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

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

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

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

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

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

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

The positions of the persons involved on the BMJV side can be found in its organizational chart[4] from 01/10/2017.

II. Coordination of statements behind the scenes

As is known, in constitutional complaint proceedings there are "necessary parties" („notwendige Beteiligte", secs. 23(2), 94(4), 77 of the German Constitutional Court Act ["BVerfGG"]), who must always be given the opportunity to make a statement, as well as "specialist third parties" („sachkundige Dritte"), who *may* be given the opportunity to make a statement by the court (sec. 27a BVerfGG).[5] The necessary parties include the German Federal government and the German Federal Parliament ("Bundestag"), while the "specialist third parties" in proceedings 2 BvR 739/17 included the European Patent Office ("EPO"), which had asked the BVerfG for an opportunity to comment and was granted this opportunity.

The fact that leading German UPC protagonists were prominently represented in more or less all organisations that had asked the BVerfG for and received an opportunity to comment as "specialist third parties" has already been mentioned elsewhere, as has the fact that the statements filed by these "specialist third parties" were very similar in content and consistently propagated the same desired result.[6]

The files show that the BMJV tried to coordinate at least some of the statements. It requested the EPO to make changes to its statement and sent its own statement to the Bundestag (whose deadline for comments expired after its own) in advance, so that it could coordinate its statement

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[1] Cf. www.stjerna.de/foia/?lang=en/.
[2] Cf. *Stjerna*, EU Patent Reform –The German state powers in constitutional complaint proceedings 2 BvR 739/17 (Part 1), accessible at www.stjerna.de/state-powers-2-bvr-739-17-part-1/?lang=en.
[3] Cf. Administrative Court Berlin, 2 K 72.18 and Federal Administrative Court, 20 F 4.20; Administrative Court Berlin, 2 K 73.18 and Federal Administrative Court, 20 F 5.20.
[4] Cf. www.stjerna.de/files/171001_BMJV_Organisationsplan.pdf.
[5] Cf. *Stjerna*, EU Patent Reform – Questions and answers on the German Constitutional Complaint proceedings, p. 5, cipher V., accessible at www.stjerna.de/qa-cc/?lang=en.
[6] Cf. *Stjerna*, Questions and answers (fn. 5), ibid.

with that of the German Federal government. The process shows with unusual clarity how, behind the scenes of proceedings before the highest German court which are claimed to abide by the Rule of Law, the highest players in the legislative and executive branches were secretly pulling strings in intimate unison in order to foster the desired outcome of these proceedings.

1. "Suggestion" of a review or amendment of the EPO's position on the part of the BMJV

The German Federal Chancellery had assigned the constitutional complaint to the BMJV for lead processing in agreement with the Federal Ministry of the Interior ("BMI"), the Federal Foreign Office ("AA") and the Federal Ministry of Economics ("BMWi"),[7] the lead had Dr Thomas Barth, BMJV Division IV A 3 (responsible for constitutional jurisdiction and judicial constitutional law).

On 18/10/2017 Johannes Karcher, BMJV Division III B 4 and now Chairman of the Administrative Committee of the Unified Patent Court ("UPC"), sent Mr Barth and other BMJV addressees the EPO's statement[8] "as a further source of inspiration" for Prof. Mayer, the German Federal government's representative in proceedings 2 BvR 739/17 (translation from German language):[9]

> *"As discussed on the phone, I am sending you the draft statement of the European Patent Office in constitutional complaint proceedings 2 BvR 739/2017 with the request to forward it to Prof. Mayer in addition to our contribution as a further source of inspiration. The opinion was drafted under the lead of Ms Margot Fröhlinger, Head of Department for Patent Law and International Affairs at the EPO. Before joining the EPO, she was the Director responsible for the European Patent Reform at the EU Commission, which she was instrumental in shaping and driving forward. We should point this out to Prof. Mayer as background for his assessment of the comments. The opinion has not yet been sent to the BVerfG, but can already be regarded as a final version; minor corrections may still be made. Against this background, we should of course ask Prof. Mayer to treat the paper confidentially."*

In terms of content, the EPO statement drafted *"under the lead of Ms Margot Fröhlinger"* caused concern at the BMJV in many respects. The comments show how deeply the BMJV involved itself in the EPO's submission and tried "to guide its hand".

Alfred Bindels, Head of BMJV Directorate ("Abteilung") IV (responsible for constitutional and administrative law, international and European law), recommended "at least an informal advice to the EPO" on "individual points" (translation from German language):[10]

> *"I have noticed several points where at least an informal advice to the EPO could be appropriate (see my comments at 73, 75, 92, 123, 139 and 141). Please take a look at this, too."*

On 18/10/2017, Mr Barth proposed the following extensive substantive comments to Mr Karcher before forwarding the EPO statement to Prof. Mayer (translation from German language, emphasis added):[11]

> *"Thank you for forwarding the document! In our opinion, it might be advisable to recommend to the EPO that the following points of the pleading be reviewed and, probably, adapted:*
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> *In para. 35, the statement that 'technically qualified judges' were "assigned to the Divisions... on a case-by-case basis' could give rise to suspicion as regards the guarantee of the statutory judge. Could this be prevented by additional explanations?*
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> *Regarding paras. 53/ 81 f./ 91/ 104, the formulation that the constitutional complaint 'is likely to be inadmissible' with regard to the respective objections appears too cautious in our view. In our opinion, a stronger formulation – such as 'appears manifestly inadmissible' – should be urgently considered. The pleading itself correctly states elsewhere – in paragraphs 119, 122 and 125 – that the constitutional complaint is 'manifestly inadmissible'.*
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> *In para. 73 (in the last sentence), the conclusion that the UPCA does not infringe any (external) competences of the EU is justified by the fact that the UPCA 'was concluded and applies exclusively between Member States of the European Union'. However, the latter would no longer be the case after a Brexit. In my opinion, it is therefore advisable to delete the words 'and shall apply'. This also seems to me to be factually correct, as the EU's external competences should primarily affect the negotiation process, but not the mere (continued) application of Agreements that have already been negotiated.*
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> *In paras. 75 ff., the accusation that the UPCA violates the EU Charter of Fundamental Rights is countered by stating that EU fundamental rights are not applicable. This may be plausible from a purely European law perspective, but does not exhaust the problem, because it is probably (also) necessary under the national fundamental rights of the Grundgesetz to guarantee effective legal protection (at least in essence) within the framework of the UPCA. The argumentation should not expose itself to the (mis)understanding that effective legal protection is ultimately not considered necessary and therefore not guaranteed. In order to avoid this, it could, in our opinion, be advisable to focus on the statement made in para. 78 that the fundamental rights requirements under EU*

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[7] Cf. document 20061.1.pdf, p. 44.
[8] As far as can be seen, the EPO statement has not yet been published. It can be found in Volume 12 of the BMJV files on proceedings 2 BvR 739/17 (BMJV file no. 1004 E (6459)) and should be accessible on the basis of the German Federal FOIA.
[9] Cf. document 20061.2.pdf, p. 177.
[10] Cf. document 20061.2.pdf, p. 250.
[11] Cf. document 20061.2.pdf, p. 249 f.

law (and thus also under the national fundamental rights of the Grundgesetz) are in any case satisfied here as a result.

With regard to para. 96, when responding to the accusation that the possibility of a reappointment affects judicial independence, it should be refrained from also using the probationary judge as a counter-argument. In my opinion, this does not fit (no pure 'reappointment' of the probationary judge upon his appointment as a regular judge), but above all, the BVerfG has justified the special features of the probationary judge (only) with reference to the compelling necessities arising from the training of junior judges, which have no similar parallel here.

The explanations on the balancing of consequences in paras. 126 ff. stand or fall with the argument that even after ratification of the Agreements (and it thus becoming binding under international law) (all!) of the deficiencies asserted by the complainant could nevertheless still be remedied. Whether Germany would be in a position to do so (by way of unilateral action!) seems questionable here. In our opinion, the corresponding statements in paras. 139 ff. should be carefully re-examined and, in case of doubt, the statements on the weighing of consequences (paras. 126 ff.) should rather be dispensed with altogether, especially since the BVerfG – according to reports – sees no reason to decide separately on the application for an interim inunction anyway, but wants to deal directly with the proceedings in the merits.

Pleading alternatively by way of weighing up the consequences, – as in para. 141 – that if the UPCA is to be suspended, then, in any case, this should not be done (also) to the Protocol for Provisional Application by way of an interim order, seems problematic here. On the one hand, the question arises as to whether a 'separate' ratification would be possible at all. Irrespective of this, the objection arises that if the fate of the UPCA itself is uncertain, there is likely to be a lack of sufficient planning certainty for the preparatory measures that would have to be taken by way of provisional application."

Cornelia Knapp, BMJV Division IV A 3, also commented critically on the EPO statement (translation from German language, emphases added):[12]

"as I have already indicated, I find it very unfortunate that the EPO intends to submit a statement which, due to its style, could only be expected from a (German) party. However, as I assume that no fundamental objections can be raised against the submission of the statement, I will limit my comments to a few points.

I would like to suggest that paragraphs 33 to 39 of the opinion be deleted in their entirety.

In my opinion, the text raises new questions and problem areas that have not yet been the subject of the proceedings with such clarity; at least not to my knowledge. The aforementioned paragraphs deal with the 'defense' of the judges' legal position at the UPC. As is also known from other international organizations, they can be 're-moved' from office. The EPO explicitly mentions that in other international organizations, the judges as a whole decide on this by at least a 2/3 majority.

At the UPC, this was not considered practicable and instead it was decided that a decision on the removal of a judge can be taken within the 7-member Presidium by a simple majority (i.e. only 4 people!). How such a significant deviation from the rules in other international organisations can be justified with 'practicality' is beyond me. It is also clear that the 'removed' judge (currently) has no legal recourse against the decision.

Furthermore, the text mentions in passing that technical judges are 'assigned on a case-by-case basis'. Against this background, the statement gives even more reason than before to question the compatibility of the legal status of UPC judges with the German understanding of judicial independence. Shouldn't German judges also be entitled to a minimum level of legal protection against removal from office (keyword: right to judicial redress)?

The comments on the legal status of judges in paragraph 102 should be entirely sufficient and do not appear to be so inappropriate.

The attempt to defend the rule that the Administrative Committee can amend the UPCA (i.e. an Agreement under international law) and that the Member States only have a veto right does not seem very promising to me. Can the Administrative Committee waive German laws (para. 48)?

In addition, the statements on probationary judges appear misleading (para. 96).

Regarding Mr Bindels' comments at 73, 75, 92, 123: Although the comments are not always convincing, I do not see as much danger in them as Mr Bindels, who also fears that these points of view could be attacked. In particular, the comments on the interim order do not seem harmful to me, although if it may seem disconcerting how much the EPO identifies with the German Federal government."

Mr Barth forwarded the statement to Prof. Mayer on 19/10/2017 with the following comments (translation from German language, emphasis added):[13]

*"on the assumption of your interest, you will find enclosed the draft statement of the European Patent Office in constitutional complaint proceedings 2 BvR 739/2017, which was sent to us *confidentially*.*

The statement was prepared under the lead of Ms Margot Fröhlinger, Head of Department for Patent Law and International Affairs at the EPO. Before joining the EPO, she was the Director responsible for the European Patent Reform in the EU Commission, which she was

[12] Cf. document 20061.2.pdf, p. 254.

[13] Cf. document 20061.2.pdf, p. 248.

instrumental in shaping and driving forward. The statement has not yet been sent to the Federal Constitutional Court; in the attached e-mail, we have asked the EPO to review and, if necessary, amend some of the points that spontaneously came to our attention."

Prof. Mayer commented on 20/10/2017 (translation from German language, emphasis added):[14]

"thank you very much for the message – I agree with the comments, it would be particularly useful if the argument of inadmissibility came from different sides.

I am quite familiar with Ms Fröhlinger, who was responsible for the first attempt at a Services Directive at the time and tried to explain it to the Member States until she and the first draft were withdrawn."

The reference to the "usefulness" of having several parties submit an argument speaks for itself. Also interesting is Prof. Mayer's reference to the fact that Ms Fröhlinger was "withdrawn" at the time. Who did? And why? The BMJV had originally blackened[15] out the relevant passage and only made it accessible following an objection. Apparently a reference that is not intended for everyone's eyes.

2. Forwarding the German Federal government's statement to the Bundestag to enable it to "reinforce" the government's presentation

Shortly before submitting his statement for the Federal government, Prof. Mayer asked Mr Barth on 12/12/2017 when he could make it available to the Bundestag's legal representative, Prof. Heiko Sauer from Bonn University (translation from German language, emphasis added):[16]

"We should also discuss when I will make our brief available to Mr Sauer, who will also be officially authorized this week.

He'll get the submission at some point anyway, but perhaps he can strengthen certain things in his text if he knows how the Federal government argues."

This shows once again how the coordination of the arguments of various institutions was deliberately used to give the BVerfG, which likely assumes that in particular the state institutions prepare independent statements, the impression of great unity among the commentators and to increase the persuasiveness of the argument.

Mr Barth agreed to secretly handing the submission over in advance on 13/12/2017 (translation from German language, emphasis added):[17]

"If you could make the pleading available to Mr. Sauer, that would certainly be useful. It goes without saying that this should not be made public and should only be done for Mr. Sauer's own information. And as a precaution, we should also wait for the approval of our management – I will let you know as soon as it is available."

Here, too, the German Federal government's striving to coordinate its statement with those of other institutions becomes evident. From the outset, such behavior perverts the sense and purpose of the opportunity to submit a statement in a proceeding, but it does not at all appear to be unusual when looking at the state actors' correspondence.

On 25/01/2018, Mr Barth forwarded the Bundestag statement[18], which had been submitted to the BVerfG in the meantime and made "unofficially" available to him, to his mailing list, noting (translation from German language, emphasis added):[19]

"for your information I enclose the statement of the Bundestag's representative, Prof. Sauer, on the constitutional complaint proceedings against the Act on the Agreement of 19 February 2013 on a Unified Patent Court mentioned in the subject line. As we have not officially received it from the BVerfG, I would ask that it only be used internally for the time being. In my opinion, the position of the Federal government is effectively supported by this submission."

No comment needed. The (rhetorical) question is whether this secret coordination of opinions is compatible with the basic requirements of the Rule of Law.

III. Course of proceedings and statements of the BVerfG

The contents of the file on the course of proceedings 2 BvR 739/17 are also informative.

1. BMJV in 2017: "The constitutional complaint will not stop the European patent reform"

The BMJV had hoped for a quick conclusion to the constitutional complaint proceedings by a rejecting decision. In summer of 2017, Mr Karcher had argued that the UPC Central Division in Munich should be connected to the internet immediately, as the pending constitutional complaint would not prevent the UPCA from entering into force. In an e-mail dated 15/06/2017, he stated (translation from German language, emphasis added):[20]

"The Bundestag has passed our laws and the signals from the Competitiveness Council at the end of May suggest that the missing MS, including the UK, will soon approve the Protocol for Provisional Application. The pending constitutional complaint should not deter us either. It will not stop the European Patent Reform. Compared to this minor risk, it is more important that we

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[14] Cf. document 20061.2.pdf, p. 289.
[15] Cf. document 20061.2.pdf, p. 288.
[16] Cf. document 20061.8.pdf, p. 205.
[17] Cf. document 20061.8.pdf, p. 205.
[18] As far as can be seen, the Bundestag statement has not yet been published. It can be found in Volume 12 of the BMJV files on proceedings 2 BvR 739/17 (BMJV file no. 1004 E (6459), see the contents on p. 33 ff.) and should be accessible on the basis of the German Federal FOIA.
[19] Cf. document 20061.9.pdf, p. 165.
[20] Cf. document 20061.11.pdf.

guarantee the timely operational readiness of the Division to be provided by us under the Agreement."

That's how you can be wrong. An old German proverb says: Pride goeth before a fall. Apart from that: What exactly is meant by *"our laws"*?

The BMJV was also concerned about "Brexit" and its impact on the UPCA. Mr Barth commented on this to Mr Karcher on 27/09/2017 (translation from German language, emphasis added):[21]

"Secondly, we had discussed the fear that a delay in German ratification could postpone the entry into force of the Agreement until after Brexit, which could then trigger additional problems under European law, because the UK would then only be a non-EU Member of the Agreement from the outset. Unless I have overlooked something, your paper does not yet address this aspect. However, as discussed on the phone last week, it seems to me that a presentation of this aspect would be important for our presentation on the urgency of a Karlsruhe decision."

2. Telephone statements by the judge rapporteur on the duration of the proceedings

In an email exchange on 01/03/2018, Prof. Mayer informed Mr Barth that the reporting judge Prof. Huber had given him information on the expected course of proceedings 2 BvR 739/17. The author, as the complainant, was not informed, nor is there any reference to said phone call in the court file. Prof. Mayer described it as follows (translation from German language, emphasis added):[22]

"I received the following information on our proceedings today during a telephone enquiry with BE BVR Huber in the matter of CETA (new organ dispute 2 be 4/16):

Mr. Huber is currently working intensively on the census proceedings. He hopes that the proceedings in the European Schools case (and the '10 pending constitutional complaints against the European Patent Office') will allow questions on legal protection requirements for non-governmental institutions outside the EU to be 'layered' in advance – in relation to our proceedings. This probably means that European Schools, and possibly also the CCs against the European Patent Office, are to be decided/pre-consulted in the Senate first, so that the UPCA proceedings can be tackled with the Senate line determined there."

Mr Barth replied as follows (translation from German language, emphasis added):[23]

"Mr. Huber's procedural planning is not so encouraging. If questions relevant to our proceedings were to be addressed in the proceedings – in particular with regard to the '10 pending constitutional complaints against the European Patent Office' – it would of course be nice if we were given the opportunity to comment. So far, we have not been served with these 10 complaints."

And again Prof. Mayer (translation from German language, emphasis added):[24]

"In addition, the constitutional complaints regarding the European Patent Office have probably been pending for some time. I already had this problem once as a representative of the Bundestag: whether and when the opportunity to comment is granted in constitutional complaint proceedings is handled somewhat arbitrarily, you have no formal influence on it.

But perhaps the whole thing will above all relieve the pressure on our proceedings so that we can concentrate on the essential issues…

In a subordinate clause, however, Mr. Huber once again made it clear – again with a slightly critical undertone – that he attributes the urgency emphasized in the UPCA matter as well as the busy activity of the 'third parties' primarily to the fact that a great deal of money is involved in these issues."

The European Schools proceedings (case no. 2 BvR 1961/09) were decided by the BVerfG on 24/07/2018[25] and thus before the decision in case no. 2 BvR 739/17[26], which was only issued on 13/02/2020. The five constitutional complaints concerning actions by the EPO (cases 2 BvR 2480/10, 2 BvR 421/13, 2 BvR 786/15, 2 BvR 756/16 and 2 BvR 561/18) were only served on the German Federal government in September 2019[27] – even though the first of these complaints dated back to 2010. As is known, the decision dated 08/11/2022 was not published until after the end of the term of office of the judge rapporteur in these proceedings, Prof. Huber, on 11/01/2023.[28] The complainants in these proceedings had to wait between more than four years (proceedings 2 BvR 561/18) and more than twelve years (proceedings 2 BvR 2480/10), in the latter case thus longer than the term of office of the judge Prof. Huber, for a decision and thus for the granting of legal protection by the BVerfG.[29]

Of course, the complainant – as the only party to the constitutional complaint proceedings – would also have been interested in being informed by the court of the length of the proceedings he could expect. Providing information on this to the German Federal government's representative

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[21] Cf. document 20061.2.pdf, p. 153.
[22] Cf. document 20061.9.pdf, p. 172.
[23] Cf. document 20061.9.pdf, p. 172.
[24] Cf. document 20061.9.pdf, p. 173.
[25] Cf. www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2018/07/rs20180724_2bvr196109.html.
[26] Cf. www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/02/rs20200213_2bvr073917en.html.
[27] Cf. document 20061.10.pdf, p. 33.
[28] Cf. the press statement at www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2023/bvg23-004.html.
[29] Cf. www.stjerna.de/prof-huber-term/?lang=en.

without also informing the complainant is hardly a fair conduct of the proceedings.

3. Judge rapporteur's telephone comments on the quality of statements

Equally astonishing are the comments that the judge rapporteur Prof. Huber apparently made to Prof. Mayer as to statements submitted in proceedings 2 BvR 739/17. Mr Barth explained this on 08/03/2018 (translation from German language, emphasis added):[30]

> *"in the meantime, we have received some further statements on our UPCA proceedings via our legal representative (Prof. Mayer) (in addition to the already available Bundestag statement [Prof. Sauer] of 22 January 2017 and that of the EPO of 18 December 2017).* (...) *As Mr. Mayer recently informed me verbally, in a telephone conversation with him Mr. Huber was not particularly impressed by the statements ('you don't need to read them') – in any case, from our point of view, it should be noted that, according to my first impression, none of the statements address the complainant's allegations, but on the contrary, the appropriateness and customary nature of the rules adopted are consistently confirmed. This applies in particular to the statements of the DAV (result on p. 40: VB is inadmissible, at least unfounded) and the BRAK (summary on p. 3: VB is inadmissible, at least unfounded)."*

Although the comment "You don't need to read them" from the responsible BVerfG judge rapporteur is devastating (and hardly objectionable in terms of content), the BMJV constructs the world as it pleases and as it serves its own cause. The fact that *"none of the statements address the complainant's allegations"* is already evidence of incapacity, as the discussion of these "allegations" is their very purpose. Deriving support for the German Federal government's position from the fact that *"on the contrary, the appropriateness and customary nature of the provisions adopted are consistently confirmed"* tells everything about the disposition of the actors at the BMJV, especially when bearing in mind that these statements came, among others, from lawyers' interest groups with a manifest financial interest in the UPCA.[31] In the opinion of the actors at the BMJV, the (alleged) "appropriateness and customary nature" of a regulation apparently suffices for its constitutionality.

4. BMJV pushing for a decision after UPCA ratification by the UK

The ratification of the UPCA and the Protocol for its Provisional Application by the UK on 26/04/2018[32] caused a flurry of activity at the BMJV. Mr Barth informed his colleagues on 27/04/2018 (translation from German language, emphases added):[33]

> *"The decision of the Federal Constitutional Court is urgent from our perspective because (also) the German ratification – currently suspended by the constitutional complaint proceedings – is a prerequisite for the entry into force of the Agreement as a whole (i.e. also in the relationship between the other contracting parties). This situation has been further exacerbated by the UK's ratification on 26 April 2018, as the entry into force of the Agreement now only depends on Germany.*
>
> *The Federal Constitutional Court is to be informed promptly of the UK's raification by means of a letter of notification in accordance with the attached draft, thereby also signaling the Federal government's interest in a swift decision.*
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> *I ask for co-signatures by ***Monday, 30 May 2018, 12:00 noon***. I apologize for the short deadline. It takes into account the fact that the faster the Federal government sends the intended signal, the clearer it is likely to be. I am also confident that there are no objections to the intended factual update from the point of view of the Departments."*

The Bundestag again acted in line with the activities of the German Federal government, also drawing the attention of the BVerfG to the British ratification and requesting a swift decision (translation from German language):[34]

> *"enclosed for your information is the letter sent confidentially (!) by Mr. Mayer for your information, in which the Bundestag's legal representative (also) informs the BVerfG of the ratification of the UK and clearly underlines the need for a speedy decision."*

Once again, the German Federal government and the Bundestag coordinated their procedural behavior behind the scenes. Is this what the Rule of Law demands?

IV. BMJV assessment of the BVerfG's decision

The reaction of the BMJV protagonists after the BVerfG upheld the constitutional complaint and nullified the UPCA ratification is also revealing. Ms Pakuscher and Mr Karcher advised the then German Federal Minister of Justice to simply initiate a new legislative procedure on the (unchanged, of course) UPCA for lack of alternatives.

1. BMJV: "Consequences of the BVerfG decision"

After the BVerfG upheld the constitutional complaint in its decision [35] of 13/02/2020, nullifying the UPCA's ratification, BMJV Division III B 4 of Ms Pakuscher and Mr Karcher sent the German Federal Minister of Justice a memo dated 27/04/2020 about the consequences of the

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[30] Cf. document 20061.9.pdf, S. 167.
[31] Cf. *Stjerna*, Questions and answers (fn. 5), ibid.
[32] Cf. on this and on the ratification's alleged later "withdrawal" *Stjerna*, EU Patent Reform – The "withdrawn" ratification of the UPCA and its protocols by the United Kingdom, accessible at www.stjerna.de/upca-uk-withdrawal/?lang=en.
[33] Cf. document 20061.10.pdf, p. 15.
[34] Cf. document 20061.10.pdf, p. 29.
[35] Above fn. 26.

decision.[36] The following statements on how to proceed are very informative (translation from German language, emphases added):[37]

> *"Ultimately, however, in paragraph 166 of the UPCA decision, the BVerfG has created a starting point for a further constitutional complaint with corresponding temporal effects. The risk of a renewed request by the BVerfG to the Federal President to suspend the ratification procedure despite a confirmation of the Ratification Act with a 2/3 majority in the Bundestag and ultimately also a second negative decision on the UPCA can only be counteracted to a limited extent by statements in the explanatory memorandum to the draft legislation and corresponding statements by the Federal government: However, these can be of considerable importance in winning over the opposition parties to the project once again. At the same time, a statement of reasons could demonstrate to the BVerfG that the legislator has seriously considered its reference.*
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> *In contrast, an amendment to the UPCA to minimize risk is practically out of the question. Neither does the regulation of an extraordinary constitutional review of measures of a supranational institution appear to be a suitable subject of the international Agreement by which the institution is established. Nor would it even seem possible to negotiate additional Agreement contents in terms of time, which would have to be ratified again by all Parliaments of the Member States, including the holding of a referendum in DK. Finally, the alternative of discontinuing work on unitary patent protection altogether is not an option either, as this would be received with deep incomprehension both by the European partner states that have already ratified the Agreement and by European industry; moreover, the measure is a core component of innovation protection for German industry and is awaited with increasing impatience by the latter – as evidenced by recent press statements. As a result, it can be assumed that although there is the possibility of a renewed constitutional complaint, the success of which cannot be completely ruled out even if risk-mitigating measures are taken, it is de facto out of the question for Germany to abandon this major European project for economic and political reasons."*

What is meant by the cryptic remarks on the "regulation of an extraordinary constitutional review of measures of a supranational institution" as not being "an appropriate subject of the international Agreement by which the institution is established"? Was the intention to provide for an "extraordinary constitutional review"? Or did they even want to exclude it? In any case, this can hardly have been meant seriously, as the protagonists had always categorically rejected the required substantive amendment of the UPCA because of the additional time needed already for national ratifications.

2. The BMJV and the position of "pan-European industry"

The memo also contains the obligatory, almost mantra-like reference to the alleged attitude of the industry, for which – as usual – reference is made to statements made by certain associations (translation from German language):[38]

> *"The technical view of the project to create uniform patent protection in Europe for the benefit of the innovative economy remains unaffected by the decision. It can also be assumed that the Ministries will support the new draft legislation. This assessment is also emphatically underlined by German industry (BDI press release – Annex 5 a): the same applies to French industry (UJUB position paper – Annex 5 b) and pan-European industry (Business Europe statement – Annex 5 c)."*

a) "Bundesverband der Deutschen Industrie"

While the Federation of German Industries ("Bundesverband der Deutschen Industrie", "BDI") had asked the BVerfG in September 2017 for an opportunity to file a statement in proceedings 2 BvR 739/17 – it claimed to be *"the decisive multiplier for the user side of the planned European unitary patent in Germany"* – it was the only one of the "specialist third parties" to ultimately not make use of this opportunity. So BDI supports the project, but does not see itself in a position to comment on its constitutionality? Of course, after the decision of the BVerfG, they immediately lamented dutifully that the "judgment against the unitary patent" (!) weakened "Europe's competitiveness".[39] No comment necessary.

b) "L'Union pour la Juridiction unifiée du brevet"

It is interesting to ask who or what "UJUB" actually is, which has hardly ever been heard of, at least in this country, and about which hardly any public information is available, but which the UPC protagonists at the BMJV have cited as representative of the attitude of French industry. "UJUB" stands for "L'Union pour la Juridiction unifiée du brevet" ("Union for the Unified Patent Court"), which is a kind of an "umbrella organization" of various associations, primarily of lawyers.[40] The president of "UJUB" is Thierry Sueur,[41] already well-known as the President of "Business Europe", who made a prominent appearance in the European legislative process on EU Patent Reform with a pithy speech in the EU Parliament's Legal Affairs Committee.[42] Were these personal ties unknown to Mr Karcher when he referred to the statements of "UJUB" and

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[36] Cf. document 20061.22.pdf, p. 1 ff.
[37] Cf. document 20061.22.pdf, p. 3 f.
[38] Cf. document 20061.22.pdf, p. 5.
[39] Cf. the press statement of 20/03/2020 at bdi.eu/artikel/news/urteil-gegen-das-einheitspatent-schwaecht-europas-wettbewerbsfaehigkeit/.
[40] Cf. the "Résolution de UJUB du 09 avril 2020", accessible at https://archive.ph/iKO0A.
[41] Cf. https://archive.ph/C0GCm.
[42] Cf. *Stjerna*, The Parliamentary History of the European „Unitary patent" (Tredition 2015), para. 674 ff.

"Business Europe" vice versa the German Federal Minister of Justice as regards the alleged position of the French and "pan-European" industry on the European patent reform?

3. A new legislative procedure for the unamended UPCA for a lack of alternatives

On the question of "What now?", the memo by Ms Pakuscher and Mr Karcher decided to reintroduce the Ratification Act into the parliamentary process unchanged – for lack of alternatives – and to seek the desired qualified majority to amend the constitution this time (translation from German language, emphasis added):[43]

> *"The attached Ratification Act in the version adopted in 2017 (Annex 6) will have to be adopted again without amendments. It is naturally limited to the approval of the provisions of the UPCA. The substantive provisions of the Agreement, which has already been ratified by a large number of Member States, could not be amended at the present time without a lengthy renegotiation of the Court Agreement and subsequent ratification procedures in all Member States. The provisions of the Ratification Act, which regulate the involvement of the Bundestag in the future amendment of the Agreement by resolution of the UPC Administrative Committee (Article 1 (2)), a publication requirement (Article 2) and the entry into force of the Act (Article 3), also remain necessary."*

The decisive consideration behind the motto of "carry on as before" regardless of all existing problems was therefore once again that the UPCA *"cannot be amended anyway without a lengthy renegotiation"*.

Against this background, it is not surprising that the BMJV did not see the UK's withdrawal from the EU as an obstacle to the entry into force of the UPCA and its protocols – since the content of the Agreement cannot be changed *"without a lengthy renegotiation"*, it cannot be any different with this or any other obstacle, can it? It was stated (translation from German language):[44]

> *"The British ratification described in Article 89 UPCA has taken place, so that the Agreement can enter into force after the German ratification. The withdrawal of the UK has no influence on the application of Article 89 UPCA because it would be contrary to the principles of interpretation under international law if the UPCA could actually no longer enter into force in the event of the withdrawal of one of these three States, which could not be foreseen by anyone. At the same time, a political declaration is being sought from the remaining Member States to the effect that the UPCA should enter into force as soon as Germany has also completed the ratification process, despite the subsequent withdrawal of the UK. The implementation of the Agreements would then also constitute a practice or agreement of the Contracting States on the entry into force of the UPCA under international law in accordance with Article 31(3) VCLT."*

The Central Division seat in London provided for in Art. 7(2) UPCA is seen as not preventing the Agreement from entering into force either, because (translation from German language):[45]

> *"Article 7(2) UPCA expressly provides for a Division to be located in London in addition to the seat of the Central Division of the court of first instance in Paris and the Munich location. However, the UPCA cannot be understood as meaning that it wishes to establish or maintain a Division in a non-contracting Member State. If the Central Division in London were to cease to exist, the Agreement would have to be interpreted in accordance with the principles of international law in such a way that its competences would be transferred to the (continuing) Central Divisions in Paris and Munich, at least on a transitional basis. This view is shared by the chairmen of the preparatory bodies. A final revision could take place later as part of a review of the functioning of the court already provided for under Article 87(1) and (3) UPCA and then be implemented in a simplified procedure without a revision conference. This issue could also be politically agreed in advance among the remaining Member States. A political debate among the states interested in an increase in competence (FR, IT, NL, DE) can be expected at the latest when a final decision is made."*

The almost desperate, unconditional adherence to the reform, despite all the obvious frictions is obvious. Whereas previously there was talk of how a UK that had left the EU could remain in the UPCA,[46] now that this has failed, the next line of defense has been taken, which on closer inspection also consists of nothing more than hot air. Under the given circumstances, what does not fit is simply made to fit.

With regard to the consequences of Brexit for the UPCA, one may recall the statement by Mr Günther (BMJV Division IV C 2) of 23/11/2017 (translation from German language, emphasis added):[47]

> *"The question is complex and controversial in the interplay between the Withdrawal Agreement, transitional arrangements, status agreement and UPCA, which may then have to be adapted, and we hope that it never ends up before the CJEU."*

According to Ms Pakuscher and Mr Karcher, the "implementation of the patent package" was to take place in the following steps (translation from German language, emphasis added):[48]

> *"Implementation of a legislative procedure for a formal resolution by the Bundestag (contacting the parliamentary groups for this purpose) and the*

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[43] Cf. document 20061.22.pdf, p. 5.
[44] Cf. document 20061.22.pdf, p. 6.
[45] Cf. document 20061.22.pdf, p. 6.
[46] *Stjerna*, German state powers (fn. 2), cipher IV.3., p. 5 ff.
[47] Cf. document 20061.3.pdf, p. 183.
[48] Cf. document 20061.22.pdf, p. 7.

Bundesrat on Ratification Act for the UPCA and its Protocol for Provisional Application before the end of this legislative period.

Achieving a consensus among the remaining Contracting States on the following points; the aim is to reach a joint declaration on the basis of which a legally secure implementation is possible:

- Effective withdrawal of the UK from the UPCA;

- Entry into force of the UPCA without British participation;

- Treatment of the Central Division London provided for in the UPCA.

If these conditions are met, the Protocol on the Provisional Application of the UPCA should be ratified first and the UPCA itself ratified later."

The problem is: None of the aforementioned steps have yet been effectively taken, but the UPCA has nevertheless been set into force. Will this be permanent?

V. Outlook

The documents made available by the BMJV paint a picture that is as revealing as it is frightening.

The most valuable finding is likely to be that the German Federal government, as the authoritative state institution authorized to make statements in proceedings 2 BvR 739/17, coordinated its submission behind the scenes with those of other institutions or influenced the latter to make statements with a content that served the German Federal government.

Another astonishing circumstance lies in the statements that the judge rapporteur in proceedings 2 BvR 739/17, Prof. Huber, apparently made to the German Federal government's representative about aspects of the proceedings without also making this information available to the complainant. For reasons of fairness alone, this is customary and appropriate in any simple judicial procedure in order to dispel any impression of bias from the outset.

The circumstances documented in the BMJV files that have been made accessible allow a deep insight into the thinking and actions of the state protagonists, which once again give the impression that the European Patent Reform was extensively played with marked cards. It will be interesting to see how this story ends.

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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!