

The German Law Ratifying the Agreement on a Unified Patent Court is Void

Kluwer Patent Blog
March 20, 2020

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Please refer to this post as: Thomas Musmann, 'The German Law Ratifying the Agreement on a Unified Patent Court is Void', Kluwer Patent Blog, March 20, 2020, <http://patentblog.kluweriplaw.com/2020/03/20/the-german-law-ratifying-the-agreement-on-a-unified-patent-court-is-void/>

By Hetti Hilge/Dr. Simon Klopschinski

Today the German Federal Constitutional Court (FCC) has declared the German law ratifying the Agreement on a Unified Patent Court (UPC Agreement) to be unconstitutional and void ([see here](#)).

On 31 March 2017 a private person filed with the FCC a constitutional complaint against the German act of parliament approving the UPC Agreement. The complaint was in substance based on the argument that the approval of the UPC Agreement was an amendment of the German constitution, the so-called 'Basic Law', which requires a two-thirds majority in parliament. In case of the statute on the UPC Agreement this requirement had not been fulfilled. In fact only 35 members of parliament were present during the vote on the statute in the Federal Diet. Due to the pending constitutional complaint the Federal President neither executed the statute approving the UPC nor notified the ratification to the European Commission pursuant to Article 84(3) of the UPC Agreement. During the proceedings before the FCC the Federal Government, the Federal Diet, the Federal Law Society (Bundesrechtsanwaltskammer), the German Bar Association (Deutscher Anwaltsverein), the European Patent Office, the Deutsche Vereinigung für gewerblichen Rechtsschutz und Urheberrecht (GRUR e.V.), the European Patent Lawyers Association, and the European Patent Litigators Association filed *amicus curiae* briefs which all argued in favour of the constitutionality of the German statute approving the UPC Agreement.

In today's decision the FCC upholds the constitutional complaint. The decision is in substance based on Article 23 (1) of the Basic Law which, *inter alia*, provides that "the establishment of the European Union, as well as changes in its treaty foundations and comparable regulations that amend or supplement this Basic Law or make such amendments or supplements possible" require approval by a two-third majority in both chambers of parliament, i.e. the Federal Diet and the Federal Council. The FCC regards the act ratifying the UPC Agreement to be an equivalent to an amendment of the treaties establishing the European Union. Since the Federal Diet did not pass the statute with the required majority, it did not comply with Article 23(1) of the Basis Law and therefore the statute is void.

In its decision the FCC does not say that the UPC Agreement as such is unconstitutional. Therefore, the German legislature could theoretically pass a new act ratifying the UPC Agreement, this time complying with the requirement of a two-third majority pursuant to Article 23(1) of the Basic Law. However, due to Brexit and the UK government's expressed intention not to participate in the UPC, the agreement may require new considerations and revisions. In view of that, and the new challenges caused by the Corona pandemic, it seems unlikely that in the near future the UPC Agreement will be a top priority for the German parliament.