

The European Patent Reform – The British ratification paradox

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Most recently, statements with relevance for the ratification of the Agreement on a Unified Patent Court (“UPCA”) made by members of the British government caused astonishment. While the new British Minister of State for Intellectual Property, *Joseph Johnson*, underlined the ratification intent, Prime Minister *Theresa May* shortly afterwards, in her speech on the “Brexit” negotiations, defined a number of objectives which appear hardly reconcilable with such ratification. In this context, it is also of interest that, contrary to the political guidelines set by the previous Prime Minister *Cameron* and against the broad opposition of the professional circles, the CJEU can be expected to have gained an interpretation competence also in relation to material questions of unitary patent protection, as a consequence of the compromise in the dispute on former Art. 6 to 8 of the “unitary patent” Regulation. The following article describes the statements and their legal implications in more detail.

I. The statements by Minister *Johnson* in the Commons Science and Technology Committee

At the end of November 2016, the British government announced its intent to proceed with preparations for a ratification of the UPCA,¹ shortly afterwards signing the “Protocol on privileges and immunities of the Unified Patent Court (“UPC”)”. On 11/01/2017, the House of Commons Select Committee for Science and Technology met for a hearing in which also the new Minister of State for, amongst others, intellectual property, *Joseph Johnson*, participated.² *Derek Thomas* MP questioned him on the ratification of the UPCA and the impact of a “Brexit” on the continued membership of the UK in the UPCA which developed into the following exchange:

*Derek Thomas:*³ “In November, [inaudible] at the Competitiveness Council that the government intends to ratify the European Unified Patent Court Agreement or the Agreement regarding that Unified Patent Court. And then you said that this decision does not preempt the UK objectives in the program of leaving the EU. Can you clarify what is meant by that statement?”

*Joseph Johnson:*⁴ “Yes. I think the statement is correct in the sense that this is not an EU institution, the Unified Patent Court, and it is independent of our mem-

bership of the European Union. We have taken the decision to ratify, to proceed with preparations to ratify the Patent Court Agreement. It hasn't yet come into effect, because the requisite number of countries needed haven't yet ratified. But we believe it's important that we participate in this framework. It has a value to UK inventors and UK businesses and we want to be there at its creation.”

DT:⁵ “That's good. Are you saying then that, currently, there is provision in the Unified Patent Court Agreement for non-EU members to participate in the unitary scheme, the unitary patent scheme?”

JJ:⁶ “These are questions which will form part of the bigger discussion around the Brexit negotiations.”

DT:⁷ “Finally then – because obviously, that's not clear –, one of the seats of the UPC is in London which will look at cases such as chemistry including pharma and life sciences. Is it possible that we go to the effort of setting this up only for to be taken down again when we leave the EU, is that likely?”

JJ:⁸ “Well, again, we have interests in the Unified Patent Court, we see benefits to business, benefits to our research environment or our innovation ecosystem. We want to be there, supporting this entity. But location decisions following our Brexit are all going to form part of the bigger package of discussions relating to us leaving the European Union.”

DT:⁹ “Well, I guess what you are saying is you go into this with the intention of us remaining in that Agreement post-Brexit?”

JJ:¹⁰ “The Unified Patent Court stands outside the European Union institutions. So, we are members of it, we are proceeding with preparations to ratify the Agreement. But aspects of how it operates, where it operates will all form part of the future negotiations.”

The approach described by Mr *Johnson* can probably be summarized as follows: The UPC is not an EU institution, it is independent of the UK's membership in the EU. Whether and subject to which conditions the UK will be able to remain a member of the UPCA even after a with-

¹ Press statement “UK signals green light to Unified Patent Court Agreement” (28/11/2016), accessible at archive.md/aEvtv.

² A recording of the hearing is accessible at bit.ly/3fkpoxf.

³ Fn. 2, from 11:07.26 of the recording.

⁴ Fn. 2, from 11:07.52.

⁵ Fn. 2, from 11:08.46.

⁶ Fn. 2, from 11:08.56.

⁷ Fn. 2, from 11:09.03.

⁸ Fn. 2, from 11:09.23.

⁹ Fn. 2, from 11:09.46.

¹⁰ Fn. 2, from 11:09.54.

drawal from the EU, will be discussed only in the course of the exit negotiations after the procedure under Art. 50(2) TEU has been initiated.

Thus, the attempt is apparently made to separate the UPCA ratification from the obvious implications of the “Brexit” vote by merely referring to the formal status of the UPC, a respective notice had already been included in said press statement of the UK government from November 2016 (“*The UPC itself is not an EU institution, it is an international patent court.*”). An examination and discussion of the Union law obligations newly founded for the UK, e. g. its liability for Union law violations by the UPC, is missing completely.

If the intention is to quickly ratify the UPCA, as it seems to have been indicated by Mr *Johnson*, while the possibility of the UK’s continued membership in it after a “Brexit” will be clarified only later in the course of the exit negotiations – what is the reason for this? –, it would mean accepting the risk to be no longer able to partake in the UPCA after a withdrawal from the EU. That this risk is very real without fundamental amendments to the UPCA, has already been set out elsewhere.¹¹ The legal uncertainty ensuing from this for the British industry is apparently not seen as a problem.

II. The speech by Prime Minister *May* on the objectives of the exit negotiations

Roughly one week after the statements by Mr *Johnson*, in a speech¹² given on 17/01/2017 the British Prime Minister *Theresa May* described the government’s objectives for the negotiations on the UK’s withdrawal from the EU. Several of these objectives contradict a ratification of the UPCA.

First of all, Mrs *May* underlined that the government intended to provide a maximum of clarity:¹³

“The first objective is crucial. We will provide certainty wherever we can. (...) But I recognise how important it is to provide business, the public sector, and everybody with as much certainty as possible as we move through the process. So where we can offer that certainty, we will do so.”

She went on to state that she wanted to regain control over “our own laws”:¹⁴

“So we will take back control of our laws and bring an end to the jurisdiction of the European Court of Justice in Britain. Leaving the European Union will mean that our laws will be made in Westminster, Edinburgh, Cardiff and Belfast. And those laws will be interpreted by judges not in Luxembourg but in courts across this

country. Because we will not have truly left the European Union if we are not in control of our own laws.”

The term “our (own) laws” is used repeatedly in the speech. At first sight, the related statements create the impression that in the future the laws for the UK will be made exclusively by its own Parliaments, implying a rejection of legislation made in Brussels. However, for international Agreements like the UPCA these statements seem to make no difference. Said Parliaments usually anyhow have their say in the ratification, so that a ratified international Agreement like the UPCA might well be considered to be part of “our (own) laws” in that sense already today.

Much more explicit are the Prime Minister’s comments on the role which the CJEU is supposed to play in the UK in the future: None any longer. Apart from the above, she has made this clear in a further statement (emphasis added):¹⁵

“What I am proposing cannot mean membership of the single market. (...) And being out of the EU but a member of the single market would mean complying with the EU’s rules and regulations that implement those freedoms, without having a vote on what those rules and regulations are. It would mean accepting a role for the European Court of Justice that would see it still having direct legal authority in our country. It would to all intents and purposes mean not leaving the EU at all.”

Consequently, the CJEU shall cease to have any “direct legal authority” in the UK. One could ask to what extent the CJEU ever has “direct legal authority” in an EU Member State in private law disputes since its respective role is limited to answering questions on Union law directed to it by way of a preliminary reference request from the national courts of the Member States, based on which the latter afterwards render their decision of the case. Insofar, already today the CJEU’s legal authority in the Member States could be said to be only indirect. Then, however, Mrs *May*’s statement would mean that the legal position of the CJEU in the UK would not be changed by a withdrawal from the EU. This will hardly be intended. The aforementioned declaration “*we will (...) bring an end to the jurisdiction of the European Court of Justice in Britain*” rather clearly indicates that the CJEU is meant to cease having judicial powers in relation to the UK.

However, if this is the plan it is difficult to see how the UK government will be able to explain its intent to ratify the UPCA as it creates new obligations from Union law, including a new competence for the CJEU.

III. UPCA and Union law

As indicated above, the statements by the UK government on their intent to ratify the UPCA are so far only based on the UPC’s position as an international organisation (Art. 4(1) UPCA). By underlining that it was not an EU institution and that the UPC allegedly had nothing to do

¹¹ *Jaeger*, “Reset and Go: The Unitary Patent System Post-Brexit”, accessible at bit.ly/3bsJDaY; *Stjerna*, The European Patent Reform – Squaring the circle after the ‘Brexit’ vote, accessible at www.stjerna.de/brexit/?lang=en.

¹² Accessible at archive.md/5fbGg.

¹³ Fn. 12, no. 1., “Certainty”.

¹⁴ Fn. 12, no. 2., “Control of our own laws”.

¹⁵ Fn. 12, no. 8., “Free trade with European markets”.

with EU membership, the impression is apparently meant to be created that the “Brexit” vote was irrelevant for the UPCA and did not hinder its ratification.

1. The UPC’s obligations from Union law

However, a closer look at the UPCA reveals profound obligations from Union law for the UPC.

This does not come as a surprise since, in its Opinion 1/09 in 2011, the CJEU rejected the first draft Agreement for the creation of a European patent judiciary as incompatible with Union law, after which the political operators saw an escape from this dilemma in an – at least declaratory – redesign of the UPC as a court common to the Contracting Member States, strengthening its obligations towards Union law and the CJEU over the rejected draft Agreement.¹⁶

This is emphasized already in the recitals to the UPCA. Here, the UPC’s legal position and the legal supremacy of the CJEU are set out.¹⁷ It is further established that the Contracting Member States have to guarantee, amongst others, the full application of and the full respect for Union law by the UPC in their respective territories.¹⁸

“RECALLING the obligations of the Contracting Member States under the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), including the obligation of sincere cooperation as set out in Article 4(3) TEU and the obligation to ensure through the Unified Patent Court the full application of, and respect for, Union law in their respective territories and the judicial protection of an individual’s rights under that law;”

Likewise, the UPC’s obligations from Union law and its connection to the CJEU are set out:¹⁹

“CONSIDERING that, as any national court, the Unified Patent Court must respect and apply Union law and, in collaboration with the Court of Justice of the European Union as guardian of Union law, ensure its correct application and uniform interpretation; the Unified Patent Court must in particular cooperate with the Court of Justice of the European Union in properly interpreting Union law by relying on the latter’s case law and by requesting preliminary rulings in accordance with Article 267 TFEU;”

Included is also the Contracting Member States’ full liability for any violations of Union law by the UPC:²⁰

“CONSIDERING that the Contracting Member States should, in line with the case law of the Court of Justice of the European Union on non-contractual liability, be liable for damages caused by infringements of Union law by the Unified Patent Court, including the failure

to request preliminary rulings from the Court of Justice of the European Union;

CONSIDERING that infringements of Union law by the Unified Patent Court, including the failure to request preliminary rulings from the Court of Justice of the European Union, are directly attributable to the Contracting Member States and infringement proceedings can therefore be brought under Article 258, 259 and 260 TFEU against any Contracting Member State to ensure the respect of the primacy and proper application of Union law;”

The scope of the UPC’s Union law obligations is set out in a separate recital:²¹

“RECALLING the primacy of Union law, which includes the TEU, the TFEU, the Charter of Fundamental Rights of the European Union, the general principles of Union law as developed by the Court of Justice of the European Union, and in particular the right to an effective remedy before a tribunal and a fair and public hearing within a reasonable time by an independent and impartial tribunal, the case law of the Court of Justice of the European Union and secondary Union law;”

The considerations from these recitals are afterwards legally implemented in several provisions of the UPCA.

As an introduction, Art. 1(2) UPCA specifies that the UPC has the same obligations from Union law as any national court:

“The Unified Patent Court shall be a court common to the Contracting Member States and thus subject to the same obligations under Union law as any national court of the Contracting Member States.”

The supremacy of Union law and the liability of the Contracting Member States for violations of it are being dealt with in separate chapter of the UPCA (chapter IV). It starts with Art. 20 UPCA, stipulating:

“The Court shall apply Union law in its entirety and shall respect its primacy.”

Additionally, Art. 24(1) lit. a) UPCA specifies Union law as one of the legal sources for the decisions of the UPC.

Art. 21 UPCA deals with the UPC’s relation to the CJEU. It states:

“As a court common to the Contracting Member States and as part of their judicial system, the Court shall cooperate with the Court of Justice of the European Union to ensure the correct application and uniform interpretation of Union law, as any national court, in accordance with Article 267 TFEU in particular. Decisions of the Court of Justice of the European Union shall be binding on the Court.”

¹⁶ Cf. *Stjerna* (fn. 11), cipher III.2.a), p. 4 f.

¹⁷ Recitals 7 and 8 of the UPCA.

¹⁸ Recital 9 of the UPCA.

¹⁹ Recital 10 of the UPCA.

²⁰ Recitals 11 and 12 of the UPCA.

²¹ Recital 13 of the UPCA.

The Contracting Member States are liable jointly and severally for any damages resulting from a violation of Union law by the UPC (Art. 22(1) UPCA). In addition, such violations are attributable to each Contracting Member State individually and to all of them collectively and can give rise to infringement proceedings (Art. 23 UPCA).

All this should demonstrate vividly that the UPC is subject to far-reaching obligations from Union law and with it the Contracting Member States which are liable for the violation of these obligations. This is regardless of the UPC's formal status as an international organisation.

Those seeking to reduce the influence of Union law and the CJEU, as the Prime Minister intends to do for the UK, cannot ratify the UPCA without further ado. At the very least, an explanation is needed why in case of the UPC the creation of new obligations from Union law and respective powers for the CJEU as well as a respective liability of the UK for Union law violations are deemed acceptable, despite the envisaged objectives for leaving the EU.

2. CJEU competences as to the interpretation of content and scope of unitary patent protection

There is a further, widely unnoticed aspect of the problem as to the scope of the CJEU's interpretation competence.

a) The dispute on former Art. 6 to 8 of the draft Regulation on the "unitary patent"

As is known, this very topic was in the centre of the dispute about former Art. 6 to 8 of the draft Regulation on the "unitary patent", relating to the content and limitations of the rights from such patent. The professional circles, in particular those in the UK, had vigorously demanded that these provisions – on which patent disputes regularly hinge – be excluded from the CJEU's interpretation competence as it was feared that the court would not be able to deal with respective references in a convincing and timely manner.²² In the UK, especially the IP Federation²³ and the Chartered Institute of Patent Attorneys ("CIPA"), both of which have recently demanded a British ratification of the UPCA,²⁴ had rejected such interpretation competence, the latter even with the remarkable statement:²⁵

"The CJEU must not decide European patent infringement law. They do not have the specialist expertise and are not suited to it. References to the CJEU lead to further expense and delay. This is also a further ceding of sovereignty to Europe, without justification."

²² Cf. *Stjerna*, The European Patent Reform – Failed for now, accessible at www.stjerna.de/failed-for-now/?lang=en and *id.*, New problems ahead?, accessible at www.stjerna.de/new-problems/?lang=en.

²³ E. g. IP Federation Policy Papers PP19/11 (25/11/2011), accessible at bit.ly/33Lsd55, or PP2/12 (23/01/2012), accessible at bit.ly/3bw9PBs.

²⁴ Cf. *Stjerna*, The European Patent Reform – The Gordon/Pascoe Opinion and the UPCA's incompatibility with Union law, accessible at www.stjerna.de/gp-opinion/?lang=en.

²⁵ CIPA Briefing Paper on European Patent Law Proposals (06/12/2011), p. 5, lit. a), accessible at xup.in/dl.14543498.

After all this, the European Council demanded the removal of said provisions from the draft Regulation in the middle of 2012,²⁶ causing outrage in the EU Parliament.²⁷

The former British Prime Minister *David Cameron* laid claim to this removal request, explaining in the House of Commons on 02/07/2012:²⁸

"We also agreed to go ahead with the European patent court. (...) In finalising the agreement, Britain had two objectives: that the new patent should be redrafted so that it did not get snarled up in the processes of the European Court of Justice, and that a significant part of the court, (...) would be based in London. I am pleased to say that we secured both those outcomes."

The dispute was finally resolved in November 2012 by the construction named the "Cypriot compromise" which involved the removal of said three articles from the draft Regulation and their replacement by a reference to external legal sources (cf. Art. 5(3), 7 of EU Regulation 1257/12).²⁹ The Regulation was adopted by the EU Parliament on 11/12/2012 together with the other two parts of the patent reform.

b) The scope of the CJEU's interpretation competences

The question whether said "Cypriot compromise" indeed ensured the widely demanded exclusion of the content and limitations of the unitary patent protection from the interpretation competence of the CJEU remained unresolved. The professional circles seem to broadly believe that this is the case and that preliminary references to the CJEU will be limited to the comparatively few pieces of EU legislation deliberately dealing with patent law. This understanding may ultimately turn out to be as erroneous as the belief in the political promise that the patent reform would support SMEs in particular which meanwhile has obviously become obsolete.³⁰

For instance, the rapporteur responsible for the UPCA in the EU legislative proceedings, *Klaus-Heiner Lehne*, declared in an interview shortly after the adoption of the patent reform that the CJEU would also be competent for the interpretation of the UPCA (emphasis added):³¹

"Articles 6 to 8 are removed from the Regulation and are written into the Court Agreement instead. In prin-

²⁶ Council document EUCO 76/2/12 (20/07/2012), p. 2 bottom, accessible at bit.ly/3hzthRx; also Council document 11959/12 (29/06/2012), accessible at bit.ly/3u0CUeR.

²⁷ Cf. *Stjerna*, "The Parliamentary History of the European Unitary Patent" (Tredition 2016), ISBN 978-3-7345-1742-6, paras. 864 ff. and 995 ff., cf. bit.ly/3oGov6f.

²⁸ Hansard, Col. 586, accessible at bit.ly/3by2QrM.

²⁹ Cf. *Stjerna*, Parliamentary History (fn. 27), paras. 1049 ff. and The European Patent Reform – The sub-sub-suboptimal compromise, accessible at www.stjerna.de/suboptimal-compromise/?lang=en.

³⁰ Cf. *Stjerna*, The European Patent Reform – A poisoned gift for SMEs, accessible at www.stjerna.de/smes/?lang=en.

³¹ JUVE Rechtsmarkt, issue 1/2013, p. 89, accessible at bit.ly/3tTeLXt.

... ciple, the compromise provides for a reference to the national provisions, thus making them a subject of European law. Furthermore, as a central requirement, it regulates the unilateral applicability of the patent. The British government wanted to keep the European Court of Justice out of the new Patent Court system at all costs and has thus pushed through the deletion of Articles 6 to 8. In my opinion, this cannot be guaranteed completely. As we adopted the reference from the Regulation to the Court Agreement and to the national arrangements into European law, I even regard referrals for preliminary rulings as likely. Of course, the European Court of Justice will then also deal with the contents of the Agreement [on the Unified Patent Court] and interpret these.

This is also the position of Prof. Tilmann, tireless campaigner for the patent reform. In an article in April 2013, he described the compromise and its consequences as follows (emphasis added):³²

“A common basis for many of the compromise proposals ventured from September to November 2012 between the Commission, the Parliament and the Council was that the Patent Regulation include a rule directly or indirectly referring to the Unified Court Agreement. An indirect referral would be a reference to the national law of the Member State where the patent is ‘rooted’ (...). Though not explicitly mentioned, the Court Agreement – as being part of the national law – would be covered by such a reference. (...) The legal effect would be that the rules referred to would become unitary law by referral. The CJEU would then have the power to interpret the rules of the Agreement or of the relevant national law.”

He emphasized this position in a further paper two months later. As a consequence of the “Cypriot compromise”, the CJEU had gained the widely rejected interpretation competence as regards the content and limitations of the unitary patent protection:³³

“This leads us to articles 5 and 7 of the Patent Regulation and to the complicated compromise reached between Parliament and Council after the deletion of the famous articles 6-8 from the Regulation. Article 5(1) and (2) grant a uniform cease and desist claim under Union law. However, for the acts addressed by this claim and for the limitations of this claim, paragraph 3 of article 5 refers, via article 7 and the national law of the member state of residence, to the Court Agreement and the definitions in its articles 25-27. In both cases (in relation to the acts as well as the limitations), this is an incorporating reference, causing the definitions in articles 25-27 to become part of the Union law. This is possible under Union law and causes the CJEU to be competent for the interpretation of articles 25-27 of the Court Agreement.”

Said Art. 25 to 27 UPCA are identical to the former Art. 6 to 8 of the draft Regulation on unitary patent protection and describe the content and limitations of the rights from a “unitary patent”, i. e. exactly those aspects which the former British Prime Minister as well as the professional circles wanted to be excluded from CJEU access.

With regard to said “incorporating reference” approach, Prof. Thomas Jaeger commented as follows:³⁴

*“It is naïve to believe that the ECJ would refrain from filling-in the blanks left in the Regulation if needed to ascertain the extent of individual legal protection under it. After all, EU law is autonomous, determined by the rule of law and incorporates a complete system of remedies for legal protection. As cases as old as *van Gend and Costa* already tell us, combining these features means that the ECJ actually has more room for proactive law-making where an act contains blanks than where it states guidelines.”*

Thus, the applied „incorporating reference“ could ultimately put the CJEU in the position to freely decide whether and to what extent it wishes to claim an interpretation competence as regards the referenced legal sources. As a result, this competence could thus extend far beyond the level which would have been possible with Art. 6 to 8 in the “unitary patent” Regulation.

The fact that in its decision on Spain’s nullity action against said Regulation 1257/12, the CJEU took the position that the reference to external legal sources as to content and limitations of the rights from a “unitary patent” was sufficient for it to rely on Art. 118(1) TFEU as a legal basis,³⁵ indicates that the court might indeed claim an interpretation competence also over the referenced legal sources. Otherwise, it would have needed to nullify said Regulation for lack of a legal basis.

c) Interim summary

Therefore, not only is the UPC subject to far-reaching obligations from Union law and to the CJEU’s interpretation competence, but the latter might well reach out into areas which, according to the avowed intent of the former British Prime Minister and the professional circles, should be excluded from it by all means. Surprisingly, associations like the IP Federation or CIPA which have bluntly rejected likewise in the past do now – with somehow doubtful means –³⁶ push intensively for a British UPCA ratification.

Although the British government seeks to evade Union law and the competence of the CJEU by way of a “Brexit” – as it has been underlined in the recent speech by Mrs May –, it apparently seems to be prepared to accept all this, briefly referring to the UPC’s formal position as an international organisation.

³² Tilmann, JIPLP 2013, 78 (79/80).

³³ Tilmann, VPP-Rundbrief 2/2013, p. 56 (r. col.).

³⁴ Jaeger, IIC 2013, 389 (391).

³⁵ CJEU, C-146/13, paras. 48 f.

³⁶ Above fn. 24.

IV. Outlook

While the announcement by the British government on 28/11/2016 that they intend to continue their preparations to ratify the UPCA were initially widely perceived as a mere declaration of intent, this statement was quickly followed by action constituted by the signature of the “Protocol on privileges and immunities of the UPC” on 14/12/2016. Before the UK can ratify this Protocol – in addition to this one, its entry into force requires at least the ratification by Germany, France and Luxembourg –³⁷, it has to be submitted to Parliament for at least 21 sitting days. This submission took place on 20/01/2017.³⁸

It remains to be seen whether Members of Parliament will, in the course of this – or as regards UPCA ratification itself –, take up the contradictions in the government’s argumentation and will demand clarification insofar. This would be as desirable as an explanation by the government on whether and how in fact it intends to guarantee the UK’s continued participation in the UPCA after a “Brexit”. The provision of clarity to the user circles in this regard is of utmost importance, not only because Prime Minister *May* guaranteed legal certainty in her speech. An explanation how it is intended to ensure a continued, legally reliable participation of the UK in the UPCA after its exit from the EU cannot be separated from the decision on UPCA ratification as such, let alone can it be left unresolved until the conclusion of the exit negotiations.

Of course, the UPCA could not be prevented from being abused as a political football and being ratified regardless of the clear political implications of the “Brexit” vote, the own respective objectives of the UK government and the yet missing legally reliable solution for a continued membership of the UK after a “Brexit”, in order to obtain political goodwill for this concession elsewhere, following the principle of “do ut des”. However, whether the will of the electorate’s majority on the one hand and the legitimate interests of the user circles in a legally reliable solution on the other should be treated in this manner as a mere political bargaining chip should be considered carefully.

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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!

³⁷ Art. 18 no. 1 of the Protocol.

³⁸ Cf. “Command Paper Cm 9405”, accessible at bit.ly/2jFfx9w and the related “Explanatory Memorandum”, accessible at bit.ly/2kHCQgA.