
The German Act on the Ratification of the UPCA null and void – Just an operational accident or an incurable disease?

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There is hardly any other decision of the German Federal Constitutional Court (FCC) which has been awaited as eagerly outside Germany and even outside Europe as the decision of the 2nd Senate of the FCC in case 2 BvR 739/17 on the complaint against the Act on the ratification of the Agreement on a Unified Patent Court (UPCA). The emphasis of most comments lies on the result of the case: The Act has been declared null and void because it had not been approved by the two-thirds majority of the members of the Parliament (Bundstag) considered necessary by the FCC. In the following, the significance of the FCC's reasoning for the future of the UPC system (if it has a future) will be analyzed.

Rationale and meaning of the FCC's reasoning

Many IP commentators seem to regard the deficiency in the ratification process (lack of a two-thirds majority) as a minor formality issue which could easily be cured, thus not deserving any detailed attention.

However, from the perspective of German constitutional law it is a landmark decision: It concerns the quite delicate issue of how and to which extent Germany's constitutional structure can be changed in the course of international cooperation, particularly for the purpose of European integration.

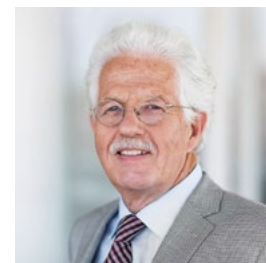
The FCC was faced with the question as to whether the conferral of sovereign powers on the UPC, which is possible pursuant to Article 23(1), 2nd sentence, of the German Constitution (Grundgesetz, GG), changed or supplemented the German Constitution in substance. If so, Article 23(1), 3rd sentence, GG in conjunction with Article 79(2) GG requires the two-thirds majority at stake.

The contentious point within the FCC was whether an obligation in an international treaty exposing German citizens to acts of an international authority can be the basis of a constitutional complaint by an individual before the act conferring the competence has entered into force. The majority of 5:3 judges said yes, taking the position that any conferral of judicial functions on an international court modified the allocation of jurisdiction to the courts as foreseen in the GG and, in this respect, constituted an amendment of the German Constitution in substantive terms. In this context, the FCC accepted a claim of a citizen for having the formal aspects of conferral reviewed, arguing that competences conferred on another entity under international law were usually "lost" and could not easily be regained by the legislator.

According to the majority of the judges of the FCC, the legal basis of this approach is the democratic principle laid down in Article 38 GG allowing a citizen to claim that sovereign rights are only conferred in the ways provided for by the German Constitution.



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“Only” a formal issue or is there more which could be relevant for the future of the UPC?

Notably, besides the mentioned formal issue, the case involved three further attacks:

- The status of the judges of the UPC did not comply with the rule of law;
- acts of the UPC affecting fundamental rights were lacking democratic legitimacy; and
- the UPCA contravened EU law.

The FCC decided that the complaint was inadmissible in respect of all three of these attacks.

However, the devil is in the detail of the reasoning: Generally, the FCC held that the complainant failed to substantiate that the rights arising from the democratic principle had been violated in his specific case. To a large extent, the FCC did not see any connection between the democratic principle as the applicable standard of review in the present proceedings and other structural constitutional principles as the rule of law.

More specifically, as to the appointment procedure for the judges and their democratic legitimacy, the FCC found that the complaint did not discuss the specific effect of a treaty to be negotiated with other states on Germany's participation in an international court. Concerning the competences of the Administrative Committee, the FCC found that the complainant's reliance on the FCC's decision on the Free Trade Agreement with Canada (CETA) did not help his case, since Germany enjoyed equal rights participating in the

decisions of the Committee. Furthermore, the FCC observed that the alleged violation of EU Law could not establish a violation of the democratic principle and that EU Law did not contain formal or substantive requirements which could cast doubt on the validity of a German act or even violate the identity of the German Constitution. The principle that the FCC had to exercise its review cautiously and in a way that is open to European integration (“europarechtsfreundlich”) did not alter this conclusion, since, according to the FCC's case law, this principle did not have the consequence that EU Law became a standard of review for German Law. Notably, the Court leaves open whether this might be different with respect to the rights laid down in the European Charter of Fundamental rights if, in the process of European integration, a legal point is exclusively dealt with under EU Law.

On the one hand, the UPC is an international body on its own outside EU Law. On the other hand, the UPC has to apply EU Law and respect its primacy in accordance with Articles 20 and 24(1) UPCA, examples being the two Regulations on the unitary patent, the BioTec Directive and the Enforcement Directive. In this context, the last paragraph of the decision has given rise to some speculative comments. In that paragraph, the FCC observed that an unconditional primacy of EU Law might violate the German Constitution. The decision cited in the context of this observation makes clear that a violation of the democratic principle submitted as grounds for a constitutional complaint may result in an examination of whether the measure under review complies with the rule of law as laid down in Art. 20(1) and 2 GG.

Therefore, many commentators who derived from the FCC's reasoning that the substantive attacks of the complaint have become meaningless for the future of the UPC are simply wrong. It is very clear that the FCC examined these attacks only in respect of the restricted standard of review applicable in the proceedings at hand which were initiated by an individual in the course of the legislative process. The standard of review in a (potential subsequent) constitutional complaint against a violation of a party's right by the UPC is much broader. This can, for instance, be seen in the decision 2 BvR 1961/09 rendered on July 24, 2018, on the effective legal protection against acts of one of the European Schools, an independent international organization. As a matter of principle, the FCC stated that international organizations had to provide fundamental rights protection covering the minimum standard under the German Constitution, and particularly guarantee the core content ("Wesensgehalt") of fundamental rights, in particular compliance with the rule of law. The guarantee of effective legal protection included access to independent courts which must not be factually impossible or difficult to obtain in an unreasonable manner. The FCC emphasized that the fundamental rights must be respected not only when sovereign powers are conferred but also when they are exercised. In a nutshell, this means that unconstitutional practices by the UPC would be subject to review by the FCC.

A first indicator of how the above principles will be applied by the FCC are the pending four cases against the allegedly deficient system of judicial review before the Boards of Appeal of the EPO. These cases are on the 2020 agenda of the FCC. The judge rapporteur is the same one as in the UPC case.

The outcome of these cases may not only be relevant for the standard of review to be expected in future constitutional complaints against decisions of the UPC. In fact, it may immediately affect the unitary patent system because the Boards of Appeal are integrated into this system as competent to finally decide on the revocation of unitary patents in opposition appeal proceedings.

UPC System needs to be changed anyway

Irrespective of the above, the system cannot remain unchanged in any event. The most obvious reason is that Article 7(2) UPCA stipulates that the UPC has a section of the central division in London. It appears to be common ground that this is incompatible with the fact that the UK will no longer be a contracting state to the UPCA. Therefore, the decisive question for the future of the UPC is whether there is still a political will to pursue a plan B, i.e. a system without the UK. There are certainly good reasons to initiate a plan B:

On the level of patent prosecution and administration, central advantages to users still are considerable cost savings because of the elimination of validation provisions that currently still exist, advantageous administration fees (to be adapted to Brexit which could entail political issues), and a broad geographical scope of protection at the same time. On the level of patent litigation, the very central advantage is the avoidance of expensive and time-consuming parallel proceedings in several European countries, i.e. the possibility of obtaining a court decision valid throughout the EU, so to speak, in single proceedings before a single court.

Thus, let us turn to the current opinion of some protagonists of the system:

With regard to the further course of action, the Chair of the UPC Preparatory Committee, Alexander Ramsay, stated:

“Once Germany will be in a position to ratify the UPC Agreement and the Protocol on the Provisional Application, arrangements will be made to deal with the practical implications of the UK’s departure.”

Surprisingly for some observers, the German Minister of Justice nurtured the hopes of an early conclusion of the German ratification process by the following communication:

“I will continue to stand up for providing the European innovative industry with a Unitary Patent and a Unified Patent Court. The Federal Government will carefully evaluate the decision of the FCC and examine ways to remedy the formal deficiencies stated by the FCC during this legislative period.”

The President of the EPO welcomed the German announcement and declared that it makes clear that an approval of the UPCA with the required parliamentary majority is still possible.

These statements are interesting against the following background: While the Preparatory Committee has always been very optimistic in announcing an imminent implementation of the system, about half a year ago, the German Ministry of Justice was much more cautious when it declared that the factual and legal consequences of a withdrawal of the UK with regard to the UPCA have to be

examined and coordinated on a European level before the process of ratification can be finalized.

Now that the UK announced its withdrawal from the UPCA, the factual and legal consequences of Brexit with regard to the UPCA still have not become clear. Indeed, there are serious concerns whether a convincing solution to several issues will be found within the present legislative period ending in fall 2021 already: What needs to be discussed are not merely practical consequences of the UK’s withdrawal, but ways of how the UPCA may be adapted to fit the changed circumstances in a legally feasible manner. Article 87 UPCA is not tailored to this exercise. Admittedly, its paragraphs 1 and 2 grant the Administrative Committee some authority for revising the UPCA, but not earlier than seven years after it entered into force, and for the purpose of harmonizing it with international treaties or EU Law. The first aspect is not relevant and as for the second one, the question of whether a provision on the revision of an agreement may be used to put the agreement into effect is highly disputable. As the decisions of the UPC are to be enforceable in all contracting member states, the UPC should only be established on a legal basis which cannot be seriously challenged.

Independently thereof, each contracting member state may block an amendment pursuant to Article 87 (1)/(2) UPCA by declaring that it does not wish to be bound to it under para. 3. So, there is a *de facto* unanimity requirement for each amendment by the Administrative Committee.

In this context, heated argument is to be expected as to which city will be heir to London in the capacity as a seat of one of

the sections of the Central Division. Milan was the first to throw its hat in the ring, but Italy has not really strengthened its position by the fact that the government obviously favors Turin. Others advocate seizing the opportunity to pool the entire Central Division in Paris, and the Netherlands are also being discussed as an option. Other states

might still follow, maybe even Germany as the country in which more patent infringement proceedings are conducted than in all other contracting member states together. So far, Germany has only exercised humble restraint in this issue which is not untypical for international negotiations but things can change over time.

What's next?

The process determining whether a Plan B will be pursued, may start now. However, it must not only involve the legal questions addressed above. It should also address those left undecided in their substance by the FCC. It would certainly not be a responsible political approach to establish a court system which will be under foreseeable and avoidable legal attacks before national courts and before the CJEU.

A further necessary element of discussion will be to keep the system attractive for industry. The amounts of renewal fees fixed after years of discussion at the “true top four” level is no longer justified considering that an average applicant desiring protection in three or four EPC member states will have to pay additional renewal fees for the UK. Thus, the restricted scope of the unitary patent should be reflected in a lower level of renewal fees. Otherwise, the unitary patent will only be used by applicants maintaining protection at a large level, e.g. the pharmaceutical industry. Why not use this opportunity to also reconsider the consensus reached among the contracting states that no state should get less from the revenue of renewal fees than under the system of the EP bundle

patent (which— frankly — is a consensus at the expense of the users)?

Finally, it could be worthwhile to use the necessary discussions to repair shortcomings of the UPCA recognized in the meantime. The opt-out / opt-in regulations have been criticized as failed in terms of legislative formalities. Further, there are no sound reasons for the compulsory inclusion of European bundle patents in the jurisdiction of the UPC – free competition between the UPC and the national courts would probably be a better solution, and the UPC would prevail if the efficiency of its proceedings and the expertise of its judges are convincing. Otherwise, users would be forced to use (available) indirect ways of maintaining access to national courts. The draft of the rules of procedure could be made leaner by eliminating elements which are based on UK concepts rather than on continental European ones. This might result in a simplification of the procedure and, thus, in cost reductions. It is worth noting that the (high) caps on reimbursable attorney fees have been criticized in particular as they are hardly acceptable for SMEs.