

FEDERAL CONSTITUTIONAL COURT ON UPC: GERMAN LEGISLATION FOUND VOID

On 20 March 2020, the German Federal Constitutional Court's second senate published its decision of 13 February 2020 on the constitutionality of the German legislation which sought to approve the agreement to establish a Unified Patent Court ("**UPC-Agreement**"). The German legislation has been found void.

BACKGROUND

The UPC-Agreement signed as an international treaty by a large majority of the EU Member States in February 2013 marked – together with a number of corresponding EU regulations – the preliminary highlight of the EU's striving for a major patent law reform and the implementation of a patent with unitary effect across (most of) Europe.

The pre-existing system of European patents granted by the European Patent Office which are, in fact, a bundle of applications for patents with national effect centrally filed, was largely seen as too lavish and costly: the validation into national patents often requires a translation of the patent, renewal fees become due on a country-by-country basis, and a nullity suit filed against a national patent derived from a European Patent has only national effect. Thus, the UPC-Agreement was meant to reduce those inefficiencies and to further strengthen the enforcement of patents across the EU by establishing a Unified Patent Court having jurisdiction with regard to European patents with unitary effect that are to be registered with the European Patent Office.

The legal framework provides three conditions for the UPC-Agreement's entry into force: entry into force of the amendments to the Brussels I Regulation; ratification or accession by at least 13 Member States; ratification by three Member States with most European Patents in effect in 2012 (France, Germany, United Kingdom). While the first two conditions could have been satisfied in recent years, the third condition turned out to be the trouble spot.

Despite Brexit, ratification in the United Kingdom was completed in April 2018, although the United Kingdom announced some weeks ago that it will not seek involvement in the UPC in future. In Germany, however, a constitutional complaint was submitted in June 2017 by a German lawyer arguing that the German legislation regarding the UPC-Agreement (i.e. the act of approval) was unconstitutional, *inter alia*, due to "democratic deficits" of the UPC organs. In view of this constitutional complaint, the Federal Constitutional Court

Key issues

- Constitutional Court found German legislation on UPC void.
- Court required a two-thirds majority of all members of parliament which had not been obtained in the German *Bundestag*.
- UPC's future unclear: implementation of UPC at least further delayed.

preliminarily stopped the legislative procedure by requesting the Federal President to refrain from promulgating the act.

DECISION

The long-awaited decision of 13 February 2020 by the Federal Constitutional Court's second senate has now been published (2 BvR 739/17). It holds that the German act of approval is unconstitutional on formal grounds and, therefore, void.

Under German constitutional law, any act that amends or supplements the content of the *Grundgesetz*, i.e. the German constitution, or makes such amendments or supplements possible, requires a two-thirds majority of all members of the legislative bodies, including the *Bundestag*.

The Federal Constitutional Court found that the adoption of the German act of approval in relation to the UPC-Agreement would have required such two-thirds majority. It transfers sovereign rights to the Unified Patent Court, a supranational body, that would – exclusively – exercise jurisdiction to a certain extent. German courts which generally exercise judicial power under the German constitution, would be substituted to the same extent. Basically, the UPC-Agreement is found to constitute a "functional equivalent" to the amendment of the fundamental treaties of the European Union.

The law was ultimately passed with only 35 members of the *Bundestag* being present. Therefore, despite the unanimity of the vote in the *Bundestag*, it clearly failed to reach the two-thirds majority of all members of the *Bundestag* that the Federal Constitutional Court found to be applicable. The act that passed parliament was therefore declared void.

According to the Federal Constitutional Court, an act of approval to an international treaty that has been adopted in violation of the *Grundgesetz* cannot provide democratic legitimation for any measure subsequently adopted by the EU or a supranational organisation. Thus, the fundamental right of citizens to participate in the democratic decision-making process is violated

Three of the eight judges comprising the second senate expressed a dissenting opinion – an unusual outcome at the Federal Constitutional Court. According to the dissenting judges, the aforementioned fundamental right of citizens to participate in the democratic decision-making process cannot be violated by neglecting the formal requirements of legislature transferring sovereign powers. If that would be the case, further steps towards European integration could be considerably delayed.

PROSPECTS

This decision will at least further delay the implementation of the UPC and the unitary patent since the required ratification by Germany – the last country to ratify the UPC-Agreement – has been stopped by the Federal Constitutional Court – at least for the time being.

To adopt a new act and thereby ratify the UPC-Agreement, Germany would need to initiate a new legislative procedure taking into account the formal requirements stipulated by the Federal Constitutional Court. This may take months. Further, it is unclear whether this new act would remain unchallenged, bearing in mind that several aspects had been raised in the original complaint which allegedly could lead to the act being void from a constitutional perspective. In its decision, the Federal Constitutional Court did

not finally decide on these other aspects of the German legislation but rather dismissed the plaintiff's further allegations as inadmissible. For the reform's proponents, this is equally good and bad news: the Federal Constitutional Court still leaves the door open for such new approach, provided, however, that the two-thirds majority has been obtained. Nevertheless, its ultimate constitutionality can hardly be read between the lines.

Two other recent developments may cast doubts on the implementation of the UPC, at least in the near future. The first is the spread of the coronavirus which will certainly keep German legislative busy in the upcoming months – if it did not cause a shutdown.

Further, the UK's role may cause additional problems: notwithstanding its ratification of the UPC-Agreement in 2018, the UK decided at the end of February 2020 that it will withdraw from the UPC system. This would trigger further delay as the legal framework would need to be adjusted, e.g. regarding the seats of the central divisions of the Court of First Instance, which is, besides Munich and Paris, also London.

More importantly, the UK's withdrawal from the UPC system might also affect the political will in Germany. Without one of the main players being part of the unitary system, it is not clear whether the two-thirds majority of all the members of the German *Bundestag* as required by the Federal Constitutional Court could be obtained. The actual advantages of the UPC system are certainly reduced without the UK sitting at the table.

The future of the UPC remains therefore open. The recent decision by the German Federal Constitutional Court is, however, a huge setback for all proponents of the reform. We will keep you updated on any new developments in the future.

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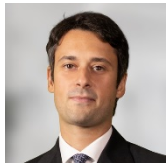
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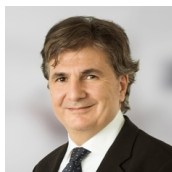
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