

Prof. Tilmann: FCC could have several reasons to reject as inadmissible complaint against UPCA

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It is questionable whether the German constitutional complaint against ratification of the Unified Patent Court Agreement addresses fundamental breaches of the German Constitution. And even if the Federal Constitutional Court thinks this is the case, it may reject as inadmissible the complaint for a decision. Prof. Dr. Winfried Tilmann of Hogan Lovells argues this in an interview with Kluwer IP Law.

In a recent GRUR article, which discussed the merits of the constitutional complaint, you said public interest in information about the case is enormous and the uncertainty among 'numerous inventors and companies in Europe, in the US, Japan, Korea and China, who expected the UPC to opens its doors soon' is considerable.

Indeed, the fact that an anonymous individual - later identified as Mr. Stjerna, although he has never admitted this publicly - has been able to delay and/or block the Unitary Patent project by silently filing a complaint, the content of which was unknown, with the Bundesverfassungsgericht (FCC): it took many by surprise. Do you think more openness in the procedure before the FCC (and from parties that have been asked for comments by the FCC) would have been preferable?

'The claimant had presented his line of thinking in several articles before including

hints on a possible complaint to the FCC. Therefore, his complaint did not come as a complete surprise. The FCC, in this case, has opened the proceedings by inviting comments from specialized organizations in the patent field, thereby providing at least some transparency. Public discussion on the complaint is possible.'

You expect the FCC not to admit the complaint for a decision, because of the FCC's restrictive interpretation of Art. 38 (1), clause 1, Basic Law, on which the complaint is based. 'There is no right to a judicial review which goes beyond the core of democratic principles, of decisions which have been made by a democratic majority', you pointed out (Es gibt keinen Anspruch auf eine über die Sicherung des Kerns des Demokratieprinzips hinausgehende Rechtmäßigkeitskontrolle demokratischer Mehrheitsentscheidungen). Can you explain why this may mean Stjerna's claim and the four concerns he has regarding breaches of the Basic Law will not be admitted?*

'On the basis of recent decisions of the FCC I expect the complaint to be dismissed as inadmissible (*unzulässig*) if it does not raise an issue of a fundamental breach of the German Constitution (Basic Law, BL) in the meaning of art. 79 (3) BL, but only an issue of a normal sort of conflict with the BL. Realizing this, the complaint does argue with a fundamental breach raising objections under the principle of Rule of Law (*Rechtsstaatsprinzip*). However, is it true that these objections do have such fundamental character?

In my mind it is not sufficient for the complainant merely to allege that his objections do have such fundamental nature. The FCC could reject the complaint as inadmissible because the objections, evaluated objectively, are lacking such rare quality. I personally have come to the result that they do not have this quality (and that they are unfounded).

Moreover, while in the past the FCC in cases of infringement of fundamental rights has admitted complaints by citizens under art. 79 (3) BL, it has not yet decided whether and to what extent the complaint of a citizen may be brought against a fundamental infringement of the general principles of the Rule of Law. The FCC (rightly) may be hesitant to enlarge the right to sue in that direction. Also, under that aspect, the complaint may be dismissed as inadmissible.'

Many observers think the complaint will be admitted for a decision, pointing at the fact that the FCC has requested comments and views from so many parties: the

German government, the Bundesländer and a series of legal associations, for instance.

'The FCC may be tempted to write history and enlarge the right to sue for the citizen in the field of the Rule of Law. Such landmark decision, however, would probably not be made by the chamber in charge of the complaint, but by the full 2nd Senate of the FCC. Again, the reasons for the complaint do not have the fundamental character which would call for a landmark decision.'

Could you briefly discuss the four reasons brought forward for a fundamental breach of the Rule of Law?

'First, the complaint raises the question whether Parliament should have decided by a two thirds majority. This argument may only be successful, if the FCC accepted a fundamental breach of the Rule of Law. According to a recent FCC decision the argument may not be raised regarding a normal conflict with the Constitution.

Secondly, the complaint criticizes the procedure to elect and re-elect judges, especially criticizing participation of lawyers in the deliberations and decisions of the Advisory Committee and criticizing that there is no appeal in case a judge is removed from office. An extensive research by EPLA has shown: The election and reelection procedure is squarely within the practice regarding international courts. An appeal of a judge who has been removed from office may be introduced by a simple decision of the Administrative Committee.

Thirdly, the complaint argues that the UPC Rules of Procedure have no democratic basis. However, all major rules of procedure are contained in the UPCA itself leaving only the details to the Rules of Procedure. The draft UPC Rules of Procedure were known to Parliament when deciding on the law implementing the UPCA.

Fourthly, the complaint criticizes the rules on the recovery of costs by the successful party as disadvantageous for SME. Presently such rules exist only as a draft awaiting a decision of the Administrative Committee after the beginning of the preliminary application. The draft is the result of a compromise between different national systems.

In my opinion, all four arguments are not founded and, certainly, do not raise

questions of the fundamental character required by art. 79 (3) BL.'

Mr. Stjerna has also claimed that the UPCA violates Union Law. Even if his complaint will be admitted for a decision, you think these claims will neither succeed nor be referred to the CJEU. Can you explain?

'The FCC has decided that a constitutional complaint is not admissible against a law arguing that this law infringes Union Law**. The FCC's argument is that the TFEU has been incorporated into German law by a simple law (not by a law of constitutional character). Therefore, a new German law containing matter inconsistent with Union law would raise only a conflict with a simple law, not with the Constitution.

Moreover, the four reasons put forward by the complaint to support the assertion of a conflict with Union Law have already been decided by the CJEU in Opinion C-1/09 and in the 2nd Spanish action or are so clearly unfounded that a referral to the CJEU is not necessary. For these subsidiary arguments I refer to my article in GRUR.' (Winfried Tilmann: Das europäische Patentsystem – Stopp vor dem Ziel? ([subscription](#)))

* *BVerfG 21. Juni 2016 – 2 BvR 2728/13*

** *BVerfG 04. November 2015 – 2 BvR 282/13*

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