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# From Bielefeld to the Unified Patent Court – A Never-Ending Story?

Rudolf Teschemacher · Tilman Müller-Stoy

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**Abstract** The authors have known Jochen Pagenberg from different perspectives: Tilman Müller-Stoy for almost 20 years as a partner in the law firm bearing Jochen's name; Rudolf Teschemacher since the start of Jochen's and his own career when both got in touch with IP at the Max Planck Institute in the early 1970s and later on for more than 15 years as a senior consultant at Bardehle Pagenberg. Thus, they paint a colourful picture, in particular throwing a glance at a leitmotiv of his work: European patent litigation.

**Keywords** Agreement on a Unified Patent Court · European patent litigation · European Patent Law Agreement · European patent jurisdiction · Rules of procedure · Brexit · Constitutional law issues

## 1 Introduction

From Bielefeld? Bielefeld does not exist! Yes, it does – Jochen Pagenberg's CV shows that he was born there 80 years ago, although the Bielefeld complot denies

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the existence of Bielefeld.<sup>1</sup> However, once he grew up, he left East Westphalia, a German region too small for his ambitions. He set out to eventually become a global IP lawyer. After many other honorary awards, he was eventually selected for the IP Hall of Fame in 2010 as the sixth German laureate.

## 2 The Writer

The key to his outstanding career was the Max Planck Institute in Munich (MPI), which at the time still had “Patent Law” in its name. Professor Beier was the director and one of his talents was sparking enthusiasm for industrial property law in young lawyers. When the EPC was signed at the Munich Diplomatic Conference, Jochen Pagenberg was about to finish his doctoral thesis on inventiveness in US and German patent law, focusing especially on secondary considerations.<sup>2</sup>

For two reasons, this book was met by extraordinary public interest. Firstly, during the preparatory period for the operation of the European patent system, there was a special awareness that a harmonized methodology had to be developed for assessing inventive step. This hot topic caused the AIPPI to organize a workshop on non-obviousness at its Congress in Munich in 1978, and Jochen Pagenberg was entrusted with moderating it, an early opportunity to act on an international stage. He had acquired the necessary skills in French when studying law in Lausanne and during an internship with Maître Mathély in Paris; his English skills were perfected when he worked on his Master of Laws degree at Harvard.

Secondly, Jochen Pagenberg’s proposal to develop a more objective basis for assessing non-obviousness by integrating secondary considerations into the examination did not meet with everybody’s approval. The then President of the Bundespatentgericht, Ernst Karl Pakuscher published a pointed criticism in reply to an article presenting Jochen Pagenberg’s approach. But Jochen Pagenberg did not hesitate in vigorously reacting and fiercely defending his ideas. This showed his critical mind and his willingness to stand up for his positions, characteristics which his clients learned to appreciate later. Thus, the topic remained on the table and he published more on inventive step, the most prominent contribution being the commentary on Arts. 56 and 57 in the *Münchner Gemeinschaftskommentar*.<sup>3</sup>

The scope of publications in IP law covered by him is too broad to be reflected here.<sup>4</sup> By way of example, two areas of patent law will be mentioned which were in the focus of his work again and again. Questions of patent infringement emerged from his broad and international practical experience as a litigation lawyer. This experience is summarized in the book on the interpretation of patents in Europe which he published together with William Cornish.<sup>5</sup>

<sup>1</sup> For this satire, see *der Freitag – Die Wochenzeitung*, issue dated 7 April 2010.

<sup>2</sup> Pagenberg (1974).

<sup>3</sup> Pagenberg (1984a).

<sup>4</sup> Beier et al. (2006), pp. 425–431.

<sup>5</sup> Pagenberg and Cornish (2006).

Another important topic has been court procedure and court organization,<sup>6</sup> particularly in respect of patent litigation in Europe. The Community patent had failed at three Diplomatic Conferences and an attempt by the EU Commission to create it via an EU Regulation seemed unpromising,<sup>7</sup> since the drafts presented by the Commission apparently failed to meet the needs of the users.<sup>8</sup> Thus, the hopes for a European patent jurisdiction concentrated on the project for a European Patent Law Agreement (EPLA). The responsible Working Party on Litigation was established by the Intergovernmental Conference of the member states of the EPO in Paris in 1999 with a mandate to harmonize European patent litigation and to draft an optional protocol to the EPC committing its member states to an integrated judicial system for litigating European patents, including uniform rules of procedure and a common court of appeal based on an international treaty.<sup>9</sup> Jochen Pagenberg actively took part in the work of the group as an expert and regularly reported on the progress of the deliberations in GRUR and IIC.<sup>10</sup> While the group presented proposals which happened to be widely welcomed by the user community, the EU Commission, which had not given up its plans for a Community patent, did not show any interest in the project and eventually the Commission and France stopped the project claiming that it interfered with the Commission's exclusive competence.<sup>11</sup> A convincing argument for this position was not given. The Commission solely relied on an unpublished opinion provided by the Legal Service of the Council concluding that the Community had exclusive competence for the matter of EPLA.<sup>12</sup> In this respect, the opinion of Attorney General Kock in G 1/09 clearly stated at footnote 60 that it is not the competences of the future PC concerning the European patent that pose a problem here: in fact judicial competences concerning European patents have always been exercised by the national courts; the Member States are free to assign them to an international body, created by mutual consent and having the vocation of being "their" common court.

This confirmed the position of experts, judges and the interested circles reported by Pagenberg some years before.<sup>13</sup>

### 3 The Lawyer and Entrepreneur

Jochen Pagenberg's career as an attorney at law started with renting a villa in Bogenhausen at Galileiplatz which was too big for his business. He sublet space to

<sup>6</sup> In this respect, it also helps to look at the experience made abroad, Pagenberg (1984b), p. 489.

<sup>7</sup> For the historical development, see Kolle (2006), pp. 45–56.

<sup>8</sup> See the critical issues addressed by Pagenberg (2003b).

<sup>9</sup> Report on the Intergovernmental Conference, OJ EPO 1999, 545, p. 548.

<sup>10</sup> Later and until 2011, he acted as an expert in the Expert Committee of the EU Commission. For a detailed account of the development of EPLA, see the monograph of Luginbuehl (2011).

<sup>11</sup> Disagreeing and apparently very disappointed by this development, Pagenberg (2006). See, in more detail, Oser (2006).

<sup>12</sup> G. Kolle, *supra* note 7, at fn. 14.

<sup>13</sup> Pagenberg (2006), p. 48.

two patent attorneys. Their shared use of the house developed into a co-operation and, on 1 April 1979, they founded the law firm Pagenberg, Dost, Altenburg. It was the first partnership of attorneys of law and patent attorneys in Germany. At the time, it was unclear whether such a partnership was in compliance with the rules of professional conduct for attorneys. However, Jochen Pagenberg was prepared to take that risk and, when the professional law changed favourably, giving comprehensive advice to clients in prosecution and litigation within one and the same law firm turned out to be a pillar of success that was copied by many others later on.

#### 4 The Editor and Politician

As the editor of IIC, Jochen Pagenberg kept contact with the MPI and academic circles. His further publications, particularly his bestseller, the bilingual work on licence agreements,<sup>14</sup> made him widely known in the IP community. This resulted in broad activities in user societies such as GRUR, AIPPI or EPLAW (among others) in which he was very active in positions of responsibility. The young law firm was a perfect example of the fact that a good team benefits from the different talents of its members. Jochen Pagenberg was not only a creative litigator committed to insistently enforcing his clients' interests<sup>15</sup> but also a representative of the user community contributing to developing the patent system and adapting it to the needs of a changing environment. His public activities made not only him but also his law firm widely known in Germany and abroad, thereby contributing to the rapid growth of Pagenberg, Dost, Altenburg, which soon expanded to Bardehle, Pagenberg, Dost, Altenburg, Geißler.

Notwithstanding the lack of enthusiasm of the organizations of the users for the draft proposal in 2000 for a Regulation on the EU patent and some follow-up proposals,<sup>16</sup> as well as the continuing disagreement among the EU member states, the EU Commission had not given up on the idea of a true EU patent title. About one year after the inglorious end of the EPLA project in late 2006, the EU Commission took the lead in the process of creating a European patent jurisdiction. The idea was to combine features of the EPLA and an EU patent jurisdiction. Proposals for a Community patent and a Community patent court were drafted.<sup>17</sup> Further discussions eventually resulted in the Draft Agreement on the European and EU Patent Court (EEUPCA). However, another failure had to be digested as the CJEU found that by including non-EU countries the agreement was incompatible with EU law, since the proposed court would be outside the institutional and judicial

<sup>14</sup> Pagenberg and Beier (2008).

<sup>15</sup> A good example for his perseverance is the case finally decided by the Federal Court of Justice, *Seitenspiegel* (GRUR 2006, 131, 37 IIC, 743 (2006) – *Side-view mirror*). The case had to be brought before the highest court three times to enforce the client's patent.

<sup>16</sup> Pagenberg (2007), p. 805.

<sup>17</sup> See EU Council documents 6985/08 of 28 February 2008 and 11270/08 of 30 June 2008, the latter based on an international treaty.

system of the EU and would thus not provide any possibility of referring questions for a preliminary opinion to the CJEU.<sup>18</sup> As a result, the project was modified by conceiving of a court to be established by a treaty outside the framework of the EU but open only to members of the EU. Eventually, the European patent package comprising two Regulations on the EU patent and the Agreement on a Unified Patent Court (UPCA) was tied up, and the agreement was ready for signature on 19 February 2013.<sup>19</sup>

## 5 The Critical Spirit

Jochen Pagenberg followed the work on a common judiciary for patent litigation in Europe and argued that some aspects were to be kept in mind for shaping a system to meet users' needs:

- Quality
- Efficiency
- Language

It seems worthwhile to take a look at the further development and find out to what extent these aspects have influenced the EPLA project and eventually the UPCA.

### 5.1 Quality

As to quality, the most important and indispensable factor is qualified judges. Jochen Pagenberg was among the first experts from the users' side to comment on the concepts which emerged from the first two meetings of the Working Party on Litigation preparing the EPLA Draft.<sup>20</sup> He was fiercely opposed to the idea of a single court of first instance favoured by the Swiss chairmanship, arguing that it was necessary to integrate the local competence of national courts with sufficient experience to cope with an estimated workload of some 1,000 cases per year for providing "quick, high quality decisions which carry authority and command user confidence".<sup>21</sup> In his opinion, central national courts specialized in patent litigation should be awarded the status of European patent courts or regional chambers. Thus, the same judges could decide national and European cases. In this way, parties would be given the opportunity to litigate "at home".

This concept was only partly implemented in Art. 2 of the EPLA Draft Statute of the European Patent Court, stipulating, *inter alia*, that present or former judges from the Contracting States may be appointed as judges, provided that they have sufficient experience in patent law. At first glance, the criteria for the UPC appear to be even more ambitious. Article 15(1) UPCA requires that the judges shall ensure the highest level of competence and shall have proven experience in the field of

<sup>18</sup> Opinion G 1/09 of 11 March 2011.

<sup>19</sup> OJ EPO 2013, 287.

<sup>20</sup> See the report by Schade (2000), p. 101.

<sup>21</sup> Pagenberg (2000).

patent law. However, a detailed look at the Statute of the UPC reveals that the required experience can be replaced by appropriate training for candidate-judges and newly appointed judges. Furthermore, the principle of geographical distribution among nationals of the Contracting States is to be observed in the appointing process. Integrating the national resources as foreseen in the EPLA model would have meant that a majority of European patent judges would have come from the states having the most developed patent jurisdictions. The UPC system allows for the appointment of judges without any previous patent litigation experience based merely on training, and Contracting States may be expected to insist on their quota when attractive posts are at stake.

A tendency for political appointments may be fostered by the fact that the Administrative Committee decides on the appointments based on proposals by the Advisory Committee composed of experts representing all Contracting States, whereas, under the EPLA, making proposals for appointments was a task entrusted to the Presidium of the Court<sup>22</sup> with the proviso that for setting up a regional division<sup>23</sup> in a Contracting State it was up to that state to name at least two candidates meeting the appointment criteria for legally qualified judges. Legally qualified members were permanently assigned to either a regional division or to the central division. Under the UPCA, the local or regional divisions sit in a composition of three legally qualified judges. Depending on the patent litigation activity in the respective state, only one or two members are nationals of the respective state or region. In countries with less than 50 cases per year, one national judge is arranged for the bench; in countries with 50 and more cases, two national judges. Thus, for example, a local German panel comprises two German nationals. The other legally qualified judge(s) and a technically qualified judge, if any, are allocated from the pool of judges on a case-by-case basis.

Jochen Pagenberg saw this composition threatened and defended it fiercely in the final phase of the EEUPCA, when the Competitiveness Council asked the Commission to closely monitor the functioning, the efficiency and the implications of the provisions regarding the panels of the first instance and to make recommendations concerning the continuation, termination or modification of the relevant provisions either six years after the entry into force of the Agreement or after about 2,000 infringement cases have been decided. In particular, the Council requested that the Commission should consider alternative solutions that would reinforce the multinational composition of the panels.<sup>24</sup> Jochen Pagenberg saw this as an opportunity for a majority of member states to remove national judges from the panels and thereby eliminate the core of German patent jurisdiction. Parties could be faced with judges who did not speak their language and a possible consequence would have been that judges speaking different native languages might clumsily communicate in English. Eventually, the revision clause in Art. 87(1) UPCA was drafted as follows: Either seven years after the entry into force of this

<sup>22</sup> Corresponding to Pagenberg's suggestion in 31 IIC 481, 496 (*loc. cit.*).

<sup>23</sup> In the terminology of the UPC, this is a Local or Regional Division.

<sup>24</sup> EU Council, 2982nd meeting of 4 December 2009, Conclusions on an enhanced patent system in Europe, note 27 *et seq.*

Agreement or once 2000 infringement cases have been decided by the Court, whichever is the later point in time, and if necessary at regular intervals thereafter, a broad consultation with the users of the patent system shall be carried out by the Administrative Committee on the functioning, efficiency and cost-effectiveness of the Court and on the trust and confidence of users of the patent system in the quality of the Court's decisions. On the basis of this consultation and an opinion of the Court, the Administrative Committee may decide to revise this Agreement with a view to improving the functioning of the Court.

While the clause does not exclude a modification of the composition of the panels, the national composition is no longer labelled as a feature which might compromise the efficiency of the court. Furthermore, the task of considering a revision is not entrusted to the EU Commission but to the Administrative Committee of the UPC. Finally, any amendment for which consent cannot be found is outside the framework of a revision under the simplified revision procedure pursuant to Art. 87(1) UPCA but requires a review conference of the Contracting States in accordance with Art. 87(3) UPCA.

A more far-reaching integration of national resources using complete and capably working national courts to a large extent would have meant a smooth transition from national to European litigation. The users would have been faced with the same heads at the bench wearing different hats in European and in national proceedings. Thus, existing confidence would have continued to exist. The available capacities could have been used for national and European litigation in the same way, thereby avoiding that overcapacities are created for the European judiciary or that fewer judges than needed are appointed. Under the UPCA, there will be more divisions than specialized national courts, at least some of them with less experienced judges. This means that users will wait and see how the new system works before entrusting their "crown jewels" to the new bodies. On the one hand, it is true that harmonization will be made easier by having mixed panels with judges from different jurisdictions, and the training of new judges profits from pairing newcomers with more experienced colleagues. On the other hand, the reliability and foreseeability of decisions are important values which the UPC will have to create. Furthermore, the Administrative Committee bears a high responsibility in making the right choices for their appointments. Qualification and experience should be the first criteria, otherwise the burden for experienced judges of training newcomers would decrease their capacity to get their cases done. Finally, if a local division has too few cases to deal with, it cannot be expected that the desirable expertise will be developed.

## 5.2 Efficiency

Efficiency is closely related to experience. Someone who knows their job can do it faster. But this is not enough to achieve an efficiently working judiciary. Smooth operation of patent litigation requires clear rules for the court and the parties, and uniformity of judicial practice.<sup>25</sup> While the aim of a quick procedure to be

<sup>25</sup> Pagenberg, *loc. cit.*, 31 IIC, 481, 491.



concluded within two years per instance was stated early on,<sup>26</sup> the EPLA draft of 2004 contains only general procedural provisions comparable to those of Art. 113 *et seq.* EPC, and the draft Statute of the Court contains some more provisions on decisions, language, representation and the like. No detailed procedural structure is set out. In this respect, Art. 59 EPLA refers to rules of procedure to be adopted by the Administrative Committee in accordance with Art. 17 EPLA.

By contrast, for the UPC very detailed procedural provisions have been worked out by a Drafting Committee<sup>27</sup> comprising highly competent judges and patent professionals. The final draft<sup>28</sup> is a complete procedural code of 382 rules providing a clear and stringent time structure for all types of actions for both instances. Inter alia, these rules deal with subjects like the role of the judge rapporteur, the case management by the judge rapporteur and the chairman, the means of evidence, the conduct of oral proceedings, provisional measures, appeals, fees and costs.<sup>29</sup> As a rule, the final oral hearing should take place within one year of lodging the statement of claim. These detailed rules are intended to provide a common structure of proceedings for all divisions of the UPC, giving clear guidance to the parties about what to do and when. The court of appeal is given the role of supervising whether the rules are properly applied in a harmonized way. As a result of Brexit, it has been argued that English tradition influenced the drafting of the rules of procedure and without this influence a more Continental approach would have been chosen. While this may be true, it is also true that the English members of the Committee are very experienced in patent litigation and made valuable contributions to the draft which has to be adopted by the Administrative Committee. Even if the draft is adopted as it is, the rules of procedure are not carved in stone and may be modified if experience shows a respective need.

In general, the efficiency of a system does not only mean that it works well, it also has to be cost-efficient. Concerning patent litigation, this means that a judiciary has to be affordable not only for big industrial players but also for SMEs. One of the reasons for creating a special European judiciary is to avoid multiple litigation and diverging decisions in different jurisdictions. Such cases receive a lot of public attention.<sup>30</sup> However, it has to be kept in mind that only a minority of patents is litigated in more than one country. Therefore, calculating reasonable costs on the assumption that litigating in several jurisdictions is avoided is not appropriate. This would mean that SMEs have to bear considerably higher costs for an advantage they do not profit from, whereas a small number of users such as big industrial players in a few technical areas would save costs from a system tailored for them.<sup>31</sup> There was

<sup>26</sup> Schade, *loc. cit.*, GRUR 2000, 101, 107.

<sup>27</sup> This work had already started within the framework of EPLA, *see* Pagenberg, *loc. cit.*, 38 IIC 805, 809 (2007), and the 2nd Venice Resolution of the Judges' Forum, 38 IIC 826 (2007).

<sup>28</sup> 18th Draft of 19 October 2015, available at: <https://www.unified-patent-court.org/>. For a survey, *see* Paschold (2019).

<sup>29</sup> Cf. Pagenberg's detailed proposal, 31 IIC 481, 496 *et seq.*

<sup>30</sup> Cf. the early *Epilady* case and the 6th Symposium of European Patent Judges, 24 IIC 803, 818, 824 *et seq.* (1993), and the still ongoing battle in the *Pemetrexed* case (*Actavis v. Eli Lilly*), *see* the review of highest instance decisions by Meier-Beck (2018), p. 241.

<sup>31</sup> Pagenberg (2010), pp. 195–197.

an early agreement that a European patent court should be self-financing and it was clear that the expenses for the system depended on the working methods and the experience of the judges doing the job.<sup>32</sup> The principle was modified in Art. 19 *et seq.* EPLA; Art. 21(1) reads: “The court fees charged by the European Patent Court shall be fixed at such a level as to ensure a balance between the parties’ right to fair access to the European Patent Court and the principle that the European Patent Judiciary’s own resources should cover its costs”.

A regional division had to be financed by the respective Contracting State, whereas the salaries for the judges in a regional division were to be covered by the court’s budget. In respect of the reimbursement of costs, Art. 58 EPLA established the principle that the unsuccessful party shall bear the costs of the other party and the court. Detailed implementing provisions have not yet been drafted.

This was made by the Preparatory Committee for the UPC when drafting the rules of procedure for the UPC. According to the final draft of the table of court fees of February 2016, the fees for first instance proceedings are as follows: the fixed fee for the infringement action is €11,000. It is supplemented by a value-based fee which starts at €2,500 for values of action above €500,000 and is capped at €325,000 for values of action above €50 million. The fixed fee for revocation actions is €20,000; for a counterclaim for revocation, it is €11,000. In addition, the value-based fee has to be paid only up to a ceiling of €20,000 for a counterclaim for revocation. The proposed fees are intended to cover the court’s budget after the transitional period.

Considering the overall financial burden of litigation before the UPC, court fees may still be a comparably minor factor. In accordance with Art. 69(1) UPCA, the losing party has to pay “reasonable and proportionate costs and other expenses incurred by the successful party, unless equity requires otherwise”. At the request of the winning party, the court renders a decision on costs.

Different from the court fees, the costs of parties’ own expenses and attorneys’ fees are not calculated on the basis of the value of the action. The main part will be the bill of the successful party’s attorneys, which in patent litigation is usually based on hourly rates. There are two limits: first, the costs must be reasonable and proportionate, and second, Art. 69(1) UPCA, in conjunction with the table for recoverable costs, provides for a ceiling for the costs to be paid by the losing party for each instance of the court proceedings. The scale starts at recoverable costs of up to €38,000 for values of action of up to €250,000 and ends at recoverable costs of up to €2 million for values of action above €50 million. The ceiling may be lowered if the amount of recoverable costs threatens the economic existence of a party. Under special circumstances, such as the complexity of the case, it may also be raised. For a typical case of a value of action of €30 million, the regular ceiling of €1.2 million may be raised by 25%, i.e. the raised ceiling is €1.5 million. If a value of action exceeds €50 million, the ceiling can be raised to €5 million. While there is much leeway for the court when deciding on the reimbursable costs, each party involved in litigation has to be prepared for the worst-case scenario. This means that the litigation cost risk in the UPC system will be much higher than before most European national courts in national litigation.

<sup>32</sup> See the comparisons made for EPLA by the Working Party on Litigation, resulting in the estimate that no more than 25 cases per year could be handled by a rapporteur, Pagenberg (2003a).

Under the UPCA, not only for EU patents but also for European bundle patents, the jurisdiction will exclusively lie with the UPC. Only for European bundle patents filed before the entry of the UPCA and only within a period of seven years thereafter are patentees allowed to opt out of the UPC system. This transitional period may be prolonged by another seven years. However, even after the end of a prolonged transitional period, litigating before national courts will still be cheaper and might appear more convenient for the users. If patent applicants consider the cost risk of litigating before the UPC to be too high, they may abstain from filing European applications and file via the national route instead. In order to avoid this effect, Jochen Pagenberg had proposed to maintain a concurring jurisdiction of the national courts for European bundle patents and to exclude their competence in respect of cross-border claims.<sup>33</sup> Giving users the choice between national courts and the UPC would not only give them the opportunity to choose what is most appropriate under the specific circumstances but it would also create a competitive situation inducing each court to handle the cases as competently as possible. However, this proposal has not been taken up in the preparatory work to the UPCA.

### 5.3 Language

As to the language, the integration of national resources as proposed would have implied that the language regime for national courts also applies to the proceedings of the European Patent Court making it easy for the (local) parties and their representatives to prepare their cases, as well as for the judges to understand the substance of the cases, to conduct the proceedings and to write the decisions.<sup>34</sup> According to the EPLA, as a rule, the language of the proceedings before the regional divisions was the official language of the EPO which the respective state has in common with the EPO and if the state has no official language in common with the EPO, the official language of the EPO designated by that state. Under the UPCA, as a rule, the language of the proceedings is the official language of the state hosting the division. The respective state may allow the use of additional languages. Most states will allow the use of English as an additional language.<sup>35</sup> This takes into account both the high percentage of patents granted in English and the increasing use of English as the lingua franca in the patent field and elsewhere. Brexit will not change the growing importance of the English language at an international level.

## 6 Future of the UPC

Now, having dealt with the issues of quality, efficiency, and language, which were always most important to Jochen Pagenberg, it might be time for a careful outlook, as the future of the UPC is still unclear. Unfortunately, the authors are not in

<sup>33</sup> Pagenberg (2009), pp. 314–317, Pagenberg (2011), pp. 32–33, Pagenberg (2012), pp. 582–583 *et seq.*

<sup>34</sup> Pagenberg, *loc. cit.*, 31 IIC 481, 492 (2000).

<sup>35</sup> Cf. in this respect Rule 14.2(c) of the Rules of Procedure, introduced on a German initiative, providing for exceptions from the use of an additional language.

possession of a reliable crystal ball. Still, some considerations can be shared: as it stands today,<sup>36</sup> the system might start soon, i.e. within the next year or so. Germany, as the last obligatory member state to ratify the UPCA, currently intends to ratify it within the next couple of months and has already re-started the legislative process.<sup>37</sup> However, on 27 October 2020, the German liberal party, FDP, which is currently in opposition, filed a relatively critical parliamentary question which might be taken as a sign that a debate is coming and that a quick and smooth ratification may not take place.<sup>38</sup> Further debate could indeed be helpful. On the one hand, having the UPC system up and running quickly is favoured by many future users as it would allow for truly pan-European patent litigation – that means empowering patent owners to assert their European patent rights for nearly all of Europe in single court proceedings instead of having to go country by country in certain high-stake cases;<sup>39</sup> on the other hand, the devil is in the details, and the UPC system is not yet where it should be.

## 7 Consequences of Brexit

Some significant concerns still exist: Firstly, the consequences of Brexit remain unclear. It is unclear whether the UK would still be part of the system given the unchanged language of the UPCA which is an international treaty. Of course, this is not what is intended but it is a possible legal consequence.

Secondly, if the UK left the system as intended, it would be unclear where cases would go – particularly high-profile pharma cases which are assigned to the London central division of the UPC. The London central division has not yet been replaced by a different division. Italy and the Netherlands seem to be quite interested in getting a central division, so this issue might well end up in a political fight.<sup>40</sup> The German government takes the stance that no replacement is needed as the related cases could simply be assigned to either the Munich or the Paris central division. This approach is questionable, not only politically but also legally, as it does not seem to have any solid basis in the UPCA or the other related regulations.

Thirdly, some concerns regarding constitutional law have not yet been dealt with. In its decision, holding the parliamentary Act of Approval to the Unified Patent Court Agreement void for lack of the required qualified majority,<sup>41</sup> the German Federal Constitutional Court (FCC) confined itself to the examination of the parliamentary procedure. It did not decide on the substantive complaints made by

<sup>36</sup> This contribution was finalized in early November 2020 and reflects the status at that time.

<sup>37</sup> See <https://www.juve-patent.com/news-and-stories/legal-commentary/germany-hastens-second-ratification-of-unified-patent-court/>.

<sup>38</sup> See for details: <http://dipbt.bundestag.de/extrakt/ba/WP19/2686/268683.html>.

<sup>39</sup> See for details: <https://www.juve-patent.com/news-and-stories/legal-commentary/european-industry-reacts-to-german-upc-judgment/>.

<sup>40</sup> See for details: <http://patentblog.kluweriplaw.com/2020/09/11/preparatory-committee-the-unitary-patent-system-can-be-functional-in-a-near-future/>.

<sup>41</sup> Decision of 13 February 2020, docket No. 2 BvR 739/17, GRUR 2020, 506.

the petitioner. The core of the decision is that citizens are granted a right to the effect that sovereign powers can only be transferred as provided for by the German Constitution. However, this does not allow citizens to have the emergent law fully examined with respect to its constitutionality by way of a constitutional complaint, since this would ultimately amount to an abstract judicial review as an individual legal remedy, which is not provided for under the German Constitution. Concerning the inadmissibility (not the lack of merit) of the objections relating to the appointment and re-appointment of judges, the FCC stated that the complainant had not substantiated that the deficiencies relied on affect the democratic legitimacy of the judges. Since this will also form the test to be applied in any future constitutional complaint regarding the ratification of the UPCA, further attempts to stop the ratification via a constitutional complaint, as predicted in some comments, are not very promising.

## 8 Constitutional Law Issues

However, the situation would be very different if, after the implementation of the UPCA, a constitutional complaint were to be based on the complainant's rights having been violated by the UPC, because the ruling judge did not meet the constitutional standards for an independent court. In such a case, the FCC would examine whether the parties' fundamental rights are protected in proceedings before the UPC, maintaining the minimum constitutional standard, particularly guaranteeing the essence of the German Constitution, and especially observing the rule of law. The guarantee of effective judicial relief includes access to independent courts.<sup>42</sup> The standard of review would not only be the relevant provisions of the German Constitution and Art. 6(1) of the European Convention on Human Rights (ECHR) but also the right to an independent and impartial tribunal previously established by law as laid down in Art. 47(2) of the Charter of Fundamental Rights of the EU. In this context, related questions of judicial independence would also arise in respect of the EPO Boards of Appeal in terms of their competence to decide on the revocation of unitary patents in opposition proceedings. Further clarification in this respect may be expected from the FCC's decision in the four pending constitutional complaints against decisions of the Boards of Appeal listed in the FCC's annual preview of cases to be disposed of for some years.<sup>43</sup>

## 9 Success?

And finally, the success of the UPC system largely depends on the success of the unitary patent. Given Brexit, the unitary patent renewal fee schedule should be revised. Currently, the True Top 4 model applies, which is based on renewal fees including the fees for renewing European patents in the UK. However, after Brexit,

<sup>42</sup> BVerfGE 169, 346, fn. 35 *et seq.* – Transfer of powers to supranational organizations.

<sup>43</sup> 2 BvR 2480/10; BvR 421/13; BvR 786/15; BvR 756/16.

national UK renewal fees will apply in addition which might well render the current model financially unattractive for many applicants. So, in summary, it might be worthwhile to take a bit more time and sort out the mentioned issues first before starting the system. Will the current political momentum get lost then? Maybe it will, maybe it won't. In the end, it will be the users pushing for the system and pushing politicians to get it done. The users need nothing less than a reliable and stable system. And only such a system would properly reflect Jochen Pagenberg's preparatory work.

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