

# Stjerna: Unitary Patent system lacks envisaged advantages

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While the patent world is waiting with anxiety what the German Federal Constitutional Court will do with the challenge of the legal basis of the Unified Patent Court Agreement, the man behind this complaint, Düsseldorf patent attorney Dr. Ingve Björn Stjerna has attacked the economic foundation of the UP system in a recent article on his website.

In his analysis 'The European Patent Reform – The prearranged affair', Stjerna writes: 'before starting to legislate in a highly complex legal field like patent law, one would usually expect the legislator to have the impact of planned legislative changes profoundly and comprehensively assessed by respective scientific opinions and analyses'. However, this was not the case with the Unitary Patent system, Stjerna points out; the UP system was justified on the basis of 'one single investigation on the patent judiciary, ordered by the European Commission: The report "Economic Cost-Benefit Analysis of a Unified and Integrated European Patent Litigation System", presented on 26/02/2009, by Prof. Dietmar Harhoff.'

According to Stjerna, a lot is wrong with the two central hypotheses of the report: 1) the supposed duplication rate of court cases and 2) the argument that the UPC would set the level of the costs of proceedings 'at a level equivalent to the cheaper continental systems like the German one'.



Stjerna: 'A duplication rate of 16 to 31 percent as assumed in the Harhoff report is obviously too high. It was abandoned even by the Commission in an own study while the EU legislative proceedings were still ongoing. After its completion, a further study was published, amongst others authored by Prof. Harhoff, which found a duplication rate of only around 8 percent.'

And although the court costs are 'more or less equivalent to or cheaper than those in the German system', there is a big problem here as well, as the 'maximum reimbursable representation costs at the UPC vs statutory German cost reimbursement' are much higher: 'In summary, it can be said that in proceedings with a lower value in dispute of up to EUR 500,000 the maximum reimbursable representation costs at the UPC exceed the statutory German RVG\* reimbursement claim more than three-fold. (...) At a value in dispute of up to EUR 1m, the UPC limit exceeds RVG by roughly the factor 4.75, at EUR 2m approximately five-fold. The maximum is reached at a value in dispute from EUR 4m with almost six times RVG, before the spread is again decreasing.'

According to Stjerna, the enacted UP 'legislative package (...) does not only contradict the initially communicated political motivation and promises, but (...) is also lacking the envisaged advantages. (...) the European patent reform has been adopted at EU level without defining the costs of unitary patent protection and of the proceedings at the UPC, both happened only well after the end of the legislative procedure.'

Only at the very end of his analysis, Stjerna says something about the legal challenge of the Unitary Patent and the Unified Patent Court Agreement before the German constitutional court, without admitting however he is the complainant.

'A similar approach has been used for legal problems possibly endangering the enactment of the patent reform. These were and still are ignored or discussed away or, if this is not possible, a solution is postponed until some time in the indefinite future. (...) The present situation is special insofar as now a court is in a position to assess in detail the UPCA's doubtful legal viability. By doing so, it can make up for what has been repeatedly and perhaps deliberately omitted in the European as well as in the national German legislative procedure, thus finally providing the badly needed legal certainty to the users.'

Later today, the German Parliament will discuss a motion of the right-wing *Alternative für Deutschland* (AfD), which is based on two of the arguments of the constitutional challenge. The AfD motion argues that the UPCA ratification bill did not have the requisite majority of two thirds of the members of the Bundestag and that UPC judges will not be independent since they are appointed by a panel which also includes attorneys at law and only for six years, and calls for the repeal of two acts concerning the Unified Patent Court and the Unitary Patent. The motion is not expected to get wide, if any support.

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\* *Rechtsanwaltsvergütungsgesetz*, the German Lawyer's Compensation Act