

# Reactions to ruling FCC in case Unified Patent Court: ‘positive’ and ‘great disappointment’

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“Despite the fact that the judgement will result in further delay the preparatory work will continue, while the judgement and the way forward is further analysed.” Within hours the Preparatory Committee of the Unified Patent Court had published its reaction to the ruling of the German Federal Constitutional Court in the complaint against the ratification of the UPC Agreement.

In the English language press release, explaining the decision, the FCC announced: “The Act of Approval to the Agreement on a Unified Patent Court (“the Act of Approval”) to confer sovereign powers on the Unified Patent Court is void. In its outcome, it amends the Constitution in substantive terms, though it has not been approved by the Bundestag with the required two-thirds majority.”

The constitutional complaint was filed in March 2017, when the UPC bill had already been approved by both chambers of the German parliament. It was yet another blow for the UP system after the Brexit vote of June 2016. At the request of the FCC, German Federal president Frank-Walter Steinmeier refrained from signing the bill, thereby halting the ratification process in Germany.



The clarity the FCC has given today in its judgement led to optimism in some circles, and to great disappointment in others, as is shown by the reactions Kluwer IP Law gathered.

## Europarechtsfreundlichkeit

**Wouter Pors**, partner of Bird & Bird a long-time supporter of the Unitary Patent project, wrote: “Today the German Constitutional Court (*Bundesverfassungsgericht*) ruled that the German ratification act for the Unified Patent Court Agreement (UPCA) is void, because only 35 out of 709 members were present for the vote, which required a majority of two thirds of the members of parliament because the UPCA forms a material change to the German Constitution as it transfers jurisdiction.

The Court also ruled – apparently unanimously – that the other complaints are inadmissible. These relate to the fact that judges are not appointed for life but only for 6 year terms and the procedure for their appointment, the more substantive complaint that there would be an insufficient justification for interference with the German Constitution and the complaint that the UPCA would be in violation of EU law. Obviously, those complaints could have constituted a much larger problem for the UPC, as the first two would require a revision of the UPCA and the last one, if awarded, could not have been overcome without additional EU legislation.

According to the Court a violation of EU law is not automatically a violation of the German Constitution, even not under the principle of “European law friendliness” (*Europarechtsfreundlichkeit*). The Court also states that the UPC can be regarded as part of the program for the integration of the EU and can be seen as a substitute for EU law. The German Constitution doesn’t require that sovereignty can only be transferred to EU institutions.

Although it is unfortunate that the ratification act has been declared void, it is good news for the UPC that the other complaints have been declared inadmissible, which means that we now do have certainty on all issues raised before the German Constitutional Court.”

A more extensive reaction can be found on the [website of Bird & Bird](#).

**Stolmár & Partner IP** from Munich wrote: “Interestingly, the Court dismissed the complaint insofar as it claimed that the UPCA violates fundamental democratic rights and the principle of separation of powers. While the respective part of the complaint was deemed to be inadmissible and thus not discussed as to its merits, the court nonetheless hints that the appointment of judges by an administrative council appears legitimate. Likewise, the court does not seem to be concerned with the fact that the administrative council will be responsible for defining the rules of procedure before the UPC.

So, where does this leave the UPC? Actually, not in a bad position. (...) Of course, with the current corona crisis ongoing, the UPCA won’t be the top priority for some months to come. In addition, one question remains: will the other member states still go forward with the UPC, despite UK having withdrawn from the project? But overall, we take this decision rather positively.”

## EPLIT

President **Koen Bijvank** of the European Patent Litigators Association (EPLIT) doesn’t feel the same way:

“Today’s decision of the German Constitutional Court is a great disappointment. After the recent announcement of the UK that it no longer intends to participate in the UPC, the project now suffers another severe setback.

What makes the decision particularly disappointing is that it is on a formal issue, and not a substantive one. Although it may theoretically be possible that the Bundestag quickly votes on the legislation again, the political balance in Germany has shifted and it is not guaranteed that there will be a 2/3 majority in favour of the UPC. Even more importantly, the world has changed and all governments have much more important and urgent topics to deal with. Without the UK, the UPC Agreement will have to be renegotiated and therefore I do not consider it likely that we will see any progress on the project in the next few years.

All this means that it is business as usual for patent litigators across Europe. Since the Brexit referendum the field has adjusted to a world in which a UPC became increasingly unlikely. The Dutch jurisdiction has shown healthy activity over the past few years and I expect the coming years to be no different.”

**Luke McDonagh**: “The project was already reeling from the blow of the the U.K. decision to not participate. With the BVertG ruling the UPC project has taken another hit – and it may be a fatal one. In the midst of the Covid-19 crisis it is unlikely German legislators will prioritise the question of whether German ratification can now be salvaged after the BVertG ruling. A rethink of the entire UPC May be inevitable.”

**JUVE Patent** wrote: “It is now unclear if the decision will be the end of the patent court. The Bundestag can now save the situation by voting on the Act again with a two-thirds majority. This could again significantly delay the UPC process. Organising a quorum and a two-third majority in the context of Coronavirus will be a major challenge. A failure of the project is thus also possible.”

**IP Watchdog**: “The likelihood therefore is that this represents the end of the UPC project, or at least a lengthy delay. The existing system whereby European patents are enforced separately in each member state will continue for the foreseeable future.”

**WIPR** investigated whether the decision could be ‘a boon for UK patent litigation’. It wrote: “The Law Society of England and Wales has claimed that the potential delay to the implementation of the UPC (or its ultimate death) could give the UK time to mitigate the risks of not participating in the system.”

## Only a formal issue?

In the meantime, there have been several reactions, among other from MN below a [post on this blog earlier today](#), in which it is pointed out that the constitutional complaint is upheld by the FCC not only because of the formal issue of the parliamentary vote, which has drawn most of the attention, but that there may be substantive issues as well:

**MN**: “Last paragraph [paragraph 166, ed]: “*Soweit Anhaltspunkte dafür vorliegen, dass die Festschreibung eines unbedingten Vorrangs des Unionsrechts in Art. 20 EPGÜ gegen Art. 20 Abs. 1 und Abs. 2 in Verbindung mit Art. 79 Abs. 3 GG verstößt ... abschließenden Entscheidung kann vorliegend jedoch abgesehen werden, weil sich die Nichtigkeit des EPGÜ-ZustG bereits aus anderen Gründen ergibt.*” I read this to state that the unrestricted primacy of Union law under to Art.20 UPCA would most likely NOT pass constitutional muster. Hence, even if UPCA’s implementation legislation would be submitted again and pass this time with the required majority, viability would still be doubtful.”

The ruling of the FCC will undoubtedly lead to more discussion and analysis in the upcoming period and it will be interesting to see what the next steps of the UPC Preparatory Committee will be.

Today’s reaction from the man who filed the complaint against the UPCA, Düsseldorf patent lawyer Ingve Stjerna, was very short and neutral. On [his website](#) he wrote: “With decision of 13/02/2020 (German language), the BVerfG allowed the constitutional complaint, declaring invalid the Act on the Agreement of 19/02/2013 on a Unified Patent Court (also cf. the court’s [press statement](#) of 20/03/2020).”