

# German draft UPC ratification bill in parliament, chance of new constitutional challenges

Kluwer Patent Blog  
October 9, 2020

Kluwer Patent blogger

Please refer to this post as: *Kluwer Patent blogger, 'German draft UPC ratification bill in parliament, chance of new constitutional challenges', Kluwer Patent Blog, October 9 2020, <http://patentblog.kluweriplaw.com/2020/10/09/german-draft-upc-ratification-bill-in-parliament-chance-of-new-constitutional-challenges/>*

Crucial months are ahead for the Unitary Patent project. In Germany the re-ratification process of the Unified Patent Court Agreement is progressing rapidly, but the threat of new constitutional complaints is looming.

Two weeks ago, the Bundesrat approved the UPC ratification bill. Yesterday, in first reading, the Bundestag referred the bill to the parliamentary committees (both the Committee of Legal Affairs and Culture will have their say) for discussion. A second decisive reading in the Bundestag is expected late October or early November. According to a report of *Juve Patent*, the UPC ratification should go through parliament in the slipstream of the discussion on the 2021 budget, "which means that a large number of members of parliament are guaranteed".

The re-ratification of the UPCA ratification bill is necessary because last March the German Federal Constitutional Court (FCC) declared the first ratification invalid, because it wasn't approved by the requisite two-thirds majority of the members of the Bundestag in 2017. Only 35 parliamentarians were present at the time.

It was a setback for the supporters of the UP system. The constitutional challenge, filed by Düsseldorf IP lawyer Ingve Stjerna in 2017, had caused three years of delay already and quite some observers thought the FCC's decision would be the final blow for the system. But less than a week later, the German minister of Justice and Consumer Protection, Christine Lambrecht, issued a **press release** stating she would "continue to work to ensure that we can provide the European innovative industry with a Unitary Patent and a Unified Patent Court."

## Entry into force

German ratification of the UPCA and the Protocol for Provision Application (PPA) means the Unitary Patent system can at long last be launched – although two more UPCA signatory states need to be found to approve or support the PPA, a protocol designed to ensure the smooth start of the Unified Patent Court by enabling parties to complete the institutional, organisational and financial preparations for the court.

The UPCA enters into force "on 1 January 2014 [!] or on the first day of the fourth month after the deposit of the thirteenth instrument of ratification or accession in accordance with Article 84, including the three Member States in which the highest number of European patents had effect in the year preceding the year in which the signature of the Agreement takes place (...)" (art. 89 UPCA)

The PPA enters into force "the day after 13 Signatory States of the Agreement on a Unified Patent Court including Germany, France and the United Kingdom, have either ratified, or informed the depositary that they have received parliamentary approval to ratify, the Agreement on a Unified Patent Court .. (art. 3(1) PPA). Thanks to article 3(1), Germany can help ensure there is enough time for the preparations, by delaying the formal deposit of its instrument of ratification of the UPCA as long as necessary.

## Complications

Supporters of the system hope the UPC can start functioning in the first half of next year, or "in a near future", as the Preparatory Committee stated. This is the uncomplicated schedule. However, various serious issues will have to be overcome before the UPC and Unitary Patent see the light of day. Legally, there have been many questions since the Brexit referendum of 2016 and more so since the July announcement of the British government to withdraw from this European patent system. For just one example see article 3(1) above: how can the PPA enter into force when it is explicitly stated in the PPA that the UK's approval or ratification is mandatory?

A hotly debated issue is the London section of the UPC's central division (mentioned in article 7 of the UPCA). Now that the UK is definitely out of the game, this division will have to be relocated and the Italian government and the IP sector and governors in Milan have been very clear they want it to go to this city. After the recent (online) meeting of the UPC Preparatory Committee, quite a vague statement was issued by the committee, whereas the Italian Ministry of Foreign Affairs announced the formal Milan candidacy to the seat of the UPC. In a press release it stated that the committee "approved a provisional redistribution of the competence of the London office between the existing offices in Paris and Munich, provided, however, that this is a short-term solution, pending the entry into force of the Agreement and that Italy can start, in agreement with the other signatory States, the procedure for amending the Agreement to include Milan as the third seat of the central Court division."

The first part of the Italian Ministry's statement – the temporary redistribution of the London competences to Paris and Munich – has been confirmed from various sides, but although the press release almost seems to state that Milan has already secured the London section, that is not the case. According to various sources, the Netherlands and France are interested in hosting the division as well.



These are just some of the issues that remain unclear. Experts and interest groups who were asked to take a stand on the draft UPC (re-)ratification bill expressed serious concerns about the uncertainties raising from the Brexit and the German constitutional challenge. They pointed out, among others, that the FCC – by declaring void the German UPC ratification on formal grounds – didn't have to go into detail about other possible issues, but seemed to hint in its judgment there is a problem with the unconditional primacy of EU law as provided for in article 20 UPCA. That could be contrary to the German constitution.

In an earlier post on this blog, "The German UPCA Ratification – at Schweinsgalopp towards Mautdebakel", Thorsten Bausch, partner of Hoffmann Eitle, lashed out at the German Ministry of Justice and Consumer Protection and the European Commission for rushing through and supporting the rapid re-ratification of the UPCA. "Politically, I would respectfully submit that this is just madness."

Still, it is clear there is a lot of support for the UP system. In July, BusinessEurope, Eurochambres, Orgalim and SMEUnited sent a joint statement to European Commissioner Thierry Breton for the Internal Market, calling "for the swift ratification of the Unified Patent Court Agreement and the entry into operation of the European Patent system as soon as possible". Breton himself has repeatedly said creating a "single European patent system" is one of his top priorities.

## New FCC challenges?

At the moment, the main risk for the future of the Unitary Patent system is that another constitutional challenge will be filed with the FCC. It seems quite certain this will happen. Half September, the Foundation for a Free Information Infrastructure (FFII) sent an open letter to the Bundesrat, raising objections regarding UPC ratification "as it carries the risk to violate 3 international agreements (VCLT, ECHR and TFEU) and the German Constitution." The FFII ends its letter warning: "If those points are not seriously addressed and the UPCA sent back for renegotiation, we will consider asking the German Constitutional Court to look again at those issues in a second Constitutional Complaint."

Besides the FFII, it is not unthinkable that a new constitutional challenge will be filed as well by Ingve Stjerna. Shortly after the outcome of the first challenge, he pointed out to *Juve Patent* that the Constitutional Court had not dealt with the content of his objections to the UPCA and said: "If, despite these problems, the German government continues to adhere to the convention, a new constitutional review by the Constitutional Court will have to be considered, possibly of a complaint from a company."

It is, at least to the author of this blog, not clear whether a second complaint would automatically mean the FCC would ask the German Bundespräsident to put the ratification procedure on hold, as happened when the first complaint was filed in 2017. The FCC declined to "provide any information on (...) legal issues or on any potential constitutional complaints that are intended to be lodged, but have not even been lodged yet."