

# The European Patent Reform – The German Ministry of Justice and the legal scrutiny of the UPCA and the draft legislation for its ratification

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

**Before a bill can be introduced into parliamentary proceedings, German law stipulates that it must be subjected to a comprehensive legal scrutiny, particularly by the Federal Ministry of Justice and Consumer Protection (“BMJV”), in order to ensure that it is compatible with the German Constitution (“Grundgesetz”) and Union law. The BMJV must certify in writing that this legal scrutiny has been carried out with a positive result. In the case of an international Agreement such as the Agreement on a Unified Patent Court (“UPCA”), the BMJV and the Federal Ministry of the Interior (“BMI”) must already be involved in the preparatory work for the purpose of constitutional examination. The following article deals with the framework of this legal scrutiny and its implementation with regard to the UPCA and the two pieces of draft legislation submitted for its ratification in Germany. The fact that compatibility with the *Grundgesetz* was apparently examined only very selectively and that with Union law was apparently not examined at all should come as no surprise in the light of previous experience.**

## **I. The BMJV’s role as to the UPCA and its ratification**

The ratification of the UPCA in Germany is based on a legislative initiative of the Federal Government which started legislative procedures on a “Ratification Act” approving the Agreement as such (“*Vertragsgesetz*”) and an “Implementation Act”, containing the amendments to align the law with the Agreement (“*Begleitgesetz*”).

### **1. Organisation and cooperation of the Federal Ministries**

The Federal Government’s technical and personnel resources for this are to be found primarily in the Federal Ministries, whose organisation and participation in legislation is regulated by the so-called “Joint Rules of Procedure of the Federal Ministries” (“*Gemeinsame Geschäftsordnung der Bundesministerien*”, “GGO”)<sup>1</sup>. The structure and course of business of the Federal Ministries will be described in more detail below, insofar as this is relevant for the understanding of this contribution.

The Federal Ministries are divided internally into Directorates (“*Abteilungen*”) and Divisions (“*Referate*”) (so-called “organisational units”). The Division is the main unit, with initial decision-making authority in all matters

within its area of responsibility (sec. 7 (1) GGO). Within the Ministry, the areas of responsibility are subdivided into different Divisions and, within a Division, according to factual contexts; the different tasks are set out in a schedule of responsibilities (sec. 7 (2) GGO). If a matter concerns several organisational units of the same Ministry, one of them takes the overall responsibility (“*Federführung*”). The responsible Division then has to involve the others (“inner-ministerial coordination”, “*Hausabstimmung*”), whereby the type and scope of the participation is incumbent upon it (sec. 15 (1), (2) GGO). The participation takes the form of the so-called “co-signature” (“*Mitzeichnung*”), with which an involved organisational unit assumes the technical responsibility for the organisational area represented by it (sec. 15 (4) GGO). For each matter, it must be stated which organisational units have processed, co-signed and signed it (sec. 15 (5) GGO).

If a matter concerns the business areas of several Federal Ministries, they work together; the timely and comprehensive involvement (“intra-ministerial coordination”, “*Ressortabstimmung*”) lies with the Ministry having the overall responsibility (sec. 19 (1) GGO). The latter must involve the other factually affected Federal Ministries at an early stage as to enable them to carry out a timely and comprehensive co-examination of the project (sec. 74 (5) GO).

Before the Federal Government introduces a bill into the parliamentary procedure, it must formally be adopted by the Federal Cabinet, consisting of the Federal Chancellor and the Federal Ministers. Such resolutions are prepared by so-called “Cabinet submissions” (“*Kabinettsvorlagen*”) by the Federal Ministry having the overall responsibility (sec. 22 GGO).

### **2. The legal scrutiny of international Agreements and Federal Government draft legislation**

The GGO contains detailed guidelines for bills of the Federal Government (sec. 42 ff GGO), such as the Ratification and Implementation Acts on the UPCA. A piece of draft legislation must also correspond to the “*Handbuch zur Vorbereitung von Rechts- und Verwaltungsvorschriften*” (“HdbVRV”, “Manual for Drafting Legislation”)<sup>2</sup> and the “*Handbuch der Rechtsförmlichkeit*” (“HdbRF”, “Handbook of Legal Formality”)<sup>3</sup> (sec. 42 (3), (4) GGO). The explanatory memorandum of the bill must (among other

<sup>1</sup> Accessible at [bit.ly/2z2Nt8C](http://bit.ly/2z2Nt8C) (German language).

<sup>2</sup> Accessible at [bit.ly/2OJEmkM](http://bit.ly/2OJEmkM) (German language).

<sup>3</sup> Accessible at [bit.ly/2VQZIOc](http://bit.ly/2VQZIOc). (HdbRF)

things) describe its connections to and compatibility with European Union law (sec. 43 (1) no. 8 GGO) as well as the legal consequences, above all the costs for the economy, in particular for medium-sized enterprises (sec. 43 (1) no. 5, 44 (1) 5 no. 1 GGO).

In order to examine legal provisions for their compatibility with the *Grundgesetz* (“GG”) and in all cases in which “doubts arise as to the application of the *Grundgesetz*”, the Federal Government must involve the BMI and the BMJV, the so-called “Constitution Ministries” (sec. 45 (1) 2 GGO). For legislative projects that require a detailed examination under European law, the Federal Government must involve the Federal Ministries with “overarching competences under European law”, in particular the BMJV and the Federal Foreign Office (“AA”), at an early stage for resolving issues under European law (sec. 45 (1) 3 GGO). Before draft legislation is submitted to the Federal Government for adoption, the BMJV must examine it in terms of its systemic and formal legal compliance (“legal scrutiny”, sec. 46 (1) GGO). The BMJV has to confirm the legal examination in the cover letter of a Cabinet submission (sec. 51 no. 2 GGO). In case of international Agreements, the BMI and the BMJV must already be involved in the preparatory work in order to carry out “the constitutional assessment” (sec. 72 (4) GGO).

#### a) The “Handbuch zur Vorbereitung von Rechts- und Verwaltungsvorschriften”

As indicated, draft legislation must comply with the HdbVRV, which contains an instructive description of the procedure<sup>4</sup> for the preparation of draft legislation by the Federal Government and several substantive requirements.

The inner-ministerial coordination takes place on Division level, in which the Division with overall responsibility asks the Divisions to be involved to co-sign the draft legislation. If these do not raise objections, they co-sign.<sup>5</sup>

An intra-ministerial coordination is necessary if competences of another Ministry are affected, whereas the Constitution Ministries – BMI and BMJV – must always be involved to review draft legislation for its compatibility with the *Grundgesetz*.<sup>6</sup> The BMI has the overall responsibility on the law on State organisation, while the BMJV is in charge of the fundamental rights assessment.<sup>7</sup> The HdbVRV emphasizes the particular importance of this examination.<sup>8</sup> In addition, it refers to the aforementioned obligation under sec. 43 (1) no. 8 GGO to describe in the explanatory memorandum of the draft legislation its connections with Union law and its compatibility with it.<sup>9</sup>

The HdbVRV also refers to the possibility of claiming a special urgency in accordance with Art. 76 (2) 4 GG and notes that such a claim is excluded in the event of an

amendment to the *Grundgesetz* and the transfer of sovereign rights.<sup>10</sup>

#### b) The “Handbuch der Rechtsförmlichkeit”

The HdbRF contains concrete requirements for the legal scrutiny to be carried out in accordance with sec. 46 (1) GGO. It states:<sup>11</sup>

*“The assessment by the Federal Ministry of Justice is a legal assessment. (...) The legal scrutiny focuses on whether the regulations are compatible with higher-ranking law (so-called vertical legal assessment). The assessment shall focus on*

- *constitutionality,*
- *compatibility with European Union law and*
- *compatibility with international law, in particular with the United Nations Universal Declaration of Human Rights and the European Convention on Human Rights,*

*to the extent that such connections are obvious or questions are posed by the submitting Division.”*

The legal scrutiny is carried out by the individual Divisions according to their respective specialization.<sup>12</sup> The examination for compatibility with constitutional law is incumbent upon the constitutional law Divisions and the fundamental rights Division.<sup>13</sup>

The HdbRF describes the assessment as follows:<sup>14</sup>

*“Generally, drafts for legislation and statutory instruments are sent to the Federal Ministry of Justice after the preparatory work has been completed, together with an explicit request that legal scrutiny be conducted. Where necessary, the Division responsible for legal scrutiny involves other Divisions in the Federal Ministry of Justice (e.g. those responsible for constitutional law) and compiles a summary of all their comments. When the Ministry with overall responsibility has dealt with any objections and the examination has been completed, the Division carrying out co-scrutiny confirms that there are neither systematic nor structural concerns (scrutiny report). In accordance with section 51 GGO, the Ministry with overall responsibility can then state in its cover letter to the Cabinet Submission that the Federal Ministry of Justice confirms that the bill has undergone legal scrutiny. This confirmation not only testifies that the Federal Ministry of Justice was given the opportunity to examine the bill, but also that it actually carried out the examination and that it raises neither systematic nor formal objections.”*

In order to examine the constitutionality of draft legislation, the HdbRF contains a separate section with numerous control questions, intending to permit early recognition of

<sup>4</sup> HdbVRV (fn. 2), para. 84 ff.

<sup>5</sup> HdbVRV (fn. 2), para. 102.

<sup>6</sup> HdbVRV (fn. 2), para. 108.

<sup>7</sup> HdbVRV (fn. 2), para. 246.

<sup>8</sup> HdbVRV (fn. 2), para. 247 f.

<sup>9</sup> HdbVRV (fn. 2), para. 249.

<sup>10</sup> HdbVRV (fn. 2), para. 133.

<sup>11</sup> HdbRF (fn. 3), para. 8.

<sup>12</sup> HdbRF (fn. 3), para. 11.

<sup>13</sup> HdbRF (fn. 3), para. 11.

<sup>14</sup> HdbRF (fn. 3), para. 13.

constitutional risks,<sup>15</sup> including such after consideration of the so-called “Essentiality Doctrine” (“*Wesentlichkeits-theorie*”) of the German Federal Constitutional Court (“*Bundesverfassungsgericht*”, “BVerfG”), according to which the legislator must take all essential decisions himself and must not delegate them to the executive branch.<sup>16</sup>

HdbVRV and HdbRF thus offer comprehensive guidance on how to conduct the legal scrutiny of draft legislation.

### **3. BVerfG: All State organs have a duty to protect constitutional identity (“*Verfassungsidentität*”)**

For an international Agreement such as the UPCA, the aforementioned issues of legality are complemented by a further important aspect. According to the case-law of the BVerfG, the admissibility of opening German State power by international Agreements is limited, inter alia, by the constitutional identity (“*Verfassungsidentität*”) of the *Grundgesetz*;<sup>17</sup> the order to apply the Agreement contained in the Ratification Act to it may only be issued within the framework of the constitutional order.<sup>18</sup> All German State organs are obliged vis-à-vis the citizen to preserve and protect the integrity of State power and to prevent any impairment of constitutional identity through the transfer of sovereign rights.<sup>19</sup> This right concerns in particular the transfer of sovereign rights to the European Union or other supranational institutions.<sup>20</sup> German State institutions must not participate in the creation and implementation of measures that affect the constitutional identity of the *Grundgesetz*.<sup>21</sup> In the context of every international Agreement and the related ratification procedure, this case law gives rise to a concrete protective mandate with regard to constitutional identity for the Federal Government and the Ministries acting on its behalf. This duty of protection and the corresponding right of the citizen, protected by the fundamental right to democratic self-determination, strongly suggest that a specific examination of the respective Agreement be carried out for its compatibility with the *Grundgesetz* and fundamental rights.

### **4. Legal scrutiny of the UPCA and its ratification: BMJV Divisions to be involved**

It is well known that the BMJV has the overall responsibility for the Federal Government’s work on the implementation of the European patent reform in Germany. The BMJV’s internal overall responsibility lies with Division

III B 4 under its head *Johannes Karcher*, formerly a judge at the Higher Regional Court of Schleswig and at the Federal Patent Court (“BPatG”), as well as an employee of the European Commission<sup>22</sup> and a member of the Preparatory Committee of the Unified Patent Court (“VA-EPG”).<sup>23</sup>

Having the overall responsibility for the ratification of the UPCA, Division III B 4 was in charge of involving the other Divisions concerned in the BMJV (sec. 15 (1), (2) GGO). For legal scrutiny pursuant to sec. 46 (1) GGO it had to involve in particular – as described – the BMJV Constitution Divisions, i. e. Divisions

- IV A 1 (competence: fundamental rights),
- IV A 2 (constitutional law as it relates to organs of the State; law of finance),

as well as, in the context of the examination of compatibility with Union law and international law, Divisions

- IV C 2 (General issues and legal questions relating to the EU; procedural law of the EU), and
- IV C 3 (international law, law of international organisations, international jurisdiction).

Further information on the individual Divisions and their management at the relevant time can be found in BMJV organizational plans of 15/02/2016<sup>24</sup> and 01/10/2017<sup>25</sup>.

### **5. Legal scrutiny of the UPCA and its ratification: Questions to be assessed**

For the legal assessment of the UPCA and the draft ratification legislation, the HdbVRV and HdbRF particularly suggest that the following questions be considered:

- Are the UPCA and the ratification laws compatible with the *Grundgesetz*, in particular with fundamental rights?
- Are the UPCA and the ratification laws compatible with the State’s duty to protect constitutional identity?
- Were the connections to and compatibility with the law of the European Union set out in the explanatory memorandum of the ratification laws (sec. 43 (1) no. 8 GGO)?
- Were the costs for the economy, especially for medium-sized enterprises, described (sec. 43 (1) no. 5, 44 (1) 5 no. 1 GGO)?

The fact that, pursuant to sec. 72 (4) GGO, the BMI and the BMJV were to be involved already in the preparatory work for the UPCA to resolve issues of constitutional law would suggest that all these issues had already been examined once before the UPCA was signed.

<sup>15</sup> HdbRF (fn. 3), para. 51 ff.

<sup>16</sup> HdbRF (fn. 3), p. 29, question 7.3.

<sup>17</sup> BVerfG, 2 BvR 2728/13 et al., judgment of 21/06/2016, para. 120 – OMT, accessible at [bit.ly/2lO8xIM](http://bit.ly/2lO8xIM); 2 BvR 2728/13 et al., decision of 14/01/2014, para. 27 – OMT (CJEU referral), accessible at [bit.ly/1JNSavy](http://bit.ly/1JNSavy).

<sup>18</sup> BVerfG, judgment 2 BvR 2728/13 et al. (fn. 17), para. 120 (w.f.r.); 2 BvR 2735/14, decision of 15/12/2015, para. 40 – European arrest warrant, accessible at [bit.ly/2BpZ7tU](http://bit.ly/2BpZ7tU); BVerfG, 2 BvE 2/08 et al., judgment of 30/06/2009, para. 343 – Lisbon, accessible at [bit.ly/2EcNPsb](http://bit.ly/2EcNPsb).

<sup>19</sup> BVerfG, judgment 2 BvR 2728/13 et al. (fn. 17), para. 166.

<sup>20</sup> BVerfG, judgment 2 BvR 2728/13 et al. (fn. 17), para. 126.

<sup>21</sup> BVerfG, judgment 2 BvR 2728/13 et al. (fn. 17), para. 30.

<sup>22</sup> Cf. *Stjerna*, The European Patent Reform – The dedication of the German Ministry of Justice to the UPC, accessible at [www.stjerna.de/bmjv-upc/?lang=en](http://www.stjerna.de/bmjv-upc/?lang=en) and Mr *Karcher*’s CV at [bit.ly/2lEJyAH](http://bit.ly/2lEJyAH).

<sup>23</sup> Cf. the “Roadmap of the Preparatory Committee of the Unified Patent Court”, accessible at [bit.ly/2mwYtka](http://bit.ly/2mwYtka), p. 2.

<sup>24</sup> BMJV organisation plan of 15/02/2016 (German language), accessible at [bit.ly/2oArxi1](http://bit.ly/2oArxi1).

<sup>25</sup> BMJV organisation plan of 01/10/2017 (German language), accessible at [bit.ly/35EH8NY](http://bit.ly/35EH8NY).

## II. The BMJV and the legal scrutiny of the UPCA and its ratification

Since the end of 2017, the author of this article has tried to find out about, based on the Federal Freedom of Information Act (“IFG”)<sup>26</sup>, the extent to which the UPCA and the ratification legislation have been reviewed by the BMJV for their compatibility with the *Grundgesetz* and Union law. The answer is sobering. According to the official information provided by the BMJV, individual aspects were examined for compatibility with the *Grundgesetz*, but relevant constitutional issues remained unexamined, as did compatibility with Union law.

The individual inquiries to the BMJV and the official documents made accessible on them are described in more detail as follows.

### 1. IFG application October 2017

In October 2017, the BMJV was sent an IFG application for access to several matters relating to the European patent reform, including those with the following titles:

- “III B 4 an IV A 2; Verfassungsmäßige Prüfung Gerichtsbarkeitsübereinkommen” (“III B 4 to IV A 2; Examination Court Agreement under constitutional law”, document 907/2012),
- “III B 4 an IV C 4 / IV C 2 – Einheitliches Patentgericht, Entwurf eines Begleitgesetzes – Frage bezüglich der Aufgabenverteilung an das Europäische Patentamt in den VO 1257/2012 und 1260/2012” (“III B 4 to IV C 4 / IV C 2 – Unified Patent Court, Draft Implementation Act – Question concerning the allocation of tasks to the European Patent Office in Regulations 1257/2012 and 1260/2012”, document 815/2015), and
- “Stellungnahme des AA – Internationale Organisation für Völkerrecht – Einordnung des Einheitlichen Patentgerichts als internationale Organisation” (“Statement by the AA – International Organisation for International Law – Classification of the Unified Patent Court as an International Organisation”, document 835/2015).

Access was largely granted, signatures and file paths were blackened.

Official information made available pursuant to the IFG is available for inspection by anyone, and interested persons can access the relevant documents at [www.stjerna.de](http://www.stjerna.de). The grey redactions in the documents were made by the author and refer to the contact details of several officials.

#### a) Document 907/2012: “Constitutional Examination of the Draft [EPG] Agreement”

Document 907/2012 concerns an e-mail from Mr *Karcher* dated 29/10/2012 to the Head of BMJV Division IV A 2 (competence: constitutional law of State organisation and financial constitutional law), *Horst Heitland*, requesting the latter “to carry out for the draft Agreement (on a Unit-

ed Patent Court [“UPC”]) the constitutional examination required for an international Agreement”.<sup>27</sup> The basis was the draft UPCA according to Council document 14750/12<sup>28</sup> of 12/10/2012.

Surprisingly, however, the BMJV was unable to provide a document containing the results of the “constitutional review” by Division IV A 2.

Initially, they declared that the statement of Division IV A 2 was “not part of the file”. They said that it may have been possible to resolve “the query by Division III B 4” by telephone or orally or that the request had been “dealt with in another way” and this had been communicated orally to Division IV A 2. Significantly, in the official file which the author reviewed, the IFG application carried the handwritten remark “highly doubtful, ongoing proceedings” in relation to document 907/2013, apparently referring to the constitutional complaint.

Finally, the BMJV declared that there was no written statement at all by Division IV A 2 and submitted an official statement by Mr *Heitland*, according to which, according to his “memory”, Division IV A 2 had not submitted a written statement “in response to the request made” in the aforementioned e-mail. Of course, the reliability of this “memory” cannot be verified. So did the German Federal Government sign the UPCA on 19/02/2013 without a positive result of legal scrutiny? The inconsistent, linguistically stilted statements of the BMJV and the internal warning “highly doubtful” with regard to the document in question should speak for themselves. It is possible that the contents and results of the “constitutional review” shall be withheld from the public and, above all, the BVerfG. If this was the case, it will not be possible to assume that the compatibility of the UPCA with the *Grundgesetz* was deemed unproblematic.

#### b) Document 815/2015: Separate legal basis needed for delegation of tasks to the EPO?

Document 815/2015 concerns the question whether the transfer of tasks to the European Patent Office (“EPO”) with regard to the administration of unitary patent protection requires the creation of a separate legal basis or whether Art. 9 (1) of Regulation 1257/12, Art. 5 (1) of Regulation 1260/12 in conjunction with Art. 143 EPC are sufficient for this purpose.

In the corresponding e-mail correspondence, *Bernadette Makoski*, who was seconded to Division III B 4 at the time, expresses her views. She explains that in CJEU proceedings C-146/13, Germany had “strongly” positioned itself to the effect that Art. 9 (1) Regulation 1257/12 did not directly transfer tasks to the EPO, but that this required a separate transfer on the part of the Member States. However, Division III B 4 now preferred the opposite reading (!), according to which Art. 143 EPC authorised a transfer

<sup>26</sup> On procedure and earlier FOI requests to the BMJV cf. *Stjerna* (fn. 22).

<sup>27</sup> Document 907/2012 (German language), accessible at [bit.ly/32jsgG9](http://bit.ly/32jsgG9).

<sup>28</sup> Accessible at [bit.ly/2nHhU0c](http://bit.ly/2nHhU0c).

of tasks and did not require a separate legal basis.<sup>29</sup> It should again become clear where the constitutional problems with the UPCA stem from.

### c) Document 835/2015: Status of the Unified Patent Court in international law

Document 835/2015 deals with the international status of the UPC and whether it is an international organisation.

Worth reading are first of all the remarks by Mr *Karcher*, formerly a judge himself,<sup>30</sup> why the pensions of the UPC judges should be tax-exempt, while those of the non-judicial staff together with the UPC chancellor and vice-chancellor should not.<sup>31</sup>

Mr *Karcher's* comments on CJEU Opinion 1/09, in which, as is well known, the first draft of an Agreement on the creation of a European patent jurisdiction was rejected as incompatible with Union law, are also revealing. Mr *Karcher* states (translation from German):<sup>32</sup>

*“In its opinion A-1/09 on the first draft Agreement, the CJEU clarified that only EU Member States may participate in such a court. In this respect, the judges of the EU Member States are guardians and guarantors of Union law.”*

This understanding of the CJEU opinion, which was almost unanimously supported for a long time, had been hastily revised and reversed by certain UPC proponents in view of the British “Brexit” vote and the German constitutional complaint proceedings.<sup>33</sup>

All the more valuable is the recognition that the original understanding is not only regularly reaffirmed by the CJEU,<sup>34</sup> but is also shared by the responsible BMJV Division and Mr *Karcher* as a member of the VA-EPG or at least was shared during his work on the ratification of the UPCA. The motivation for any changes in this attitude is thus obvious.

## 2. IFG application August 2018

In August 2018, the author of this article submitted to the BMJV an IFG application for access to all official information as of 01/01/2008 concerning the compatibility with the *Grundgesetz* of the UPCA and the Agreement on the European and Community Patents Court (“EEUPCA”) according to Council document 7928/09 of 23/03/2009)

<sup>29</sup> Document 815/2015 (German language), p. 2, fourth para., accessible at [bit.ly/2MKJzG7](http://bit.ly/2MKJzG7).

<sup>30</sup> Cf. his CV (fn. 22).

<sup>31</sup> Document 835/2015 (German language), p. 5/6 and 6/7, accessible at [bit.ly/2VN36d2](http://bit.ly/2VN36d2).

<sup>32</sup> Document 835/2015, p. 6, third para.

<sup>33</sup> Cf. *Stjerna*, The European Patent Reform – Squaring the circle after the “Brexit” vote, accessible at [www.stjerna.de/brexit/?lang=en](http://www.stjerna.de/brexit/?lang=en).

<sup>34</sup> Cf. CJEU, Opinion 1/17 of 30/04/2019 – CETA, accessible at [bit.ly/2xD1reV](http://bit.ly/2xD1reV); Matter C-284/16, judgment of 06/03/2018 – Slovak Republic / Achmea BV, accessible at [bit.ly/2LJBBY8](http://bit.ly/2LJBBY8); Matter C-64/16, judgment of 27/02/2018 – Associação Sindical dos Juizes Portugueses / Tribunal de Contas, accessible at [bit.ly/2S8ewGM](http://bit.ly/2S8ewGM).

discussed prior to it. The version of the Agreement described in Council document 7928/09<sup>35</sup> was the subject of CJEU Opinion 1/09.

The BMJV made accessible ten documents with a total of 716 pages, almost 600 of which related to various legal texts. Signatures and file paths were again blackened.

According to the BMJV, these documents are all the official information available there under the request.

Official information made available pursuant to the IFG is available for inspection by anyone, and interested persons can access the relevant documents at [www.stjerna.de](http://www.stjerna.de). The grey redactions in the documents were made by the author and refer to the contact details of several officials.

### a) Document 907/2012

Of interest is document 907/2012, an e-mail correspondence between the BMJV, the BMI and the AA from October/November 2012 concerning the draft UPCA as set out in Council document 14750/12<sup>36</sup> of 12/10/2012, which was already the subject of the above-mentioned “constitutional review” by Division IV A 2. With regard to this UPCA draft, Mr *Karcher* had also asked BMI Division VI 4 (competence: European law, international law) for the “constitutional review to be carried out for international treaties” by e-mail of 30/12/2012.<sup>37</sup>

#### aa) “Non-terminability” of the UPCA?

In the e-mail correspondence, the initial message of AA Division E05 (competence: EU legal affairs, justice and home affairs of the EU) of 25/10/2012 on the question of whether the Agreement should contain a provision on the termination of membership is of interest. For the AA, *Kristin Kinder* remarked (translation from German):<sup>38</sup>

*“The Agreement lacks a termination clause, which is necessary from a formal contractual point of view. According to information from the BMJ, Division III B 4 (Mr Karcher), the question of a termination provision was submitted to the Presidency respectively to the Council Legal Service for examination. According to Mr Karcher, the JD Council spontaneously tended – according to Mr Karcher – that the possibility of termination was to be expressly excluded, because Union law in the form of the Patent Regulation depended on the entry into force of the Court Agreement (and its continued existence). From the point of view of our Division 501, this question should not be left to the Council alone, but rather a vote should be taken by the Division as to whether, as an exception, the normally agreed possibility of termination should be waived. In particular, we ask you to check whether the situation described – the reference to secondary EU law – is suf-*

<sup>35</sup> Accessible at [bit.ly/32spuLy](http://bit.ly/32spuLy).

<sup>36</sup> See above fn. 28.

<sup>37</sup> Document 907/2012-1 (German language), accessible at [bit.ly/2MkJqu7](http://bit.ly/2MkJqu7).

<sup>38</sup> Document 907/2012-7 (German language), p. 7/8, accessible at [bit.ly/2pm4mbh](http://bit.ly/2pm4mbh).

*ficient to waive such a clause and to become bound irrevocably to a contract.”*

In the final UPCA, a termination clause “required from a formal contractual point of view” does not exist.

#### **bb) Constitutional doubts concerning the amendment of the UPC Statute by the Administrative Committee without the involvement of the legislator**

*Tobias Plate*, who at the time was active in BMI Division VI 4, expressed constitutional concerns primarily with regard to the possibility of amending the UPC Statute by decision of the UPC Administrative Committee with a three-quarters majority and without the participation of the German legislator, as provided for in Art. 21a (2) of the draft UPCA (= Art. 40 (2) UPCA).

In an e-mail dated 02/11/2012, Mr *Karcher* explained in more detail how the BMJV viewed this question. According to Art. 21a (2) of the draft UPCA, the Statute must not contradict the requirements of the Agreement. This meant that the Administrative Committee could make amendments to the Statute only within the framework of Agreement, which in turn could not be amended against the will of the German legislator in accordance with Art. 58d of the draft UPCA.<sup>39</sup> This design corresponded to Art. 164 EPC and the EPC Implementing Regulations, which could be amended by a majority decision of the EPO Administrative Council. The same should also apply to the UPC.<sup>40</sup>

Mr *Plate* could not be convinced by this. By e-mail of 13/11/2012, he remarked that the simplified amendment procedure of the UPC Statute according to Art. 21a (2) of the draft UPCA contradicted established German State practice. In order to solve the problem, either a two-stage procedure as in Art. 58d of the draft UPCA (= Art. 87 UPCA) would have to be provided for or the German representative in the UPC Administrative Committee would have to be authorised to cast his vote by a Federal Act of Law.<sup>41</sup> Mr *Plate* also regarded it as constitutionally problematic that the Administrative Committee did not decide unanimously but by a three-quarters majority, so that the German legislative bodies could be overruled even if said two-stage procedure was to be provided for.<sup>42</sup>

In an e-mail dated 15/11/2012, Mr *Karcher* stated that amendments to the UPC Statute were directly valid as a consequence of the sovereign rights conferred on the UPC and “therefore required no further domestic implementation”.<sup>43</sup> He drew an astonishing comparison with the Rules of Procedure of the UPC (translation from German):<sup>44</sup>

*“The Rules of Procedure of the Court, for which, pursuant to Article 22 of the Agreement, the Administrative Committee is competent as well, also constitute a*

*transfer of sovereign rights under Article 24 (1) GG, with the effect that the Rules of Procedure directly trigger rights and obligations for citizens or companies in the Contracting States. Here, too, there is no provision for an additional domestic enactment.”*

Whether such a direct creation of rights and duties for the citizen by a committee of the executive branch, bypassing the Parliament, is constitutionally permissible, might occasionally be clarified by the BVerfG.

Finally, Mr *Karcher* expressed his hope that his supplementary statements would dispel the doubts of the BMI or that it would “put aside any remaining doubts”.<sup>45</sup>

However, Mr *Plate* stuck to his attitude, stating in an e-mail of 19/11/2012 (translation from German):<sup>46</sup>

*“The overwhelming view, which corresponds to the State practice of recent decades, is that it cannot be assumed that the legislative bodies, by approving the Agreement in accordance with the Ratification Act, will already – as it were in anticipation – approve possible amendments to the Agreement which they cannot even begin to envisage. It follows that, in the specific case where amendments to the Statute forming part of the Agreement also constitute amendments to the Agreement itself, which the legislature cannot accept in advance with its consent to the Agreement.*

(...)

*As a consequence, in my view, no inter-ministerially coordinated instruction with a positive tenor is currently possible at European level that does not also contain the text amendments requested by this House. In this context, I was surprised to note that, according to the instruction text, BMJ ‘took the view’ that this was a transfer of sovereign rights within the meaning of Article 24 GG, with the result that decisions of the Administrative Committee also applied directly in Germany. I have not yet received a statement from your House under constitutional law. If this were to deviate from the constitutional practice supported by both Houses for several decades, it would at least surprise me.”*

The final settlement of the objected aspects took place in the UPCA according to the position of the BMJV.

#### **b) Minister Submission on UPCA ratification**

Also provided was the submission of BMJV Division III B 4 to the then Federal Minister of Justice and Consumer Protection (“Federal Minister of Justice”), *Heiko Maas*, regarding the restart of the ratification procedure for the UPCA Ratification Act in December 2016 (Minister Submission of 22, 24/11/2016). This submission also made available the earlier Minister Submissions on initiating the ratification procedure in May 2016 (Minister Submission of 09/05/2016) and for approving the Ministerial drafts on the Ratification and Implementation Acts to the UPCA

<sup>39</sup> Document 907/2012-2 (German language), p. 2, accessible at [bit.ly/2VQ7Z1Y](http://bit.ly/2VQ7Z1Y).

<sup>40</sup> Document 907/2012-2, p. 2.

<sup>41</sup> Document 907/2012-7, p. 5, fourth para.

<sup>42</sup> Document 907/2012-7, p. 5/6.

<sup>43</sup> Document 907/2012-7, p. 2.

<sup>44</sup> Document 907/2012-7, p. 2/3.

<sup>45</sup> Document 907/2012-7, p. 4, first para.

<sup>46</sup> Document 907/2012-7, p. 1.

(Minister Submission of 07/01/2016). These documents contain some interesting remarks by the BMJV and show that numerous BMJV Divisions supported the draft legislation on the ratification of the UPCA after examination.

#### **aa) Minister submission of 22, 24/11/2016 on the reintroduction of the UPCA Ratification Act at the end of 2016**

In December 2016, the Federal Government reintroduced its draft of the Ratification Act on the UPCA to the Federal Council, after having claimed a special urgency in its first submission in May 2016, despite Art. 76 (2) 5 GG expressly excluding this for legislation involving – as the UPCA – the transfer of sovereign rights; the author of this article had pointed out the error to the Federal Council at that time.<sup>47</sup>

The documents obtained on the basis of the IFG show how the BMJV first tried to conceal this constitutional violation by justifying the renewed introduction of the draft legislation with the British vote in favour of leaving the EU shortly before.

On 16/11/2016, *Axel Jacobi*, a BPatG judge who was seconded to the BMJV at the time and who is also known for his commitment to the considerable extent of the reimbursable legal representation costs<sup>48</sup> and has now returned to the judicial service of the BPatG<sup>49</sup>, circulated the following message to employees of numerous Federal Ministries outside the BMJV (translation from German, emphasis added):<sup>50</sup>

*“I would like to inform you that the Heads of our House, in consultation with the Chancellery, have decided to reintroduce the attached draft legislation into the German Bundestag. The result of the referendum on the withdrawal of Great Britain from the European Union gives rise to submit the Federal Government’s draft legislation, which is already in the Parliamentary process, to the Cabinet again. This intends to confirm that a speedy start of the Unified Patent Court with all Signatory States, including Great Britain, is preferable.”*

It is not known invented this theory. However, it shows once again the methods used by the BMJV. The same questionable assertion can be found in the “speaking note” for the Government spokesman, who informs the press and media about the work of the Federal Government,<sup>51</sup> thus the Brexit theory was also meant to be served up to the public. The section is identically contained in the corre-

sponding draft referral letter from the Federal Minister of Justice to the head of the Federal Chancellery, which was intended to initiate the re-introduction of the draft legislation to the Federal Cabinet (Cabinet case no. 18/07104).<sup>52</sup>

On 18/11/2016, Mr *Jacobi* then circulated by e-mail a new version of the ministerial proposal BMJV-internally, which no longer contained the reference to the “Brexit” vote.<sup>53</sup> In the accompanying note of Division III B 4 to the version of the Ministerial Submission of 22/11/2016 as approved by the Federal Minister of Justice, an agreement between the responsible Parliamentary State Secretary and the Federal Chancellery was stated as the reason for the re-introduction (translation from German):<sup>54</sup>

*“The draft legislation on the Agreement of 19 February 2013 on a Unified Patent Court is to be adopted again by the Federal Cabinet on 8 December 2016 as a Government draft, after the Federal Cabinet had already adopted a first decision on this on 25 May 2016.*

*According to the Cabinet Division, this is the result of an agreement between Parliamentary State Secretary Lange and the Federal Chancellery. In the Cabinet decision of 25 May 2016, the bill was described as particularly urgent, contrary to Article 76 paragraph 2 sentence 5 of the Grundgesetz (GG). The consequence of this was that the Federal Government had already forwarded the bill to the Bundestag after the deadline shortened in accordance with Article 76 paragraph 2 sentence 3 GG. The Bundestag already discussed the bill in its first reading on 23 June 2016. Although the Bundesrat was aware of the shortened deadline in the first round on 8 July 2016, it did not object to the shortened deadline and decided not to raise any objections. Nonetheless, the bill is to be reintroduced in order to rule out any doubts as to whether a legislative resolution has been duly passed.”*

In his e-mail, Mr *Jacobi* asked ten BMJV Divisions to co-sign the draft legislation “with reference to the previous involvement”,<sup>55</sup> namely Divisions

- Z A 6 (competence: administrative affairs of the German Patent and Trademark Office, BPatG and the EPO; international personnel),
- Z B 1 (budget),
- Z B 5 (legal information; reducing bureaucracy),
- I A 4 (international civil procedure law; maintenance law; arbitration),
- I A 5 (private international law),
- III B 5 (trademark law; design law; unfair competition law; combating product piracy),
- IV A 2 (constitutional law as it relates to organs of the State; law of finance),

<sup>47</sup> Cf. *Stjerna*, The European Patent Reform – The Parliamentary UPCA ratification proceedings in Germany, p. 2, section II., accessible at [www.stjerna.de/ratification-proceedings-upca/?lang=en](http://www.stjerna.de/ratification-proceedings-upca/?lang=en).

<sup>48</sup> Cf. *Stjerna* (fn. 22), p. 3, section II.3.b).

<sup>49</sup> Cf. BPatG allocation of business plan of 01/10/2019 (German language), accessible at [bit.ly/2ptGQsB](http://bit.ly/2ptGQsB).

<sup>50</sup> Document 246/2016-8 (German language), p. 2, first para., accessible at [bit.ly/2MPHsw9](http://bit.ly/2MPHsw9).

<sup>51</sup> Document 246/2016-8, 9. 4, second para.

<sup>52</sup> Document 246/2016-8, p. 13, second para.

<sup>53</sup> Document 246/2016-9 (German language), p. 1, accessible at [bit.ly/2MKtLn0](http://bit.ly/2MKtLn0).

<sup>54</sup> Document 246/2016-10 (BV [“*Bezugsvorlage*”, Referenced submission] 22/11/2016) (German language), p. 2, accessible at [bit.ly/2OUr30D](http://bit.ly/2OUr30D).

<sup>55</sup> Document 246/2016-9, p. 1 (e-mail of 18/11/2016, 16:32).

- IV C 2 (general issues and legal questions relating to the EU; procedural law of the EU),
- IV C 3 (international law; law of international organizations; international jurisdiction), and
- IV C 4 (international treaty law).

Division IV A 1 responsible for fundamental rights, headed by *Henning Plöger*, does not appear to have been involved; Mr *Plöger* is not an addressee of the e-mail. These are apparently the same ten units that were involved before the first introduction of the draft legislation in May 2016.<sup>56</sup> Here, too, Division IV A 1, responsible for fundamental rights, was apparently not involved; Mr *Plöger* is not on the mailing list for the e-mail. For the drafts of the Ratification and Implementation Acts, this was still different; the e-mail of Ms *Makoski* of 03/12/2015 with the request for co-signature in this regard was also addressed to Mr *Plöger*.<sup>57</sup>

The Minister Submission was finalised on 24/11/2016 and submitted to the Cabinet on 08/12/2016 (Cabinet case no. 18/07151<sup>58</sup>). In it, BMJV confirmed that legal scrutiny had been carried out and that the Ratification Act was legally sound (translation from German).<sup>59</sup>

*“The draft legislation was examined in terms of systematic system and form legality (legal scrutiny according to sec. 46 GGO).”*

According to the enclosed order, eleven BMJV Divisions co-signed the draft on 18/11/ and 21/11/2016,<sup>60</sup> namely the ten Divisions involved plus responsible Division III B 4. The Federal Cabinet adopted the re-introduction of the UPCA Ratification Act, and the draft was submitted anew to the Federal Council on 09/12/2016 in identical form, but now without claiming “special urgency”.<sup>61</sup>

#### **bb) Minister Submission of 09/05/2016 on the initiation of the procedure for ratifying the UPCA**

The submission to the Federal Minister of Justice of 09/05/2016<sup>62</sup>, which preceded the original initiation of the procedure for UPCA ratification, was also made accessible. It likewise contains revealing statements.

First of all, the grounds for the urgency claimed contrary to Art. 76 (2) 5 GG are astonishing. This is said to exist insofar as (translation from German)

*“... the launch of the new system should not be significantly delayed due to the national proceedings in Germany.”*<sup>63</sup>

It expressly states (translation from German):<sup>64</sup>

*“The draft legislation is particularly urgent within the meaning of Article 76 paragraph 2 sentence 4 GG. According to the timetable at European level, the Unified Patent Court should start its work at the beginning of 2017. This date should not be jeopardised by the Federal Republic of Germany.”*

Accordingly, from the outset the UPCA ratification procedure did not follow the legal necessities, in particular the constitutional ones, but the latter were rather forced into the tight corset of an alleged temporal urgency, which was determined by the UPC’s commencement of work envisaged at “the European level”. From the beginning, legal scrutiny appears to have been based on the premise that the Agreement has to enter into force at the intended time. When it is stated that “This date (...) should not be endangered by the Federal Republic of Germany”, this indicates that the constitutional examinations to be carried out, as confirmed in Art. 84 (2) 1 UPCA, were apparently understood as a time-consuming obstacle to the entry into force of the UPCA and were handled accordingly.

The submission was signed by the same ten BMJV Divisions as the Minister Submission of 24/11/2016.<sup>65</sup>

#### **cc) Minister Submission of 07/01/2016 concerning the Ministry drafts of the Ratification and Implementation Acts for the ratification of the UPCA**

The Minister Submission of 07/01/2016<sup>66</sup>, with which Division III B 4 had submitted the Ministry drafts (“*Referentenwürfe*”) of the UPCA Ratification and Implementation Acts to the Federal Minister of Justice for approval, was also made accessible. Remarkable statements can also be found in this submission.

For the ratification of the UPCA, the following is noted (translation from German):<sup>67</sup>

*“Until now, DEU had postponed the start of the Parliamentary procedure in order, on the one hand, to exert the best possible influence on the implementation work with the existing capacities. At the same time, the weight of the German negotiating position in this work could be maximised. It was not least because of this strategy that DEU was able to prevail on a number of difficult issues, such as on the Rules of Procedure of the UPC or the question of fees for the unitary patent.”*

It is also pointed out that discussions with the BMI could ensue with regard to the possibilities for the UPC Admin-

<sup>56</sup> Document 246/2016-9, p. 3 (e-mail of 27/04/2016, 14:24).

<sup>57</sup> Document 246/2016-9, p. 4 (e-mail of 03/12/2015, 15:15).

<sup>58</sup> Document 246/2016-10 (BV 24/11/2016) (German language), accessible at [bit.ly/2oPN3iC](http://bit.ly/2oPN3iC).

<sup>59</sup> Document 246/2016-10 (BV 24/11/2016), p. 3, third para.

<sup>60</sup> Document 246/2016-10 (BV 22/11/2016), p. 7.

<sup>61</sup> BR-Ds. (Federal Council printed matter) 751/16 (German language), accessible at [bit.ly/2tLbn5q](http://bit.ly/2tLbn5q); also *Stjerna* (fn. 47), p. 3, section IV.2.

<sup>62</sup> Document 246/2016-10 (09/05/2016) (German language), accessible at [bit.ly/2oCEbgv](http://bit.ly/2oCEbgv).

<sup>63</sup> Document 246/2016-10 (09/05/2016), p. 3, third para.

<sup>64</sup> Document 246/2016-10 (09/05/2016), S. 8, fourth para.

<sup>65</sup> Document 246/2016-10 (09/05/2016), p. 9.

<sup>66</sup> Bezugsvorlage (Referenced submission) of 07/01/2016 (German language), accessible at [bit.ly/2ONTgXb](http://bit.ly/2ONTgXb).

<sup>67</sup> Bezugsvorlage of 07/01/2016, p. 4, second para.



istrative Committee to amend the UPC Statute, presumably in accordance with the correspondence described in point II.2.a)bb), p. 6) above (translation from German):<sup>68</sup>

*“With regard to the possibility for the Administrative Committee to amend the Statutes, as provided for in Article 40(2) of the Agreement, it is to be expected that discussions with the BMI will take place during intra-ministerial coordination. Before the signature of the Agreement, BMJV and BMI were unable to reach a final common position on the question of whether insofar a transfer of sovereignty is involved (according to the BMJV) or whether any decision requires Parliamentary approval (according to the BMI) because the Statute is adopted and ratified as ‘part of the Agreement’.”*

It is interesting to note the broad co-signing and the resulting legal approval of the draft Ratification and Implementation Acts by ten respectively 19 BMJV Divisions, including IV A 2, IV C 2 and IV C 3.<sup>69</sup> Division IV A 1, responsible for fundamental rights, co-signed the Implementation Act, but not the Ratification Act.

From the perspective of the co-signing Divisions, the ratification of the UPCA thus did not pose any problems as to its compatibility with the *Grundgesetz* and Union law. From the outset, fundamental rights were apparently not even considered to be affected by the Ratification Act.

### **3. IFG application February 2019**

In addition, in February 2019 the author of this article applied to the BMJV based on the IFG for access to all official information from after 01/01/2008, containing written statements by the BMJV Divisions with responsibility for

- the constitutional law of State organisation (Division IV A 2),
- EU policy and legal issues and EU procedural law (Division IV C 2),
- international law; law of international organizations; international jurisdiction (Division IV C 3); and
- the law of international treaties (Division IV C 4)

relating to the compatibility of the UPCA and of the draft EEUPCA discussed before it with the *Grundgesetz* or with the primary law of the European Union, in particular the Treaty on the European Union and the Treaty on the Functioning of the European Union (in each case in the version based on the Treaty of Lisbon which entered into force on 01/12/2009), as well as CJEU Opinion 1/09 of 08/03/2011.

The BMJV transmitted three unmarked documents with a total of 109 pages, of which 74 pages alone were devoted to Council document 11533/11 containing the Presidency text of the then version of the UPCA and a draft of the UPC Statute. Transmitted were:

- the statement of the Federal Government of 29/09/2009 in CJEU Opinion proceedings 1/09,

- the pleading of the Federal Government of 17/05/2010 in CJEU Opinion proceedings 1/09, as well as
- an assessment of the constitutionality of the revision clause by BMJV Division IV C 4 of 13/10/2011.

According to the BMJV, these documents are all the official information available there under the request.

Official information made available pursuant to the IFG is available for inspection by anyone, and interested persons can access the relevant documents at [www.stjerna.de](http://www.stjerna.de). The grey redactions in the documents were made by the author and refer to the contact details of several officials.

#### **a) Statements by the German Federal government in CJEU Opinion Proceedings 1/09**

In the first two documents<sup>70</sup>, the representatives of the Federal Government in CJEU Opinion proceedings 1/09 argue – unsurprisingly – that the draft EEUPCA was compatible with Union law, in particular with the autonomy of the Union legal order. As is well known, the CJEU took the opposite position in its Opinion.

#### **b) Document 1132/2011: Constitutional doubts concerning UPCA amendment by the Administrative Committee without the participation of the legislator**

Instructive is also document 1132/2011, in which BMJV Division IV C 4 (competence: law of international treaties) deals with the constitutionality of the UPC Administrative Committee’s competence to amend the Agreement as provided for in Art. 58d (1) and (2) of the UPCA draft set out in Council document 11533/11<sup>71</sup> of 14/06/2011. According to Art. 57 (3) of that draft, the Administrative Committee was to adopt its decisions by a three-quarters majority of the votes cast, unless the Agreement or the Statute provides otherwise.

The assessment is based on a request for a statement from “*Ms State Secretary*” – apparently the then State Secretary *Birgit Grundmann* – (translation from German),

*“... whether the ‘revision clause’ currently provided for in Article 58d of the draft for the creation of a European patent judiciary is unconstitutional or is in the ‘constitutional grey area’.”*<sup>72</sup>

The constitutional problems were described by Division IV C 4, then headed by *Martin Hiestand* (successor and current head: *Josef Brink*), as follows (translation from German, emphasis added):<sup>73</sup>

*“The planned Agreement touches on subject matter of Federal legislative competence within the meaning of Article 59 (2) 1 GG<sup>1</sup> (footnote 1: The Agreement governs, inter alia, issues of national judicial organisation and judicial procedure in the Member States which re-*

<sup>68</sup> Bezugsvorlage of 07/01/2016, p. 6, third para.

<sup>69</sup> Bezugsvorlage of 07/01/2016, p. 10, section II.

<sup>70</sup> StN 29/09/2009 and Pleading 17/05/2010 (German language each), accessible at [bit.ly/2VKuMzz](http://bit.ly/2VKuMzz) and [bit.ly/33FtkBf](http://bit.ly/33FtkBf).

<sup>71</sup> Accessible at [bit.ly/2m8xktS](http://bit.ly/2m8xktS).

<sup>72</sup> Document 1132/2011 (German language), p. 2, first para., accessible at [bit.ly/31kUxrg](http://bit.ly/31kUxrg).

<sup>73</sup> Document 1132/2011, p. 3, first para.

*quire a legal basis (see in particular Articles 5 ff.) (...) and therefore requires a Ratification Act at national level. Any amendment to the Agreement therefore also requires a Ratification Act, unless the legislator has authorised the enactment of the amendments by means of a statutory order. Due to the Essentiality proviso [“Wesentlichkeitsvorbehalt”] which results from the principle of democracy, the possibility of enacting amendments by statutory order would have to be limited to provisions which cannot be regarded as so essential that a delegation to the executive is excluded.”*

Essential in that sense, thus excluded from delegation and to be regulated by means of a formal parliamentary Act, according to the Essentiality Doctrine of the BVerfG<sup>74</sup>, are any matters which are essential for the realisation of fundamental rights. Accordingly, only decisions without relevance to fundamental rights may be delegated. This problem, which has already been described<sup>75</sup> in the past, is relevant for the UPCA wherever the UPC Administrative Committee is granted powers to legislate or to amend legislation.

Similar to the concerns expressed later in 2012 by the BMI in the context of the UPC Statute (see section II.2.a)bb), p. 6), BMJV Division IV C 4 took offence at the possibility of a revision of the UPCA by the UPC Administrative Committee, as provided for in Art. 58d of the draft UPCA. They explained (translation from German):<sup>76</sup>

*“The revision clauses provided for in Article 58d (1) and (2) of the draft are constitutionally problematic since the amendments to the Agreement adopted by the Administrative Committee enter into force under international law without the consent of the German legislator. Thus, the international legal obligation that has already arisen could only be implemented by the legislator at the domestic level; a rejection by the legislator would no longer be possible. In order to avoid this problem, an opt-out clause should be sought according to which decisions of the Administrative Committee only take effect if a State has not objected to them within a certain period. The time limit should be set in such a way that the adopted amendment can be made the subject of a Ratification Act during this period.”*

The note was co-signed by Divisions III B 4, IV A 2 and IV C 3.<sup>77</sup>

In the final version of the revision clause in Art. 87 UPCA, the unanimity requirement still contained in the draft according to Council document 11533/11 for amending the Agreement according to para. 2 was removed. Art. 12 (3) UPCA corresponds to the aforementioned Art. 57 (3) of the draft, according to which the Administra-

tive Committee adopts its decisions by a three-quarters majority of the votes cast, unless the UPCA or the Statute provides otherwise. A corresponding amendment of the UPCA by the Administrative Committee is therefore intended to be possible by a three-quarters majority and would thus also be binding on UPCA Contracting States objecting to the amendment. To this end, Art. 87 (3) UPCA now contains the reservation that a Contracting State may declare within twelve months that it does not wish to be bound by such a decision; in this case, a review conference of the Contracting States must be convened.

This may have mitigated a little the constitutional sensitivity of an amendment to the Agreement by the UPC Administrative Committee; but there is no provision at all in particular for the UPC Rules of Procedure, which has considerable relevance for fundamental rights.

#### **4. Result**

According to the official information provided by the BMJV on said three IFG applications, individual aspects of the UPCA and the related ratification laws were examined for their compatibility with the *Grundgesetz*, an examination for compatibility with Union law, in particular with CJEU Opinion 1/09, does not seem to have occurred.

##### **a) Assessment for compatibility with the *Grundgesetz* during the UPCA preparatory work?**

An assessment for compatibility with the *Grundgesetz* already during the preparatory work for the UPCA, as required by sec. 72 (4) GGO, appears to have occurred only in the form of the request for “constitutional examination” addressed to BMJV Division IV A 2 in October 2012 (see above section II.1., p. 4). The fact that the BMJV claims that this examination has not been documented in writing gives rise to skepticism.

##### **b) Assessment of compatibility with the *Grundgesetz*, in particular with fundamental rights?**

The compatibility of the UPCA with the *Grundgesetz* has been questioned in some respects, interestingly throughout with regard to the powers granted to the UPC Administrative Committee to amend the Agreement and the UPC Statute.

An examination of the UPC and the Ratification Act for compatibility with fundamental rights does not appear to have taken place; in any case, the participation of the corresponding Division IV A 1 is only documented with regard to the Implementation Act. This is despite the fact that the BMJV has the overall responsibility for the legal scrutiny in the field of fundamental rights<sup>78</sup> and that this examination is considered to be particularly important.<sup>79</sup>

As far as can be seen, an assessment of the compatibility of the project with the State’s duty to protect the constitutional identity did not take place either.

<sup>74</sup> Cf. e. g. BVerfG E 98, 218 (251); 95, 267 (307 f.).

<sup>75</sup> *Stjerna*, The European Patent Reform – Urgently needed: A legal basis for the opt-out fee, accessible at [www.stjerna.de/legal-basis-opt-out-fee/?lang=en](http://www.stjerna.de/legal-basis-opt-out-fee/?lang=en).

<sup>76</sup> Document 1132/2011, p. 2, last para.

<sup>77</sup> Document 1132/2011, p. 5.

<sup>78</sup> HdbVRV (fn. 2), para. 246.

<sup>79</sup> HdbVRV (fn. 2), para. 247 f.

**c) Assessment of compatibility with Union law, in particular with CJEU Opinion 1/09?**

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The BMJV could not provide any information showing an examination of the UPCA for its compatibility with Union law, in particular with CJEU Opinion 1/09. Nothing is apparent for an early clarification of questions under European law pursuant to sec. 45 (1) 3 GGO. The draft legislation on UPCA ratification also lacks the presentation of the connections to and the compatibility with the law of the European Union, as required by sec. 43 (1) no. 8 GGO.

**d) Description of the costs for the economy, in particular for small and medium-sized enterprises?**

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Finally, it is noticeable that contrary to sec. 44 (1), (5) no. 1 GGO, the costs of the European patent reform for the economy, in particular for small and medium-sized enterprises, were not addressed in the draft ratification laws. In the draft Ratification Act it says only succinctly (translation from German):<sup>80</sup>

*“There is no compliance burden for the economy, especially for small and medium-sized enterprises.”*

The considerable additional costs which the reform would entail for the economy and above all for small and medium-sized enterprises, in particular the significantly increased costs of legal representation before the UPC, as pointed out already in April 2016 in a much-noticed article<sup>81</sup>, remained unmentioned. This may have something to do with the fact that the BMJV had previously been particularly committed to the corresponding cost rules and had repeatedly sold them as particularly advantageous.<sup>82</sup>

**III. Outlook**

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The documents provided suggest that the BMJV having the overall responsibility for the implementation of the European patent reform in Germany and the ratification of the UPCA, did not comprehensively examine the Agreement for its compatibility with the *Grundgesetz* nor or that with Union law, in particular with CJEU Opinion 1/09. The BVerfG may take note of this with interest.

\* \* \*

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!

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<sup>80</sup> BT-Ds. (Parliament printed matter) 18/11137 (German language), p. 3, E.2., accessible at [bit.ly/2up89Tc](http://bit.ly/2up89Tc).

<sup>81</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>82</sup> *Stjerna* (fn. 22).