

German complaint threatens future Unitary Patent system

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When will the Unified Patent Court open its doors and the Unitary Patent (UP) become available? The German constitutional complaint against ratification of the Unified Patent Court Agreement (UPCA) has dashed expectations that the UP system could launch at the end of this year. Considerable delays and even the end of the system in its current guise are possible.

Last June, shortly after the German parliament had ratified the UPCA and the surprising news broke that the Federal Constitutional Court (FCC) in Karlsruhe had asked the German president not to sign into law the parliamentary Act declaring Germany's accession to the UPCA, chairman Alexander Ramsay of the UPC Preparatory Committee was still positive: 'I am hopeful the situation regarding the constitutional complaint in Germany will be resolved rather quickly and therefore I am hopeful that the period of provisional application can start during the autumn 2017 which would mean that the sunrise period for the opt out procedure would start early 2018 followed by the entry into force of the UPCA and the UPC becoming operational.' In a message of September 2017 that optimism had disappeared: 'It is now difficult to predict any timeline.'

Although he has not publicly admitted it nor published it on his website, the complaint against the UPCA was filed at the end of March 2017 by Dr. Ingeve Björn Stjerna, a long-time critic of the Unitary Patent system. His arguments were set out in this blogpost for the first time, based on information from the FCC. According to the Constitutional Court:

'In terms of substance, plaintiff is essentially asserting a breach of the limits to surrendering sovereignty that are derived from the right to democracy (Art. 38 (1), clause 1, Basic Law). Primarily the following violations are asserted:

- *breach of the requirement for a qualified majority arising from Art. 23 (1), sentence 3, in conjunction with Art. 79 (2) Basic Law;*
- *democratic deficits and deficits in rule of law with regard to the regulatory powers of the organs of the UPC;*
- *the judges of the UPC are not independent nor do they have democratic legitimacy;*
- *breach of the principle of openness towards European law owing to alleged irreconcilability of the UPC with Union law.'*

This article of Hogan Lovells describes the complaint in more detail.



Since, the FCC has sent a request for comments on the complaint, which comprises 170 pages, to both chambers of German parliament; to the Federal Government (the Federal Chancellery, the Federal Ministry of Justice and Consumer Protection and the Federal Ministry of the Interior); to all governments of the Bundesländer and to the Federal Bar Association, the German Lawyers' Association (DAV, Deutscher Anwaltverein) and the European Patent Lawyers' Association (EPLAW). The deadline for submitting views was originally 31 October. But the FCC confirmed that 'parties entitled to submit statements requested a prolongation of the deadline. Therefore, the deadline for submitting statements was prolonged until 31 December 2017.'

Now what does the German challenge mean for the time schedule and the moment the UP system could start functioning, if all hurdles are overcome? Several scenarios are possible:

1. The claim is not admitted

The FCC will first have to decide whether Stjerna's complaint will be admitted for a decision. Article 93a of the Act on the Federal Constitutional Court says a complaint must be admitted a) in so far as it has general constitutional significance, b) if it is appropriate to enforce the rights referred to in Article 90(1); (...). According to Article 90 (1): Any person claiming a violation of one of his or her fundamental rights or one of his or her rights under Article 20(4), Articles 33, 38, 101, 103 and 104 of the Basic Law by public authority may lodge a constitutional complaint with the Federal Constitutional Court.

According to an FCC spokesman, 'a date for decision has not been scheduled yet', but it will probably be somewhere in the first half of 2018. If the FCC decides not to admit the complaint, the German ratification procedure can resume, the *Bundespräsident* can sign and Germany can complete all formalities by depositing its instrument of ratification with the secretariat of the EU Council. After the so-called 'period of provisional application' of the UPCA, during which all preparations for the UPC will be completed, the court could probably open its doors in the second half of next year.

2. The claim is admitted

Another option is that the FCC admits the complaint for a decision. Most observers think the court will do this, as statements have been requested from the Federal Government and all the organizations mentioned above. 'While this alone doesn't mean that the admittance of the complaint is certain, it shows that the Court takes the complaint seriously and will therefore probably admit it for decision', according to the Hogan Lovells article. Henrik Holzapfel of McDermott Will & Emery, points at these 'amicus curiae briefs' as well in a recent podcast. Apart from this, Holzapfel says it is very remarkable and rare the FCC asked the German president not to sign the German ratification bill, and that this 'clearly indicates' the FCC judges may think the complaint has merits.

If the constitutional complaint is admitted indeed, it would take a while for the FCC to decide on the merits of case; 'until spring/summer 2018', according to the Hogan Lovells article. Holzapfel thinks it will take longer: he expects the FCC to decide to admit the complaint next spring and schedule a oral hearing no sooner than in the fall of 2018. Another observer is even less optimistic: 'Considering the speed with which this court (and this particular panel) has been deciding its cases this year, I would even find it optimistic to expect a decision next year at all. And there is force to the argument that complaints against the EPO, which have been pending for a couple of years now at the FCC, should be decided first.'

3. The FCC refers questions to the CJEU

A big question with regard to the time schedule: Will the FCC refer questions of European Law to the CJEU in a preliminary ruling procedure pursuant to Article 267 of the Treaty on the Functioning of the European Union? According to Hogan Lovells, a referral to the CJEU 'will - also in view of the considerable and complex number of Union law issues raised by the complainant - seriously delay the proceedings as a whole. Thus in the event of a referral, a final decision by the Constitutional Court will perhaps only be reached in 2019.'

Henrik Holzapfel thinks it is 'absolutely realistic' to think there will be a referral, 'because the European law implications of the case are not straightforward'. He estimates this will bring an additional delay of no less than two years, 'time for the CJEU to work with the details of the case'. That would mean a decision cannot be expected before 2020.

4. The FCC rules the claim has merit

Up to now, it has been assumed in this article that the FCC in Karlsruhe will eventually dismiss the challenge to the German UPCA ratification, which is by no means certain. If the FCC determines one or more arguments of the complaint have merit, this could kill the UPC project in its current form.

According to Henrik Holzapfel, two arguments are particularly strong. In the podcast he explains why he thinks the independence of the UPC judges is not guaranteed under the UPCA. He also thinks the involvement of the CJEU may not be strong enough. In a recent post on this blog, retired FCC judge and patent judge Professor Siegfried Broß argued EPC, EPO and UPCA have put at risk democracy, rule of law and human rights.

5. Brexit complications



Even a ruling dismissing the German complaint doesn't guarantee the future of the UPC, as it may lead to complications regarding the UK. The UK is well on its way to ratify the UPCA later this year - although this agreement will have to be substantially amended post-Brexit.

But what happens if the German constitutional complaint is rejected only after 29 March 2019, the day the UK formally exits the European Union (precisely two years after triggering article 50) and is no longer a UPCA/EU Member State under 'UPCA article 2(b): "Member State" means a Member State of the European Union'?

In that case, the UK's participation in the Unitary Patent system could only be secured by fundamentally changing the UPCA, which would mean complicated negotiations, further delays, or back to square one. If the EU decided to go ahead with the UPCA without the UK, an amendment to the UPCA at least in regard to London as a seat of the central division would be inevitable.

A recent Pinsent Masons report summarized the precarious situation: 'The most likely scenario for the Unitary Patent and UPC system to survive the current challenges is for UK ratification to take place prior to 29 March 2019 and for the German constitutional complaint to be rejected by the Karlsruhe court in time for Germany to ratify prior to that date too. At the moment, there is a lot of uncertainty over whether those two eventualities will materialise.'

Moreover, if the complaint is indeed unsuccessful but decided very closely to the Brexit date, it doesn't make much sense for Germany to allow a system to start which must be amended a few months later. In that case, it is much more likely and sensible that the UP system in its present form doesn't enter into force at all, and that it will be modified first to make it stable post-Brexit.

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