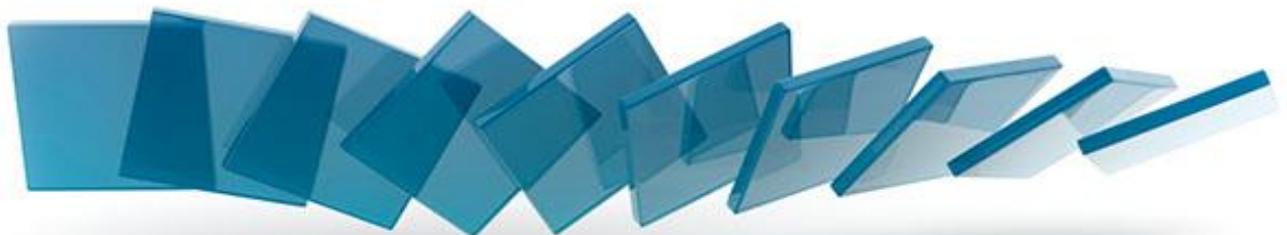


UPC ratification process in Germany put on hold following constitutional complaint

June 2017

Overview

Over the last months, the UPC project has been continuously subjected to a number of uncertainties. First and foremost there was the Brexit vote in the UK last year, followed by the General Election on 8 June 2017 (see our [article on the impact of the UK General Election on the UPC](#)). Now, Germany has unexpectedly added to these uncertainties; so far the UPC ratification process in the country had run very smoothly. Now the German President has put the process on hold, pending a constitutional complaint filed in March this year. Germany, being the most important patent litigation venue in Europe, is one of three countries which mandatorily have to ratify the UPCA to bring the UPC to life. This article describes what is currently known about the background of the constitutional complaint. It also gives a basic understanding about the operation of the German Federal Constitutional Court where the complaint is pending. It furthermore considers the potential impact the stay in Germany may have on the overall UPC ratification schedule.



Background

On 13 June 2017 it became public that an unidentified individual filed a constitutional complaint, together with a request for a temporary restraining order, against both the German bill for ratifying the UPC Agreement and the UPC Agreement itself with the German Federal Constitutional Court (“*Bundesverfassungsgericht*”)¹. The bill had already been passed the two chambers of the German legislature, the Bundestag and the Bundesrat. Now it only needs to be formally executed by the German President, Frank-Walter Steinmeier, to take effect.

The constitutional complaint was filed on 31 March 2017. Following this, the German Federal Constitutional Court has asked the German President on 3 April 2017 to put on hold the execution of the bill for ratifying the UPC Agreement, to give the Federal Constitutional Court enough time to render a decision on the complaint. Practically, this comes close to issuing the requested temporary restraining order. The Federal Constitutional Court has not published a press release. The legal arguments on which the complaint is based are unknown at this point in time and thus the chances of success cannot be evaluated. Based on the conduct of the Federal Constitutional Court, apparently it *prima facie* does not exclude that the complaint has merit. The reporting judge Professor Huber is also responsible to prepare the hearings on four constitutional complaints challenging the status of the Boards of Appeal at the EPO and their lack of independence from the administrative institution of the EPO. These hearings are scheduled to take place this year. Some commenters assume that the connection between the unitary patent, the UPC and the EPC may have influenced the Constitutional Court in its decision to ask the Federal President not to sign the Bills on the UPCA. However, this remains speculative as long as the complaint is not published.

Operation of the German Federal Constitutional Court

The German Federal Constitutional Court is a court solely dedicated to constitutional issues. In this capacity, it *inter alia* hears constitutional complaints. Any person alleging violation of her or his constitutional rights by acts of the German sovereign (often a court decision) may file a constitutional complaint. To protect the court from a flood of unfounded complaints, it first needs to accept a complaint before the case undergoes legal review. The court must accept a complaint if (i) it pertains to a

constitutional issue which needs to be clarified and (ii) a decision on the merits is necessary for protecting the complainant’s constitutional rights. There is usually – but not necessarily – an oral hearing later in the process. The time needed for the legal review heavily depends on the complexity of the issues in question and therefore we cannot foresee how long it will take the court to decide the case.

Impact of the stay of the German ratification process

At this point in time, it is unclear what the impact will be on the overall UPC ratification schedule. As the Federal Constitutional Court obviously believes the case has some merit, it will most certainly accept it for legal review. Considering the urgency and political dimension associated with this case some commenters are optimistic that the Federal Constitutional Court renders a decision on the merits still this year.

If the Federal Constitutional Court finds the German bill for ratifying the UPC Agreement and the UPC Agreement itself to be constitutional still this year, there could only be a minor delay of the overall ratification process. This assumes that the UK – as expected – completes ratification on its part in the fourth quarter of 2017. Following a positive decision of the Federal Constitutional Court, the German President would sign the bill and the German Government would deposit the instrument of ratification within a few weeks.² As Germany has always declared that it intends to ratify after the UK, in this scenario the delay should amount to a few months only.

However, in case the Federal Constitutional Court should identify a violation of the German constitution, the impact on the overall ratification schedule would be considerable. As one of the mandatory ratifying countries, Germany would not be able to complete the ratification process until the identified shortcomings are rectified. This would even become worse if at the same time major concerns would be expressed by the Constitutional Court on the EPC. The uncertainty which has been caused (again) on the UPC is for sure critical. This makes it even more important that the Federal Constitutional Court, in respect of all the other Member States having already ratified the UPCA, speeds up the process to decide on the constitutional complaint.

¹ Docket no. 2 BvR 739/17.

² Note that although a General Election will take place in Germany in September with a new parliament being formed thereafter, the bill for ratifying the UPC Agreement will not fall victim to the principle of discontinuity as it was already passed by parliament.

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