail"*, which meant that the 18th Bundestag was no longer able to deal with the proceedings before the then upcoming Federal elections (translation from German language):[12]

> *"You have served the German Bundestag with the constitutional complaint regarding the Act on the Agreement of 19 February 2013 on a Unified Patent Court (2 BvR 739/17). Due to the loss of the first item in the mail, the 18th German Bundestag was no longer able to deal with the proceedings for procedural reasons. However, the rapporteurs in disputes of the parliamentary groups of the 18th German Bundestag are of the opinion that the submission of a statement by the 19th German Bundestag should be seriously considered. We will recommend this to the rapporteurs of the parliamentary groups of the 19th German Bundestag. It will therefore not be possible to submit a statement within the deadline you have set. I currently assume that there is still a chance of a plenary session in December of this year, at which the 19th German Bundestag could decide to issue a statement and appoint a legal representative."*

The newly constituted 19th German Bundestag finally decided to issue a statement in proceedings 2 BvR 739/17. However, it seems astonishing that the Federal government only found out about the constitutional complaint after a delay and that the German Bundestag apparently did not know about it at all initially.

II. The selection, appointment and payment of the Federal government's authorized representative

The considerations on the part of the Federal government as to who should be entrusted with representing them in proceedings 2 BvR 739/17 are also noteworthy. The files contain a large amount of e-mail correspondence in this regard, although the Ministry has blacked out the names of the candidates with the exception of Prof. Franz Mayer, who was ultimately selected.[13] Apparently, the Ministry initially considered appointing several authorized representatives, including one specifically for patent law issues. The following consideration is interesting (translation from German language):[14]

> *"Prof.* [redacted by BMJV] *is an experienced patent lawyer who has also dealt extensively with the UPCA. I also know him to be a thorough worker who should also be able to 'get to grips' with the 170 pages of the complaint. Therefore, no reservations here (if the fact that Prof.* [redacted by BMJV] *and Prof.* [redacted by

---

TFEU, accessible at www.stjerna.de/requirements-118-1-tfeu/?lang=en and *ibid*., "Cypriot compromise" compromised, accessible at www.stjerna.de/cypriot-compromise/?lang=en/.

[6] Cf. www.stjerna.de/foia-1802-1/?lang=en.

[7] Cf. document 20061.1.pdf, p. 10.

[8] Cf. document 20061.1.pdf, p. 13.

[9] Cf. document 20061.2.pdf, p. 5.

[10] Cf. document 20061.1.pdf, p. 44.

[11] Cf. document 20061.2.pdf, p. 142.

[12] Cf. document 20061.2.pdf, p. 280 f.

[13] Cf. document 20061.1.pdf, p. 20 ff.

[14] Cf. document 20061.1.pdf, p. 21.

BMJV] *are both members of the law faculty of* the [redacted by BMJV] *as the prospective rapporteur for the proceedings in the 2nd Senate is not a problem).*

It can probably be assumed that, due to their frequent procedural dealings with the BVerfG in constitutional complaint proceedings concerning the ratification of international Agreements like the UPCA, the BMJV expected Prof. Huber as a rapporteur in the case. Prof. Huber has held a chair for public law and state philosophy at Ludwig Maximilian University of Munich since 2002.

Ultimately, the Federal government chose Prof. Franz Mayer, "LL.M. (Yale)", from Bielefeld University.[15] He was apparently commissioned on better terms than was the case in other proceedings, as it was stated in internal correspondence – inter alia with reference to an earlier commission of Prof. Mayer by the BMWi –[16] that these terms could be "justified" (translation from German language):[17]

> *"BMWi intends to remunerate the representation with a lump sum of* [redacted by BMJV]. *The deviation from the usual lump sums* [redacted by BMJV] *appears justified in view of the large number of proceedings and, in particular, in view of the short deadline and the high organizational effort involved."*

The BMJV did not disclose the agreed conditions[18] even upon a further IFG application.

The invoicing of the agreed fee by Prof. Mayer is also remarkable. He divided the total amount – presumably for tax reasons – into two parts, the first[19] of which he invoiced on 21/12/2017 and the second[20] on 05/01/2018.

In contrast, however, he was quick to argue that the value in dispute of the constitutional complaint proceedings – which is the basis for the reimbursement of the complainant's costs – should be as low as possible. In one of the first drafts of the Federal government's statement, he considered it appropriate to state that there were (translation from German language)

> *"(...) no compelling reasons apparent that would justify a significant deviation from the minimum amount [of EUR 5,000]."*[21]

This is remarkable, as Prof. Mayer is certainly well aware that the BVerfG regularly assigns the highest values in dispute to constitutional complaint proceedings concerning international Agreemeents.[22] The fact that, on the one hand, he is paid unusually high in view of the importance of the proceedings and also requested an extension of the time limit for filing the statement arguing with the *"considerable scope of the constitutional complaint and the complexity of the matter"*, [23]while at the same time trying to minimize the reimbursement of costs for the complainant in view of the alleged "prophanity" of the proceedings, clearly shows what kind of characters are involved here.

III. Comments on the constitutional complaint

Some of the BMJV's assessments of the content of the constitutional complaint are interesting. Ms Pakuscher told several addressees in an e-mail on 25/08/2017 (translation from German language):[24]

> *"The approach of the complaint that it 'cannot be ruled out' that the complainant's rights under Article 38 of the Grundgesetz have been violated and therefore the BVerfG must carry out the requested comprehensive review should – according to Mr AL III – be vigorously opposed."*

"Mr AL III", the head of BMJV Directorate III, was Dr Hubert Weis at the time. The fact that the *"requested comprehensive review"* had to be *"vigorously opposed"* speaks for itself. After the BMJV itself had previously carried out the prescribed constitutional review of the UPCA in a cursory manner at best,[25] the comprehensive review that was now being requested was obviously perceived as threatening, which may also explain the agitated language.

An e-mail from Ms Knapp dated 30/08/2017 also shows that the Federal government was apparently determined to avoid a substantive discussion of the issues raised by the constitutional complaint (translation from German language):[26]

> *"For the Federal government, questions of admissibility are of primary importance, since the constitutional complaint is obviously inadmissible because the complainant is ultimately seeking a review of ordinary law via Article 38 of the Grundgesetz which is not allowed."*

As far as it says in the corresponding order of Ms Knapp from 07/09/2017 (translation from German language)[27]

> *"The pending constitutional complaint against the Act on the Agreement of 19 February 2013 on a Unified Patent Court is of fundamental national and European political importance."*

---

[15] Cf. document 20061.1.pdf, p. 44 ff, 54.
[16] Cf. document 20061.1.pdf, p. 31.
[17] Cf. document 20061.1.pdf, p. 32.
[18] Cf. document 20061.1.pdf, p. 54.
[19] Cf. document 20061.9.pdf, p. 2.
[20] Cf. document 20061.9.pdf, p. 11.
[21] Cf. document 20061.3.pdf, p. 80.
[22] BVerfG, 2 BvR 1022/08, decision of 13/10/2010: EUR 750.000,--; 2 BvR 2730/13, decision of 16/05/2018 – OMT: EUR 1.000.000,--.
[23] Cf. document 20061.2.pdf, p. 5.
[24] Cf. document 20061.1.pdf, p. 22.
[25] Cf. document 20061.1.pdf, p. 22.
[26] Cf. *Stjerna*, The European Patent Reform – The German Ministry of Justice and the legal scrutiny of the UPCA and the draft legislation for its ratification, accessible at www.stjerna.de/bmjv-gg/?lang=en.
[27] Cf. document 20061.1.pdf, p. 56.

this does not seem to constitute any legal requirements as to constitutional law and EU law. This, too, is deeply revealing.

The statement by Mr Johannes Karcher, BMJV Division III B 4 and meanwhile Chairman of the Administrative Committee of the Unified Patent Court ("UPC"), dated 26/09/2017, in which he comments on the constitutional complaint, is also informative.[28]

IV. The preparation of the Federal government's statement and aspects discussed for this purpose

The BMJV's files show how the Federal government's statement was the subject of intense debate on how to best address the various issues raised in the constitutional complaint. It was not infrequently expressed that the objections raised were by no means considered to be as absurd as they liked to allege in public and that they preferred to avoid an in-depth debate on fundamental issues. Of particular interest in this respect are the questions of the position of the UPC judges, the referral to the CJEU and the impact of "Brexit" on the UPCA.

1. The position of the UPC judges

An e-mail from Ms Knapp to Mr Barth dated 18/10/2017 contains interesting statements on the position of the UPC judges and the deficits in legal protection in this regard (translation from German language, emphasis added):[29]

> *"I would like to suggest that paragraphs 33 to 39 of the statement be deleted in their entirety. In my opinion, the text raises new questions and problem areas that have not yet been the subject of the proceedings with such clarity; at least not to my knowledge. The above-mentioned paragraphs are about the 'defense' of the legal status of judges at the UPC. As is also known from other international organizations, they can be 'removed' from office. The EPO explicitly mentions that in other international organizations the majority of the judges decides on this with at least a 2/3 majority.*
>
> *This was not considered practicable for the UPC and instead it was decided that a decision on the removal of a judge can be taken by a simple majority (i.e. only 4 persons!) within the 7-member Presidium.*
>
> *How such a significant deviation from the regulations in other international organizations can be justified with 'practicability' is not clear to me. It is also clear that the 'removed' judge (currently) has no legal protection against the decision.*
>
> *Furthermore, the text mentions in passing that technical judges are 'assigned on a case-by-case basis'. Against this background, the statement gives even more reason than before to question the compatibility of the legal status of the judges of the UPC with the German understanding of judicial independence.*
>
> *Shouldn't German judges also be entitled to a minimum of legal protection against removal from office (keyword: the right to justice)?*
>
> *The comments on the legal status of judges in paragraph 102 should be entirely sufficient and do not appear to be so inappropriate.*
>
> *The attempt to defend the rule that the Administrative Committee can amend the UPCA (i.e. a treaty under international law) and that the Member States only have a veto right does not seem very promising to me. Does this mean that the Administrative Committee can waive German laws (para. 48)?"*

Thus, the problems raised in the constitutional complaint were not considered to be absurd, but the BMJV chose to rather not face them.

In an e-mail from Mr Karcher to Mr Barth dated 18/10/2017, the former argues that a reference to the alleged possibility of changing the legal status of UPC judges after the UPCA enters into force by amending the Statute, should rather be deleted (translation from German language):[30]

> *„it concerns the following sentence in paragraph 139, which in my opinion should rather be deleted:*
>
> *'In the same way, certain provisions contained in the Statute concerning the legal status of judges could be amended even after ratification of the UPCA by the Federal Republic of Germany, since amendments to the Statute can be decided by the Administrative Committee in accordance with Art. 40(2)'."*

2. Referral to the CJEU

The BMJV's handling of the UPCA's compatibility with Union law and the referral to the CJEU suggested in the constitutional complaint is also very revealing.

Here, too, the tactic of camouflage and deception dominates. For example, Prof. Mayer tells Thomas Barth in an e-mail dated 24/10/2017 (translation from German language, emphasis added):[31]

> *"An important point is that I want to exclude all European law and place it in a separate section at the end, under the aspect of a referral procedure (the necessity of which I deny, of course). This makes the argumentation on the admissibility and merits of the constitutional complaint more transparent.*
>
> *Here I have almost finished the part on the autonomy of Union law.*
>
> *However, I had some difficulty in presenting the question of whether the UPC is a court within the meaning of Art. 267 TFEU – namely the court of a Member State... – as settled. It is probably necessary to distance oneself as far as possible from the BeNeLux Court as a point of reference."*

[28] Cf. document 20061.2.pdf, p. 8 ff.
[29] Cf. document 20061.2.pdf, p. 254.
[30] Cf. document 20061.2.pdf, p. 253.
[31] Cf. document 20061.2.pdf, p. 257.

Even the Federal government's procedural representative doubted that the UPC could be presented as a court of a Member State within the meaning of Art. 267 TFEU. Here too, the solution was not an open discussion of the issue, but rather an attempt to distance oneself *"as far as possible"* from the applicable standards, i.e. in particular the relevant case law of the CJEU[32].

In an e-mail to Thomas Barth dated 01/12/2017 Prof. Mayer identified further problems with his own line of argumentation (translation from German language, emphasis added):[33]

> *"Referral to the CJEU: I still have a problem with the presentation of the relevance of the decision. In the OMT and in the QE referral, the BVerfG has indeed indicated that it can consider a question of European law to be relevant for a decision in the context of a constitutional complaint. I would be reluctant to make this a point of discussion in the present case.*
>
> *I haven't even mentioned the whole question of the relevance of the decision for the time being, then everything will concentrate better on the fact that there are no more open questions of interpretation."*

Very good. What is not mentioned as a problem is not a problem. The reliability of this "solution" is obvious and easily demonstrates the "spirit" of the personnel acting on behalf of the Federal government.

Mr Karcher's comment in an e-mail to Mr Barth dated 04/12/2017 falls into the same category (translation from German language):[34]

> *"Only the latter point struck me as being of substantive importance when reviewing the text. Prof. Mayer correctly writes on page 60 of the text that a referral to the CJEU lacks relevance because European law is not a standard of review under Article 38 of the Grundgesetz in the present case. In the following, however, he seems to question this clear statement somewhat by stating that this consideration is not relevant because there are no open questions of interpretation of Union law in the matter. This also applies to the result on page 78, where the lack of a standard of review is no longer mentioned. It seems clear to me that the relevant questions of European law are not part of the constitutional identity, whereas a clever lawyer could perhaps justify a different opinion on the point of whether there are open questions of interpretation of Union law. Therefore, in my opinion, we should (more) clearly mark the point that there are no open questions of interpretation as an additional consideration."*

The CJEU will comment on the point that allegedly *"there are no open questions of interpretation of Union law"* at the appropriate time.

3. „Brexit"

The Federal government's position on the consequences of "Brexit" for the UPCA played a major role in the preparation of the statement.

In an e-mail dated 19/09/2017, Mr Karcher wrote to his colleagues Josef Brink (BMJV Division IV C 4) and Andreas Günther (BMJV Division IV C 2) on the subject of *"whether a delay caused by the court proceedings beyond Brexit could lead to an obstacle to ratification for DE"* for the purpose of the preparation of a *"brief statement"* for *"our legal representative Prof. Mayer"*. He describes the question as follows (translation from German language, emphasis added):[35]

> *"in the ongoing constitutional complaint proceedings against the Ratification Act ('Vertragsgesetz') on the Agreement on a Unified Patent Court 2 BvR 739/17, Mr Barth and Ms Ley approached me with the question of whether a delay beyond Brexit caused by the court proceedings could lead to an obstacle to ratification for DE. If this were the case, the BVerfG would have to be asked for acceleration, stating the reasons. We have been asked to draft a short statement on this issue for our legal representative Prof. Mayer.*
>
> *The question arises as to the extent to which international law and European law considerations could give rise to a requirement to refrain from ratification. The only indication that I can see could be the fact that GBR was still an EU MS at the time of its own ratification, but is no longer an EU MS at the time of DE ratification, which is required for the Agreement to enter into force. The UPCA stipulates that the Contracting Member States are EU States.*
>
> *Is there a principle that DE may not participate in any Agreement where one of the contractual parties does not fulfill a contractual requirement? Alternatively, is it not enough to amend the Agreement later?"*

From a procedural perspective, the first question that arises is who can ask the BVerfG to expedite proceedings and with what prospects of success. From the complainant's perspective, it may be mentioned here that, for example, applications for access to the court file, which is usually allowed within a few days, repeatedly took more than half a year at the BVerfG before they were granted. So can third parties who – like the Federal government in proceedings 2 BvR 739/17 – are not even a party to the proceedings prompt the court to expedite the processing of a case?

Mr Karcher also expressed an idea as to how membership of the UPCA could possibly be maintained for a Great Britain that is no longer a member of the EU (translation from German language):[36]

---

[32] Cf. for instance matters C-337/95, judgment of 05/11/1997 – Parfums Christian Dior; C-196/09, judgment of 14/06/2011 – Paul Miles / European Schools.
[33] Cf. document 20061.5.pdf, p. 96.
[34] Cf. document 20061.6.pdf, p. 190.
[35] Cf. document 20061.14.pdf, p. 2.
[36] Cf. document 20061.14.pdf, p. 3.

"Furthermore, in my view, the content of the Brexit agreement, which, of course, we do not yet know, would have to be taken into account when assessing this question. The approach is that the Brexit Agreement would stipulate, for example, that GBR would be invited to participate in the Court Agreement as a former EU Member State, reaffirming all obligations under EU law arising from the UPCA. On this basis, the UPCA would be amended after its entry into force in a simplified procedure pursuant to Article 87(2) UPCA by decision of the Administrative Committee to the effect that Contracting Member States are EU MS and former EU MS that have been invited to participate by the Union."

Mr Brink commented as follows (translation from German language, emphasis added):[37]

"I agree with the opinion of Division IV C 2. The UK has already ratified the Agreement. Brexit would not result in the expiry or termination of the Agreement. German ratification is governed by the Agreement, which provides for its entry into force in the event of German ratification, as all requirements for entry into force will then have been met. In your reply to Division IV A 3, you should therefore focus strictly on the Agreement and its provisions for its entry into force. There is no general rule of international law or constitutional law that DEU may only ratify Agreements whose ratification or implementation or compliance by all other contracting parties can be expected with certainty or probability. Rather, according to the Vienna Convention on the Law of Treaties, the obligation to fulfill the treaty must generally be assumed."

The reference to the Vienna Convention on the Law of Treaties and the obligations arising therefrom is interesting. Was this convention observed when the UK allegedly "withdrew" its ratification of the UPCA? Does the Convention permit such a withdrawal? If so, from what date does it take effect?[38]

Mr Karcher replied to Mr Barth on 28/09/2017 regarding the possible effects of "Brexit" as follows (translation from German language):[39]

"You had asked whether ratification by DE would no longer be possible for legal reasons after Brexit, with the consequence that the BVerfG would have to be asked for accelerated treatment in the constitutional complaint proceedings against the UPCA Ratification Act ('Vertragsgesetz') in order to avoid a ratification obstacle for DE. Divisions IV C 2, IV [C] 4 and III B 4 take the following position on this question:

Brexit cannot be seen as an obstacle to ratification for Germany. Germany could ratify the Agreement in accordance with Article 89, even if GBR were to lose its status as an EU MS, required by the UPCA, as a result of Brexit. Brexit would not result in the expiry or termination of the Agreement on a Unified Patent Court. In this respect, only GBR would be in breach of the Agreement. There is no general rule under international law or constitutional law that DEU may only ratify Agreements whose ratification or implementation or compliance by all other contracting parties can be expected with certainty or probability. Rather, according to the Vienna Convention on the Law of Treaties, the obligation of all contracting parties to fulfill the treaty must generally be assumed.

Brexit would therefore mean that GBR would no longer fully comply with the provision in the UPCA because – unlike provided for in the Agreement – it is not an EU Member State. In this respect, the UPCA would have to be amended. The Brexit Agreement could, for example, stipulate that GBR is invited to participate in the Court Agreement as a former EU MS, reaffirming all obligations under EU law arising from the UPCA.

For general considerations, however, the phase of uncertainty about the progress of the European patent reform should of course be kept as short as possible."

Prof. Mayer advocated addressing the topic of "Brexit" rather cautiously in the statement, explaining in an e-mail dated 20/11/2017 (translation from German language):[40]

"At some point, it should be addressed that GB's withdrawal threatens to create the situation that a third country is on board with the UPCA, which the CJEU rejected in its opinion [1/09]. I did this very briefly at the beginning. An alternative would be a separate section further back in the pleading with reference to the complainant etc. But then the problem would be presented in a bigger way than is necessary/helpful in my opinion.

At some point it should be pointed out that the BVerfG's decision should not require another 2 years – possibly until after BREXIT. Perhaps best placed in the context of the expedited proceedings. I have therefore added a separate section on the expedited proceedings in order to again emphasize this urgency. We can also completely omit the comments on expedited proceedings. Conversely, if you see a need to provide the BVerfG with even more arguments for the urgency of the proceedings, please add them. But be careful, so far the BVerfG has not been in a hurry, the extension of the deadline for the statement is due to us."

Mr Barth's comment on the relevant passage in the draft was telling (translation from German language):[41]

"Our assessment under European law is somewhat more flexible, but this should not be further problematized here."

---

[37] Cf. document 20061.14.pdf, p. 2.
[38] Cf. *Stjerna*, The European Patent Reform – The "withdrawn" ratification of the UPCA and its protocols by the United Kingdom, accessible at www.stjerna.de/upca-uk-withdrawal/?lang=en.
[39] Cf. document 20061.18.pdf.
[40] Cf. document 20061.3.pdf, p. 2.
[41] Cf. document 20061.4.pdf, p. 18.

The attentive observer will have noticed that the BMJV has maximum flexibility in all legal matters when it comes to helping the European patent reform to enter into force.

In an e-mail to Mr Günther dated 23/11/2017, Alfred Bindels argued that EU Member States and former EU Member States can easily be equated for the purposes of the UPCA (translation from German language):[42]

> *"On page 65, you formulate 'not excluded'. Of course, this puts you on the safe side, as you do not know whether an agreement with GBR will be reached in time and whether and what it will contain. For tactical reasons, however, it would be preferable not to offer an open flank here. Could this not be worded more positively: 'In the Withdrawal Agreement, however, the primacy and autonomy of EU law can also be adequately safeguarded in this specific context by provisions in the Withdrawal Agreement, so that the former Member State continues to assume the obligations required under European law in the context of the UPCA'?"*

Mr Günther commented in an e-mail dated 23/11/2017 (translation from German language, emphasis added):[43]

> *"We are already going out on a limb with this issue, which is not at all relevant to the constitutional complaint. The question is complex and controversial in the interplay between the Withdrawal Agreement, transitional arrangements, status agreement and UPCA, which may then have to be adapted, and we hope that it never ends up before the CJEU."*

The topic was apparently too sensitive for Mr Karcher. He stated in an e-mail dated 23/11/2017 (translation from German language):[44]

> *"Like Prof. Mayer, I would also prefer moving the issue of Brexit out of the spotlight as far as possible."*

As to the passage in the draft statement [45] at the time (translation from German language)

> *"For the time being, Great Britain's participation remains unaffected by Great Britain's declaration under Art. 50 TEU that it wishes to withdraw from the European Union. A regulation remains reserved for the contractual arrangements between Great Britain and the EU provided for in Art. 50 TEU. Should such arrangements not be reached, Great Britain would have to continue to accept the primacy of EU law and the jurisdiction of the CJEU in this specific area via the UPCA."*

Silja Waibel from the AA (Direction E11) asked for removal, while approving the draft in all other respects (translation from German language):[46]

> *"AA (AS-GBR) pleads for the removal of the explanatory passage on GBR and Brexit as a precautionary measure, as for the post-Brexit period it is part of the overall package to be negotiated on the future relationship and also does not appear to be absolutely necessary for this pleading.*
>
> *In addition: The applicability of the UPCA to GBR does not automatically end with the execution of Brexit, as the UPCA is an international Agreement. However, the status of GBR in the UPCA post-Brexit is problematic. This is because only EU MS can currently be Contracting States to the UPCA (Art. 84 UPCA) – adjustments would at least be necessary. In addition, according to Art. 20 ff. UPCA, the UPC cooperates with the CJEU to ensure the correct application and uniform interpretation of EU law and recognizes the primacy of EU law."*

Although these objections are readily understandable, Mr Barth refused to delete the passage. In his reply dated 08/12/2017, he stated (translation from German language, emphasis added):[47]

> *"Please understand that I cannot comply with the request to delete the 'Brexit passage' on p. 10. The question of our position on the Brexit issue has been discussed intensively in our Ministry, with the participation of the European Law Division IV C 2 (Dr Günther). We have come to the conclusion that, while we should exercise as much restraint as possible, we cannot completely ignore the issue because it is already being discussed intensively in professional circles.*
>
> *It would not only make a very unfavorable impression on the BVerfG if we did not address this 'elephant in the room'. On the contrary, we must also signal to the court that these issues appear to be resolvable and that they do not constitute a reason to wait and see what happens. It is very important to our Ministry – especially from a patent law perspective – that the proceedings are expeditious and that a decision is reached soon."*

Is it sufficient for the Federal government to "signal" to the BVerfG that a central legal issue "appears to be solvable" in order to prevent the latter from intervening under constitutional law?

After approval by the directorial and sub- directorial management as well as the responsible State Secretary,[48] the Federal government's statement [49] in proceedings 2 BvR 739/17 was submitted to the BVerfG on 15/12/2017.

To be continued.[50]

* * *

[42] Cf. document 20061.3.pdf, p. 183.
[43] Cf. document 20061.3.pdf, p. 183.
[44] Cf. document 20061.4.pdf, p. 3.
[45] Cf. document 20061.8.pdf, p. 106.
[46] Cf. document 20061.8.pdf, p. 106.
[47] Cf. document 20061.8.pdf, p. 102.
[48] Cf. document 20061.8.pdf, p. 208 ff.
[49] Cf. document 20061.8.pdf, p. 212 ff.
[50] Cf. *Stjerna*, EU Patent Reform – The German state powers in constitutional complaint proceedings 2 BvR 739/17 (Part 2), accessible at www.stjerna.de/state-powers-2-bvr-739-17-part-2/?lang=en.

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