

German UPCA Ratification - Now We Have The Salad

Kluwer Patent Blog
March 5, 2021

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Please refer to this post as: Thorsten Bausch, 'German UPCA Ratification - Now We Have The Salad', Kluwer Patent Blog, March 5, 2021, <http://patentblog.kluweriplaw.com/2021/03/05/german-upca-ratification-now-we-have-the-salad/>

In my post "The German UPCA Ratification - at Schweinsgalopp_towards_Mautdebakel" on this blog, I cautioned the German Ministry of Justice and Consumer Protection against ignoring the apparent political and legal problems with Germany ratifying the Unified Patent Court Agreement (UPCA) with the same wording as it had before Brexit and before the Federal Constitutional Court's (FCC) first decision on this matter came out. Naturally, none of the bigshots in the Ministry or the Bundestag and Bundesrat has cared. So it happened what had to happen: a second constitutional complaint (actually, even two) and then "the same procedure as last year" - the FCC asked the President to wait with his signing of the Ratification Law, the President complied, and now the ratification law is back in the queue on the FCC's stack of cases. Now we have the salad, as we say in German - Mautdebakel II in full swing.

How will it evolve? Well, the FCC has just published its annual overview, i.e. a list of proceedings that it intends to decide in the course of 2021. It traditionally publishes this list in February of each year, and equally traditionally it is incapable of deciding even half of these cases by end of the same year. This has led to the unofficial name of this list, i.e. "Lügenliste" (Liar's List), which may be a bit harsh, but sometimes jokes are like this. Nonetheless, while the list is not necessarily indicative of the cases that *will* be decided in the year to come, it is of value for the cases that *will not* be decided, i.e. those cases that we know have been filed but do not (yet) appear on this list. For example, the two constitutional appeals on the "new" UPCA ratification law. Thus, if I may dare making any recommendation to the stakeholders and judges that have been preparing for the imminent enactment of the UPCA for years, it is: relax and look to other plans for the near to mid-term future. While I have already won my unofficial bet that the new Berlin airport will open before the UPCA will enter into force, my second bet that UPCA will come before Stuttgart 21 (currently predicted for 2026) is still running, and it is possible that I will lose this one. This will not be over any time soon, all the more so since the Case Load of the responsible 3rd Department of the FCC, even to the extent shown on the list, is pretty crazy: A constitutional complaint against the marketing approval of a generic veterinary medicament, two disputes in regard to the government's obligations to inform the Bundestag about its plans to act against human traffickers in the mediterranean, a dispute in regard to a state law of Bremen prohibiting the turnover of nuclear fuels in its ports, various constitutional complaints against CETA, another constitutional complaint against a decision of the FCJ and CJEU declaring an arbitration clause in an investment protection agreement between Slovakia and the Netherlands inapplicable under EU Law, several referrals of courts and the Parliament in regard to the "Mietendeckel" of Berlin (rent cap) - and five more constitutional complaints, of which at least four have appeared on the "annual overview" for years.

Indeed, the first entries in the 2021 list of the FCC's 3rd Department are now the five constitutional complaints on the grounds of violating Article 2(1), Article 19(4), Article 20(3), Article 24(1) and Article 103(1) of the Basic Law due to insufficient legal protection at the EPO against decisions of the Boards of Appeal.

Berichterstatter: BVR Prof. Dr. Huber		
3.	2 BvR 2480/10, 2 BvR 421/13, 2 BvR 786/15, 2 BvR 756/16, 2 BvR 561/18	Verfassungsbeschwerde wegen Verletzung von Art. 2 Abs. 1, Art. 19 Abs. 4, Art. 20 Abs. 3, Art. 24 Abs. 1 und Art. 103 Abs. 1 GG wegen unzureichenden Rechtsschutzes beim Europäischen Patentamt gegen Entscheidungen der Beschwerdekammern.

These constitutional appeals should be no "newcomers" to readers of this blog, and I sufficiently warned about their significance in earlier posts [here](#), [here](#) and [here](#). To be clear, I did and do so without taking any pleasure if my warnings were eventually found to be well-reasoned.

But be that as it may, I would now really expect that the FCC will decide about these constitutional appeals this year. Not only because the first of them dates back from the year 2010 (!), which might be a record even for an FCC case, but also because the FCC published - for the first time ever and even in English - an [annual report](#) looking back to the previous year, but also giving an outlook of cases up for decision in 2021. This outlook lists four of the above cited cases as "to be decided in 2021", the Berlin "Mietendeckel", the EPO cases, CETA and the case about the arbitration clause in the bilateral agreement on investment protection. Which would still be an impressive program for the the 2nd Senate and its 3rd Department. With that, let's get ready for another interesting year.