

Finally a green light for the start of the UPC – an analysis of the ruling by the *Bundesverfassungsgericht* and the remaining preparatory work

Wouter Pors, Bird & Bird The Hague

On 23 June 2021 the German Constitutional Court (*Bundesverfassungsgericht*) issued an order rejecting the requests for a preliminary injunction against ratification of the Unified Patent Court (UPC) Agreement. The order was published on 9 July 2021 and immediately drew a lot of attention, because this removed the most important obstacle for the start of the UPC. In fact, the UPC will now almost certainly open for business by the end of 2022, or the beginning of 2023 at the latest.

I will first discuss the judgment of the German Constitutional Court and then briefly the next steps towards the start of the UPC.

The procedures before the Constitutional Court

This was in fact the second case before the Constitutional Court against ratification of the UPC Agreement. In the first case the Court declared the ratification invalid in a judgment of 13 February 2020, because the required quorum was not present in the German federal parliament (*Bundestag*) when the ratification act was adopted. The second case was handled much faster than the first one, inter alia because there was an important procedural difference.

The last step for the ratification act, after acceptance by the *Bundestag* and the *Bundesrat* (the council that represent the 16 states or *Länder* that make up the German federation), is that it is signed, issued and declared ("*ausgefertigt und verkündet*") by the federal president (*Bundespräsident*). When a complaint is filed in the Constitutional Court, alleging that legislation is in violation of the constitution, the Court asks the president's office to postpone signing, issuing and declaring until the Court has ruled on the complaint. This is normally awarded. To anticipate a refusal to postpone, a complaint is normally accompanied by a request for a preliminary injunction, but that doesn't need to be decided if the president agrees to postponing. That is how it went with the first complaint against ratification of the UPC Agreement.

However, with this second set of complaints it was apparently clear that the president would not agree to postponing anymore, except for the time needed to decide on the preliminary injunction. This made it necessary for the Court to indeed rule on a preliminary injunction that would halt the ratification until the Court would have decided on the complaint itself. It is this request for a preliminary injunction that has now been refused, but in the grounds for its decision the Court clearly states that the complaints in the main case themselves have no merit.

The Constitutional Court mentions that this is the last opportunity to stop the German participation in the UPC Agreement, since once the ratification act is submitted, Germany is bound to the agreement by international law, which cannot be reversed by the Constitutional Court. Since it is very unlikely that in

this case the ruling on the complaint will deviate from the grounds for rejecting the preliminary injunction, this basically means that ratification of the UPC Agreement by Germany is now certain.

The approach towards handling the preliminary injunction

Both the German government and the German parliament argued that further delay would harm the confidence of the other countries in Germany, whereas the plaintiffs had not stated a specific personal interest that would be harmed if the UPC proceeds. Therefore, in their view the balance of interests would prevent a preliminary injunction. Of course they also argued that there was no violation of the German Constitution.

The Constitutional Court starts its reasoning by clearly stating that the preliminary injunction should be dismissed because complaints in the main proceedings are inadmissible, rather than ruling on the basis of the balance of interests. This means that the whole case has no merit and this ruling basically is the final ruling on the issue. Of course, if the plaintiffs want to pursue their case, they are entitled to a ruling on the complaints themselves, but that will most likely not differ from the grounds for this ruling. It is important to realize that, where in many courts preliminary injunctions are decided by a single judge, this judgment was delivered by no less than eight judges. The Court mentions that normally in deciding a preliminary injunction the grounds for the complaint should not be taken into account, unless it is clear that these grounds are without merit, but that of course exactly is the case here, which entitles the Court to discuss the merits of the actual complaints in detail.

The Court also states that strict criteria apply for awarding a preliminary injunction, because it is an interference with the competence of the legislator. The threshold is even higher in case of ratification of an international treaty. The plaintiff has to specify which Constitutional obligation is violated and in how far concrete fundamental rights of the plaintiffs are affected by this, both in their complaint and in their request for a preliminary injunction, taking into account previous case law. The Court has ruled that the plaintiffs haven't met this obligation, especially not in view of the judgment on the merits in the first case of 13 February 2020 (in which procedure some of the same arguments were raised and decided).

The grounds for the decision do not provide for easy reading, as they needed to be based very precisely on provisions in the German Constitution and their underlying fundamental principles, taking into account previous case law. The wording is very concise, with many references to previous case law of the Constitutional Court.

The substantive arguments of the plaintiffs and rulings by the Court

According to the complaints transferring judiciary power to the UPC would be subject to democratic principles, including the rights of voters, which would mean that this would require a basis in the Constitution itself. Also, the UPC Agreement would interfere with the rights of parliament, which in turn is based on the right to self-determination of the voters. However, according to the Court this would only apply if the core of democratic values is affected, which should be demonstrated by the plaintiffs. An appeal to the Constitutional Court does not provide for a further evaluation of the lawfulness of

decisions taken by a democratic majority or the democratic process itself, beyond such a violation of the basic democratic principles. This is quite a high threshold.

Transferring powers to the UPC would not be allowed according to the complaints, because judges at the UPC are only appointed for a term of 6 years, although consecutive appointments are possible. This would violate the independence of the judges, as this would expose them to subtle undue influence. In addition, the possibilities for the presidium to have a judge *“deprived of his or her office or of other benefits only if the Presidium decides that that judge no longer fulfils the requisite conditions or meets the obligations arising from his or her office”* (article 10 of the Statute) would be too extensive, whereas the UPC doesn't provide for a possibility to appeal such a decision. Thus, this would interfere with the rule of law and therefore with the principle of democracy. The Court states that it is in fact unclear how the principle of democracy would be affected by these facts, which interference would be necessary to conclude that the German Constitution is violated. The plaintiffs have also failed to argue which minimum constitutional standards would apply to the appointment of judges, especially since appointments for a limited period of time are the norm for international courts, such as the CJEU and the European Court of Human Rights. Obviously, if the Constitutional Court had awarded this complaint, that would have created huge problems for the EU and for international courts, as they also have appointments of judges for a limited period of time instead of for life. With regard to the possibility for judges to appeal decisions that affect their position, the Constitutional Court has held that it is unclear how this would affect the right of the plaintiffs to democratic self-determination.

The role of the Advisory Committee and the Administrative Committee in the appointment of judges was also questioned, especially because the Advisory Committee will include patent litigators, but the Constitutional Court didn't deal with this argument specifically after rejecting all the other arguments that relate to the appointment of UPC judges.

According to the plaintiffs the fact that the UPC can issue judgments which can be enforced in Germany requires remedies against such enforcement in accordance with the German Constitution. In addition the German Constitution and article 6 of European Convention on Human Rights require the availability of effective remedies by independent judges and by means of a thorough and expedient procedure. According to the Constitutional Court this can however only be the subject of a complaint in case of an actual and present violation of the rights of the plaintiff himself, a theoretical potential future violation is not enough. One of the plaintiffs had claimed that they would be entitled to attack patents for computer programs based on artificial intelligence granted by the EPO, but in this respect their fundamental right to an effective remedy would be violated, since the judges would be insufficiently independent and the organisation of the UPC would not meet the requirements of the rule of law. The Court rejected this as a merely theoretical issue, which is insufficient basis for a constitutional complaint.

The argument that the UPC Agreement would be in violation of European Union law was also rejected, since Union law, with the possible exception of the Charter of Fundamental Rights of the European Union, does not constitute a condition for the validity of German national law (because it is not part of the German legislative body). Therefore, this could not lead to a violation of the German Constitution.

A further complaint filed in this respect was that Brexit would have caused uncertainty, which would qualify as a violation of the principle of the rule of law. It was also mentioned in the complaints that London is a seat of the Central Division according to the UPC Agreement, but such a seat can only be

established in a state that is a party to the UPC Agreement and therefore this became a problem post Brexit. The Constitutional Court held that this was an issue of interpretation of the UPC Agreement, which cannot be the subject of a constitutional complaint (since it is an international agreement and not German law).

The complaint that the priority of Union law in article 20 UPC Agreement would only be acceptable in as far as this would be allowed by the German Constitution and that the obligation in article 21 to cooperate with the CJEU would also be a problem in this respect was also rejected. The Court pointed out that according to established case law such priority is allowed under article 23 of the German Constitution, which deals with the issue. However, such priority of Union law is on the other hand limited by the rights awarded under the German Constitution, which prevail in case of a conflict. Thus, there is no problem in Union law taking priority over other laws that need to be applied by the UPC, as long as that doesn't lead to a concrete violation of fundamental rights protected by the German Constitution, in which case that protection can be invoked before the German Constitutional Court. The position of the UPC is not different from the position of national courts in this regard.

Plaintiffs had also argued that it would not be allowed to conclude an agreement like the UPC Agreement without the direct participation of the European Union itself and that a ruling by the CJEU would be required on the question whether the UPC would qualify as a court as meant in article 267 of the Treaty on the Functioning of the European Union ("court or tribunal of a Member State"), because it is not part of the national judiciary. The Constitutional Court did not deal specifically with these arguments, probably since they also relate to Union law and not to the German Constitution and the issue of complaints for violation of Union law had already been dealt with.

Thus, the outcome is that in deciding a preliminary injunction the German Constitutional Court for all practical purposes actually decided the case on the merits, this time no more than 6 months after the vote in the German parliament. In view of the reasons for this decision the federal president can now sign, issue and declare the ratification act without further hesitance.

The next steps towards the UPC opening for business by late 2022 or early 2023

The UPC Agreement enters into force on the first day of the fourth month after deposition of the required ratifications with the General Secretariat of the Council of the European Union. Thirteen ratifications are required, including at least ratifications by the United Kingdom, France and Germany. Currently 16 ratifications have been deposited, which include the UK and France. Therefore, the UPC will open for business 3 months after deposition of the German ratification. This means that Germany will actually postpone such deposition until at least the UPC is ready to open within the next 3 months.

Because the UPC Agreement doesn't contain provisions on the preparatory work and especially not on the appointment of judges prior to the agreement entering into force, an additional Protocol on provisional application was agreed, which takes care of these issues. That protocol enters into force once it has been ratified by thirteen countries, again including the UK, Germany and France, or when those countries have informed the depositary that they have received parliamentary approval to ratify. The German ratification act also includes ratification of the Protocol and this act has been adopted by the *Bundestag* and the *Bundesrat*, so Germany can now notify the depositary of such parliamentary

approval (without actually depositing the ratification act). Currently two further countries that have signed the UPC Agreement need to send a notification that they have parliamentary approval for the Protocol and then it can enter into force. This is expected in the next months.

Next to the Protocol there are also the so-called Minutes of the signing of the Agreement on a Unified Patent Court of 19 February 2013. Although the name doesn't suggest it, these minutes are actually also an international agreement and one that doesn't require ratification. The Minutes have formed the legal basis for the Preparatory Committee and all of its work. This has already progressed very far. The 18th (and almost final) draft of the UPC Rules of Procedure was finalized and published on 15 March 2017. There will still be some minor tweaks on these rules, but nothing fundamental. All the legal documents on the Unitary Patent are ready. The IT systems for recording unitary effect at the EPO and for the case management and electronic filing at the UPC are close to completion. Locations for the seats of the Central Division, the Court of Appeal, the Registry, most of the Local Divisions and the Nordic Regional Divisions have been selected.

The major task now is the appointment of judges. Due to the past delay there needs to be a new opportunity to submit an indication of interest to become a UPC judge and then a first selection. This will be done under the supervision of the Preparatory Committee on the basis of the Protocol on provisional application. Then the candidates who have no or little experience in patent law need to be educated. This educational program on patent law has already been executed twice, in 2014 and 2015, but of course there may be new applicants who didn't participate back then, so a new run later this year is necessary. After that there will be a training program for all candidate judges on UPC law, both substantive and procedural. Finally the Protocol allows for the appointment of judges under article 16 of the UPC Agreement, which will be the last step to achieve a functional court.

Therefore all the preparatory work can be finalized during the provisional application phase. This is expected to start in September and will presumably take around one year. Once everything is ready (or it is certain that it will be ready within the next three months), Germany will deposit its ratification and then the UPC opens for business 3 months later.

I have said in previous publications that now is the time to prepare for the Unified Patent Court and the Unitary Patent and I am saying that again now, but this time it's for real!