The European Patent Reform – The Secret Disappearance of Key Documents from the Public Domain

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

Anyone seeking to review the many twists and turns of European patent reform will often find that documents previously published online are no longer available and cannot be found anywhere else on the internet. The documentation of European patent reform, supposedly a groundbreaking project of great success, is thus subject to a process of progressive erosion that is as astonishing as it is telling. This makes it all the more important to continue facilitating a profound, substantive scholarly examination of the project and to preserve access to as many of these "disappeared" documents as possible.

I. CJEU Opinion 1/09: Statement of Position by the Advocates General of 02/07/2010

In the decades-long struggle to establish a centralized European court system for disputes concerning patent infringement and validity, the Council of the EU presented a working document in October 2007 outlining the key elements of a future Europe-wide patent litigation system.[1] After an updated draft proposed at the end of 2008 that the Agreement on the Patent Court be concluded as a mixed agreement between the EU, its Member States, and other non-EU States,[2] the Council's Legal Service expressed concerns regarding the compatibility of this structure with Union law and suggested seeking an opinion from the CJEU pursuant to Art. 300(6) EC (now Art. 218(11) TFEU).[3] A corresponding request was submitted to the CJEU on 06/07/2009.[4]

The response from the CJEU, which in its Opinion 1/09[5] dated 08/03/2011, found the draft submitted to it to be incompatible with union law, came as a bombshell.

However, the opinions of the CJEU Advocates General had already caused a stir, as they had foreshadowed this outcome but had raised even more far-reaching objections. Although not strictly public, these opinions – originally drafted in French – had been widely circulated at the time; one law firm had even commissioned an English translation and distributed it.

These opinions are no longer available in public sources. They were made available to the author under the German Freedom of Information Act ("IFG") and are therefore being made available to the public in their original language.[6]

II. The "Tilmann/Pagenberg Dispute"

Following the negative opinion of the CJEU, a lively discussion unfolded in April 2011 on the blog of the "European Patent Lawyers Association" ("EPLAW") between *Winfried Tilmann*, a proponent of a European patent court, and *Jochen Pagenberg*, an opponent of at least the structure discussed at the time. Today, the exchange between the two is a prime example of a civil exchange of controversial views. It is no longer available on the EPLAW blog, but the posts have been saved to archive.is.[7]

III. The European legislative proceedings

The European legislative process, in which the so-called "patent package" was debated and adopted, is inherently lacking in transparency. Of course, plenary sessions are broadcast on Parliament TV and recorded in writing; however, this does not apply to the same extent to the committees, where, however, the bulk of the legislative work takes place. There are no minutes of those meetings. The only documentation available consists of recordings by Parliament TV – provided that a recording is made, which was repeatedly not the case during the European patent reform, particularly for important meetings.

Since a contribution available only in spoken form is of limited use for academic research due to the lack of a basis for comparison, the author has prepared transcripts in German[8] and English[9] language for the majority of the sessions in the European legislative process dealing with EU Patent Reform.

Various opinions issued by the Legal Services of the relevant European institutions during the legislative process are also significant for the development of the corresponding draft legislation. This includes, first and foremost, the preliminary opinion SJ-0844/06[10] issued by

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[1] Council document 14492/07 of 30/10/2007.
[2] Council document 14970/08 of 04/11/2008.
[3] Council document 15487/08 of 10/11/2008, p. 11, para 28. f. and p. 12, para. 32 f.
[4] Council document 11125/09 of 18/06/2009.
[5] CJEU, Opinion 1/09 of 08/03/2011.
[6] Prise de Position des Avocats Généraux, Avis 1/09, accessible at https://www.stjerna.de/files/AG-SoP_Avis1_09.pdf.
[7] Cf. the list at https://archive.md/eplaw.org.
[8] Cf. https://www.stjerna.de/parlhistorie-einheitspatent/.
[9] Cf. https://www.stjerna.de/phistory-unitary-patent/?lang=en.
[10] Accessible at https://www.stjerna.de/files/070201-EU-Parliament-Legal-Service-SJ-0844-06.pdf.

the Legal Service of the European Parliament on 01/02/2007, regarding the possibility of the Member States concluding the so-called "European Patent Litigation Agreement". Also informative is the so-called "Note to Ms. Fröhlinger" [11] from the Commission's Legal Service dated 18/04/2011, concerning a possible solution to the objections raised by the CJEU in its Opinion 1/09, as well as Opinion SJ-0462/12 [12] from the Legal Service of the European Parliament dated 09/07/2012, on the removal of Articles 6 to 8 from the "Unitary Patent" Regulation.

IV. The documents of the Preparatory Committee of the Unified Patent Court

Following the signing of the Agreement on a Unified Patent Court ("UPCA") in February 2012, the so-called "Preparatory Committee of the Unified Patent Court" ("UPC-PC") was established to ensure the court's operational readiness.[13] It began its work in early 2013.

Since then, the Committee has published information, documents, and news related to the Unified Patent Court ("UPC") that it considered relevant at https://www.unified-patent-court.org/, resulting in an interesting public record of the court's eventful history over the years. Apparently, not everyone considered this documentation helpful, so that in early 2023, as part of a so-called "relaunch", nearly all publications made up to that point disappeared from the UPC website. Only a few selected documents, apparently deemed useful, remained there.

Since 2013, the author has documented and archived publications posted on https://www.unified-patent-court.org/ to ensure that this information remains available and accessible to the public in the future. The archived content is available at https://www.stjerna.de/pcupc-documents/?lang=en.

V. The Gordon/Pascoe Opinion

In 2016, the British vote in favor of the country's withdrawal from the EU caused great concern among supporters of patent reform, particularly those in the British legal community, as the entry into force of the Convention under Art. 89(1) UPCA required ratification by Germany, France, and the United Kingdom, as well as at least ten further contracting states.[14]

Consequently, three British associations interested in the ratification of the UPCA, two of which were associations of patent attorneys, commissioned a legal opinion on several issues regarding the impact of the "Brexit" vote on the UK's ratification of the Agreement with the barristers *Gordon* and *Pascoe*. [15] Although their Opinion [16] largely gave the impression of developing arguments that were legally rather far-fetched in order to support the desired results for the clients, it necessarily concluded that the UPCA was not a common court of the UPCA Contracting States. Since the political approach to ensuring the UPCA's compatibility with Union law, following CJEU Opinion 1/09, had been based on the exact opposite premise, this confirmed the continuing doubts regarding the Agreement's compatibility with Union law. Today, the UPCA proponents are once again advocating the original thesis, as they would otherwise have to admit the (unchanged) incompatibility of the UPCA with Union law.

The Gordon/Pascoe Opinion was also initially widely distributed and discussed by the UPCA proponents in order to share with the public, as comprehensively as possible, the theories put forward by the two barristers serving these proponents' own purposes – theories that certainly came at a high price. In addition to the websites of the commissioning associations and law firms affiliated with them,[17] it was also reviewed in the trade press in just as much detail and, for the most part, uncritically.[18] As far as can be seen, it has since disappeared from the associations' websites as well as from those of the aforementioned law firms.

VI. The statements by the "specialist third parties" in the German constitutional complaint proceedings 2 BvR 739/17

After the constitutional complaint[19] against Germany's first ratification of the UPCA became public in late spring 2017 and the UPCA proponents had recovered from their initial shock, they quickly sought to introduce arguments aligned with their interests into these proceedings as well. Accordingly, various associations in which relevant stakeholders collectively assert their interests immediately sought contact with the German Federal Constitutional Court ("BVerfG") and requested an opportunity to submit a statement as an expert third party pursuant to sec. 27a of the Federal Constitutional Court Act ("BVerfGG").

While it has been claimed on several occasions that the BVerfG had "requested statements on the proceedings",[20] the reality was exactly the opposite: With the exception of

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[11] Accessible at https://www.stjerna.de/files/110418-EU-Commission-Legal-Service-Note-to-Ms-Froehlinger.pdf.
[12] Accessible at https://www.stjerna.de/files/120709-EU-Parliament-Legal-Service-SJ-0462-12.pdf.
[13] Cf. Commission document 7265/13 of 08/03/2013.
[14] Cf. *Stjerna*, EU Patent Reform – Squaring the circle after the "Brexit" vote, accessible at https://www.stjerna.de/brexit/?lang=en.
[15] Cf. in detail *Stjerna*, EU Patent Reform – The Gordon/Pascoe Opinion and the UPCA's incompatibility with Union law, accessible at https://www.stjerna.de/gp-opinion/?lang=en. .
[16] Opinion by Richard Gordon QC and Tom Pascoe "Re the Effect Of 'Brexit' on the Unitary Patent Regulation and the Unified Patent Court Agreement" of 12/09/2016, accessible at https://www.stjerna.de/files/160912-Gordon-and-Pascoe-Advice-UPCA.pdf.
[17] Cf. *Stjerna*, The Gordon/Pascoe Opinion (fn. 15), p. 1/2.
[18] Cf. for instance the article "No legal obstacles for post-Brexit UK to participate in Unitary Patent system", Kluwer Patent Blog on 18/09/2016, accessible at https://archive.is/ZUUIx.
[19] Cf. https://www.stjerna.de/epgu-i-docs/?lang=en. .
[20] E. g. "Constitutional Court asks for comments on German complaint against Unified Patent Court Agreement", Kluwer Patent Blog on 06/09/2017, accessible at https://archive.ph/edVYc.

the BRAK and the DAV, which are typically granted the opportunity to submit comments as a matter of course in constitutional complaint proceedings, all other third parties admitted to comment under sec. 27a BVerfGG – amongst others, the European Patent Office ("EPO"), GRUR, EPLAW, and EPLIT – had requested this from the court.[21]

Given who authored them, it came as no surprise that the content of these statements sounded very similar and consistently called for the constitutional complaint to be dismissed – primarily, of course, as "manifestly inadmissible"! The lack of substantive merit in these submissions was quickly apparent to the informed observer. Even the reporting judge at the BVerfG, Prof. *Huber*, is said to have *"not been particularly impressed"* by them when speaking to the German Federal government's legal representative and to have remarked that he did not need to read them.[22]

With the exception of EPLAW and the EPO, the specialist third parties had promptly published their statements on their websites,[23] where they were also linked to by various third parties.[24] These links, such as those on the Kluwer Patent Blog, are now largely dead.

The statement from EPLIT, drafted under then-President *Koen Bijvank*, appears to no longer be available even on their website today. It is particularly odd because, in its introduction, the association informed the BVerfG that it would refrain from submitting a comprehensive statement on the constitutional complaint – despite they had previously requested this very opportunity from the court – and would instead limit themselves to commenting on *"a few selected topics discussed in the constitutional complaint"* in cooperation" with an external attorney.

For completion, this statement – which EPLIT has already made widely available to the public – is available for download.[25]

The most comprehensive and informative statements are those issued by the German Bundestag and the German Federal government. As far as can be determined, these have not been published; however, interested parties should be able to obtain access to them under the IFG.

VII. Outlook

One cannot help but feel that the disappearance of certain documents from the public domain was no accident, as some of them clearly illustrate the peculiar flexibility in the arguments of certain key figures, as well as the persisting structural shortcomings of the UPC that remain unchanged.

The documents from the UPC website, in particular, vividly illustrate the turbulent history of the court's formation – amidst "Brexit" and the German constitutional complaints – as well as the deep involvement of various "patent practitioners" from industry and the legal profession in shaping the – supposedly impartial and independent – court, and the variability of the positions taken by key players over the years, which often aligned with whatever best served the entry into force of the new system at the time.

All of this information is of fundamental importance for gaining as complete an understanding as possible of the origins of the UPC, particularly from an academic perspective, so that gaps that had emerged in the collection of previously published documents have now, hopefully, been filled – at least for the most part.

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

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[21] Cf. in detail *Stjerna*, EU Patent Reform – Questions and answers on the German Constitutional Complaint proceedings, accessible at https://www.stjerna.de/qa-cc/?lang=en.

[22] Cf. *Stjerna*, EU Patent Reform – The German state powers in constitutional complaint proceedings 2 BvR 739/17 (Part 2 of 2), accessible at https://www.stjerna.de/state-powers-2-bvr-739-17-part-2/?lang=en, p. 6, section III.3.

[23] Cf. "EPLIT comments to the complaint filed with the German Constitutional Court", accessible at https://archive.md/NR0pV.

[24] Cf. the article "EPLIT, BRAK, GRUR publish view on German complaint against ratification UPCA", Kluwer Patent Blog on 25/01/2018, accessible at https://archive.is/Y51fL.

[25] EPLIT Statement in case 2 BvR 739/17, accessible at https://www.stjerna.de/files/181228-EPLIT-Stn-2-BvR-739-17.pdf.