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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

A Decision on the Unitary Patent System is Announced for Early 2020

There is news to report, albeit from a somewhat surprising source, concerning the Constitutional Complaint¹ (2 BvR 739/17) which remains pending against the Agreement on a Unitary Patent Court (UPCA). In an interview with *Managing IP*, the reporting judge Prof. Dr. Huber revealed that a decision would be forthcoming in early 2020. This is rather surprising, given that judges of the Constitutional Court normally do not give interviews on ongoing proceedings; it is the sort of interview one would more likely expect to read in an interregional German newspaper, too.

Huber explained that a decision on the complaint had been delayed because the court had had to deal with several more pressing cases, particularly the constitutional complaints over the European Central Bank and the European banking system,² but that it would of course do its best to reach a timely verdict. This order of priority had already been widely surmised.³ But now that decisions have been handed down – or oral proceedings have at least been completed – in the preceding matters, it appears that Case 2 BvR 739/17 has (finally) reached the top of the agenda.

Another explanation given by Judge Huber for the drawn-out proceedings was that the Federal Constitutional Court, as the court of highest instance, was duty-bound to craft its judgments with great precision and that this necessarily entailed a diligent, and thus time-consuming, approach. He pointed out that never before had interested members of the public submitted so many petitions to expedite the proceedings; nevertheless, the Federal Constitutional Court, as the highest instance, could not allow itself to be placed under time pressure.

It is not yet known whether, this complaint will be adjudicated concomitant to the constitutional complaints⁴ against the European Patent Office and the EPC due to the structure of the Boards of Appeal. The occasion would certainly present itself, given that this was specifically requested in the statement of complaint against the UPCA. The one really telling (albeit indirect) disclosure came when Huber, having been asked whether the evolving Brexit situation was one reason for the delay, bluntly dismissed the idea as “bullshit.”⁵ While he was personally sorry that the British were exiting EU, Huber explained, the Brexit was irrelevant to the case at hand, since it touched exclusively upon the German Constitution.

So does this mean that the UPCA’s alleged inconsistency with EU law – a key point of the complaint – will also play only a minor role or no role at all? One can merely speculate. Supporters of the UPCA will probably see this as welcome news, since it implies that Federal Constitutional Court is unlikely to address this aspect of the UPCA or the question of whether Great Britain can remain in the unitary patent system despite the UPCA’s integration into European law.⁶ So what consequences is the court’s decision likely to have? Three scenarios appear most probable:

In the (rather unlikely) event that the complaint is granted in full, the consequences will be clear: The unitary patent system in its present form would be at an end. Whether an

¹ See our Newsletters for April 2017 and February 2019

² See the following Constitutional Court Docket Nos.: 2 BvR 859/15, 2 BvR 1651/15, 2 BvR 2006/15, 2 BvR 43/16, 2 BvR 980/16, respectively 2 BvR 1685/14, 2 BvR 2631/14.

³ Cf.: <https://www.juve-patent.com/news-and-stories/legal-commentary/signs-of-life>

⁴ 2 BvR 2480/10, 2 BvR 421/13, 2 BvR 786/15, 2 BvR 756/16

⁵ Sic(!) According to *Managing IP* the interview was conducted in English

⁶ Cf. our Newsletters for March 2016 and April 2016; cf. also *Hüttermann*, Info Bulletin for 2016, p. 353.



In Our Own Affairs

We would already like to call your attention to our upcoming Annual Patent Seminar, which will be held on 23 April 2020 at the Industrieclub in Dusseldorf. As in all the years past, our seminar will be free of charge. Invitations containing the detailed programme will be sent out in good time.

alternative concept would be deemed constitutional remains to be seen, but the ensuing shock would probably be so great as to discourage any attempts to implement a new system for the foreseeable future.

If the complaint is granted only in part, on the other hand, then the decisive factor will be whether corresponding remediation options are available. If the fact that the German Bundestag approved the law unanimously but without the required number of cast votes were to be deemed problematic – in line with the complaint – then one could simply hold a second vote. The only German political party that has come out against the unitary patent system is the Alternative for Germany (AfD),⁷ but it currently lacks enough seats for a minority veto.

It seems conceivable that the Federal Constitutional Court may have difficulties with the proposition that legal practitioners (i.e. patent attorneys/attorneys at law) will also form part of the Advisory Committee defined under Article 14 UPCA, i.e. the body which, pursuant to Article 16 UPCA, will be entitled to present the Administrative Committee with a list of suitable candidates to be appointed as judges. This seems less problematic when it comes to the judges' initial appointment, but conflicts of interest could potentially arise when it comes to their re-appointment. In other words, judges who wish to be reappointed after their six-year term might be tempted to show a favourable bias in cases where members of the Advisory Committee appear before them. It is certainly true that the Federal Constitutional Court has set aside judgments in the past due to the mere theoretical presumption of a conflict of interest;⁸ inasmuch, the court has set the benchmark quite high in certain respects.

Here, too, however, it would be relatively easy to take corrective action, since the judges' term of service well as the reappointment process are codified in the UPCA's Articles. Thus, one could include language to the effect that legal practitioners, or even the entire Advisory Committee, are to be excluded from decision-making in the reappointment process. It should be noted that the Articles as they currently stand do not actually regulate the reappointment process in any great detail.

If the Federal Constitutional Court should deny the complaint in its entirety, then the law approving UPCA will be finally ratified as soon as the instrument of ratification has been forwarded and the German President (Bundespräsident) affixes his signature. It has already been announced that the forwarding process will be slightly delayed due to certain technical preparations and that, as a provisional measure, only the corresponding protocol⁹ will come into force. Expert observers expect this transitional period to last six months or more.

This said, a number of public statements and press releases have engendered a debate over whether the President will actually be in a position to sign the law before the Brexit issue has been resolved in a manner that ensures legal certainty. The well-founded counterargument made¹⁰ is that the President cannot refuse to sign off on laws except in extraordinary cases. Thus, some past Presidents confronted with controversial laws opted to break the impasse by affixing their signature while concomitantly expressing constitutional reservations. This was done by President Horst Köhler, for example, in connection with the *Luftsicherheitsgesetz* (LuftSiG, Aviation Security Act)¹¹.

⁷ As recently as February 2019, the AfD demanded that the law approving the AUPC be set aside, but this was rejected by the other parties; see the Official Records of the Bundestag under [BT-Drucksache 19/1180](#)

⁸ See for example, Docket No. 1 BvR 436/17, where a conflict of interest was already confirmed before the proceeding had even begun.

⁹ See our [Newsletter for January 2017](#).

¹⁰ Here, for example: <http://patentblog.kluweriplaw.com/2019/09/04/brexit-cannot-be-an-argument-to-delay-german-ratification-unified-patent-court-agreement/>

¹¹ <http://www.bundespraesident.de/DE/Amt-und-Aufgaben/Wirken-im-Inland/Amtliche-Funktionen/Entscheidung-Januar-2005.html>

In Our Own Affairs

If you would like to be included in our invitation-mailing list, or if you already know that you will attend the seminar, please let us know by sending us an email, along with your mailing address, at: seminar@mhpattent.de.

We would like to wish you a peaceful Christmas season, happy holidays and all the best for 2020!

Perhaps the most trenchant argument is that, in the case at hand, the competent panel of judges, namely the Federal Constitutional Court itself, has already affirmed that the law is constitutional. And that it has done so in full cognizance of the Brexit dilemma, as the aforementioned interview confirms. So one can hardly ask for more. On the merits, then, it is hardly conceivable that the law could fail to come into force. Still, one will have to wait to see how things unfold.

All in all, the interview with Judge Huber is an encouraging sign that, after years of uncertainty, the unitary patent system has now advanced to a decisive phase. Thus, 2020 could prove to be the all-important year.

The EJC on Indemnification of Damage When Interim Injunctions Subsequently Prove to be Unjustified – C-688/17

In a highly interesting case, the European Court of Justice had its say on the topic of indemnifying damage when an issued interim injunction later proves to be unjustified. The case at hand involved a legal dispute from Hungary in which Bayer Pharma AG had successfully obtained an interim injunction against Gereon Richter, but in which Bayer's claimed patent was later declared null and void.

Gereon Richter had thereupon sued Bayer for damages. Yet Hungarian law – in contrast to Section 945 of the German Civil Code (ZPO) – makes no provision for such a claim. Article 9 paragraph 7 of EC Directive 2004/48 (Enforcement Directive), on the other hand, expressly stipulates that the courts must have the power to order corresponding indemnification of damage. This in turn begs the question of whether such indemnity is mandatorily required.

In its decision, the EJC held that, so long as the petitioner was not acting abusively, a provision which precludes indemnity of damage when an interim injunction is lifted due to subsequent nullification of a disputed patent does not contravene the Enforcement Directive. This decision seems to be somewhat less relevant to German law, given that Section 945 of the Code of Civil Procedure (ZPO) stipulates exactly the opposite. Still, the decision could influence the future practice of the Unitary Patent Court. For according to Rule 213.2 of the Court's Rules of Procedure, it is up to the discretion of the Court to provide for indemnity of damage in such scenarios.

Nonetheless, some commentators are now asking whether, in view of the aforementioned case, the strict provision of Section 945 ZPO – which calls for indemnity of damage on a no-fault basis while precluding any discretion by the court – is still consistent with the Directive. For certain pronouncements by the EJC (particularly Recitals 63-66) could lead one to conclude that the EJC sees an absolute obligation to indemnify as a bridge too far. After all, one of the reasons which the EJC gave for its approval for the Hungarian legal provision was that a different interpretation of the Directive "...could have the effect, in circumstances such as those of the main proceedings, of discouraging the holder of the patent in question from availing himself of the measures referred to in Article 9 of Directive 2004/48 and would thus run counter to the directive's objective of ensuring a high level of protection of intellectual property."¹²

Although it remains to be seen whether the judgment can be used to derive such an interpretation, it could become the subject of a further referral on points of law, this time from Germany.



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¹² Recital 65 in No. C-688/17