

Breaking News: Germany's Federal Constitutional Court pulls Emergency Break on UPC Agreement

Kluwer Patent Blog

June 13, 2017

Thorsten Bausch (Hoffmann Eitle)

Please refer to this post as: Thorsten Bausch, 'Breaking News: Germany's Federal Constitutional Court pulls Emergency Break on UPC Agreement', Kluwer Patent Blog, June 13 2017, <http://patentblog.kluweriplaw.com/2017/06/13/breaking-news-germanys-federal-constitutional-court-pulls-emergency-break-upc-agreement/>

Another significant delay - or even more substantial - trouble seems to be ahead of the Unitary Patent system, due to today's decision of the German Constitutional Court (*Bundesverfassungsgericht*) in Karlsruhe. The *Bundesverfassungsgericht* has requested the German President not to sign the bills already approved by Bundestag and Bundesrat on the ratification of the Unitary Patent system.

This has been reported by Hendrik Wieduwilt of the *Frankfurter Allgemeine Zeitung*, who I would consider a reliable source. Mr Wieduwilt says the news was confirmed by the press offices of the *Bundesverfassungsgericht* and the German presidency. According to his report, an unknown private person is behind the complaint against the UP system for infringing the German Constitution.

My own interpretation (and at this point this is mere speculation, but too tempting not to mention it!) is that the *Bundesverfassungsgericht's* request to the President is based on the pending constitutional appeals against the EPO on which I wrote earlier in this blog. If the *Bundesverfassungsgerichts* is of the preliminary view that any of the pending four constitutional complaints may have merit, it would make eminent sense to request the President, at least for the time being, not to sign the UPCA ratification bills and first await the Federal Constitutional Court's decision on

these appeals, in order not to create faits accomplis. The decisions on these four appeals are expected later this year, but an exact point in time has not yet been defined.

The immediate consequence of the Bundesverfassungsgericht's request will be a further delay in the ratification of the UPCA by **at least** a few months. Germany is one of the three member states that has to ratify before the system can be launched.

And if the Constitutional Appeals are found to have merit, then the delay will be pretty substantial, in my opinion. Namely, if the current EPO system is found to violate the constitutional right to a judicial review of a decision of an office, the EPO system will have to be changed much more fundamentally than by the previous reforms (who were by many considered to be a fig leaf only) and a truly independent judiciary will need to be established. If so, I would expect the Bundesverfassungsgericht to set generous transitional terms, yet I doubt that it would consider the UPCA constitutional before this reform has been actually implemented.

We will probably know more by tomorrow when reports on the reasoning of the Bundesverfassungsgericht's request are likely to appear.

I would like to express my special gratitude to our indefatigable Kluwer News Blogger, who alerted me to this piece of news. Stay tuned for more in the next couple of days!