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German Federal Constitutional Court rejects Act of Approval to the Agreement on a Unified Patent Court, but remedy appears possible

COVID-19: We have ensured the operation of the firm

M I C H A L S K I



H Ü T T E R M A N N

P A T E N T A N W Ä L T E

German Federal Constitutional Court rejects Act of Approval to the Agreement on a Unified Patent Court, but remedy appears possible

On March 20, the German Federal Constitutional Court published its long-awaited decision¹ on the Act of Approval to the Agreement on a Unified Patent Court – and declared the Act void.

The sole reasoning for this, however, is that the Act itself was not passed with the two-thirds majority of all members of the Bundestag enshrined in Art. 79 of the Basic Law (Grundgesetz, the constitution of the Federal Republic of Germany). In view of the scope of the sovereign powers conferred, the Federal Constitutional Court holds this to be an absolute necessity.

"[...] The Act of Approval to the Agreement on a Unified Patent Court had to be adopted by the legislative bodies with a qualified majority pursuant to Art. 79(2) of the Basic Law.

In view of the particular importance of the majority requirement for the integrity of the Constitution and the democratic legitimation of interferences with the constitutional order, a law cannot be enacted when it does not achieve the majority pursuant to Art. 79(2) of the Basic Law. [...]"²

In contrast, all the other parts of the complaint, which do not relate to rights deriving from Art. 38(1) first sentence in conjunction with Art. 20(1) and (2) and Art. 79 (3) of the Basic Law, were dismissed as inadmissible:

"The constitutional complaint, in contrast, is inadmissible for lack of standing to file a constitutional complaint inasmuch as the complainant derives a possible infringement of rights [...] from an argument that the Act of Approval to the Agreement on a Unified Patent Court violates constitutional identity because the status of the judges lacks an adequate basis in constitutional law (1), interferences with fundamental rights by the Unified Patent Court are not adequately legitimated in law (2), and the Unified Patent Court Agreement violates EU law (3)."³

What initially sounds like good news for supporters of the Unified Patent Court Agreement is less encouraging upon closer examination. The primary issue here was the capability as such to file a complaint – but the Federal Constitutional Court explicitly left open the question of whether at least the established primacy of EU law pursuant to Article 20 of the Unified Patent Court Agreement⁴ might not in fact violate the constitution:

"[...] If there are indications that the establishment of an absolute primacy of EU law in Art. 20 of the Unified Patent Court Agreement violates [the Basic Law], the Federal Constitutional



¹ https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2020/02/rs20200213_2bvr073917.html

² Paragraphs 162 and 163 of the decision

³ Paragraph 103

⁴ Note: Article 20 was inserted at the time in response to Opinion 1/09 of the CJEU, and thus is considered the pivotal section of the Agreement on a Unified Patent Court.

Court shall of course thoroughly review the measure in question with respect to its compatibility with [the Basic Law]. In the present case, however, it is possible to refrain from a final decision because the Act of Approval to the Agreement on a Unified Patent Court is already void for other reasons.”⁵

It is worth mentioning that the decision was reached by a 5:3 vote, and a minority opinion of the dissenting justices, König, Maidowski and Langenfeld, has even been published. In this opinion, these justices speak out in opposition to requiring the two-thirds majority pursuant to Art. 79 of the Basic Law as mandatory for every act conferring powers, and also in favor of a certain “restraint” on the part of the Federal Constitutional Court from immediately reviewing every such conferral. Otherwise, there is a risk that the parliament can no longer exercise its necessary authority, thus indirectly endangering democracy:

“We do not wish to fundamentally close our minds to a broad understanding of the scope of application of Art. 23(1) of the Basic Law⁶ in the context of the development of the European integration process and in view of the growing scope of competences of the European Union. Nevertheless, we would like to submit for consideration that allowing a review of the formal aspects of conferral opens up further areas to dispute before the Constitutional Court in view of the definition of Art. 38(1) second and third sentences of the Basic Law, which is dependent on interpretation and, in many cases, ambiguous. This will result in the narrowing of parliament’s necessary political leeway in the context of European integration, contrary to the intentions of the Constitution-amending legislature, and the protection of the democratic process intended by Art. 38(1) first sentence of the Basic Law may thus be turned into its opposite.”⁷

What might happen next?

As already proposed,⁸ the Bundestag could simply vote on the Act of Approval again, this time with a nearly certain two-thirds majority. Since no party represented in the Bundestag other than the AfD (Alternative for Germany)⁹ has rejected the unitary patent system thus far, the majority for this seems assured.

Naturally, the question then remains open as to whether the next constitutional complaint would then take place immediately – owing to the loophole left open regarding review of Art. 20 of the Unified Patent Court Agreement – and whether the Federal Constitutional Court would once again hold up the ratification process. One could wish that the Federal Constitutional Court had given a clearer opinion here.

It is not clear whether the British government’s statement¹⁰ that it will not participate in the unitary patent system is helpful or harmful here.

Great Britain’s non-participation could be helpful in a legal regard, since the problems based on Opinion 1/09 will of course be avoided. Because Great Britain has already ratified,¹¹ there are no obstacles under international law standing in the way of the Agreement on a Unified Patent Court taking effect.

⁵ Paragraph 166

⁶ Note: This is the Article that governs the capability to transfer sovereign powers to European institutions, among other matters.

⁷ Paragraph 21 of the minority opinion

⁸ Here, for example: <https://www.juve-patent.com/news-and-stories/legal-commentary/breaking-german-constitutional-court-upholds-upc-complaint/>

⁹ For example, in February 2019 the AfD proposed abandoning the unitary patent system in the legal affairs committee of the Bundestag (see. BT Printed Paper 19/1180) – which was rejected by all the other parties (see BT Printed Paper (see BT Printed Paper 19/7961)

¹⁰ See, for example: <http://ipkitten.blogspot.com/2020/02/breaking-news-uk-will-not-participate.html>

¹¹ See our [Newsletter 3/2018](#)

Non-participation by Great Britain could potentially be harmful on account of the fact that the territory of the Unified Patent Court then becomes smaller. Even so, should the Unified Patent Court still come into being at some point, the territory covered would certainly be attractive nonetheless, both in terms of its number of inhabitants and its economic power. On the other hand, Great Britain's non-participation might only strengthen the will of the other countries to bring about the unitary patent system after all, if only to show Great Britain that they can get on without it – so that Great Britain's non-participation would actually be helpful in this regard as well.

As before, it will also be a question here of the political will to carry the project forward despite the adverse circumstances. It does not seem impossible in view of the Federal Constitutional Court's decision.

COVID-19: We have ensured the operation of the firm

At present, all members of the firm are healthy and fit for work.

Due to school closures and in order to reduce social contacts, we have set up facilities to work via home office. On site, our offices are only operated with a basic staff.

We can be reached by telephone and e-mail as usual. If possible, please refrain from sending us documents by post or fax.

Following the official guidelines, we will limit personal meetings and travel as much as possible. In order to be able to keep in touch with you, we offer the possibility for telephone and video conferences.

We assume that in this way we will be able to maintain the operation of the firm without restrictions until the end of the Corona crisis. However, should you have any further questions, please do not hesitate to contact us.

We wish your colleagues and co-workers, your loved ones and yourself all the best for the current troubled times.



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