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# The European Patent Reform – Questions and answers on the German Constitutional Complaint proceedings

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

**This article tries to provide answers to some of the questions raised in relation to the constitutional complaint against the ratification of the Agreement on a Unified Patent Court in Germany.**

## I. The Federal Constitutional Court and the constitutional complaint procedure

First of all, a few introductory words on the German Federal Constitutional Court (*Bundesverfassungsgericht*, "BVerfG") and on the constitutional complaint procedure.

### 1. Composition of the court

It is often assumed that the judges at the BVerfG are all particularly experienced judges with many years of service in the judiciary. This is not necessarily the case. Only three of the eight judges of each of the two Senates are for judges of the Federal supreme courts (sec. 2(3)1 Act on the BVerfG ["BVerfGG"]). Beyond this requirement, becoming a judge at the highest German court does not require having ever exercised judicial activity before. Since a decision granting the requested relief requires the approval of at least five of the eight judges with a tie vote leading to its rejection (sec. 15(4)2, 3 BVerfGG), the court can render any decision against the votes of the three Senate members from a judicial career if the others agree.

Many of the current BVerfG judges are or have been full-time university professors and have little judicial experience. In the Second Senate which will decide the constitutional complaint on the Agreement on a Unified Patent Court ("UPCA"), three members have a mainly judicial background. The others, including the judge rapporteur, Prof. *Peter Huber*, have taken office from careers as university professors. Prof. *Huber* gained experience as a judge between 1996 and 2002 as a part-time judge at the Higher Administrative Court of Thuringia and between 2007 and 2009 as a member of the State Constitutional Court in the Free Hanseatic City of Bremen.[1]

Probably also in order to overcome a certain distance of some constitutional judges from judicial practice, each of them has four full positions for the employment of so-called "scientific assistants" (*"Wissenschaftliche Mitarbeiter"*).[2] The selection of these assistants, who are acquired from all legal fields and are dependent on instructions, is the responsibility of the respective judge (sec. 13(2)1 BVerfG Rules of Procedure ["GO-BVerfG"]). Scientific assistants are seconded to the BVerfG or employed on a temporary basis, they are often junior judges.[3] They support the constitutional judges in their official work (sec. 13(1)1 GO-BVerfG), essentially by drafting votes, on the basis of which the chambers and senates of the BVerfG subsequently make their decisions.[4] Despite this influence on the work of the BVerfG, it does not give any information on the scientific assistants and on their background.[5] The court refused to provide information on the scientific assistant involved in the UPCA proceedings. His person and background, e. g. his connection to the Maximilianeum Foundation[6], which he shares with the judge rapporteur,[7] can, however, be ascertained from publicly accessible sources. The reasons why the highest German court exercises such secrecy are not known.

### 2. The election procedure of BVerfG judges

Noteworthy is also the procedure for the election of the BVerfG judges. One half of them is elected by the German Parliament (*Bundestag*), the other half by the Federal Council (*Bundesrat*) (sec. 5(1) BVerfGG). The judges to be elected by the *Bundestag* are recommended by its Election Committee, consisting of 12 of the – currently 709 – statutory Members of Parliament (sec. 6(1)2 BVerfGG), and require approval by a two-thirds majority. In the past, the nomination decisions were sometimes not even taken by the Election Committee, but by a so-called "Selection Committee", where the two largest parliamentary groups in the *Bundestag*, the Conservatives ("CDU/CSU") and the Social Democrats ("SPD"), arranged the composition of the two BVerfG Senates among themselves, mutually granting the right to fill four posts in each of the two Senates, combined with the option of assigning this right to a smaller coalition partner.[8] In view of the required two-thirds majority, no candidate could and can be nominated

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[1] Cf. CV, accessible at bit.ly/2pQS0oc (German language).
[2] *Lenz/Hansel*, BVerfGG, 1st ed. (2013), § 90, para. 32 (German language).
[3] *Lenz/Hansel* (fn. 2), paras. 33 f.
[4] *Lenz/Hansel* (fn. 2), para. 36.
[5] Critical on this in particular *Zuck*, Das Recht der Verfassungsbeschwerde, 5th ed. (2017), paras. 913 f., also cf. the literature provided there in fn. 22 (German language).
[6] www.stiftung-maximilianeum.com.
[7] Cf. CV (fn. 1).
[8] Article *„Umstrittenes Wahlverfahren – Lammert kritisiert Verfassungsrichter"* ("Controversial election procedure – Lammert criticises Constitutional Court judges"), spiegel.de on 14/07/2012, accessible at bit.ly/2QHKfMT (German language).

without the approval of CDU/CSU or SPD. In the meantime, the Greens ("Bündnis 90/Die Grünen") have achieved a strong position in the *Bundesrat* and are able to block BVerfG judge candidates to be appointed by it. As a result, they were granted the right of appointment for every fifth BVerfG judge to be appointed there.[9] Due to the ensuing political orientation of the BVerfG, this politically motivated selection and appointment practice is remarkable in itself and raises doubts as to whether the judges of the BVerfG are *"independent and subject only to the law"*, as Art. 97(1) of the German Constitution (*Grundgesetz*, "GG") stipulates for judges. The BVerfG had no problem with this procedure and upheld it as constitutional.[10]

This tight meshing of the highest German court's judges with party politics is all the more relevant in proceedings such as those on the UPCA, the ratification of which was agreed on unanimously by all parliamentary groups of the (then) *Bundestag*, although only 35 Members of Parliament were attending the vote[11]. How independent will be the examination by judges, who are appointed under political considerations, in this legislative project, which was highly desired politically across party lines and passed with positive knowledge of all constitutional problems? Skepticism seems justified. Against the background described above, it would not come as a surprise if the BVerfG made its contribution to the political agenda and waved through the ratification of the UPCA – on time for the "Brexit" talks between the EU and the British government – by the end of November. In the recent past, the court has repeatedly lent support to the government in politically important proceedings,[12] providing a coat of legal legitimacy for sometimes constitutionally doubtful political activities, the legal reasoning not always being fully convincing. Also in the case of the UPCA, the members of the Second Senate undoubtedly know what the political groups to whom they owe their office expect of them.

## 3. Procedure

The BVerfG can conduct the constitutional complaint proceedings almost solely at its discretion. It endeavors to keep all options open at all times, avoiding any commitment. The possible procedural outcomes are hence not described here.

Of central importance are the so-called substantiation requirements derived from sec. 23(1)2, 92 BVerfGG, according to which the alleged fundamental rights violation must be described in the constitutional complaint with "sufficient clarity". The requirements in this regard vary greatly and sometimes from case to case.[13] Recently, for example, the BVerfG confirmed earlier decisions according to which, in case of existing BVerfG case law, the alleged violation of fundamental rights was to be substantiated *"discussing the standards developed therein"*.[14] How detailed such "discussion", in which the complainant has to inform the court of its own case law, has to be, remains unclear. The vagueness of this requirement makes it a sore point of any constitutional complaint. As long as not every potentially relevant BVerfG decision has been discussed comprehensively on all relevant issues, the reasoning can always be rejected as insufficient, irrespective of its scope and level of detail. This seems to be quite intentional, as these opaque substantiation requirements allow the court to comment on constitutional issues raised, while still rejecting the constitutional complaint as "insufficiently substantiated". It is no coincidence that all of the publicized third party statements in the proceedings on the UPCA object an insufficient substantiation of the complaint, which, due to said opacity, is the cheapest "argument". It can be applied even if one does not have a lot to contribute on the constitutional issues in question. It remains to be seen whether the BVerfG will be convinced of this in the present proceedings.

## 4. Communication

The BVerfG likes to call itself a "citizens' court", deduced from the fact that the citizen can call on the court directly. In an interview published in early 2018 titled *"Das Recht fühlt sich kalt an"* ("The law feels cold"), the BVerfG's President, Prof. *Andreas Voßkuhle*, stated (translation from German):[15]

> *"The Federal Constitutional Court is supported by the trust and acceptance of the citizens and only through this does it acquire its significance."*

The constitutional complaint on the UPCA should actually be somewhat of a showcase for the "citizens' court". Here a citizen calls upon the highest German court in his own name and at his own expense, demanding it to ensure compliance with the *Grundgesetz* and Union law. Experience to date, however, has been rather sobering.

This applies, first of all, to the fact that the court does not provide any information about the proceedings and their expected course even to the complainant, who is currently the only party to the proceedings. This is the case even for

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[9] Article *„Neue Abrede für BVerfG-Richterwahlen"* ("New agreement for BVerfG judge elections"), lto.de on 01/06/2018, accessible at bitly.com/2pLXUXV (German language).

[10] BVerfG, 2 BvC 2/10, decision of 19/06/2012, accessible at bitly.com/2A3KVXi (German language).

[11] Cf. *Stjerna*, "Unitary patent" and court system – The Parliamentary UPCA ratification proceedings in Germany, accessible at www.stjerna.de/ratification-proceedings-upca/?lang=en.

[12] E. g. those on the "European Stability Mechanism" (2 BvR 1390/12 et al., judgment of 18/03/2014, accessible at bit.ly/2A40YET, on the "OMT" programme of the European Central Bank (2 BvR 2728/13 et al., judgment of 21/06/2016, accessible at bit.ly/2IO8xlM or, most recently, on the collection of a broadcasting contribution (1 BvR 1675/16, judgment of 18/07/2018, accessible at bitly.com/2uJmL0J (German language).

[13] Cf. *Zuck* (fn. 5), paras. 679 ff. (w.f.r.).

[14] BVerfG, 2 BvR 1961/09, decision of 24/07/2018, para. 23, accessible at bit.ly/2NRzdYI (German language).

[15] *„Andreas Voßkuhle im Interview – ‚Das Recht fühlt sich kalt an'"* („Interview with Andreas Voßkuhle – ‚The law feels cold'"), rp-online.de on 06/01/2018, accessible at bit.ly/2NJWoik (German language).

trivial questions like, for instance, the number of third party statements received by the court. When contacted by phone, the responsible registry brusquely refused providing information on this point, although each party to the proceedings is entitled to information on the content of the court file already from its right to file inspection (sec. 20 BVerfGG).[16] The complainant had also suggested the publication of a press release shortly after filing the complaint with the BVerfG, but the court saw no reason to do so. Obviously, this attitude was later changed in view of the number of inquiries about the proceedings. Generally, the impression of a certain imbalance in treatment is hard to resist. Requests submitted by external third parties appear to be answered within days, while vis-à-vis the complainant even the simplest procedures, such as granting access to the file or forwarding the statements on the proceedings, take months to complete. The court seems to underestimate the importance communication has not least for the acceptance of its decision. The communication practice observed in the present proceedings, which does not appear to be an exception, can therefore only be regretted. This hardly does justice to a "citizens' court".

## II. Is the suspension of the ratification procedure by the Federal President unusual?

The constitutional complaint and the application for a provisional order were submitted to the BVerfG immediately after the Federal Council's decision on the ratification of the UPCA on 31 March 2017. The court then asked the Federal President not to enter into the execution of the corresponding laws. Some commentators described this as an unusual procedure.

This is common German state practice in constitutional complaint proceedings against the ratification of an international Agreement. The special feature here is that the ratification becomes legally effective when the Federal President issues the instrument of ratification and sends it to the depositary, a review by the BVerfG in main proceedings would thus come too late if the ratification procedure progressed unhindered. It is therefore necessary to prevent the execution and the accomplished facts brought about by it. This is done by an application to the court to prohibit the Federal President by a provisional order from executing the ratification legislation as long as the constitutional complaint has not been decided on the merits.

Granting such order is subject mainly to four conditions:

(1) The proceedings on the merits must be admissible,

(2) the provisional order must not anticipate the merits of the case,

(3) the proceedings on the merits must not be manifestly unfounded, and

(4) upon balancing the consequences, the applicant's interests must prevail. In this exercise, the consequences that would arise if the provisional order was not issued but the constitutional complaint was successful on the merits are to be compared with those arising if the order was issued while the constitutional complaint was subsequently unsuccessful on the merits. If these conditions are met, the requested provisional order can be issued.

If, as in the present case, the main proceedings are directed against legislation concerning assent to an international Agreement, it is additionally necessary, following a more recent BVerfG decision[17], that the grounds submitted for the constitutional complaint are very likely to be upheld.

The constellation is special insofar as here an organ of one state power – the BVerfG as part of the judiciary –would have to prohibit that of another state power – the Federal President as part of the executive – from carrying out an official act, i. e. interfere with its competences. In view of the tense relationship with the principle of the separation of powers, such interference is sought to be avoided, mostly through the aforementioned consensual suspension of the ratification procedure.

For the same reasons, it is obvious that such suspension can only be considered if the conditions for issuing a provisional order are fulfilled. If the corresponding application were already inadmissible or manifestly unfounded, there would be no reason to exert any judicial influence on the business of the Federal President.

## III. Were the constitutional shortcomings of the UPCA unknown?

According to frequent allegations, the constitutional complaint came as a complete surprise for the legislative bodies and for the professional circles. This would be strange.

This applies, first of all, to the legislative bodies. The author of this article drew the attention of all parliamentary groups represented in the 18th German *Bundestag* ("BT") – i. e. CDU/CSU, SPD, Bündnis 90/Die Grünen and The Left – to constitutional problems in extensive letters in April, June and October 2016. There was no reaction to this.

The Legal Affairs Committee of the Federal Council was made aware of these risks in June and July 2016 and in January and March 2017. As a result of pointing out the violation of Art. 76(2)5 GG in July 2016, the legislative proceedings on the ratification Act were started anew.[18] However, this did not increase sensitivity for the constitutional problems in question, but on the contrary apparently promoted ignorance towards later remarks.

The BT Committee on Legal Affairs and Consumer Protection, which had the lead in discussing the draft legislation, was also informed of constitutional issues in writing early and comprehensively, e. g. in April and June 2016 and again in February 2017. Without success. Corresponding letters in March 2017 to the BT Committees for Edu-

[16] *Lenz/Hansel* (fn. 2), § 20, para. 8.

[17] BVerfG, 2 BvR 1368/16 et al., judgment of 12/10/2016, para. 36 – CETA (interim relief), accessible at bit.ly/2IO8F4K.

[18] *Stjerna*, (fn. 11), cipher IV.2., p. 3.

cation, Research and Technology Assessment and for EU Affairs, both of which were involved in the deliberations on the draft legislation, also remained without reaction.

The constitutional risks were known to all those involved in the legislative process. However, as described elsewhere[19], there seemed to have been a strong determination to nonetheless pass the bills as quickly as possible, regardless of these risks.

Also for the professional circles, at least some of the constitutional issues are by no means new. It should be remembered that the author of this article has drawn attention to deficits in the reform plans for years, including those of a constitutional nature.[20] It should also be remembered that the main "official" information carriers of the German professional circles, namely the journals "GRUR" published by the association of the same name and the Chamber of Patent Attorneys' "Mitteilungen der deutschen Patentanwälte" have rejected the publication of articles criticising the European patent reform since spring 2012.[21] In this respect, the sometimes lamented, alleged "lack of discussion" stands in obvious contradiction to the initially avoided and later on actively suppressed discussion of the UPCA's shortcomings.

## IV. Is there an isolated decision on the acceptance of the complaint for decision?

It is sometimes assumed that the BVerfG will formally decide on accepting the constitutional complaint for decision, so that this is open until then. It is true that a constitutional complaint requires acceptance for a decision (sec. 93a(1) BVerfGG). A formal decision, however, is usually made only if acceptance is rejected, normally within a few weeks after receipt of the complaint. There is no isolated decision on acceptance;[22] rather, the absence of said rejection decision usually allows the conclusion that the complaint has been accepted for a decision.

## V. The statements by "specialist third parties"

It was reported on several occasions that the BVerfG had *"asked for comments on the proceedings"*.[23] Some of the associations which have been allowed comments on the proceedings under sec. 27a BVerfGG also boasted that the BVerfG had *"requested their comments"*.

In constitutional complaint proceedings, there are necessary participants (sec. 23(2), 94(4), 77 BVerfGG) which must always be given the opportunity to submit comments, as well as specialist third parties, which the court *can* grant such opportunity (sec. 27a BVerfGG). Presently, all specialist third parties except BRAK and DAV have requested the court to be admitted for comments. The impression caused by some of these third parties that the highest German court had approached them with a request for a statement is just as wrong as the peculiar theory[24] that the Senate had *"invited for a statement"* everyone willing to do so. On the contrary, unsolicited comments received are not taken into account by the court.[25]

The fact that the leading German UPC protagonists are represented in prominent positions in more or less all of the organisations that have asked for and received an opportunity to submit comments and that their comments are therefore by no means unbiased was, of course, not disclosed to the court. How it can be believed that this will remain unaddressed and will not affect the credibility of the statements is not clear.

Most of the specialist third parties have made their statements public. Against this background, it is not surprising that the statements are very similar in content and consistently propagate the same desired result. However, the meaning and purpose of being allowed to submit comments pursuant to sec. 27a BVerfGG were fundamentally misunderstood. The court grants the opportunity to submit comments because it hopes that, in particular, this will (further) clarify the facts of the case and provide (further) background information. Anyone understanding this as an opportunity to carry out public relations work for his own interests runs the risk of gambling away his credit quickly.

The idea that it will be possible to influence the court in their favor by means of coordinated comments under the guise of organisations says everything about the mindset of the persons behind them. The proceedings will be followed with great interest by numerous observers outside the legal profession at home and abroad, and the decision of the court will be examined in detail and commented on. It is to be hoped that the highest German court will not be influenced in its decision by a small group whose interest in the UPCA lies primarily in their own profit.

## VI. Is the constitutional complaint inadmissible?

Since the turn of the year, in view of the publicized statements submitted by the specialist third parties, speculations have been pushed that the constitutional complaint could already be inadmissible. It is not surprising that this view is promoted in particular by UPC supporters in the legal profession, who naturally wish for a speedy end to the proceedings.

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[19] *Stjerna* (fn. 11).
[20] E. g. *Stjerna*, "Unitary patent" and court system – Urgently needed: A legal basis for the opt-out fee", accessible at www.stjerna.de/legal-basis-opt-out-fee/?lang=en, or *id*., "The European Unified Patent Court: what can still go wrong?" (FOSS Patent Blog of 24/01/2017), accessible at bit.ly/2kcd98j.
[21] Cf. *Stjerna*, "Unitary patent" and court system – The peculiar silence of the German professional associations, accessible at www.stjerna.de/silence-associations/?lang=en.
[22] *Lenz/Hansel* (fn. 2), § 93b, paras. 14, 16.
[23] E. g. Kluwer Patent Blog, "Constitutional Court asks for comments on German complaint against Unified Patent Court Agreement" (06/09/2017), accessible at bit.ly/2ptMKGU; The Law Society Gazette, "Top German court seeks comments in patent court challenge" (23/10/2017), accessible at bit.ly/2xjOIfC.
[24] *Tilmann*, GRUR 2017, 1177 (r. col.).
[25] *Lenz/Hansel* (fn. 2), § 27a, para. 8.

Inadmissibility would at least be surprising. As explained in paragraph II. above, the request made by the court to the Federal President to suspend the ratification procedure might already require admissibility of the constitutional complaint. Otherwise it might be easier to desist from such intervention and reject the complaint directly. For if issuing a provisional order against another state power is to be avoided even when the respective legal requirements are fulfilled, this must be the case all the more if these requirements – e. g. as a result of an inadmissibility of the constitutional complaint – are lacking. Anything else would be questionable with regard to the principle of the separation of powers.

Furthermore, as a rule, an inadmissible or obviously unfounded constitutional complaint is not served on those entitled to comment.[26] According to the newest annual BVerfG statistics, only 150 out of a total of 5,784 constitutional complaints received in 2017 were served, i. e. about 2.6 percent.[27] It would thus be surprising if the court made this effort, usually only applied in a tiny number of cases, to subsequently reject the complaint as inadmissible.

These considerations are confirmed by the listing of the UPCA proceedings in the court's annual preview[28] for 2018. Although it is well known that this listing is by no means binding – the proceedings concerning the EPO are on this list since 2016 –, the question should be asked whether the court would really include in its decision preview an inadmissible complaint.

In November 2018, the author of this article had contact with the Office of the Federal President in a different matter, during which also the UPCA constitutional complaint was touched upon. It became clear that a provisional order would have been issued by the BVerfG had the Federal President not followed its demand for a suspension of the ratification procedure. According to the standards described in paragraph II. above, this would require not only admissibility of the complaint, but – due to the increased requirements applying to a provisional order requested against the ratification of an international Agreement – also a high likelihood that the grounds submitted for the constitutional complaint will prevail.

After all, dogmatically there is not much indication for the inadmissibility of the complaint and it will be interesting to find out the court's position also on this aspect.

## VII. Would a rejection of the constitutional complaint mean the constitutionality of the UPCA?

Should the constitutional complaint be dismissed by a decision on the merits, this would only mean that there is no violation of the invoked fundamental right from Art. 38(1)1 GG under the aspects asserted. Whether there is a violation of this right from other points of view or a violation of other fundamental rights is not answered and remains susceptible to objection.

### 1. German *Grundgesetz*

In particular, a violation of the fundamental right to property under Art. 14 GG might be considered. This might be used to conduct an examination of the changes in substantive law brought about by the patent reform, e. g. as to the requirements of an indirect patent infringement or the limitations on patent protection, for its compatibility with the *Grundgesetz*. However, in order to be able to challenge a violation of a fundamental right granted by the *Grundgesetz*, the complainant must be directly affected by a correspondingly protected legal position, i. e., in case of Art. 14 GG, a protected property position. Since patents and patent applications are such property positions,[29] owners of all patents and patent applications which would fall within the scope of the UPCA should in principle be entitled to file a constitutional complaint in this respect.[30] This also applies, generally, to legal persons in Germany and other EU Member States.[31]

### 2. Union law

Another question is the compatibility of the UPCA with Union law. If, contrary to expectations, the BVerfG does not request a preliminary ruling from the CJEU in this case, the compatibility of the UPCA with Union law remains questionable and the corresponding Damocles sword over the reform remains. Should the UPCA enter into force and the UPC begin its work, it is to be expected that defendants in proceedings there will promptly demand that a preliminary ruling by the CJEU be obtained on the UPCA's compatibility with Union law. As long as the CJEU has not decided on this issue, the system remains legally in limbo.

Thus, the intensity with which certain circles agitate against a CJEU referral by the BVerfG is all the more astonishing. Of course, in view of the requirements of Opinion 1/09, which the CJEU recently confirmed in its *Achmea*[32] decision, and the deficits of the UPCA in this respect, they must seriously fear that the CJEU will also declare the UPCA to violate Union law. However, they apparently speculate that, given the long history of the European patent reform, once the Agreement has entered into force and the UPC started working, the CJEU will be hesitant to put substantial obstacles in its way. This attitude is questionable, not least because every judicial review serves the purpose of legal certainty and thus promotes user confidence in the new system, which should be in the interests of all parties involved. However, it is no

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[26] *Zuck* (fn. 5), para. 974.
[27] BVerfG annual statistics 2017, accessible at bit.ly/2PGeioh, p. 14 f.
[28] Accessible at bit.ly/2opOm3R.
[29] BVerfG E 36, 281 (290 f.).
[30] Cf. *Stjerna*, "Unitary patent" and court system – Compatible with the German Constitution?, cipher V., p. 5; accessible at www.stjerna.de/compatibility-german-constitution/?lang=en.
[31] BVerfG, 1 BvR 1916/09, decision of 19/07/2011, accessible at bit.ly/2P4AHhQ, and *Stjerna* (fn. 30), p. 6.
[32] CJEU, case C-284/16, judgment of 06/03/2018 – Slovak Republic / Achmea.

secret that some considerations are based on less altruistic motives.

### 3. Amendment of the UPCA by the Administrative Committee of the UPC?

Should the UPCA enter into force, further constitutional questions are likely to arise in the near future with regard to the powers of the Administrative Committee under Art. 87(2) UPCA. It is well known that this allows the Administrative Committee to amend the UPCA *"to bring it into line with an international treaty relating to patents or Union law"*. For example, it is sometimes represented by certain circles that after a withdrawal of the UK from the EU, the UPCA could be adapted by a decision according to Art. 87(2) UPCA in order to enable its membership also as a non-EU member.[33] It is also claimed that legal protection for the UPC judges, which is completely lacking in the UPCA, could be supplemented by a decision pursuant to Art. 87(2) UPCA. The corresponding authority of the Administrative Committee thus seems to be understood as a panacea for closing even gaping gaps in the Agreement without the need to involve the national parliaments and conduct any time-consuming ratification afterwards. Every measure carried out by the Administrative Committee pursuant to Art. 87(2) UPCA will therefore have to be examined under constitutional law as to whether and to what extent inalienable rights are affected and possibly undermined. It is clear that constitutional issues will continue to accompany the UPC even if the constitutional complaint should be rejected.

## VIII. On the "lack of transparency"

It has been criticised that the constitutional complaint submission has not been made public. Foreign commentators, who are sometimes accustomed to strongly divergent regulations from their own country, especially in Great Britain, may be forgiven for this. For German legal practitioners, however, such position is a little odd.

According to sec. 169(1) Judicature Act ("GVG") (only) the oral hearing and the pronouncement of judgment in a case are publicly accessible. This is not the case for the court file as the parties and the court are to conduct the legal dispute irrespective of the influence of third parties. Nothing different applies in constitutional complaint proceedings. It happens here that legal representatives publish their own pleadings for marketing purposes, often while the proceedings are ongoing. From this side's viewpoint, it is advisable to exercise restraint. If the court considers informing the public to be necessary, it can do so; as the BVerfG press office has done in the present case.[34]

It is not surprising that complaints about an alleged "lack of transparency" often come from circles which themselves tried to obstruct or suppress critical publications on the patent reform and which by no means practice in their own affairs the "open communication" they demand from others. It is worth recalling, for example, that publication of the extensive instructions underlying the so-called "Gordon/Pascoe opinion" was refused as follows:[35]

> *"It was decided when the Opinion was obtained that we would share the Instructions only with those for whom the Opinion was obtained (including the UK Government),* (…). *The organisations responsible for obtaining the Opinion have confirmed that they see no reason to alter this policy."*

When sitting in a glass house, you better not throw stones.

## IX. Outlook

Newer BVerfG decisions[36] emphasize the importance of judicial independence and the guarantee of effective legal protection also by international organisations. UPCA proponents saw the decision 2 BvR 1961/09 in particular as a signal in favor of the UPC, since, so they say, the BVerfG had approved the transfer of sovereign rights to an intergovernmental institution. Apart from the fact that the admissibility of the transfer of sovereign rights was not challenged in this case, it is not disputed that the *Grundgesetz* permits the transfer of sovereign rights to such institutions (cf. already Art. 24(1) GG). What is decisive, however, is compliance with the respective requirements and limits as defined by the BVerfG in its settled case-law. In case of the UPCA, the constitutional complaint represents that these requirements and limits were violated under different aspects. It remains to be seen whether the BVerfG shares this view.

Beyond the content of the decision, there is equally great interest in its timing. Nevertheless, the court has not yet given any indications in this regard.

It may be possible to forecast a trend on the basis of some recent developments. Once again at the center: Prof. *Tilmann*, a staunch UPC advocate, according to reports member of the CDU since the 1960s and obviously closely connected to the relevant political protagonists. Already in the past, Prof. *Tilmann's* zealousness, which is apparently controllable only to a limited extent, sometimes produced interesting information, the revelation of which might not always have been received with enthusiasm at the political level. Readers may recall his interference with the CJEU case C-146/13[37] or his alleged remarks on the origin[38] of

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[33] Cf. *Stjerna*, "Unitary patent" and court system – Squaring the circle after the "Brexit" vote, cipher IV.3., p. 7, r. col., accessible at www.stjerna.de/brexit/?lang=en.

[34] E. g. Kluwer Patent Blog, "UPC – Finally some News from the German Federal Constitutional Court" (16/08/2017), accessible at bit.ly/2fOgsVF.

[35] *Stjerna*, "Unitary patent" and court system – The Gordon/Pascoe Opinion and the UPCA's incompatibility with Union law, cipher II.2., p. 2, l. col., accessible at www.stjerna.de/gp-opinion/?lang=en.

[36] 2 BvR 780/16, decision of 24/07/2018, accessible at bit.ly/2NPajsk (German language) and 2 BvR 1961/09 (fn. 14).

[37] *Stjerna*, "Unitary patent" and court system – Prof. Tilmann, the old Roman god Janus and the requirements of Article 118(1) TFEU, cf. www.stjerna.de/requirements-118-1-tfeu/?lang=en.

the resolution of the dispute over former Articles 6 to 8 of the Regulation on unitary patent protection, which became known as the "Cypriot Compromise".

Prof. *Tilmann* is co-editor of a 1500-page commentary on the UPCA which has been announced since 2016 and is to be published by C. H. Beck. While the announcement had always been made with an open publication date, this has now been determined, most recently to the 43rd calendar week, commencing on 22/10/2018.[39] Would C. H. Beck put the commentary into print and make the associated considerable investment if it had to fear not being able to later on sell the book as a result of a decision by the BVerfG against ratification of the UPCA? In the meantime, the publication announcement has again disappeared.

On 30 October 2018, after publication of the first version of this article, also *Kevin Mooney* provided a comment on this aspect. In the second oral evidence session in the British House of Lords' EU Justice Sub-Committee inquiry on the topic "Intellectual property and the Unified Patent Court"[40], when answered by the *Earl of Kinnoull* on his view on the prospects of the constitutional complaint, Mr *Mooney* stated:

> *"The rumours that I heard in Venice over the weekend are that we can expect…we hope to expect a decision in December and that it is likely to be favourable. I stress they are rumours, gossip and nothing concrete from the court."*

It is worthwhile watching the video recording[41] of Mr *Mooney's* statement in which is documented the part "*…that we can expect…*" followed by an immediate interruption, chuckling and the straightened sentence finally included in the minutes[42]. The successive remark by the *Earl of Kinnoull "But you are not very worried about it?"* was not commented by Mr *Mooney*. As his source, he named the annual meeting of European intellectual property judges taking place at the end of October near Venice.

After all, is the outcome of the proceedings already known in certain circles, even before the BVerfG has announced its decision? If this were the case, the significance of the ensuing state political implications could hardly be overestimated. Or are all these just once more astonishing "coincidences", as they have already been observed repeatedly in the context of the European patent reform?

You be the judge.

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[38] *Stjerna*, "Unitary patent" and court system – "Cypriot compromise" compromised, accessible at www.stjerna.de/cypriot-compromise/?lang=en.
[39] archive.fo/9lqcj.
[40] Cf. the Committee website, accessible at bit.ly/2F74bYz.
[41] Accessible at bit.ly/2yVuKud, from 11:45:12.
[42] Uncorrected minutes of the oral evidence session of 30/10/2018, p. 19, middle, accessible at bit.ly/2F7baRq.