

Kluwer Patent Blog

German FCC: No preliminary injunction against ratification of Agreement on a Unified Patent Court

Kluwer Patent blogger · Friday, July 9th, 2021

Two applications for preliminary injunctions against German ratification of the Unified Patent Court Agreement have been rejected. The German Federal Constitutional Court has announced this in a [press release](#).

“Order of 23 June 2021

[2 BvR 2216/20](#), [2 BvR 2217/20](#)

In an order published today, the Second Senate of the Federal Constitutional Court rejected two applications for preliminary injunction directed against the Act of Approval that was adopted on 18 December 2020 for the purposes of ratifying the Agreement of 19 February 2013 on a Unified Patent Court (hereinafter: UPC Act of Approval II). In its reasoning, the Court states that the constitutional complaints lodged in the principal proceedings are inadmissible as the complainants failed to sufficiently assert and substantiate a possible violation of their fundamental rights.

Facts of the case:

The Agreement on a Unified Patent Court (hereinafter: UPC Agreement) is part of a comprehensive European patent package at the core of which lies the introduction of a European patent with unitary effect as a new intellectual property right recognised at EU level. The UPC Agreement was concluded as an international treaty between the participating EU Member States.

It provides for the establishment of a Unified Patent Court (UPC) as a court common to the Contracting Member States for disputes concerning European patents and European patents with unitary effect. The Agreement confers upon the UPC exclusive jurisdiction over the types of patent disputes listed in an extensive catalogue – in particular actions concerning patent infringements, disputes on the validity of patents and certain actions concerning decisions of the European Patent Office. The challenged UPC Act of Approval II replaces the first act of approval to the UPC Agreement (UPC Act of Approval I), which had been adopted by the *Bundestag* on 10 March 2017 but was later declared void by the Federal Constitutional Court (Order of the Second Senate of 13 February 2020).

The complainants essentially assert that their right to democratic self-determination, as derived from Art. 38(1) first sentence of the Basic Law (*Grundgesetz* – GG) in conjunction with Art. 20(1) and (2) GG and Art. 79(3) GG, is violated. They claim that the principle of the rule of law, the fundamental right to effective legal protection and EU law are violated, and that the precedence of

EU law laid down in Art. 20 of the UPC Agreement amounts to an impermissible encroachment upon German constitutional identity enshrined in Art. 79(3) GG.

Key considerations of the Senate:

The Court rejects the applications for preliminary injunction on the grounds that the constitutional complaints lodged in the principal proceedings are inadmissible.

1. The complainants did not sufficiently substantiate the possibility that ratifying the UPC framework could indeed result in the rule-of-law principle, the fundamental right to effective legal protection or EU law being violated in the asserted manner.
2. The complainants in particular failed to demonstrate why and how the UPC Agreement, in its organisational structuring of the Unified Patent Court and in the legal status afforded judges, could violate the principle of the rule of law enshrined in Art. 20(3) GG in a manner that would also encroach upon the principle of democracy. Demonstrating an encroachment upon the principle of democracy would have been necessary given that it is this principle alone, enshrined in Art. 20(1) and (2) GG, that gives rise to the individual right of democratic self-determination that can be invoked by citizens through Art. 38(1) first sentence GG.

It follows from Art. 23(1) third sentence GG that any transfer of sovereign powers to the European Union (or to an organisation that supplements or is otherwise closely tied to the European Union) must not encroach upon the Basic Law's core – its constitutional identity – which enjoys absolute protection under Art. 79(3) GG and is beyond the reach of constitutional amendment. At the same time, bringing a challenge in constitutional complaint proceedings asserting a violation of constitutional identity is subject to stringent requirements given that the individual right to democratic self-determination that can be invoked by each citizen through Art. 38(1) first sentence GG is strictly limited to the core of the principle of democracy rooted in human dignity. Beyond that, the Basic Law does not confer a right upon citizens that would allow them to subject all majority decisions taken by Parliament to a review of lawfulness.

To establish that the challenged Agreement encroaches upon the core guarantee of the principle of democracy, the complainants must thus demonstrate that the Agreement entails a transfer of sovereign powers to the European Union (or to an organisation that supplements or is closely tied to the European Union) that confers upon the recipient organisation the competence to thereafter decide on its own competences (*Kompetenz-Kompetenz*), or that amounts to a blanket authorisation for exercising public authority without creating necessary safeguards, or that considerably curtails the *Bundestag*'s powers such as its budgetary powers and overall budgetary responsibility.

2. In their submissions, the complainants merely assert that Art. 6 ff. of the UPC Agreement are contrary to Art. 97(1) GG in conjunction with Art. 6(1) of the European Convention on Human Rights and the principle of the rule of law under Art. 20(3) GG on the grounds that judges at the Unified Patent Court are appointed for a six-year term, that re-election is possible and that no adequate remedy is available to challenge a removal from office. However, the complainants fail to address the question on why and how this affects the principle of democracy.
3. As regards complainant no. I. 1., his constitutional complaint is also not sufficiently substantiated to the extent that it is directed against the precedence of EU law laid down in Art. 20 of the UPC Agreement.
4. In Art. 23(1) first sentence GG, the Basic Law sets out a commitment to recognise the legal effects of EU law and to enforce it. This implies that with the act of approval adopted in

accordance with Art. 23(1) second sentence GG, EU law is afforded precedence of application over domestic law. This precedence over domestic law in principle also applies where EU law conflicts with the Constitution, meaning that the relevant provision of national constitutional law is generally rendered inapplicable.

Yet this precedence only applies to the extent that the Basic Law and the domestic act of approval permit or provide for a transfer of sovereign rights. It is incumbent upon the Federal Constitutional Court to uphold these constitutional limits, in particular when conducting a review on the basis of constitutional identity (identity review) or an *ultra vires* review. Giving absolute precedence to EU law would not be compatible with the Basic Law. These constitutional standards, which bind all constitutional organs of the Federal Republic of Germany, may not be relativised or undermined.

2. Neither the Treaty on European Union nor the Treaty on the Functioning of the European Union contains an express guarantee specifying the precedence of application (*Anwendungsvorrang*) accorded to EU law. Against this backdrop, it has to be assumed that Art. 20 of the UPC Agreement simply aims to clear up any doubts as to the Agreement's compatibility with EU law and has no bearing on the status quo in the relationship between EU law and national constitutions. This is in line with the interpretation put forward by the Federal Government in the legislative process and by several governments of the *Länder* in declarations submitted to the record in the *Bundesrat*. Yet it must be noted that so far, this understanding has not been communicated to the Contracting Member States.
3. Complainant no. I. 1. does not address any of these considerations. Rather, his submission merely refers to the Order of the Second Senate of 13 February 2020 and rests on the sole argument that Art. 20 of the UPC Agreement is contrary to Art. 79(3) GG on the grounds that it would effectively deprive him of the possibility to seek an identity review. This does not satisfy the procedural requirement that submissions be sufficiently substantiated."

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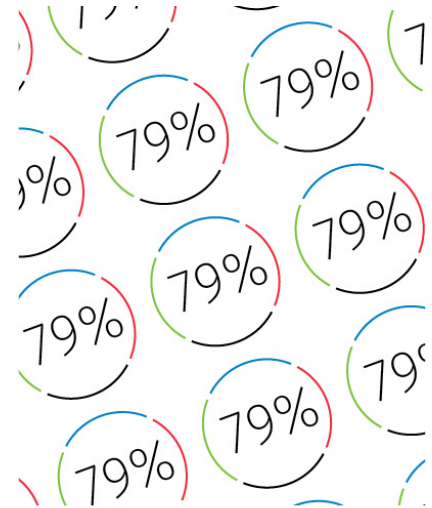
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