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UPC – Finally some News from the German Federal Constitutional Court

Thorsten Bausch (Hoffmann Eitle) · Wednesday, August 16th, 2017

The [surprising request](#) by the German Federal Constitutional Court (FCC) to the German President to wait with his executing of the UPC ratification law, pending the outcome of a – heretofore unknown – constitutional complaint, has made many people wonder what is behind this constitutional complaint and on which alleged violations of the German Basic Law (i.e. our constitution) this complaint was based.

I therefore asked the FCC directly what is going on here, and today, finally, received the following answer (my translation):

“In terms of substance, plaintiff is essentially asserting a breach of the limits to surrendering sovereignty that are derived from the right to democracy (Art. 38 (1), clause 1, Basic Law). Primarily the following violations are asserted:

- breach of the requirement for a qualified majority arising from Art. 23 (1), sentence 3, in conjunction with Art. 79 (2) Basic Law;
- democratic deficits and deficits in rule of law with regard to the regulatory powers of the organs of the UPC;
- the judges of the UPC are not independent nor do they have democratic legitimacy
- breach of the principle of openness towards European law owing to alleged irreconcilability of the UPC with Union law.

The proceedings are pending; a specific date for the decision is presently not foreseeable.”

I am not a specialist in constitutional law and respectfully ask that my following comments be therefore taken with a grain of salt. But just to give a little more background, let me point out the following:

Article 38(1) clause 1 BL states that “Members of the German Bundestag shall be elected in general, direct, free, equal and secret elections.” The FCC has derived from this clause a quite general and far-reaching right to democracy (*Anspruch auf Demokratie*). The argument goes like this: If an organ of the EU administers its sovereign powers contrary to the Basic Law, this would vacate the constitutional right to elect representatives to the German Bundestag. Therefore, an

examination for compliance with the German Basic Law must be possible. This right to democracy is inalienable and must not be affected by Union Law.

Article 23(1) BL reads as follows:

(1) With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law. To this end the Federation may transfer sovereign powers by a law with the consent of the Bundesrat. 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, shall be subject to paragraphs (2) and (3) of Article 79.

Article 79(2) BL in turn relates to the possibility to amend the Basic Law and provides the following.

- (1) This Basic Law may be amended only by a law expressly amending or supplementing its text. In the case of an international treaty regarding a peace settlement, the preparation of a peace settlement, or the phasing out of an occupation regime, or designed to promote the defence of the Federal Republic, it shall be sufficient, for the purpose of making clear that the provisions of this Basic Law do not preclude the conclusion and entry into force of the treaty, to add language to the Basic Law that merely makes this clarification.
- (2) Any such law shall be carried by two thirds of the Members of the Bundestag and two thirds of the votes of the Bundesrat.
- (3) Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.

So it seems that Plaintiff argued that the German ratification law to the UPC is tantamount to a law that amends or supplements the Basic Law, or makes such amendments or supplements possible and hence is subject to paragraphs (2) and (3) of Article 79. If so, then a majority of two thirds of the Members of the Bundestag would have been necessary. However, when the ratification law was passed by the Bundestag, there were by far not enough members of the Bundestag present to satisfy this quorum.

If the constitutional complaint is successful on this point only, the German parliament would have to repeat the legislation process leading towards the ratification law and this time mind the requisite majority. This process could easily take a couple of months after the September 2017 election.

The second alleged violation of the BL is said to be based on democratic deficits and deficits in rule of law with regard to the regulatory powers of the organs of the UPC. I can only speculate that

this ground alludes to the structure and (relatively far-reaching) powers of the UPC administrative committee, which is/are quite similar to the structure and powers of the administrative committee of the EPO and which are at least indirectly subject to four pending constitutional complaints in regard to the EPO, as reported [earlier on this blog](#). Thus it seems that there is at least indirectly a connection between these cases.

The third alleged violation pertains to the perceived lack of an independent judiciary under the UPC. Perhaps (but this is my speculation based on [Prof. Bross' criticism to the EPO system](#)) this is related to the fact that the judges are only appointed for six years, with a re-appointment being possible, but not guaranteed (Art. 4 UPC Statute).

The fourth alleged violation seems to be substantially based on the argument that the UPC does not conform to EU law. We do not know more details, e.g. whether this argument has anything to do with the [Brexit](#) etc., but if this violation is seen as critical by the FCC for rendering its decision, I would think that it is very likely that the FCC will refer this particular question to the CJEU.

All in all, in view of the number and the complexity of the issues to be resolved by the FCC, I now consider it very unlikely that the UPC will be able to start in early 2018. More patience will probably be necessary, and perhaps much more.

For our German readers, the original information in German is reproduced below:

Der Beschwerdeführer macht inhaltlich im Wesentlichen die Verletzung der Grenzen für eine Übertragung von Hoheitsrechten geltend, die durch den Anspruch auf Demokratie (Art. 38 Abs. 1 Satz 1 GG) gezogenen werden. Vornehmlich werden die nachfolgend genannten Verstöße behauptet:

- Verstoß gegen das Erfordernis qualifizierter Mehrheit aus Art. 23 Abs. 1 Satz 3 in Verbindung mit Art. 79 Abs. 2 GG;
- Demokratische und rechtsstaatliche Defizite hinsichtlich der Rechtsetzungsbefugnisse der Organe des EPG;
- Mangelnde Unabhängigkeit und demokratische Legitimation der Richter des EPG;
- Verstoß gegen den Grundsatz der Europarechtsfreundlichkeit aufgrund behaupteter Unvereinbarkeit des Übereinkommens mit dem Unionsrecht.

Das Verfahren ist in Bearbeitung; ein konkreter Entscheidungstermin ist derzeit nicht absehbar.

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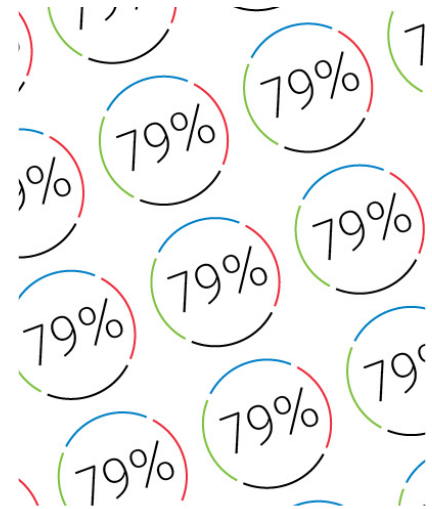
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