

German Constitutional Court Clears Way for the Unified Patent Court

On July 9, 2021, the German Federal Constitutional Court (FCC) published its decision rejecting two applications for a preliminary injunction against the German ratification of the Agreement on a Unified Patent Court (UPCA) that had been approved by the German parliament on 18 December 2020.¹ The FCC had originally asked Germany's Federal President to wait with his signature required for the underlying bill to enter into force. With the two applications dismissed, the President is now free to sign the bill into law, despite the still pending underlying constitutional complaints.

More than eight years after the adoption of the EU patent package by the European Parliament in December 2012, this decision marks a key step towards the implementation of the Unified Patent Court (UPC).

I. What is the UPC?

The UPC will unify patent litigation in Europe, for the first time establishing a single European court system dealing with patent infringement and revocation proceedings with effect for all participating Member States. Up until now, European patents, despite their unified examination and grant by the European Patent Office, were not more than a “bundle” of individual national patents that had to be asserted and revoked in individual litigation in each Member State in which they were validated. This made enforcement of European patents in all Member States cost prohibitive, resulting in a concentration of patent enforcement in just a handful of European countries, other than in truly exceptional cases.

II. The Long History of the UPC

Despite the looming Brexit, the UPC was already about to be launched in 2017. In order to launch, the UPCA requires ratification by thirteen Member States, including Germany, France and (after Brexit) Italy. Germany serves the role of the “gatekeeper”, being the last of the three required Member States to ratify and deposit its instrument of ratification to allow for a timed launch of the UPC. However, immediately after Germany's first attempt at ratification, a first constitutional complaint including an application for a preliminary injunction was filed against the bill and the FCC asked the German Federal President to not sign the bill. The future of the UPC remained in limbo for almost three years as everybody waited for the FCC's decision. On February 13, 2020, the FCC declared the ratification Bill to be null and void due to a violation of the two-thirds majority requirement for legislative acts that transfer core sovereign rights to international bodies (here: substantial modification of the judicial organisation intended by the Basic Law for patent disputes).²

In June 2020, the German government introduced a new ratification bill into the *Bundestag* (the lower house of the German Parliament), which now approved with the necessary majority. After approval by the *Bundesrat* (the upper house of German parliament), two further constitutional complaints including applications for a preliminary injunction were lodged against the new ratification bill. The legal arguments of the complainants were already well-known, several of them having been part of the first constitutional complaint against the first ratification bill. The complainants assert that the approval of the UPCA violates their right to democratic self-determination (Art. 38(1) of the Basic Law for the Federal Republic of Germany (GG) in conjunction with Art. 20(1) and (2) and Art. 79(3) GG), based on several alleged defects in the UPCA relating

¹ Decision of June 23, 2021, case nos. 2 BvR 2216/20 and 2217/20.

² Decision of February 13, 2020, case no. 2 BvR 739/17.

to, for example, the selection and independence of its judges and (the lack of) procedural safeguards (relating to democratic legitimacy of the administrative committee and costs). In its 2020 decision, the FCC had already dealt with several of these issues and had denied the complainant's standing to raise those issues by way of a constitutional complaint against the ratification bill (pointing to possible constitutional complaints against the acts of the UPC itself, e.g. in case of their enforcement in Germany), notwithstanding the success of the first complaint on formal grounds. In its first decision, the FCC had left open whether the unconditional supremacy of EU law enshrined in Art. 20 UPCA could violate German constitutional law,³ and this is what the complainants focused on in their second constitutional attack, arguing that this supremacy constitutes an inadmissible interference with the constitutional identity protected by Art. 79(3) GG, in addition to new arguments regarding the selection of the judges, the term they serve and their independence.

In its decision of June 23, 2021, published on July 9, 2021, the FCC rejected both applications for preliminary injunction based on the inadmissibility of the main constitutional complaints. In particular, the FCC found that the complainants had failed to sufficiently assert and substantiate that their fundamental rights had been violated, with arguments along the lines already established in the first decision. The FCC also dismissed the argument based on Art. 20 UPCA it had left open the first time. It explains that Art. 20 UPCA can only be understood as ensuring compliance of the UPCA with EU law, but not changing the relationship between EU law, the UPCA and German law, in particular German constitutional law.⁴

Even though the FCC still has to dismiss the still pending constitutional complaints and the complainants have the chance to amend their constitutional complaints with further arguments, the fact that the FCC has already thoroughly dealt with similar attacks in its first decision and has taken considerably more time with the current decision than was previously expected indicates that it has already examined the constitutional complaints extremely carefully. In view of the reasons given for the decision, it seems highly doubtful that the complainants will succeed in presenting a sufficiently substantiated violation of their fundamental rights.

In any case, this decision clears the way for the German Federal President's signature under the ratification bill and, thus, Germany's ratification of the UPCA.

III. Next Steps

Step 1: Ratification of the German Act of Accession to the UPCA

Under the German system, the Act of Accession must be countersigned by the Federal Government, executed by the Federal President, and published in the Federal Law Gazette. Before his signature, the Federal President has to enter into the constitutional review of the law, however a refusal of his signature is not expected here, after the two FCC decisions.

Step 2: Deposit of the Instrument of Ratification of the Protocol to the UPCA on its Provisional Application

In October 2015, a Protocol to the UPCA on its provisional application was signed by representatives of the Member States.⁵ This Protocol provides the legal basis for the institutional, financial and administrative provisions of the UPCA to become applicable before the rest of the UPCA enters into force. This allows the setting up of the administrative organization required to run the UPC. Germany is expected to ratify and deposit

³ Id. at 166.

⁴ FCC decision of June 23, 2021, at 77.

⁵ https://www.unified-patent-court.org/sites/default/files/Protocol_to_the_Agreement_on_Unified_Patent_Court_on_provisional_application.pdf.

the Protocol this fall. With the deposit of the instrument of ratification by Germany with the General Secretariat of the Council of the European Union, the Protocol will enter into force. This will initiate the provisional application period of the UPCA and enable the UPC to start the pilot phase.

Step 3: Pilot Phase

Once the ratification of the Protocol is deposited, the phase of provisional applicability starts, also referred to as pilot phase, which is supposed to last approximately 6 months and can be extended by a month or two. During this period, crucial decisions on the UPC's practical setup will be finalized before the UPCA actually enters into force. The pilot phase involves, among other things, the recruitment and appointment of the judges of the UPC, the election of the president and the presidium, the renting of premises as well as the completion and testing of IT systems. The question of the United Kingdom's withdrawal from the UPCA will also have to be addressed during this period. This procedure will ensure that the UPC can operate from the first day of entry into force of the Agreement. The pilot phase will also be used to allow for early registration of requests to opt European patents out of the UPC's jurisdiction.

Step 4: Deposit of the Instrument of Ratification of the UPCA

Once the preparatory work is complete, Germany will deposit the instrument of ratification of the UPCA itself with the General Secretariat of the Council of the European Union. This will be followed by the so-called "sunrise period", which lasts exactly 3 months. During the sunrise period, it will be possible for the first time to "opt out" European patents from the jurisdiction of the UPC (Art. 83(3) UPCA).

Step 5: Entry into Force of the UPCA

The UPCA will enter into force on the first day of the fourth month following the deposit of the instrument of ratification of Germany. The UPC is therefore expected to become operational either at the end of 2022 or at the beginning of 2023.

During a transitional period of seven years starting with the entry into force, actions for infringement or revocation of European patents can still be brought before the national courts or other competent national authorities (Art. 83(1) UPCA). After that, the UPCA will have exclusive jurisdiction unless a European patent has been opted out. This remains possible for the duration of the transitional period for all European patents granted or applied for prior to the end of the transitional period, unless an action regarding the patent has already been brought before the UPC.

IV. The Current Status of Ratifications

The UPCA was signed as an intergovernmental treaty on February 19, 2013 by 25 Member States, which corresponds to all EU Member States except Spain, Poland and Croatia. For the UPCA to enter into force, it must be ratified by 13 Member States, including the three Member States in which the highest number of European patents were in effect in 2012. Following the withdrawal of the United Kingdom in July 2020, these are Germany, France and Italy. Currently, 15 Member States have already deposited their ratification, including France and Italy,⁶ i.e. there is no need to wait for further ratifications other than the mandatory ratification by Germany.

Outstanding ratifications, which are not mandatory for the entry into force of the UPCA, can be divided into three groups:

- the ratification is on the way;

⁶ <https://www.consilium.europa.eu/en/documents-publications/treaties-agreements/agreement/?id=2013001>.

- legal obstacles stand in the way of ratification;
- no steps have been taken towards ratification.

The first group includes Greece, Romania and Slovenia. While a government draft ratification law already exists in Greece, Romania is expected to ratify soon and Slovenia's ratification law has already been approved in 2016. Legal obstacles stand in the way of Ireland and Hungary, which thus form the second group. While Ireland must hold a referendum on a constitutional amendment in order to ratify the UPCA, the Constitutional Court of Hungary, following a request for interpretation by the government, ruled that the UPC was incompatible with the Constitution of Hungary, and therefore an amendment of the Constitution is necessary for ratification. The third group, which concerns Member States that have not yet taken steps towards ratification, consists of Slovakia, the Czech Republic and Cyprus. Ratifications are still delayed in these countries for political reasons. In particular, these Member States fear economic disadvantages, which is why they would like to assess the situation after the system has already entered into force.

It remains to be seen whether and how the European Commission will influence the Member States that have not yet ratified the UPCA. It is conceivable that the participation in the so-called “enhanced cooperation” process, in which the “European Patent Package” was passed on the EU level, could lead to an obligation to implement it and thus to also ratify the UPCA. Failure to do so could therefore be regarded as a breach of contract.

V. The Uncertainty about the Planned Central Division in London

Finally, it still has to be clarified how to deal with the part of the UPC's Court of First Instance's central division, that was originally to be located in London (Art. 7(2) UPCA in accordance with Annex II). According to current plans, its responsibility for pharmaceutical and chemical patents, among others, is to be temporarily taken over by the headquarter in Paris and the part of the central division located in Munich. However, this is far from the end of the discussion on this matter. In the long run, three alternatives are conceivable:

- assumption of jurisdiction at the seat of the central division in Paris;
- accumulation to the two remaining parts of the central division in Paris and Munich;
- introduction of a new seat of the central division in another Member State, e.g. Italy or the Netherlands.

No solution in the sense of one of the three alternatives mentioned can be derived from the UPCA. The Member States obviously have different interests here. The seat of the central chamber was in dispute until shortly before the signing of the UPCA and was only decided by a political compromise at the highest level. It can only be assumed that the seat(s) of the central division will have to be renegotiated again, potentially leading to further political compromises, and that the UPCA will be amended accordingly as a result.

If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to reach out to:

Dr. Marcus Grosch

Email: marcusgrosch@quinnemanuel.com

Phone: +49 89 20608 3001

Jerome Kommer

Email: jeromekommer@quinnemanuel.com

Phone: +49 89 20608 3002

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