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Ingve Stjerna: Examination compatibility UPCA with German and EU law was deficient

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The compatibility of the Unified Patent Court Agreement (UPCA) and two pieces of draft legislation submitted for its ratification in Germany with the German Constitution was examined only very selectively, whereas the compatibility with EU law was apparently not examined at all. This is the conclusion of the Düsseldorf based patent lawyer Ingve Björn Stjerna, who meticulously investigated the procedure leading to the German ratification of the UPCA.

Stjerna, the lawyer behind the constitutional complaint against the UPCA which led to a stay of ratification proceedings in Germany, published an article on the issue last month. The timing is not coincidential: a decision of the German Federal Constitutional Court (BVerfG) about the case (2 BvR 739/17) is expected in the upcoming months. At the end of his article, Stjerna implicitly says the BVerfG should take into account his findings:

‘The documents provided suggest that the BMJV [the Federal Ministry of Justice and Consumer Protection] having the overall responsibility for the implementation of the European patent reform in Germany and the ratification of the UPCA, did not comprehensively examine the Agreement for its compatibility with the Grundgesetz nor or [of?] that with Union law, in particular with CJEU Opinion 1/09. The BVerfG may take note of this with interest.’

In Stjerna’s constitutional complaint, filed late March 2017, he had already set out why he himself is convinced the UPCA is unconstitutional. As patent attorney Thorsten Bausch reported earlier on this blog, Stjerna’s claim is based on four grounds:

‘In terms of substance, plaintiff is essentially asserting a breach of the limits to surrendering sovereignty that are derived from the right to democracy (Art. 38 (1), clause 1, Basic Law). Primarily the following violations are asserted:

- breach of the requirement for a qualified majority arising from Art. 23 (1), sentence 3, in conjunction with Art. 79 (2) Basic Law;
- democratic deficits and deficits in rule of law with regard to the regulatory powers of the organs of the UPC;
- the judges of the UPC are not independent nor do they have democratic legitimacy;
- breach of the principle of openness towards European law owing to alleged irreconcilability of the UPC with Union law.’

The first of the four points refers to the fact that according to Stjerna, a majority of two thirds of the members of the Bundestag would have been necessary for passing the ratification law, whereas in reality there were by far not enough members present to satisfy this quorum (see also this article).

However, in his most recent publication, Stjerna argues there were deficiencies in the procedure preceding the parliamentary ratification as well. He starts out by explaining the legal requirements for German ratification of the UPCA, the role of the various ministries and their divisions and officials. Paragraph 5, 'Legal scrutiny of the UPCA and its ratification: Questions to be assessed', contains the following list of issues which, according to Stjerna, have to be considered to comply with the law:

- Are the UPCA and the ratification laws compatible with the Grundgesetz, in particular with fundamental rights?
- Are the UPCA and the ratification laws compatible with the State's duty to protect constitutional identity?
- Were the connections to and compatibility with the law of the European Union set out in the explanatory memorandum of the ratification laws (…)?
- Were the costs for the economy, especially for medium-sized enterprises, described (…)?

'The fact that (…) the BMI [Federal Ministry of the Interior] and the BMJV were to be involved already in the preparatory work for the UPCA to resolve issues of constitutional law would suggest that all these issues had already been examined once before the UPCA was signed', Stjerna adds.

In the second chapter of his article, using among others information he gathered with three requests (in October 2017, August 2018 and February 2019) based on the Freedom of Information Act, he writes what happened in practice. 'The answer is sobering. According to the official information provided by the BMJV, individual aspects were examined for compatibility with the Grundgesetz, but relevant constitutional issues remained unexamined, as did compatibility with Union law'. Then he proceeds with all the details sustaining his conclusion. A few exemples are given below.

II.1.a) Document 907/2012: "Constitutional Examination of the Draft [EPG] Agreement"

'Document 907/2012 concerns an e-mail from Mr Karcher dated 29/10/2012 to the Head of BMJV Division IV A 2 (competence: constitutional law of State organisation and financial constitutional law), *Horst Heitland*, requesting the latter "*to carry out for the draft Agreement* (on a United Patent Court ["UPC"]) *the constitutional examination required for an international Agreement*". The basis was the draft UPCA according to Council document 14750/12 of 12/10/2012.

Surprisingly, however, the BMJV was unable to provide a document containing the results of the "constitutional review" by Division IV A 2.

Initially, they declared that the statement of Division IV A 2 was "not part of the file". (…) Finally, the BMJV declared that there was no written statement at all (…) So did the German Federal Government sign the UPCA on 19/02/2013 without a positive result of legal scrutiny? The inconsistent, linguistically stilted statements of the BMJV and the internal warning "highly doubtful" with regard to the document in question should speak for themselves. It is possible that the contents and results of the "constitutional review" shall be withheld from the public and, above all, the BVerfG. If this was the case, it will not be possible to assume that the compatibility of the UPCA with the Grundgesetz was deemed unproblematic.'

II.2.bb) Constitutional doubts concerning the amendment of the UPC Statute by the Administrative Committee without the involvement of the legislator

'*Tobias Plate*, who at the time was active in BMI Division V I 4, expressed constitutional concerns primarily with regard to the possibility of amending the UPC Statute by decision of the UPC Administrative Committee with a three-quarters majority and without the participation of the German legislator, as provided for in Art. 21a (2) of the draft UPCA (= Art. 40 (2) UPCA).

(….) In an e-mail dated 15/11/2012, Mr *Karcher* stated that amendments to the UPC Statute were directly valid as a consequence of the sovereign rights conferred on the UPC and "*therefore required no further domestic implementation*". He drew an astonishing comparison with the Rules of Procedure of the UPC (translation from German):

"The Rules of Procedure of the Court, for which, pursuant to Article 22 of the Agreement, the Administrative Committee is competent as well, also constitute a transfer of sovereign rights under Article 24 (1) GG, with the effect that the Rules of Procedure directly trigger rights and obligations for citizens or companies in the Contracting States. Here, too, there is no provision for an additional domestic enactment."

Whether such a direct creation of rights and duties for the citizen by a committee of the executive branch, bypassing the Parliament, is constitutionally permissible, might occasionally be clarified by the BVerfG. (…)'

II.4.c) Assessment of compatibility with Union law, in particular with CJEU Opinion 1/09?

'The BMJV could not provide any information showing an examination of the UPCA for its compatibility with Union law, in particular with CJEU Opinion 1/09. Nothing is apparent for an early clarification of questions under European law pursuant to sec. 45 (1) 3 GGO [Joint Rules of Procedure of the Federal Ministries]. The draft legislation on UPCA ratification also lacks the presentation of the connections to and the compatibility with the law of the European Union, as required by sec. 43 (1) no. 8 GGO.'

II.4.d) Description of the costs for the economy, in particular for small and medium-sized enterprises?

'Finally, it is noticeable that contrary to sec. 44 (1), (5) no. 1 GGO, the costs of the European patent reform for the economy, in particular for small and medium-sized enterprises, were not addressed in the draft ratification laws.'

These examples above constitute just a fraction of what Dr. Stjerna has researched and concluded. Those who are interested in the complete article and underlying documents are recommended to go to Stjerna's website, where his article is also available in its original, German language.

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