

March 2020

German Federal Constitutional Court (BVerfG) delays establishment of the Unified Patent Court

Another setback for the Unified Patent Court (UPC)

In 2017, a constitutional complaint was lodged with the **German Federal Constitutional Court** (BVerfG) against the law approving the Agreement on a Unified Patent Court. This law was intended to create the conditions for ratification of the Agreement on a Unified Patent Court (UPCA) by Germany. Since without ratification by Germany the UPC will not enter into force, the decision on the constitutional complaint was eagerly awaited throughout Europe.

This decision has now been published on 20 March 2020: With a narrow majority, the BVerfG decided that the relevant provision of the Consent Act is **null and void**, failing to achieve the required approval of two thirds of the members of the German Bundestag. Such would have been necessary as a transfer of jurisdictional tasks under the UPCA, displacing German courts, would result in a **substantive amendment of the constitution**. A ratification of the UPCA is therefore not possible on the basis of the Consent Act.

Surprising BREXIT from the UPC

The future of, and further developments in connection with, the UPC remain uncertain: The **United Kingdom** already ratified the UPC before the **Brexit** but announced a few days ago that it will not be seeking involvement in the UP/UPC system. Participating in a court that applies EU law and is bound by the Court of Justice of the European Union (CJEU) is inconsistent with the aims of becoming an independent self-governing nation.

While this resolves some of the legal uncertainties that would result from the participation of a Non-EU member state in the UPC system, many other questions remain. Against this background, it is questionable whether a rapid new attempt at ratification by Germany can be expected - in particular, as the German Federal Government already stated last year in response to a parliamentary inquiry that the factual and legal effects of the Brexit on the UPC would have to be examined and coordinated at European level.

UPC and European Patent with unitary effect in a nutshell

The vision, which had existed for decades, of a Community patent – an intellectual property right with unitary effect throughout the EC – could not be realized. However, in the course of an enhanced cooperation, at least the legal prerequisites for providing European Patents (under the EPC) with unitary effect in the EU member states participating in such enhanced cooperation were created by Regulation (EU) No. 1257/2012. In addition, the UPCA, an international agreement, created the basis for a unified patent court. Regulation (EU) No. 1257/2012 shall apply from the date of entry into force of the UPCA. The latter will enter into force when at least 13 of the 25 contracting states have ratified and deposited the ratification certificate, subject to ratification by those states in which the largest number of European Patents were granted in the year prior to signature of the UPCA. While the required number of ratifications has been achieved, ratification by Germany, as one of the three states whose ratification is mandatory, has not occurred yet.

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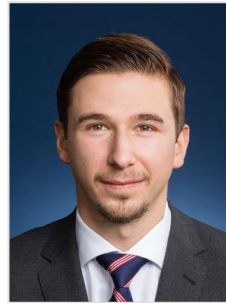


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