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Berlin and Brussels, 23 November 2020

Open Letter to the Bundestag and to the EU institutions: Is Germany competing with Hungary and Poland on the "Worst Rule of Law Award" with its rushed ratification of the Unitary Patent?

Dear Members of the Bundestag,
Dear Members of the European Parliament,
Dear Members of the Council,
Dear German Presidency of the EU,
Dear Chancellor Merkel,
Dear Commissioner von der Leyen,
Dear Commissioner Reynders,
Dear Commissioner Breton,

FFII e.V is a pan-European alliance of software companies and independent software developers, defending the rights to a free and competitive software creation since 1999. Over the years, more than 3,000 software companies across Europe have supported our calls against software patenting, among which 1,100 German ones. With the Unitary Patent project, we are at the third attempt to validate software patents in Europe. The previous 2 first attempts to change the law (EPC2000 and the 2005 software patent directive) failed.

This Wednesday 25th November 2020, the Legal Affairs committee of the Bundestag will vote on the ratification by Germany of the Unitary Patent and its Court¹. In a series of answers to questions asked by the Free Democratic Party (FDP)² ³, the **German Ministry of Justice Christine Lambrecht (SPD) says that there are “no constitutional problems” with the Unitary Patent and its Court⁴.**

Firstly, on the 22nd of April 2020, the same Legal Affairs committee of the Bundestag voted⁵ to participate in the legal proceedings in front of the German Federal Constitutional Court (GFCC) in Karlsruhe, on cases related to the question inter alia of impossibility to sue the administration (the EPO) in front of the courts for maladministration. **The possibility to sue an administrative body, such as the EPO, for maladministration before the courts is one of the fundamental pillars of our western democracies, also called the “Rule of Law” (TFEU art2) and is a categorical constitutional guarantee (i.e judicial review of administrative acts).** This applies also to the institutional possibility, under the requisite constitutional system of separation of powers, to appeal acts and decisions of administrative bodies (e.g. the EPO), as it can be observed in all national systems and also at the EU level, as with the other intellectual property rights of trademarks and designs, where the decisions of the EUIPO are

¹ https://www.bundestag.de/resource/blob/807950/efba54c4ec7f116f346c80c3f23165df/a06_to_113-data.pdf

² <http://patentblog.kluweriplaw.com/2020/11/02/better-late-than-never-german-liberal-party-files-parliamentary-question-on-unified-patent-court/>

³ <http://dipbt.bundestag.de/extrakt/ba/WP19/2686/268683.html>

⁴ <http://patentblog.kluweriplaw.com/2020/11/20/upca-ratification-bill-progresses-in-german-bundestag-academics-upc-not-the-best-solution-for-europe-and-for-innovation/>

⁵ <https://dip21.bundestag.de/dip21/btd/19/187/1918737.pdf>

frequently appealed before the CJEU. In this respect, the constitutional mechanism that sustains the absolutely necessary separation of powers exists for intellectual property rights in the EU (trademarks and designs) but **is spectacularly absent from the Unified Patent Court and Unitary Patent institutional arrangement**. As they cannot provide such basic constitutional-democratic guarantees, they concern clear unconstitutional arrangements that deprive the patent system in Europe from adequate democratic control and undermine the whole system of the EU, as these constitute blatant constitutional failures that fly in the face of the whole institutional design and function of the EU and of the arrangements and understanding that member states have with the EU. On this basic issue there is now a pan-European academic initiative⁶ from various EU member states, including from Germany, asking for a legal reform of the the Unified Patent Court in order to restore essential democratic safeguards in its operation, such as those seen in other areas of intellectual property, as pointed out above.

Other cases relate to the fact that the EPO examiners preferred to go watch a football match of the 2010 FIFA world cup in South Africa instead of hearing an appeal (Wallinger case)⁷. In 2012, our association also hit the same problem during our oral opposition at the EPO against Amazon's One Click Gift patent⁸. The EPO refused to provide us a live translation in the language of our choice (spanish in the particular case)⁹. We came to the conclusion at the time that the EPO could not be sued for maladministration.

Nevertheless, despite these well known institutional anomalies, some members of the Bundestag and the Ministry of Justice want to go forward with this ratification project, even though there are obvious "constitutional problems". The Bundestag is now part of the legal proceedings that are active before the Constitutional Court and should have more insight about those particular cases. Those cases on the impossibility to sue the EPO for maladministration were on the agenda of the Court for 2020, but apparently they won't be decided this year, but early next year in 2021.

We strongly advise the German Bundestag to wait for this decision of the Constitutional Court on the EPO and the "Rule of Law", following the guidelines for a "Better Law Making". Not doing so would make Germany compete with Poland and Hungary in the contest of the "Worst Rule of Law Award" in a context of tremendous social-economic significance that can have wider negative implications for the whole European Union project in the future. It is reasonably expected that the upcoming decision of the Constitutional Court to be of a seismic magnitude for the patent system in Europe¹⁰. We also have prepared a constitutional complaint raising this particular problem if Bundestag persists in ratifying this agreement¹¹.

Other principles were also violated, such as the undemocratic adoption of the Rules of Procedure (RoP) or the expensive Court fees that were never discussed nor validated by any Parliament(s) anywhere in Europe. So much for the "Rule of Law" (TFEU art2) and the "Right to

⁶ CRIDES: Position paper on the Unified Patent Court: The Unified Patent Court system is not the best solution for Europe and for innovation, and there are alternative systems to consider after Brexit <https://uclouvain.be/fr/instituts-recherche/juri/crides/actualites/upc-alternatives.htm>

⁷ Wallinger case, Under Steam, JUVE Rechtsmarkt 07/14, by Catrin Behlau and Mathieu Klos, pages 62 et seq.: "Dampf im Kessel" https://www.wallinger.de/sites/default/files/newsdocs/Article%20in%20JUVE%20magazine_RM%2007_2014_translation_WRST.pdf or <https://is.gd/PN0zHC>

⁸ FFII: Amazon one-click patent still lingering in Europe after 15 years <https://ffii.org/amazon-one-click-patent-still-lingering-in-europe-after-15-years/>

⁹ Techrights: The European Patent Office (EPO) Doesn't Like Spanish, So Why Should the Spanish Tolerate the EPO? <http://techrights.org/2016/01/08/epo-vesus-spanish-speakers/>

¹⁰ Kluwer Patent Blog: The Rule of Law, the EPO and the Ugly Writing on the Wall, 25 May 2017 <http://patentblog.kluweriplaw.com/2017/05/25/rule-law-epo-ugly-writing-wall/>

¹¹ FFII preparing constitutional complaint against Unified Patent Court Agreement, 23 Oct 2020 <http://patentblog.kluweriplaw.com/2020/10/23/ffii-preparing-constitutional-complaint-against-unified-patent-court-agreement/>

Democracy” (TFEU art 10) principles mentioned by academics in 2015^{12 13}. The adoption of the Rules of Procedure of the Court is also contrary to the well established jurisprudence of the ECHR on article 6, “a tribunal established by law”, which requires that such a rule “emanates from Parliament” (see Coeme Vs Belgium, 2000, para98)¹⁴. The proponents of the UPC claim that there is “indirect democracy”, since the Bundestag would have a vote via its delegation in the Committee of the UPC.

Secondly, in the same series of questions by the FDP, the German Ministry of Justice does not want to procure an impact assessment of this new Unitary Patent system, notably for SMEs. She relies on an old “impact assessment” study procured by the European Commission. Except that their “impact assessment” was done in 2009, for a treaty that was signed in 2012! This “impact assessment” was already heavily criticized in 2012 by the UK and discarded by the scrutiny committee of the British Parliament for being “outdated” and “full of errors”¹⁵ (sections 4.1 and 4.1.3). This “impact assessment” of course did not consider the expensive Court Fees of the self-financed UPC, as those were only “decided” by an obscure committee in 2016 without any parliament debate whatsoever! In fact, the European Commission has already admitted that the cost of patent litigation under the UPC “hits SMEs disproportionately hard”¹⁶.

So we are left today with no reliable nor effective robust impact assessment of the UPC, including for the software industry, while key observers expect a boost in patent trolling, a validation of software patents by the backdoor, the destruction of jobs, and the ultimate lack of competitiveness against non-EU-based companies that already dominate European patenting in the continent.

The Unitary Patent project was advertised as a “cheaper” solution for patents in Europe, but we are ending up with a system that is more expensive to litigate for a simple case compared to the current situation. So much for the “Better Law Making”, “SMEs” and “Access to Justice”.

Thirdly, the Bundestag must send back the Unitary Patent for renegotiation, as London is still listed in Annex2 of the treaty. The Preparatory Committee of the UPC (nor Germany) does not have the power to temporary move the workload of the London court to Paris and Munich. The (re)location of institutions requires an unanimous decision of the “Head of States” (art 341 TFEU), as it was done in 2012, and **this temporary relocation has not been decided yet, and requires a renegotiation anyway**. What Germany is trying to do here is a “bruteforce” to rush the ratification treaty entering into force as soon as possible at any cost, where there are known constitutional problems at both national and European levels and alarming concerns about the economic impact involved in such a serious area of economic development that will affect the entire continent, exposing the new system to continuous legal challenges during its future operation leaving the relevant industries under a constant uncertainty.

Fourthly, another design flaw of a historic dimension is the exclusion of the European Institutions like the European Court of Justice (CJEU) or the European Parliament from patent law. **The exclusion of the CJEU was done at the request of the UK and Prime Minister, Mr**

12 A Motion against the Regulation 1257/2012 (Unitary Patent Protection) <http://www.universitates.eu/jsberge/?p=20381>

13 Academics: The Union cannot be stripped of its powers by the Member States: the dangerous precedent of the patent package http://www.universitates.eu/jsberge/wp-content/uploads/2015/03/UPC-Reg-1247-2012-Motion-13-March-2015-DEF-10-April-up-date-signat_01687141.pdf

14 Germany will violate 3 international agreements with the Unitary Patent, says FFII <https://ffii.org/open-letter-to-the-bundesrat-on-the-unitary-patent-tomorrow-germany-will-be-asked-to-violate-multiple-international-agreements/>

15 The European Unified Patent Court: Assessment and Implications of the Federalisation of the Patent System in Europe, Dimitri Xenos, 12 Sep 2013 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2324123 see sections 4.1 and 4.1.3

16 European Commission (2015) A Single Market Strategy for Europe – Analysis and Evidence, Staff Working Document (SWD/2015/0202 final), Brussels, October, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015SC0202&qid=1485438520140&from=EN>

Cameron who put his veto over articles 6-8, heavily influenced by the British patent industry and by a large British pharmaceutical company producing vaccines. Now with the Brexit, everybody is aware of the allergy of the UK towards the CJEU. The European Parliament was also removed as a legislator in patent law, the rapporteur on the project Mr Lehne (EPP) even threatened to go to court if articles 6-8 were removed. So much for the “Right to Democracy” and the “Power to the Parliament(s)”.

The CEOs of our companies would sleep better at night if they have the hope that software patents would one day go away, for example with the intervention of the European Court of Justice (CJEU) in patent law, like it happened in the US with the Supreme Court in the Alice case. But no, the current institutional design of the UPCA shields the CJEU away from accessing EU patent law (actual or future), and software patents in particular. A specialized patent court living in its own bubble (self-standing existence) will promote patent maximalism (extension of patents to new fields, automatic injunctions, bifurcation, patent trolling), which will have negative economic consequences for the whole society (e.g. lack of competitiveness towards stronger non-EU based companies, job losses, etc.). Previous calls to keep patent law and the patent office within the realm of the CJEU fell in deaf ears (despite being signed by 600 software companies in 2012¹⁷).

We are therefore asking you to renegotiate the Unitary Patent project and stop this gross attempt which bypasses the European Union and its Institutions and creates a parallel self-standing international judicial system that cannot be counterbalanced by an elected Parliament.

We encourage you as a matter of urgency and institutional responsibility to read a similar motion issued last week by more than forty reputable academics and patent practitioners, including an ex-Vice President of the European Patent Office¹⁸.

Best regards,

Benjamin Henrion
President of FFII e.V.



¹⁷ Unitary-patent.eu: Against software patents, companies demand an improvement of the unitary patent for Europe <http://www.unitary-patent.eu/content/against-software-patents-companies-demand-improvement-unitary-patent-europe.html>

¹⁸ CRIDES: Position paper on the Unified Patent Court: The Unified Patent Court system is not the best solution for Europe and for innovation, and there are alternative systems to consider after Brexit <https://uclouvain.be/fr/instituts-recherche/juri/crides/actualites/upc-alternatives.htm>