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What is behind the FCC Judgment?

Thorsten Bausch (Hoffmann Eitle) · Sunday, March 22nd, 2020

By now, the decision by the Federal Constitutional Court (FCC) voiding the German law approving the ratification of the UPC Agreement has gone viral in the patent world, though fortunately not pandemic. Most of the usual suspects have already taken position for one side or the other, so I thought I might likewise throw my five cents in.

It seems to be common ground now that the UPCA will not come any time soon, if at all. This is because it would not help, in view of the UK's imminent departure from the EU and the UPCA, if the Bundestag took another vote on the same approval bill. The UPCA must be amended anyway; the question is just how (and when). Therefore, whether the FCC's decision contributed to a further delay ("at least 5 years", says Willem Hoyng here) or whether the need to renegotiate the UPCA in view of the UK's intention not to join would anyway have caused the same or a similar delay, is a matter of speculation and may be left undecided here. Also the fact that the UPC Preparatory Committee seems to be determined to continue its preparations as it did for the past seven years is probably no surprise either; what else should the Preparatory Committee do? Another question is whether it was really necessary to defiantly announce that their work will move forward using all available resources to keep the momentum even under the current unprecedented challenges with the COVID-19 outbreak. I find this almost touching (which momentum?); but for sure, the preparatory committee is not to blame for the current standstill.

In my opinion, the decision is clearly a slap in the face of the German Ministry of Justice and the Legal Committee of the German Bundestag, who underestimated the gravity of this law. When they put the approval bill to the final vote, it was very late in the day; most MPs had already left and only about 35 of them, mainly members of the legal committee, remained in the plenary hall. It may be human but it is still pretty amazing that none of these specialists – I assume that most of them were lawyers or at least had a legal education – seem to have bothered to determine the presence of the required quorum, even though the accompanying letter by the Chancellor cautioned them that this bill transfers sovereign rights according to Art 23(1) Basic Law, which directly refers to Art 79 and the 2/3 quorum. Perhaps they thought that the matter was so uncontroversial – in the end, the decision was even unanimous – that worrying about a decision quorum is just a needless formality, so why bother? At least now we know why. The simple reason is that we have a Basic Law, whose Articles 23 and 79

explicitly and in no uncertain terms demand a majority of two thirds **of the members of the Bundestag** (and the Bundesrat) for decisions transferring sovereign powers of the Federal Republic of Germany to the European Union. And those two thirds were simply not in the room. Thus the approval law had not passed Parliament in the orderly way commanded by the constitution and was therefore invalid. Consequently, the desired transfer of sovereign rights would have been ineffective and void, even if the President had executed the law and the UPC had started its operation.

That the law was passed without the requisite quorum of MPs has long been known and was never in dispute. A success of the Constitutional Complaint for this simple reason could (or better: should) thus never have been excluded, and was always a realistic possibility. This was also recognized as early as 2017 by at least some observers. One should rather wonder why it took the FCC almost three years to come to this conclusion.

This brings us to the core of the legal dispute, which was never really about whether there was a problem with the legitimacy of the ratification law (there was!), but whether Dr. Stjerna was actually *entitled* to contest this very point by a constitutional complaint. Both the statutes and the established jurisprudence of the FCC have set up very high hurdles for the admissibility of constitutional complaints by private individuals. Some of them transpire also from the present judgment – in the end, Dr. Stjerna prevailed only with one of his four attacks; the other three were declared inadmissible for "lack of substantiation". And he nearly lost also the fourth one: in the end, only five of the eight judges voted for his right to complain, while a minority of three expressed concerns in this regard and would have preferred that Dr. Stjerna's constitutional complaint would have been thrown out in its entirety. It was a close case, which was intensely discussed and decided in the end by eight very busy judges – this is certainly part of the explanation why it took so long.

What were the key reasons prompting the court to reach its conclusions? I am no constitutional lawyer and the decision may speak for itself. But to cut a long decision short, my overall impression was that the majority of the 2nd Senate was of the view that the Bundestag's breach of Art 79 Basic Law was so blatantly clear that the transfer of Germany's sovereign rights to the UPC by this approval law would have been simply ineffective. Consequently, any decision by the UPC about (patent) rights with effect in Germany would have been "ultra vires", because the UPC was not effectively empowered by the democratic institutions of Germany to take such a decision. And this was too much to tolerate (or risk) even for the FCC. They may or may not have liked the fact that this matter was brought up by a constitutional complaint of an individual, but they probably thought that firmly closing their eyes against a law passed by such an unconstitutional process would not score well for the FCC as the appointed "guardians of the constitution". Hence the majority of the judges of the 2nd Senate invented a new legal construct, i.e. the right of a citizen to contest and have the FCC control (also) the formal aspects of conferral of sovereign rights – *formelle Übertragungskontrolle* (formal transfer control). That is, as the judges put it in their press release,

> in order to safeguard their rights to influence the process of European

> integration, citizens, in principle, can also claim that sovereign powers be conferred only in the ways provided for by the Basic Law in Art. 23(1) second and third sentence in conjunction with, Art. 79(2) BL. This is because competences conferred on another entity under international law are usually "lost" and cannot easily be regained by the legislator.

The dissenting opinion took issue with this expanded right of citizens to a formal transfer control. They mainly feared that this instrument might be misused in the future and result in many more admissible constitutional complaints, which might actually impede the European integration process. If I understood their opinion correctly, they also thought that an individual's right to democracy under Art. 38 (1) BL cannot be infringed per se by a decision of the very same democratic body mentioned in this Article, i.e. the Bundestag, even if this decision is unconstitutional and thus void. I am not sure that I would follow this view (and the majority did not), but I accept that it is also a reasoned, benevolent and clearly not outlandish opinion.

Turning now back to the majority opinion, they clearly had much less of a problem to strike out Dr. Stjerna's other three attacks, i.e. (i) democratic deficits and deficits in rule of law with regard to the regulatory powers of the organs of the UPC; (ii) that the judges of the UPC are not independent nor do they have democratic legitimacy, and (iii) irreconcilability of the UPCA with Union law. These attacks were considered inadmissible for lack of substantiation that the complainant is personally affected in his right to democratic representation under Article 38(1) by any of this. In particular ground (iii), which had played a major role in Dr. Stjerna's constitutional appeal, was pretty categorically rejected using the argument that a violation of EU Law by the UPCA is not tantamount to a violation of an individual's basic right as protected by the German Basic Law. Wrong court, wrong means of redress – that's at least my impression of the FCC's position in this regard. But make no mistake: if the UPC ever came into being and were to issue its first couple of judgments, then I would not be surprised if the same or similar arguments were (again) be advanced against the legitimacy of the court and compliance of the UPCA with Union Law. These matters would then have to be discussed and decided under Union Law, firstly by the UPCA and finally (likely) by the CJEU. As we say in Germany: *Aufgeschoben ist nicht aufgehoben*.

Finally, there is also the interesting paragraph 166 at the end of the decision that has already provoked several comments, particularly by UPC-sceptical colleagues who view it as another writing on the wall for the UPCA in the future. Here is my English translation of what the FCC wrote:

> 2. Insofar as there are indications that the establishment of unconditional primacy of Union law in Article 20 UPCA violates Article 20 (1) and (2) in conjunction with Article 79 (3) of the Basic Law, the Federal Constitutional Court will in principle comprehensively review the measure in question for its compatibility with Article 20 (1) and (2) in conjunction with Article 79 (3) of the Basic Law (cit. omitted). However, it is not necessary to give a final decision thereon in the present case, because the

> invalidity of the UPCA Approval Law already results from other reasons.

What does this mean? For background, Article 20 BL states the following:

> (1) The Federal Republic of Germany is a democratic and social federal state.
>
> (2) All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive and judicial bodies.
>
> (3) The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice.
>
> (4) All Germans shall have the right to resist any person seeking to abolish this constitutional order if no other remedy is available.

EU Law and the UPCA will probably not question any of these principles. If my understanding is correct, the FCC might rather have a problem with the (unconditional) "primacy" of EU Law, which the UPC "shall respect" according to Article 20 UPCA. If EU Law is supposed to have unconditional primacy, even relative to the Basic Law (i.e. the German constitution), then it is at least arguable that a transfer of sovereign rights to an international (EU-related) body may violate the unalienable core of the German constitution, which is enshrined in Article 79(3) BL:

> Amendments to this Basic Law affecting the division of the Federation into Länder, their participation in principle in the legislative process, or the principles laid down in Articles 1 **and 20** shall be inadmissible.

Thus, we will have to wait and see whether this paragraph 166 was only a *Leerformel* (vacuous phrase), informing Dr. Stjerna and the public in a very neutral way that there was no need to examine this point in the present case (different than in the Bank Union case, but no problem was found there), or whether the FCC indeed wanted to hint to a further door through which future constitutional complaints could enter.

And perhaps, just perhaps, this paragraph can also be seen as an ominous sign for the European Patent Office where at least I feel that "specific judicial bodies" exercising "state authority derived from the people", as required by Article 20(2), and only bound by law and justice (Article 20(3)), as well as a "constitutional order" binding the legislative power (including the Administrative Committee) are absent. The decisions of the FCC on the four constitutional complaints relating to insufficient legal protection against decisions of the Boards of Appeal, which is closely related to the question whether the Boards of Appeal are (independent) courts, may now be awaited with even more tension.

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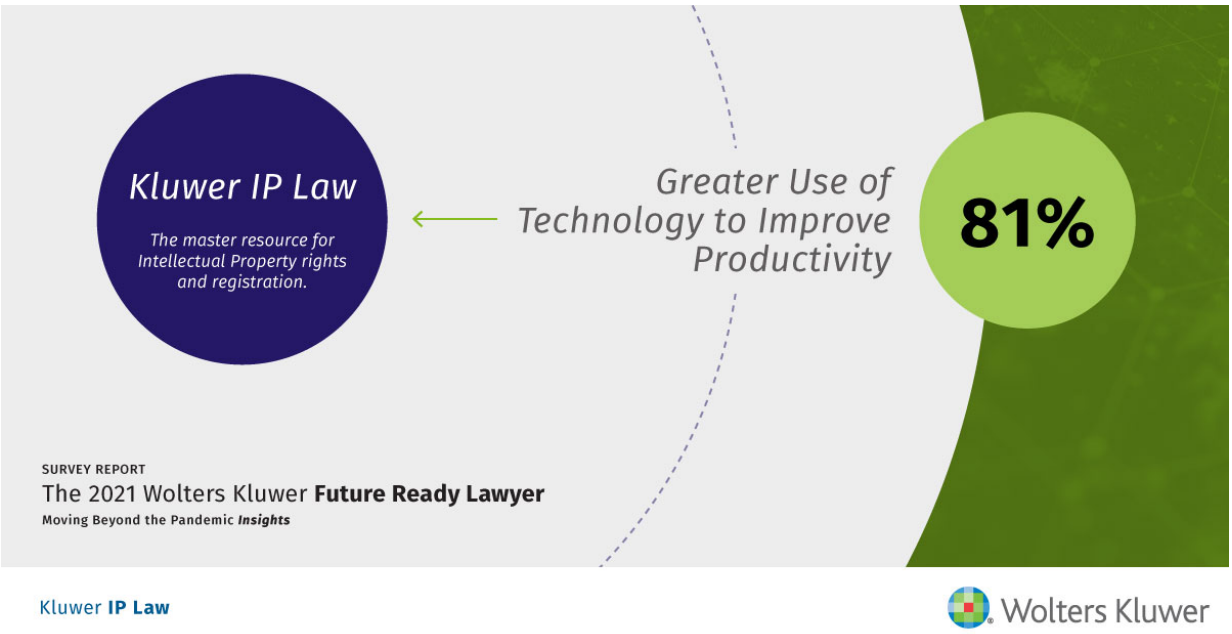

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