

The European Patent Reform – The “withdrawn” ratification of the UPCA and its protocols by the United Kingdom

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

The European patent reform and the Agreement on a Unified Patent Court (“UPCA”) in particular continue to be controversially discussed, with a frequently raised question concerning the role of the United Kingdom in the UPC and the protocols thereto as well as its “withdrawals” of the related ratifications. In his second constitutional complaint against the German ratification of the UPCA (Case No. 2 BvR 2217/20), the author of this article had submitted these issues to the German Constitutional Court (“BVerfG”) for clarification, which, however, did not deal with them in substance, as it did with all other material issues raised. The relevant aspects of this question are discussed in more detail below, based on the statements in the constitutional complaint.¹

I. The central importance of the UK in the conception of the European patent reform

The participation of the UK is of central importance for the European patent reform and in particular the UPCA.

According to its Art. 89(1), the UPCA enters into force “on the first day of the fourth month after the deposit of the thirteenth instrument of ratification or accession (...), including the three Member States in which the highest number of European patents had effect in the year preceding the year in which the signature of the Agreement takes place”.

The signing took place on 19/02/2013, in the previous year 2012 Germany, the UK and France had the most valid European patents.² Ratification of the UPCA by the UK is therefore mandatory for its entry into force.

The UK is also central to the “Protocol on the Provisional Application of the UPCA” (“PPA”). According to Art. 3(1) PPA it enters into force on the day after 13 Signatory States of the UPCA including Germany, France and the UK, have either ratified, or informed the

¹ Cf. *Stjerna*, Die Verfassungsbeschwerde vom 18.12.2020 gegen die Ratifikation des Übereinkommens über ein Einheitliches Patentgericht – Verfahren 2 BvR 2217/20 vor dem Bundesverfassungsgericht [The constitutional complaint of 18/12/2020 against the ratification of the Agreement on a Unified Patent Court – Proceedings 2 BvR 2217/20 before the Federal Constitutional Court], Tredition 2021; the preface can be viewed at www.stjerna.de/files/EPGU-II-V1V.pdf.

² Cf. *Stjerna*, The European Patent Reform – Squaring the circle after the “Brexit” vote, accessible at www.stjerna.de/brexit/?lang=en.

depository that they have received parliamentary approval to ratify the Agreement and have signed or signed, and ratified, accepted or approved this Protocol (Art. 3(1) lit. a)) or have otherwise declared that they consider themselves bound by the articles of the UPCA mentioned in Art. 1 of the Protocol (Art. 3(1) lit. b)). Again, the UK is one of the three states whose participation is mandatory for the Protocol to apply.

The same goes for the “Protocol on Privileges and Immunities of the Unified Patent Court” (“PPI”). It enters into force 30 days after the date on which the last of the four contracting states France, Germany, Luxembourg and the UK has deposited its instrument of ratification, acceptance, approval or accession (Art. 18(1) PPI). The UK is also one of the states whose participation is mandatory for the Protocol to apply.

The participation of the UK is as much a basic element of the European patent reform as that of Germany and France. The central role of these three countries is also evidenced by the tripartite division of the central division of the Unified Patent Court (“UPC”) between them; one of them being located in London (Art. 7(2) UPCA in conjunction with Annex II).

II. The ratification of the UPCA and its protocols by the UK and its “withdrawal”

The UK initially approved both the UPCA and the aforementioned two protocols to it, but subsequently declared its “withdrawal” of this approval.

1. The ratification

After the vote of the British electorate on the UK’s withdrawal from the EU on 23/06/2016 had given rise to doubts as to whether and to what extent the country’s participation in the UPCA was still politically and legally possible,³ the British government announced in November 2016 that it intended to ratify the UPCA regardless of the “Brexit” vote.⁴ They stated that the UPCA was not an EU institution, but an international organization and was independent of the UK’s membership in the EU.⁵ Whether and under what conditions participation will continue after

³ Cf. *Stjerna*, Squaring the circle (fn. 2).

⁴ Press release “UK signals green light to Unified Patent Court Agreement” of 28/11/2016, <https://archive.ph/aEvyt>; cf. *Stjerna*, The European Patent Reform – The British ratification paradox, accessible at www.stjerna.de/uk-paradoxon/?lang=en.

⁵ Press release “UK signals green light” (fn. 4).

the withdrawal from the EU was said to be clarified in the course of the withdrawal negotiations.⁶

The UK ratified the UPCA⁷ and the PPA⁸ on 26/04/2018. Even before that, it had reportedly declared its consent to be bound by the PPI,⁹ although it is unclear when and by what means this was done.

2. The “withdrawal” of the ratification

The UK left the EU on 31/01/2020 (Art. 185 of the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community of 12/11/2019). In the Withdrawal Agreement, a transitional period until 31/12/2020 was agreed, during which the UK would remain a member of the Single Market and all EU law applicable to the UK would continue to apply (Art. 126 ff. of the Withdrawal Agreement).

On 27/02/2020, the British government published the document “The Future Relationship with the EU – The UK’s Approach to Negotiations”¹⁰, in which the UK’s desired future relationship with the EU and its approach to negotiations were outlined in more detail. It stated that the country would “not agree to any obligations for our laws to be aligned with the EU’s, or for the EU’s institutions, including the Court of Justice, to have any jurisdiction in the UK”.¹¹ Shortly after the publication of the BVerfG’s decision in matter 2 BvR 739/17 in March 2020 and the nullification of Germany’s first ratification of the UPCA, it became known that the UK was no longer interested in participating in the UPCA and unitary patent protection.¹²

Then, on 20/07/2020, the UK Minister for Science, Research and Innovation, *Amanda Solloway*, announced that the UK had withdrawn from the “Unified Patent Court system” with immediate effect in a written statement to the UK Parliament (HCWS395) as well as to the House of Lords (HLWS383).¹³ This statement reads as follows:

⁶ In more detail cf. *Stjerna*, ratification paradox (fn. 4).

⁷ EU Council Treaties and Agreements database on the UPCA, accessible at www.consilium.europa.eu/en/documents-publications/treaties-agreements/agreement/?id=2013001.

⁸ EU Council Treaties and Agreements database on the PPA, accessible at www.consilium.europa.eu/en/documents-publications/treaties-agreements/agreement/?id=2015056&DocLanguage=en.

⁹ EU Council Treaties and Agreements database on the PPI, accessible at www.consilium.europa.eu/de/documents-publications/treaties-agreements/agreement/?id=2016047&DocLanguage=en.

¹⁰ Document “The Future Relationship with the EU – The UK’s Approach to Negotiations”, accessible at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/868874/The_Future_Relationship_with_the_EU.pdf.

¹¹ “The Future Relationship with the EU” (fn. 10), p. 3, cipher 5.

¹² Article “IP Minister confirms UK’s non-participation in UPC”, *bristowsupc.com* on 14/04/2020, <https://archive.ph/Nu8PI>.

¹³ Statement by *Amanda Solloway* of 20/07/2020, accessible at archive.is/t2UHA.

“I am tabling this statement for the benefit of Honourable and Right Honourable Members to bring to their attention the UK’s withdrawal from the Unified Patent Court system.

Today, by means of a Note Verbale, the United Kingdom of Great Britain and Northern Ireland has withdrawn its ratification of the Agreement on a Unified Patent Court and the Protocol on Privileges and Immunities of the Unified Patent Court (dated 23 April 2018) in respect of the United Kingdom of Great Britain and Northern Ireland and the Isle of Man, and its consent to be bound by the Protocol to the Agreement on a Unified Patent Court on provisional application (dated on 6 July 2017) (collectively ‘the Agreements’).

In view of the United Kingdom’s withdrawal from the European Union, the United Kingdom no longer wishes to be a party to the Unified Patent Court system. Participating in a court that applies EU law and is bound by the CJEU would be inconsistent with the Government’s aims of becoming an independent self-governing nation.

The Agreements have not yet entered into force. However, in order to ensure clarity regarding the United Kingdom’s status in respect of the Agreements and to facilitate their orderly entry into force for other States without the participation of the United Kingdom, the United Kingdom has chosen to withdraw its ratification of the Agreements at this time. The United Kingdom considers that its withdrawals shall take effect immediately and that it will be for the remaining participating states to decide the future of the Unified Patent Court system.”

A legal basis for this procedure and for the desired effect was not mentioned, the Note Verbale was – as far as can be seen – not published. In the database of the Council of the EU on international agreements it is noted with regard to the UPCA that the UK’s ratification was withdrawn and became effective on 20/07/2020 (“Withdrawal of ratification received on, and effective as from, 20/07/2020”).¹⁴ The same note is found there for the PPI.¹⁵ As to the PPA, it is stated that the UK’s consent to be bound by it was withdrawn and became effective on 20/07/2020 (“Withdrawal of consent to be bound received on, and effective as from, 20/07/2020”).¹⁶

3. The UK’s “Note Verbale”

The exact content of the aforementioned Note Verbale from the British government could not be ascertained at first, but it is now available. The main content of the statement¹⁷, dated 14/07/2020, is as follows:

¹⁴ Council database re UPCA (fn. 7).

¹⁵ Council database re PPI (fn. 9).

¹⁶ Council database re PPA (fn. 8).

¹⁷ Note Verbale of 14/07/2020, accessible at www.stjerna.de/files/UK-Note-Verbale-UPCA.pdf.

“I have the honour to refer to the United Kingdom of Great Britain and Northern Ireland’s signature and ratification of the Agreement on a Unified Patent Court, dated 19 February 2013 and 23 April 2018 respectively; and to the United Kingdom of Great Britain and Northern Ireland’s signature and ratification of the Protocol on Privileges and Immunities of the Unified Patent Court, dated 14 December 2016 and 23 April 2018 respectively. I have further the honour to refer to the United Kingdom of Great Britain and Northern Ireland’s signature and notification of completion of domestic procedures of the Protocol to the Agreement on a Unified Patent Court on provisional application, dated 1 October 2015 and 6 July 2017 respectively (collectively referred to as the ‘Agreements’).

On 31 January 2020, the United Kingdom of Great Britain and Northern Ireland withdrew from the European Union and, under the terms of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, entered a time-limited transition period.

In view of its withdrawal from the European Union, the United Kingdom of Great Britain and Northern Ireland no longer wishes to be party to the Agreements. In order, therefore, to ensure clarity regarding the United Kingdom’s status in respect of the Agreements and to facilitate their orderly entry into force, the United Kingdom of Great Britain and Northern Ireland hereby withdraws its ratification of the Agreement on a Unified Patent Court and the Protocol on Privileges and Immunities of the Unified Patent Court in respect of the United Kingdom of Great Britain and Northern Ireland and the Isle of Man. The United Kingdom of Great Britain and Northern Ireland further withdraws its consent to be bound by the Protocol to the Agreement on a Unified Patent Court on provisional application. These withdrawals shall take effect upon the deposit of this notification.”

It is unclear on what legal basis such a “withdrawal with immediate effect” should be legally possible at all. In addition to the aforementioned written declaration of the British government in Parliament on 20/07/2020, the Note Verbale is also silent on this and only mentions the desired legal consequence.

III. Legal consequences of the “withdrawal”?

At the time of ratification of the UPCA and the PPA, the UK was a Member State of the EU and thus both a “Member State” within the meaning of the UPCA (Art. 2 lit. b) UPCA) and a “Contracting Member State” (Art. 2 lit. c) UPCA) and thus fulfilled the requirements for participation in the Agreement set out in Art. 84(1) UPCA. However, the country left the European Union on 31/01/2020, the agreed transitional period ended on 31/12/2020. Since then, according to Art. 50(3) TEU, Union law is no longer applicable there. The UK left the

EU because it no longer wishes to recognize Union law and the jurisdiction of the CJEU.¹⁸

However, the UK’s membership in the UPCA and the corresponding protocols does not automatically end with its EU membership, but remains unaffected by the withdrawal, which caused a need for action not least in view of the fact that membership in the Agreement is limited to EU Member States under Art. 2 lit. b), Art. 84(1) UPCA and that a location of the central division is located in London under Art. 7(2) UPCA in conjunction with Annex II.

The UK’s status with regard to the UPCA and the associated protocols is currently unclear, since the legal basis of the declared “withdrawals” and the legal consequence of immediate effect attributed to them are still unknown.

1. No replacement of UK, no revision of UPCA before its entry into force

As described in the beginning, Germany, France and the UK must ratify the UPCA in accordance with Art. 89(1) in order for it to enter into force. If one of them drops out, no other state can succeed it, because Art. 89(1) UPCA refers to “Member States”, which according to Art. 2 lit b) UPCA means a Member State of the EU. Such Member State is to be distinguished from a “Contracting Member State”, which designates a Contracting Party to the Agreement (Art. 2 lit. c) UPCA).

On the other hand, according to the unambiguous wording of Art. 89(1), the Agreement is based on the number of those Member States – not Contracting Member States! – in which there were the most European patents in force in 2012. This is an objective criterion. In 2012, the three EU member states with the most European patents in force were inevitably Germany, the UK and France. Due to the clear wording of Art. 89(1) UPCA, a substitution of one of these three by another member state is not possible. If the UK does not (any longer) participate in the UPCA, its place cannot be taken by another member state – e.g. that with the fourth most European patents in force in 2012 – because the decisive factor for the entry into force continues to be “the three Member States in which the highest number of European patents had effect in the year preceding the year in which the signature of the Agreement takes place”. These are irrefutably Germany, the UK and France. If one wanted to change this, the text of the Agreement would have to be amended accordingly and the amended Agreement would have to be ratified anew.

Under certain conditions, Art. 87(2) UPCA allows a revision of the Agreement by the UPC Administrative Committee without requiring the participation of the Contracting Member States and subsequent ratification. But irrespective of the question whether the conditions for such a revision could even theoretically exist in the present case, it would, first of all, require the entry into force of the UPCA, since otherwise, its Art. 87 is not applicable.

¹⁸ “The Future Relationship with the EU” (fn. 10).

However, the UPCA has neither entered into force, nor is Art. 87 even among the provisions which are to be made provisionally applicable by the PPA.¹⁹ A corresponding revision of the UPCA is therefore currently excluded.

2. The „withdrawal“ of the British ratification in the German ZustG II

After the nullification of the first German ratification attempt by the BVerfG, the German Federal government initiated the second procedure for UPCA ratification on 25/09/2020, submitting its “Draft Legislation on the Agreement of 19 February 2013 on a Unified Patent Court”²⁰ (“ZustG II”). The British “withdrawal” of the ratification of the UPCA and the associated protocols was not addressed, although this had been declared more than two months before the start of the legislative process. The ZustG II limited itself to stating that the UK had ratified the UPCA and that its withdrawal as a result of “Brexit” would not prevent the implementation of the UPCA. In any case, certain provisions of the UPCA were to be “interpreted” in such a way as not to prevent its entry into force. In detail, the ZustG II states (translation from German language).²¹

“The fact that the United Kingdom is leaving the Agreement as a result of Brexit does not prevent its implementation:

The regulations on entry into force in the Agreement and its Protocols should ensure that all three [sic] states participating in the Agreement, the Federal Republic of Germany, France and the UK, already participate in the court system at the start of the Unified Patent Court. In this respect, it was to be avoided that, for example, due to the different duration of the ratification procedures, the Agreement initially enters into force with only one or two of the three states. The reference to this serves the purpose of coordinating the time of entry into force among the actual participants in the Agreement.

Irrespective of the fact that the British consent has currently been given, in any case a withdrawal of the UK has no influence on the applicability of the regulations on entry into force because they are to be interpreted in such a way that a withdrawal of one of these three states, which could not be foreseen by anyone, does not prevent the entire entry into force for the remaining participants.

Moreover, for the first instance central division the Agreement expressly provides for the establishment of a seat in London, in addition to those in Paris and the Munich location. However, it cannot be understood in such a way that it wants to establish or leave a chamber location in a non-contracting Member State. In the

¹⁹ Cf. Art. 1 PPA.

²⁰ BT-Drucksache (Bundestag printed matter) 19/22847 of 25/09/2020, accessible at <https://dserver.bundestag.de/btd/19/228/1922847.pdf>

²¹ BT-Drucksache 19/22847 (fn. 20), p. 2/3.

event of the London central division unit ceasing to exist, the Agreement is to be interpreted in such a way that its competences accrue, at least transitionally, to the (continuing) central division seats in Paris and Munich. An explicit provision can be made in due course in the context of a review of the functioning of the court provided for under Article 87(1) and (3) of the Agreement.

A political declaration on these issues is being sought among the remaining Contracting Member States. Finally, the consensual implementation of the Agreements would also constitute a practice or agreement of the Contracting States under international law in accordance with Article 31(3) of the Vienna Convention on the Law of Treaties.”

Completely missing in these statements is a well-founded and comprehensible legal justification of the theses put forward. It is obvious that there is a considerable problem at this point. For years, the protagonists of the European patent reform have only been able to counter the problems caused by their own lack of legal foresight and that of the numerous “experts” involved, which, from a legal point of view, can no longer be resolved coherently, by denying, lying and referring to obviously questionable legal constructs of so-called “experts”, in comparison with whom a house of cards often seems like a rock-solid structure. Nevertheless, they continue to ride the dead horse as if there were no tomorrow, apparently trusting that they will somehow succeed in defending their questionable constructions successfully in court using all means at their disposal, as they have done so far.

3. “Withdrawal” of the British ratification under the Vienna Convention on the Law of Treaties?

The UPCA and the associated protocols are “treaties” within the meaning of Art.2 lit. a) of the Vienna Convention on the Law of Treaties (“VCLT”) (Art. 5 VCLT in conjunction with Art. 4(1) UPCA), so that the VCLT is applicable. Nevertheless, the “reinterpretation” of the clear wording of the UPCA into a diametrically opposed meaning, as propagated in the ZustG II, is not possible under Art. 31 VCLT, nor are further grounds for termination under the VCLT applicable.

a) Agreement or practice of the Contracting States pursuant to Art. 31(3) VCLT

The understanding of the UPCA as propagated in the ZustG II cannot be based on Art. 31 VCLT.

aa) Requirements

Art. 31 VCLT formulates a number of generally accepted principles to be observed in the interpretation of a treaty within the meaning of the Convention (afterwards “treaty”). It defines the meaning, the context, the object and purpose, and good faith as essential elements of interpretation, with paragraphs 2 and 3 further qualifying the con-

text.²² In general, interpretation serves to determine the meaning of the contractual text, in particular the normative content of the legal regime created by it, but not to establish a level of meaning that contradicts the text. The consideration of the objective and purpose are limited by the contractual text's general meaning to the extent that it cannot be attributed a meaning based on teleological considerations which is not supported by its literal meaning. In addition, the interpretation must be carried out in accordance with the principle of good faith.²³

Relevant is any subsequent agreement between all²⁴ the contracting parties on the interpretation and application of the treaty (Art. 31(3) lit. a) VCLT). However, according to the will of the contracting parties, this subsequent agreement must have the same rank as the treaty to be interpreted, otherwise it does not influence the interpretation of the treaty or the application of its provisions.²⁵

According to Art. 31(3) lit. b) VCLT, a subsequent practice of applying the treaty shall also be taken into account in its interpretation, provided that it is consistent and involves all the parties to the treaty. "Practice" in this sense is, in principle, any action of the contracting parties with regard to the implementation of the treaty. However, a "practice" requires a plurality of uniform acts of the contracting parties as to the application of the treaty in order to establish a pattern of conduct in this respect. Further, these acts must fall within the treaty's scope and must have been undertaken by the contracting states for the purpose of fulfilling their obligations under the treaty.²⁶

bb) Application to the UPCA

The understanding of the UPCA claimed in the *ZustG II*, in particular of Art. 89(1) and Art. 7(2) UPCA with Annex II, cannot be obtained by recourse to Art. 89(1) UPCA because it contradicts the unambiguous literal sense of the Agreement.

(1) Mandatory Contracting Member States under Art. 89(1) UPCA

The understanding of the UPCA propagated in the *ZustG II* cannot be justified by interpretation, because it only serves to determine the normative content of the existing treaty, but not to establish a completely new meaning.²⁷ However, this is exactly what happens when it is claimed (translation from German language),²⁸

"a withdrawal of the UK has no influence on the applicability of the regulations on entry into force because they are to be interpreted in such a way that a withdrawal of one of these three states, which could

not be foreseen by anyone, does not prevent the entire entry into force for the remaining participants."

This assertion contradicts the clear and valid provision in Art. 89(1) UPCA, according to which ratification by the UK is mandatory for the entry into force of the Agreement. Attributing to this clear provision the meaning that a ratification by the UK is not (any longer) mandatory for the entry into force, i.e. the exact opposite of its clear wording, is therefore not possible. This is all the more true since the German Federal government did not even mention in its *ZustG II* that the UK had notified the "withdrawal" of its ratification with unclear legal consequences. These central questions cannot be avoided by declaring them irrelevant and then calling this an "interpretation". Such "interpretation" is clearly inadmissible as the literal sense of Art. 89(1) UPCA does not support it, it determines just the opposite.

(a) Contracting parties excluded a termination of the UPCA

Further, it must be taken into account that, according to statements by the German Federal Ministry of Justice and Consumer Protection ("BMJV"), the UPCA was apparently intended to be "non-terminable". At least this is claimed in a document made accessible by the BMJV on the basis of the Freedom of Information Act. In it, in the context of the constitutional review of the UPCA, an employee of the German Foreign Office states (translation from German language):²⁹

"The Agreement lacks a termination clause, which is required from a treaty perspective. According to information from the BMJ, Department III B 4 (Mr Karcher), the question of a termination provision was submitted to the Presidency, respectively to the Legal Service of the Council, for consideration. The LS Council – according to Mr Karcher – spontaneously tended to the view that rather the possibility of termination should be explicitly excluded, because Union law in the form of the Patent Regulation depends on the entry into force of the Court Agreement (and its continuance). From the point of view of our Unit 501, this question should not be left to the Council alone, but a coordination of the department should take place as to whether, exceptionally, the usually agreed possibility of termination should be dispensed with. In particular, we ask for an examination of whether the factual situation presented – the reference to secondary EU law – is sufficient to dispense with such a clause and to bind oneself to an Agreement in a non-terminable manner."

As is known, Mr *Karcher* is the senior official in BMJV Department III B 4, which is responsible for the European patent reform. He is also a member of the UPC Preparato-

²² *Dörr/Schmalenberg*, Vienna Convention on the Law of Treaties, 2nd ed. (2018), Art. 31, para. 5.

²³ *Dörr/Schmalenberg* (fn. 22), Art. 31, paras. 16, 57 and 59.

²⁴ *Dörr/Schmalenberg* (fn. 22), Art. 31, paras. 76 f.

²⁵ *Dörr/Schmalenberg* (fn. 22), Art. 31, paras. 73.

²⁶ *Dörr/Schmalenberg* (fn. 22), Art. 31, paras. 77, 79 to 81.

²⁷ *Dörr/Schmalenberg* (fn. 22), Art. 31, paras. 16, 57, p. 587.

²⁸ BT-Drucksache 19/22847 (fn. 20), p. 3, third para.

²⁹ BMJV document 9330/29-2-31 907/2012, p. 7/8, accessible at www.stjerna.de/files/907_2012-7.pdf.

ry Committee³⁰ and heads its “Subgroup Legal Framework”. The fact that the final version of the UPCA does not contain the termination clause which, according to the Foreign Office, is “*required from a treaty perspective*”, indicates that a termination of the Agreement was possibly intended to be excluded.

Significantly, the BMJV has rejected a FOIA request for access to all official information relating to the possibility of termination of UPCA membership, in particular the aforementioned statement of the Council Legal Service, on the grounds that it had “*no information on a statement of the Council Legal Service or other official information on the question of a possibility of termination of membership in the UPCA*” (translation from German language).³¹ So, does the information given by Mr Karcher, described in detail and conclusively by said Foreign Office employee, in fact not exist? Or was the Legal Service deliberately questioned only by telephone in order not to produce any information which would be subject to the FOIA?

(b) Intended “political declaration of the Contracting States”?

As far as it is stated in the ZustG II that a “*political declaration of the contracting states*” was desired³² as regards the understanding propagated therein, such declaration has not yet been made. So far, this is only a mere declaration of intent, which cannot change the clear wording of the UPCA, also against the background of Art. 31 VCLT. Even such a declaration could not, however, give the existing treaty text a completely new meaning.

(c) “Practice or agreement of the Contracting States under international law”?

This also applies to the claim that “*the consensual implementation of the Agreements*” would constitute “*a practice or agreement of the Contracting States*” pursuant to Art. 31(3) VCLT.³³

Whether or not such “*consensual implementation of the Agreement*” would have the alleged effect is currently irrelevant, because it is unclear already which conduct is to be regarded as “consensual implementation” in this sense. Presumably, even in the view of the German Federal government, this does not exist, because otherwise it would not have to explain what would have to apply to the hypothetical case if there were such conduct. An agreement between the contracting parties on the interpretation and application of the UPCA within the meaning of Art. 31(3) lit. a) VCLT would, in any case, have to include all contracting parties. Where such an agreement of all contracting parties on the understanding of the UPCA alleged in the ZustG II should lie is not apparent. However,

even such an agreement could not give the existing treaty text a completely new meaning like that propagated by the German Federal government.

This is also the case for a subsequent practice of the application of the treaty under Art. 31(3) lit. b) VCLT. Such practice would also have to include all the contracting parties in the first place, and it also presupposes a number of uniform acts by the contracting parties with regard to the application of the treaty. What conduct would constitute such practice is presently not apparent.

Art. 31 VCLT does not support the understanding of Art. 89(1) UPCA forwarded in the ZustG II.

(2) Central division location in London (Art. 7(2) UPCA with Annex II)

Insofar as the ZustG II states on the London location provided for in Art. 7(2) UPCA and Annex II that the UPCA

“...cannot be understood in such a way that it wants to establish or leave a chamber location in a non-contracting Member State. In the event of the London central division unit ceasing to exist, the Agreement is to be interpreted in such a way that its competences accrue, at least transitionally, to the (continuing) central division seats in Paris and Munich.”

the above applies equally.

In this respect as well, the existing provisions in the UPCA are unambiguous and valid. In this respect as well, the treaty text cannot be given a completely new meaning by means of interpretation, which is not supported by the literal sense.³⁴ This would be the case, however, if the clear rule in Art. 7(2) UPCA in conjunction with Annex II, according to which a location of the central division is in London, could be reinterpreted as claimed in the ZustG II.

This likewise applies to the allegedly desired “*political declaration of the Contracting States*”.

It also applies to the claim that “*the consensual implementation of the Agreements*” would constitute “*a practice or agreement of the Contracting States*” pursuant to Art. 31(3) VCLT. It is neither clear which conduct is to be seen as a “consensual implementation” in this sense, nor are the requirements for a corresponding agreement or practice of the contracting parties to the UPCA fulfilled.

The meaning of Art. 7(2) UPCA and Annex II claimed in ZustG II cannot be based on Art. 31 VCLT either.³⁵

b) Termination of a provisional application of a treaty pursuant to Art. 25(2) VCLT

Some voices in the literature claimed that Art. 25(2) VCLT could entitle a state that has signed and ratified an international agreement to withdraw this signature and ratification by a mere notification with retroactive effect (!).³⁶ This was said to have probably been consid-

³⁰ Cf. the “Roadmap of the Preparatory Committee of the Unified Patent Court”, p. 2, accessible at www.stjerna.de/files/roadmap-201409.pdf.

³¹ Cf. the BMJV decision of 09/07/2020, accessible at www.stjerna.de/foia-2006-3/?lang=en.

³² BT-Drucksache 19/22847 (fn. 20), p. 3, third para.

³³ BT-Drucksache 19/22847 (fn. 20), p. 3, third para.

³⁴ Dörr/Schmalenberg (fn. 22), Art. 31, paras. 16, 57, p. 587.

³⁵ Also Aymaz/Horn/Karaosmanoglu, Mitt 2020, 197 (200).

³⁶ Tilmann, GRUR Int 2020, 847 (848); GRUR 2020, 441 (445).

ered self-evident so that it was not explicitly regulated in Art. 25(2) VCLT (!).³⁷ This does not bear out either.

aa) Requirements

Irrespective of the fact that these adventurous theories are ultimately unhelpful, as, without a change of the clear wording of Art. 89(1) UPCA which refers to the three EU Member States with the most European patents in force in 2012, Germany, the UK and France will continue to be decisive, Art. 25(2) VCLT does not help either due to the lack of the respective requirements.

Art. 25(1) VCLT stipulates that a treaty under Art. 2 lit. a) VCLT may be applied provisionally, the terms of such provisional application being left to the parties.³⁸

Art. 25(2) VCLT provides for the termination of provisional application of a treaty. It intends to counter the risk of abuse or provisional application for an indefinite period by allowing a state participating in such provisional application to terminate it for itself by notifying the other participating states of its intention.³⁹

bb) Application to the UPCA

Accordingly, the application of Art. 25 VCLT to the UPCA presupposes that the latter is provisionally applied – either by virtue of a provision contained therein or by virtue of an agreement on the part of the negotiating states (cf. Art. 2 lit. e) VCLT). However, this is missing already. The UPCA does not provide for provisional application; rather, such application is to be made possible by the PPA only subsequently with regard to certain provisions of the UPCA. As the PPA has not yet entered into force, the UPCA is currently not provisionally applied. This also rules out recourse to Art. 25 VCLT. In any case, even a permissible procedure under Art. 25(2) VCLT would not change the fact that the UPCA, according to its current content, provides that one location of the central division is in London.

c) Fundamental change of circumstances pursuant to Art. 62 VCLT

Also to the extent that it has been argued in the literature⁴⁰ that the UK's withdrawal from the EU constituted a fundamental change in the circumstances existing at the time of the conclusion of the UPCA within the meaning of Art. 62(1) VCLT, this would presently not justify a withdrawal from the Agreement and the associated protocols, because in view of the reference to “Contracting Parties” as defined in Art. 2 lit. g) VCLT, the provision only applies to Agreements that have entered into force, what is currently not the case for the UPCA.

Furthermore, even the effective exercise of a potential right under Art. 62(1) VCLT would not affect the rights

and obligations of the contracting parties established before the treaty's termination by its execution and their legal situation thus created (Art. 70(1) lit. b), (2) VCLT), so the legal consequences would only have effect for the future (“ex nunc”).⁴¹

Further, it would be mandatory to comply with the procedure set out in Section 4 (Arts. 65 to 68 VCLT) (cf. Art. 42(2) VCLT).⁴²

d) Result

After all this, the legal basis of the “withdrawal” of the ratification of the UPCA and its protocols by the UK is open. If this “withdrawal” were legally possible, the question would arise as to its effect and whether this should have an effect in the future (“ex nunc”) or also in the past (“ex tunc”).

If the declared “withdrawal” were not possible, the UK would be bound to its ratification of the UPCA and the associated protocols, so that the Agreement has become unlawful on expiry of the transitional period on 31/12/2020, because with the UK, a non-EU country would belong to it contrary to Art. 84(1) UPCA. In the opinion of the BVerfG, this would also be a violation of Union law.⁴³ With the location of the central division in London, a court of the UPC would be located outside EU territory and in a country which expressly rejects⁴⁴ Union law, an essential source of law to be taken into account by the UPC (Art. 24(1) lit. a) UPCA), as well as the jurisdiction of the CJEU, with which, however, the UPC is obliged to cooperate (Art. 21 UPCA).

If the “withdrawal” declared by the UK were possible and became effective for the future with its submission on 20/07/2020, the question would arise whether the withdrawal of one of the three central UPCA member states would not also eliminate the validity of the latter, at least in its current form. In any case, also then the problem of the central division location in London would remain, which since the end of the transitional period on 31/12/2020 is located outside the EU on the territory of a state which rejects the validity of Union law and the jurisdiction of the CJEU.

If the “withdrawal” declared by the UK were possible and became effective retroactively to the date of the respective ratification with its submission, according to its current wording, neither the UPCA nor its protocols could ever enter into force, because this requires a British ratification, which would then be considered as not existing (any longer) as a result of the retroactive effect. In addition, this constellation would also pose the problem of the court location being situated outside EU territory, where the validity of Union law and the case law of the CJEU are be rejected.

³⁷ *Tilmann*, GRUR Int 2020, 847 (848).

³⁸ *Dörr/Schmalenberg* (fn. 22), Art. 25, para. 1.

³⁹ *Dörr/Schmalenberg* (fn. 22), Art. 25, para. 27.

⁴⁰ *Aymaz/Horn/Karaosmanoglu*, Mitt 2020, 197 (200); *Ubertazzi*, GRUR Int 2017, 301 (307); *Ohly/Streinz*, GRUR Int 2017, 1 (3); *Tilmann*, GRUR 2016, 253 (257); *ibid.*, GRUR 2016, 253 (257).

⁴¹ *Dörr/Schmalenberg* (fn. 22), Art. 70, para. 33.

⁴² *Dörr/Schmalenberg* (fn. 22), Art. 70, para. 35.

⁴³ BVerfG, 2 BvR 739/17, decision of 11/02/2020, para. 150 – EPGÜ.

⁴⁴ Document “The Future Relationship with the EU” (fn. 10).

IV. Outlook

The BVerfG avoided taking up these questions in proceedings 2 BvR 2217/20 and reviewing their content, as it should have done. Instead, it has once again dealt with the matter in the cheapest possible way alleging that the possibility of a violation of fundamental rights was „*nicht hinreichend substantiiert dargelegt*“ [“not sufficiently substantiated”]⁴⁵ and has thus impressively confirmed the suspicion⁴⁶ already expressed in 2018 that no unbiased constitutional review can be expected from this court, which is staffed according to party-political considerations, in a legislative project that is absolutely desired politically.

Nevertheless, this does not make the relevant legal issues go away. They merely become more urgent and increase the falling height of the entire legislative project. If the “sub-sub-suboptimal compromise”⁴⁷ of the EU Parliament, which started the problems, had not been insisted on in 2012, but the project had instead been put on a legally sound footing, regardless of the associated loss of time, it would probably have entered into force long ago. Instead, more than ten years later, the protagonists are still frantically biting into their increasingly surreal legal patchwork. The time will come when, despite all the camouflage and deception and the undoubtedly extensive use of inter-institutional networks, this work of art will nevertheless have to undergo a legal review worthy of the name. The clock is ticking.

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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!

⁴⁵ BVerfG, 2 BvR 2216/20 and 2 BvR 2217/20, decision of 23/06/2021, para. 52 – EPGÜ II.

⁴⁶ Cf. *Stjerna*, The European Patent Reform – Questions and answers on the German Constitutional Complaint proceedings, p. 1 f., ciphers I.2. and 3., accessible at www.stjerna.de/qa-cc/?lang=en.

⁴⁷ Cf. *Stjerna*, The European Patent Reform – The “sub-sub-suboptimal compromise” of the EU Parliament, accessible at www.stjerna.de/suboptimal-compromise/?lang=en.