

Primacy of EU Law over National Law - German Federal Constitutional Court Judge Comments On Unified Patent Court Decision

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by Dr. Simon Klopschinski

On February 13, 2020 the German Federal Constitutional Court decided that the German law ratifying the Agreement on a Unified Patent Court is void (see [here](#)). In the meantime the Constitutional Court has issued another sentence which deals with the European Central Bank's bond-buying programme (see [here](#)). On May 13, 2020 the daily newspaper Frankfurter Allgemeine Zeitung (FAZ) published an interview with Judge Huber, who was involved in both proceedings as judge rapporteur, on the ECB decision, in which Judge Huber also commented on the court's UPC verdict.

In its ECB decision the Constitutional Court decided that it was not bound by a previous CJEU ruling. Therefore, the European Commission is currently thinking about initiating infringement proceedings against Germany under Article 258 TFEU. When asked by FAZ on this issue Judge Huber made the following comment on the primacy of EU law and the court's UPC verdict:

„Die EU-Kommission prüft ein Vertragsverletzungsverfahren. Ist das nicht unausweichlich? Unausweichlich ist das keineswegs. Vielmehr hat die Kommission insoweit einen politischen Ermessensspielraum. Dabei sollte sie zur Kenntnis nehmen, dass Deutschland und die meisten anderen Mitgliedstaaten der Europäischen Union gar nicht hätten beitreten dürfen, wenn es den vom EuGH angenommenen schrankenlosen Anwendungsvorrang des Europarechts vor dem Grundgesetz gäbe. Das haben wir auch in der Entscheidung zum Einheitlichen Patentgericht im Januar noch einmal deutlich gemacht.“

(source: Frankfurter Allgemeine Zeitung, May 13, 2020, p. 2, see [here](#))

Translation:

„The EU Commission is examining an infringement procedure. Is that not inevitable? It is by no means inevitable. On the contrary, the Commission has political discretion in this respect. In doing so, it should note that Germany and most other Member States of the European Union would not have been allowed to join the European Union at all if the unrestricted primacy of European law over the Basic Law, as assumed by the CJEU, would exist. We made this clear once again in the decision on the Unified Patent Court in January.“

In its decision of February 13, 2020 the Constitutional Court had left open the question whether the unconditional primacy of EU law, as stipulated in Article 20 of the UPC Agreement, violates the German constitution, even though the court held that there may be indications for such a finding (see para. 166 of the decision).

Judge Huber's comment in the FAZ reaffirms that the Constitutional Court's reservations against the UPC Agreement are not limited to the formal errors which were made when passing the German ratification act in parliament. Rather, it appears that the court's concerns also relate to the substance of the UPC Agreement. Thus, if the second attempt to ratify the UPC Agreement is confined to organizing the required two-thirds majority in parliament (and some formal rectifications due to Brexit), the fate of the UPC Agreement in another constitutional complaint before the Federal Constitutional Court will remain uncertain.