

New draft bill presented in Germany for ratification of the UPCA

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The German government has been acting fast since the Federal Constitutional Court declared void the German ratification of the Unified Patent Court Agreement in March. It submitted a new draft bill to ratify the UPCA last week, which was sent for consultation to associations and other institutions. Their deadline for filing opinions is three weeks.

Quite a few observers considered the Constitutional Court's decision last March as a decisive blow to the Unitary Patent project, which had been delayed by years already, not only because of the constitutional complaint filed by patent lawyer Ingve Stjerna in March 2017, but also by the Brexit and more recently the statement of the government of Boris Johnson that the UK is no longer interested in participating in the Unitary Patent system – despite statements to the contrary from previous governments.



But less than a week after the FCC decision, the German minister of Justice and Consumer Protection, Christine Lambrecht, issued a [press release of 26 March 2020](#), stating: "I will continue to work to ensure that we can provide the European innovative industry with a Unitary Patent and a Unified Patent Court. The Federal Government will carefully evaluate the decision of the Federal Constitutional Court and examine ways to remedy the formal deficits the FCC found during this legislative period."

Since then, apparently work has been done. Taking into account the short consultation period, it now seems possible re-ratification of the UPCA in both chambers of parliament could be completed this year.

In the [text accompanying the new draft proposal](#), the German Ministry of Justice and Consumer Protection explains that the FCC declared void the UPCA only on a formal ground: it wasn't approved by a two-thirds majority. The Ministry reasons that this is the only problem to be solved, as three substantive points of the constitutional complaint were held inadmissible: ratification must be done with the required two-third majority.

The fact that the UPCA will have to be amended due to the UK's exit from the UP project – London is mentioned as the venue for one of the court's branches of the central division, for instance – is apparently not seen as a problem. Winfried Tilmann, consultant at Hogan Lovells and one of the court's founders, [told JUVÉ Patent](#) this can be discussed once Germany has ratified the UPCA: "It would be better, once the provisional application phase is under way in accordance with the protocol, to determine in the competent administrative committee the inevitable legal consequence of the loss of London, namely that the tasks of London will be provisionally performed by the remaining central divisions."

Despite the German diligence, several problems are looming however. New constitutional complaints, to begin with. Immediately after the FCC had declared the German ratification procedure void, Ingve Stjerna told JUVÉ Patent: "The court did not even rule on the substantive complaints and even hinted at further constitutional deficits of the agreement. (...) If, despite these problems, the German government continues to adhere to the Convention [the UPCA, ed.], a new constitutional review by the Constitutional Court will have to be considered, possibly of a complaint from a company."

President Benjamin Henrion of the Foundation for a Free Information Infrastructure, also [announced](#) his organisation "will go fundraising to file a second constitutional complaint in Germany against EU-wide software patents via the backdoor of the Unitary Patent Court."

As [reported here](#), a possible ground for a challenge is that the UPCA's provisions that establish the primacy of EU law violate the German constitution. Complaints before the FCC, if materialized, could lead to further delays for the Unitary Patent system, although it isn't sure the constitutional court will ask parliament or the German president to suspend activities concerning the UPCA pending a decision, as happened in 2017.

In the meantime, Alan Johnson, former partner of Bristows, raised an interesting question on Twitter: "So Germany is to ratify a treaty still naming London as the seat of the pharma CD! If this goes through and with the UK not yet having withdrawn its instrument of ratification (even if this is legally possible) does the UK automatically become a participant country?"

Precisely because of this issue, Patrick Breyer, representative of the Pirate Party in European Parliament, has [asked the European Commission](#) to confirm that Germany no longer has the right to ratify the UPCA, as according to EU case law, Member States must not enter into agreements with third countries that affect EU rules or alter their scope.