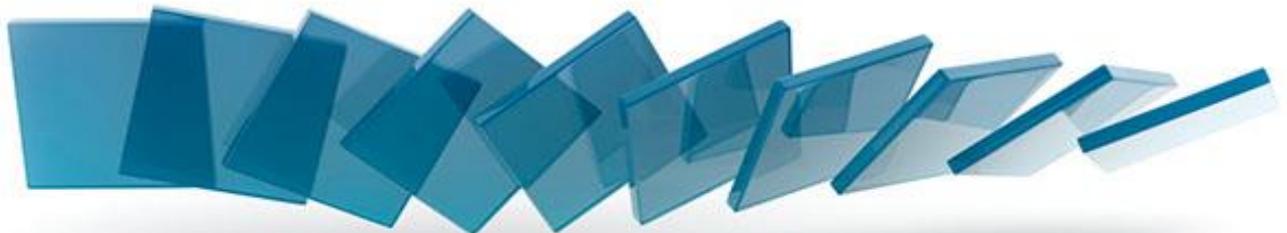


## UPC ratification process in Germany put on hold following constitutional complaint

September 2017

### Overview

In March 2017, a constitutional complaint was filed against both the German bill for ratifying the UPC Agreement and the UPC Agreement itself with the German Federal Constitutional Court (“Bundesverfassungsgericht”) (see our article on the UPC ratification hold-up in Germany). Many stakeholders have been speculating on the grounds for this constitutional complaint. Now, the German Federal Constitutional Court has disclosed the main line of argumentation of the complainant.



# Background

## What does the complaint assert?

In essence, the constitutional complaint alleges that the German ratification process and the UPCA itself infringe upon democratic principles in the context of the transfer of sovereign rights.

First, the complaint asserts that the ratification process did not comply with the necessary two-third majority vote in both chambers of the German legislature (the “*Bundestag*” and the “*Bundesrat*”) when sovereign rights are transferred (Articles 23 (1) section 3 and 79 (2) of the German Constitution). The Bundestag voted for the bill for ratifying the UPCA with a simple majority. In addition, this argument is probably related to the fact that the Bundestag voted very late at night, with only few of its members present.

Second, the complaint argues that the UPC violates fundamental democratic principles which the German Constitution prescribes. In this respect, the complaint argues

- democratic deficits and deficits in the rule of law with regard to the regulatory powers of the UPC’s bodies,
- lack of independence and democratic legitimation of the UPC judges,
- breach of EU law through the UPCA

## Arguments of the complaint

Currently no details on the arguments in the complaint are public. There is therefore still a lot of speculation going on at the moment in the German patent community.

Possibly the complaint argues that the powers of the UPC administrative committee are too far reaching in order to establish the alleged democratic deficits and deficits in the rule of law. Furthermore, the complaint may also have brought up the lack of independence of the Boards of Appeal of the EPO in this context. The alleged lack of independence and democratic legitimation of the UPC judges might arguably trace back to the fact that the judges are initially only appointed for a term of six years, with no guaranteed re-appointment, as well as to the selection process.

## When can a result be expected?

At this point in time, we cannot predict when the Federal Constitutional Court will render a decision. Currently, the German government and experts from institutions may submit opinions to the court. It is noteworthy in this context that the timing of the filing implies that the complainant sought to disrupt the UPC ratification timeline most effectively. Considering the complexity of the questions involving substantive constitutional law as well as EU law, this constitutional complaint may very well hold up the German ratification process for a considerable amount of time. On the other hand, having these questions answered now is preferable to a Constitutional Court interruption at a time when the UPC is operative and proceedings are running there.

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