

Kluwer Patent Blog

Unified Patent Court a lot closer after decision German FCC

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After a delay of almost four years, the route to German ratification of the Unified Patent Court Agreement has been reopened by the [decision of the Federal Constitutional Court of 23 June 2021](#), which was [published yesterday](#). The FCC's rejection of two applications for an interim injunction against the UPCA ratification bills means the German president can now sign them into law and Germany can complete all formalities. It brings a lot closer the start of the Unitary Patent system, although some hurdles must still be taken.

The FCC's decision concerns the requests for an interim injunction against ratification only, but the reasoning of the Court makes clear the main proceedings against the UPCA bills have no chance whatsoever to be successful.

“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.”

Reaction Stjerna



By Rainer Lück

Patent lawyer Dr. Ingve Stjerna, the complainant in matter 2 BvR 2217/20, acknowledged on his website that: “After the decision, also the main proceedings on the UPCA are now likely to be unsuccessful. The conclusion of the German UPCA ratification, which can now be expected shortly, will cause a binding effect under international law which cannot easily be removed. This also limits the possibilities of further legal action against the Agreement itself.”

Stjerna is critical of the FCC’s decision: “Already the first UPCA decision shows that its considerations are primarily politically dominated and that legal issues play at best a subordinate role. This is a necessary consequence of the close ties between the BVerfG judges and party politics. I had already pointed this out in 2018 in an [article on the first UPCA constitutional complaint proceedings](#) and raised the question how independent the examination by judges, who are appointed under political considerations, would be in this legislative project which was politically highly desired across party lines and passed with positive knowledge of all constitutional issues. With its decision, the BVerfG has once again made its contribution to the implementation of a legally questionable political agenda, and citizens’ trust in its function as “the guardian of the constitution” is likely to continue to dwindle.

There has not been a reaction from the complainants in the parallel case (2 BvR 2216/20), probably the Foundation for a Free Information Infrastructure (FFII) and its president Benjamin Henrion (and an unknown company). Henrion published some tweets, in which he [criticizes an element of the decision](#): “GFCC: ‘any transfer of sovereign powers to the European Union (or to an organisation that supplements or is otherwise closely tied to the European Union)’ UPC is not an EU institution”.

The FCC’s announcement came as a surprise to many. After a constitutional complaint had been filed against the German ratification bills for the first time in 2017, by Ingve Stjerna, it took the FCC three years to decide on the case (the complaints were partially upheld and the German parliamentary [ratification procedure had to be repeated](#)).

Still, in an [interview with this blog last month](#), Kevin Mooney, one of the architects of the UPC system, explained this time it was different, as during the first case the Bundespräsident refrained from signing the UPCA bills into law at the request of the FCC. In the interview Mooney showed his frustration that the FCC had not yet made a decision on the requests for a preliminary injunction: “We had expected a decision very quickly, as soon as past January. (...) When there was no decision in January, there were many rumours it could come out anytime, but we’re in June now and we’re still waiting. I have to say I think it is disgraceful that it takes so long for the FCC to make a decision on the grant or refusal of preliminary measures.”

Late 2022

In a [reaction](#) to the publication of the FCC’s decision, Alexander Ramsey, Chairman of the UPC Preparatory Committee, welcomed “this positive development, with the way now being cleared for Germany’s deposit of its ratification Bill.”

He pointed out that: “In addition to this, in order for the project to move into its final phase, a further two signatory states must agree to be bound by the [Protocol on Provisional Application](#) [regulating the practical preparations for the UPC]. In the meantime, the work of the Preparatory Committee and its interim team continues. A timeline and a more detailed plan for the start and execution of the Provisional Application Period will be published in due course (...).”

The idea is that after the phase of practical preparations, about 12 months, Germany will formally deposit its instrument of ratification with the European Council, thereby launching (three months later, [art 89 UPCA](#)) the Unitary Patent system.

Kevin Mooney doesn't expect any progress before September: "In addition to Germany ratifying the protocol for the PAP period two other Member States are also required and that may mean further delay. I am sure the Preparatory Committee will now be lobbying hard the other Member States."

Alexander Ramsay told [JUVE Patent](#): "we expect Germany to ratify the protocol on provisional application in early autumn. (...) If everything runs smoothly, we can expect a functioning UPC late in 2022, or possibly early 2023."

Before that time however, a solution will have to be found among others for complications resulting from the Brexit and the UK's decision to withdraw from the Unitary Patent system. Italy and Milan have since long [claimed the pharma branch of the UPC's central division](#), which was meant to be located in London but will now have to go somewhere else. But other member states are interested as well and there are also proposals to leave all central division decisions to Munich and Paris, at least during an interim period.

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