

Stjerna: Constitutional complaint against Unified Patent Court Agreement will be admitted

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The fact that the German Federal Constitutional Court (BVerfG) requested the Bundespräsident not to proceed with ratification of the Unified Patent Court Agreement indicates that the complaint against the UPCA will be admitted for a decision. This is one of the observations of Dr. Inge Björn Stjerna, the Düsseldorf based IP specialist who is behind the constitutional complaint and who published an article about the case earlier this month.

Stjerna – who has been widely reported to be the complainant, but never publicly admitted this – writes that the BVerfG can 'prohibit the Federal President by a provisional order from executing the ratification legislation as long as the constitutional complaint has not been decided on the merits'. This is subject mainly to four conditions, according to Stjerna, one of them being that 'the proceedings on the merits must be admissible' (...).

This is 'special insofar as here an organ of one state power – the BVerfG as part of the judiciary – would have to prohibit that of another state power – the Federal President as part of the executive – from carrying out an official act, i. e. interfere with its competences. In view of the tense relationship with the principle of the separation of powers, such interference is sought to be avoided, mostly through the aforementioned consensual suspension of the ratification procedure.' But it is 'obvious that such suspension can only be considered if the conditions for issuing a provisional order are fulfilled', according to Stjerna. He points out something else as well: 'as a rule an inadmissible or obviously unfounded constitutional complaint is not served on those entitled to comment', as has happened in the UPCA case.



'Inadmissibility would at least be surprising', he concludes. And he has a third argument for this: 'A formal decision [on admissibility] is usually made only if acceptance is rejected, normally within a few weeks after receipt of the complaint. There is no isolated decision on acceptance; rather, the absence of said rejection decision usually allows the conclusion that the complaint has been accepted for a decision.'

Own profit

In his article, Stjerna discusses various issues concerning the procedure. He criticizes, for instance, the impression that was created that many organisations were asked by the BVerfG to submit comments. This was their own initiative, according to Stjerna:

'In constitutional complaint proceedings, there are necessary participants (...) which must always be given the opportunity to submit comments, as well as specialist third parties, which the court can grant the opportunity to submit comments (...). Presently, all specialist third parties except BRAK and DAV have asked the court to be given such opportunity. The impression caused by some of these third parties that the highest German court had approached them with a request for a statement is just as wrong.'

Stjerna criticizes the content of the comments that were submitted: 'The fact that the leading German UPC protagonists are represented in prominent positions in more or less all of the organisations that have asked for and received an opportunity to submit comments and that their comments are therefore by no means unbiased was, of course, not disclosed to the court. (...)

The idea that it will be possible to influence the court in their favor by means of coordinated comments under the guise of organisations says everything about the attitude of mind of the persons behind them. (...) It is to be hoped that the highest German court will not be influenced in its decision by a small group whose interest in the UPCA lies primarily in their own profit.'

Impression of imbalance

The paragraphs Stjerna dedicates to the contact (of 'the complainant') with the BVerfG give an informative impression of what's happening behind the screens of the FCC. Stjerna isn't positive: '(...) This applies, first of all, to the fact that the court does not provide any information about the proceedings and their expected course even to the complainant, who is currently the only party to the proceedings. This is the case even for trivial questions like, for instance, the number of third party statements received by the court. When contacted by phone, the responsible registry brusquely refused providing information on this point, although each party to the proceedings is entitled to information on the content of the court file already from its right to file inspection (...).

The complainant had also suggested the publication of a press release shortly after filing the complaint with the BVerfG [end of March 2017], but the court saw no reason to do so. Obviously, this attitude was later changed in view of the number of inquiries about the proceedings.

Generally, the impression of a certain imbalance in treatment is hard to resist. Requests submitted by external third parties appear to be answered within days, while vis-à-vis the complainant even the simplest procedures, such as granting access to the file or forwarding the statements on the proceedings, take months to complete.'

Political considerations

More generally spoken, Stjerna has his doubts about the functioning of the BVerfG, whose composition is influenced by political agreements: 'How independent will be the examination by judges, who are appointed under political considerations, in this legislative project, which was highly desired politically across party lines and passed with positive knowledge of all constitutional problems? Skepticism seems justified. Against the background described above, it would not come as a surprise if the BVerfG made its contribution to the political agenda and waved through the ratification of the UPCA – on time for the "Brexit" talks between the EU and the British government – by the end of November.'



It is surprising that Stjerna apparently thinks the constitutional complaint may be decided as soon as next month. This is contrary to the opinion of many other observers, who think a decision cannot be expected any time soon – and the chances for the Unitary Patent system to launch before the Brexit are zero.

Stjerna has another reason to expect a decision fast, which clearly shows his conviction that the influence of supporters of the UP system on legal and political decision making is enormous. 'Prof. Tilmann is co-editor of a 1500-page commentary on the UPCA which has been announced since 2016 and is to be published by C. H. Beck. While the announcement had always been made with an open publication date, this has now been determined, most recently to the 43rd calendar week, commencing on 22/10/2018. Would C. H. Beck put the commentary into print and make the associated considerable investment if it had to fear not being able to later on sell the book as a result of a decision by the BVerfG against ratification of the UPCA? (...) is the outcome of the proceedings already known in certain circles, even before the BVerfG has announced its decision? If this were the case, the significance of the ensuing state political implications could hardly be overestimated. Or are all these just once more astonishing "coincidences", as they have already been repeatedly observed in the context of the European patent reform?'