

MOVING FORWARD: THE GERMAN FEDERAL CONSTITUTIONAL COURT REJECTS TWO PRELIMINARY INJUNCTIONS LODGED AGAINST THE AGREEMENT ON A UNIFIED PATENT COURT

The applications for preliminary injunction filed against the German legislation to ratify the agreement establishing a Unified Patent Court (the "**UPC**", and the "**UPC Agreement**") were dismissed by the German Federal Constitutional Court (the "**Court**") on 23 June 2021 as it found the constitutional complaints, subject of the main proceedings, to be inadmissible. According to the Court, the claimants had failed to adequately substantiate the possibility of an infringement of their constitutional rights.

HOW WE GOT HERE

Establishing a new unitary court with exclusive jurisdiction over European patents with unitary effect and eventually all European Patents represents an important aspect of the EU's efforts to reform the European patent system. But even though politically the UPC and patent reform have always enjoyed great support, the legal prerequisites of the ratification process have caused some unexpected difficulties. In order to enter into force, the UPC Agreement requires ratification by, in particular, the three Member States with most European patents in effect in 2012 (France, Germany and the United Kingdom).

After its successful start in 2013, the road to ratification faced its first challenges in 2016 when the United Kingdom voted for Brexit. After a period of uncertainty in the aftermath, the UK government finally ratified the UPC Agreement in 2018. However, in February 2020 the UK Prime Minister's Office announced that the UK – originally destined to host a central division of the UPC – had chosen to withdraw its ratification. While the withdrawal did not come as a surprise given the government's clear position that there should be no room for the EU's jurisdiction in the UK, it remains to be seen if and how this decision may impair the relevance of the UPC.

In 2017, the ratification process hit its first major roadblock in Germany when a constitutional complaint was filed by an individual lawyer arguing that the Act of Approval was unconstitutional due to "*democratic deficits*" of the UPC

Key issues

- German Federal Constitutional Court rejects two preliminary injunctions against German Act of Approval of UPC Agreement
- Ratification process in Germany is expected to be completed in early fall
- Alex Ramsay expects the UPC to be up and running in late 2022, early 2023

organs. In February 2020, the Court finally ruled that, indeed, due to formal defects, i.e. not meeting the required quorum of a two-thirds majority of all members of the legislative bodies, the Act of Approval was void.

MORE HURDLES ALONG THE WAY

German lawmakers did not take long to start a new attempt to facilitate the ratification process by publishing a new draft bill for the Act of Approval. The draft bill, which remained substantively unchanged, was approved with the required two-thirds majority in November 2020 by the *Bundestag* and unanimously passed by the second chamber of the German parliament, the *Bundesrat*, on 18 December 2020. On the same day, the Court received two applications for preliminary injunction ("PI"), bringing the ratification process to a halt once again. The German Federal President was asked to withhold his signature which is required in order for a legislation to enter into force and therefore necessary to finalise the ratification in Germany.

In its decision published on 9 July 2021, the Court rejected both applications for preliminary injunction due to the inadmissibility of the constitutional complaints in the main proceedings. The applicants had failed to sufficiently substantiate a violation of their fundamental rights (*Grundrechte* according to the German constitution, the *Grundgesetz* ("GG")). In particular, they were unable to show how a transfer of sovereign powers to the EU under the UPC Agreement would compromise core principles of democracy as guaranteed under the German constitution. In support of their PI applications, the claimants merely alleged that the appointment of UPC judges for a six-year term with the possibility of re-election and without sufficient means to contest a removal from office would interfere with the principle of judicial independence and the principle of rule of law pursuant to Article 97 para 1 GG and Article 6 para 1 European Convention on Human Rights ("ECHR"). They did not, however, set out how this would affect the principle of democracy. A further claim which referred to the deprivation of the right to an identity review pursuant to Article 79 para 3 GG due to the precedence of EU law as stipulated in Article 20 UPC Agreement was dismissed. The Court held that the provision pursuant to which the UPC "*shall apply Union law in its entirety and shall respect its primacy*" does not impinge on the premise of Article 23 para 1 GG according to which the precedence of EU law is only assumed if and to the extent that the fundamental rights protection on EU level is essentially comparable to the protection provided by the *Grundgesetz*.

THE ROAD AHEAD

It follows from the rejection of the PI applications based on the inadmissibility of the constitutional complaints that the underlying claims will not be subject to examination in the main proceedings. Months after the Court asked the Federal President Frank-Walter Steinmeier to refrain from signing the law pending a decision, the last obstacles have now been cleared out of the way and the German ratification bill can finally be issued.

However, the EU has not yet reached its final destination on the road to establishing the UPC. According to the latest update on the UPC's official website¹, in order for the process to enter its final phase, two more signatory states must agree to be bound by the Protocol of Provisional Application. It is

¹ <https://www.unified-patent-court.org/news/german-federal-constitutional-court-declares-complaints-against-upcas-ratification-bill>, last accessed 10 August 2021

to be hoped that this will soon be the case. Still, a detailed timeline of the start and implementation of the period of provisional application has yet to be published on the UPC's website. While the Preparatory Committee continues its work, its chairman Alex Ramsay told JUVE Patent² that, following the German Court's recent decision, we can expect a functioning UPC late in 2022, or possibly early 2023 if everything runs smoothly.

² <https://www.juve-patent.com/news-and-stories/legal-commentary/upc-dream-gets-closer-after-german-court-rejects-constitutional-complaints/>, last accessed 10 August 2021

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