

EPO, European Union, Germany, Unitary Patent, United Kingdom, UPC

## **German complaint threatens future Unitary Patent system**

[Kluwer UPC News blogger/November 2, 2017 /4 Comments](#)

When will the Unified Patent Court open its doors and the Unitary Patent (UP) become available? The German constitutional complaint against ratification of the Unified Patent Court Agreement (UPCA) has dashed expectations that the UP system could launch at the end of this year. Considerable delays and even the end of the system in its current guise are possible.

Last June, shortly after the German parliament had ratified the UPCA and the surprising news broke that the Federal Constitutional Court (FCC) in Karlsruhe had asked the German president not to sign into law the parliamentary Act declaring Germany's accession to the UPCA, chairman Alexander Ramsay of the UPC Preparatory Committee was still [positive](#): 'I am hopeful the situation regarding the constitutional complaint in Germany will be resolved rather quickly and therefore I am hopeful that the period of provisional application can start during the autumn 2017 which would mean that the sunrise period for the opt out procedure would start early 2018 followed by the entry into force of the UPCA and the UPC becoming operational.' In a [message of September 2017](#) that optimism had disappeared: 'It is now difficult to predict any timeline.'

Although he has not publicly admitted it nor published it on [his website](#), the complaint against the UPCA was filed at the end of March 2017 by Dr. Ingve Björn Stjerna, a long-time critic of the Unitary Patent system. His arguments were set out in [this blogpost](#) for the first time, based on information from the FCC. According to the Constitutional Court:

*'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.'*

[This article](#) of Hogan Lovells describes the complaint in more detail.

Since, the FCC has sent a request for comments on the complaint, which comprises 170 pages, to both chambers of German parliament; to the Federal Government (the Federal Chancellery, the Federal Ministry of Justice and Consumer Protection and the Federal Ministry of the Interior); to all governments of the Bundesländer and to the Federal Bar Association, the German Lawyers' Association (DAV, Deutscher Anwaltverein) and the European Patent Lawyers' Association (EPLAW). The deadline for submitting views was originally 31 October. But the FCC confirmed that 'parties

entitled to submit statements requested a prolongation of the deadline. Therefore, the deadline for submitting statements was prolonged until 31 December 2017.'

Now what does the German challenge mean for the time schedule and the moment the UP system could start functioning, if all hurdles are overcome? Several scenarios are possible:

### **1. The claim is not admitted**

The FCC will first have to decide whether Stjerna's complaint will be admitted for a decision. Article 93a of the Act on the Federal Constitutional Court says a complaint must be admitted a) in so far as it has general constitutional significance, b) if it is appropriate to enforce the rights referred to in Article 90(1); (...). According to Article 90 (1): Any person claiming a violation of one of his or her fundamental rights or one of his or her rights under Article 20(4), Articles 33, 38, 101, 103 and 104 of the Basic Law by public authority may lodge a constitutional complaint with the Federal Constitutional Court.

According to an FCC spokesman, 'a date for decision has not been scheduled yet', but it will probably be somewhere in the first half of 2018. If the FCC decides not to admit the complaint, the German ratification procedure can resume, the *Bundespräsident* can sign and Germany can complete all formalities by depositing its instrument of ratification with the secretariat of the EU Council. After the so-called 'period of provisional application' of the UPCA, during which all preparations for the UPC will be completed, the court could probably open its doors in the second half of next year.

### **2. The claim is admitted**

Another option is that the FCC admits the complaint for a decision. Most observers think the court will do this, as statements have been requested from the Federal Government and all the organizations mentioned above. 'While this alone doesn't mean that the admittance of the complaint is certain, it shows that the Court takes the complaint seriously and will therefore probably admit it for decision', according to the Hogan Lovells article. Henrik Holzapfel of McDermott Will & Emery, points at these 'amicus curiae briefs' as well [in a recent podcast](#). Apart from this, Holzapfel says it is very remarkable and rare the FCC asked the German president not to sign the German ratification bill, and that this 'clearly indicates' the FCC judges may think the complaint has merits.

If the constitutional complaint is admitted indeed, it would take a while for the FCC to decide on the merits of case; 'until spring/summer 2018', according to the Hogan Lovells article. Holzapfel thinks it will take longer: he expects the FCC to decide to admit the complaint next spring and schedule a oral hearing no sooner than in the fall of 2018. Another observer is even less optimistic: 'Considering the speed with which this court (and this particular panel) has been deciding its cases this year, I would even find it optimistic to expect a decision next year at all. And there is force to the argument that complaints against the EPO, which have been pending for a couple of years now at the FCC, should be decided first.'

### **3. The FCC refers questions to the CJEU**

A big question with regard to the time schedule: Will the FCC refer questions of European Law to the CJEU in a preliminary ruling procedure pursuant to Article 267 of the Treaty on the Functioning of the European Union? According to Hogan Lovells, a referral to the CJEU 'will – also in view of the considerable and complex number of

Union law issues raised by the complainant – seriously delay the proceedings as a whole. Thus in the event of a referral, a final decision by the Constitutional Court will perhaps only be reached in 2019.’

Henrik Holzapfel thinks it is ‘absolutely realistic’ to think there will be a referral, ‘because the European law implications of the case are not straightforward’. He estimates this will bring an additional delay of no less than two years, ‘time for the CJEU to work with the details of the case’. That would mean a decision cannot be expected before 2020.

#### **4. The FCC rules the claim has merit**

Up to now, it has been assumed in this article that the FCC in Karlsruhe will eventually dismiss the challenge to the German UPCA ratification, which is by no means certain. If the FCC determines one or more arguments of the complaint have merit, this could kill the UPC project in its current form.

According to Henrik Holzapfel, two arguments are particularly strong. In the podcast he explains why he thinks the independence of the UPC judges is not guaranteed under the UPCA. He also thinks the involvement of the CJEU may not be strong enough. In a recent post on this blog, retired FCC judge and patent judge Professor Siegfried Broß argued [EPC, EPO and UPCA have put at risk democracy, rule of law and human rights](#).

#### **5. Brexit complications**

Even a ruling dismissing the German complaint doesn’t guarantee the future of the UPC, as it may lead to complications regarding the UK. The UK is well on its way to ratify the UPCA later this year – although this agreement will have to be substantially amended post-Brexit.

But what happens if the German constitutional complaint is rejected only after 29 March 2019, the day the UK formally exits the European Union (precisely two years after triggering article 50) and is no longer a UPCA/EU Member State under ‘UPCA article 2(b): “Member State” means a Member State of the European Union’?

In that case, the UK’s participation in the Unitary Patent system could only be secured by fundamentally changing the UPCA, which would mean complicated negotiations, further delays, or back to square one. If the EU decided to go ahead with the UPCA without the UK, an amendment to the UPCA at least in regard to London as a seat of the central division would be inevitable.

A [recent Pinsent Masons report](#) summarized the precarious situation: ‘The most likely scenario for the Unitary Patent and UPC system to survive the current challenges is for UK ratification to take place prior to 29 March 2019 and for the German constitutional complaint to be rejected by the Karlsruhe court in time for Germany to ratify prior to that date too. At the moment, there is a lot of uncertainty over whether those two eventualities will materialise.’

Moreover, if the complaint is indeed unsuccessful but decided very closely to the Brexit date, it doesn’t make much sense for Germany to allow a system to start which must be amended a few months later. In that case, it is much more likely and sensible that the UP system in its present form doesn’t enter into force at all, and that it will be modified first to make it stable post-Brexit.

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## 4 comments

### 1. Peter Parker

[November 2, 2017 at 3:41 pm](#)

Thank you for this article. Personally, I was looking forward to the UPC. I am no expert on constitutional matters, but I find it a bit strange that the FCC can informally ask the Federal President to delay signing a law and then “stall the matter”, e.g. by extending deadlines for amicus curiae briefs. It appears to me that if both federal chambers agree on a law, it must be presumed that it is “the will of the people” (Art 20(2) GG) to bring that law into force as quickly as possible. I think the situation therefore requires that the FCC decides the matter as quickly as possible or, if it cannot, indicates to the Federal President that he may sign the law. It does not prevent the FCC to find the law unconstitutional later anyway according to my understanding. Just for my enlightenment: what could the other constitutional organs do to resolve the situation between the FCC and the Federal President if it becomes clear for them that the FCC “unreasonably” stalls the matter and the Federal President refuses to simply sign the law? A further, related question: could the Federal President decide to sign the law anyway without acting against the constitution in the present situation?

### 2. Attentive observer

[November 2, 2017 at 4:51 pm](#)

All the discussions about the post Brexit participation of UK (sic), and possibly of other states (re-sic), could have been avoided if the situation would have been clarified beforehand.

The EPLA has died after Opinion 1/09. Would it not have been wiser to bring the UPCA agreement, one way or another to the CJEU, before pumping lots of efforts into it? Early certainty (to use EPO language) would have been to the benefit of all those concerned.

It is to be hoped that the German Constitutional Court will remedy this mistake.

When dismissing the Spanish complaints, the CJEU avoided carefully to take position on certain questions of substance, and stayed at a very formal level. If the GCC sends a question to the CJEU, it will not be possible this time to dodge the embarrassing questions.

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### 3. Attentive observer

[November 3, 2017 at 6:56 am](#)

That the two chambers have apparently ratified the UPC agreement is one thing. According to the complaint this apparent ratification is void as the required quorum for the ratification was not reached. If it is right that the needed quorum was not reached, then the will of the people will not have been correctly expressed.

It is thus by no way strange that the GCC has asked the President not to sign the law of ratification. This is not a common occurrence, and it is not just for fun that the GCC has had such a request.

It might be envisageable at first sight to let the President sign, and check afterwards whether he was right to do so, but then, should the GCC find it unconstitutional, there would be a big mess. Any decision taken by an unconstitutional body would be nul and void. It is thus perfectly reasonable to stay the matter.

There is nothing strange for a court to ask for amicus curia briefs. This does not mean that the court will agree with any of them. Even the Enlarged Board of Appeal of the EPO does so.

That the matter is highly complex warrants a longer time to file such briefs.

It is not the only case pending before the GCC, and out of fairness to the other complainants that this question cannot suddenly be put on the top of the file.

The GCC is a reputable court and thinking it may act, as Germans would say “aus Jux und Dallrei”, in other words for fun and to be awkward, is giving little credit to the court. Stating that the GCC might act “unreasonably” is bordering to contempt of the court.

Even if the President would think that the GCC is unreasonable, simply signing the law, would bring about a severe constitutional conflict. Do you in all honesty think that the President would risk this? If he would be a dictator yes, but not in a democratic country respecting the Constitutional Court.

Oversimplifying the situation and suggesting solutions which range more in the field, lets shoot first and think afterwards, is not the best way to give credit to a complicated situation.

I would allow myself to say to Mr Parker to wait and see, and primarily trust the wisdom of the court.

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#### 4. **Concerned observer**

[November 3, 2017 at 9:23 am](#)

@Peter Parker

Why would you advocate bringing a system to life when it is possible (and, in my estimation, highly likely) that the system does not comply with fundamental requirements of EU and constitutional laws? What would you stand to gain by doing this? Would it not just result in absolute chaos? Or are you hoping that some “fudge” will be found to keep the system operational despite its manifest deficiencies?

Let me put the question another way: what would you have thought if the UK government had triggered Article 50 TEU without the consent of Parliament? The situation is entirely analogous. In both circumstances the only constraints on the government are the requirements of constitutional law.