KATHER · AUGENSTEIN
RECHTSANWÄLTE

Will the Unified Patent Court be established?

1 Last Friday, the Federal Constitutional Court (Bundesverfassungsgericht – BVerfG) granted a constitutional complaint by a Düsseldorf lawyer (Constitutional Complaint) and declared the Ratification Act on the Unified Patent Court unconstitutional on formal grounds (BVerfG, decision of 13 February 2020 - 2 BvR 739/17 - Unified Patent Court, hereinafter BVerfG - UPC). The reason for this was that the Bundestag (German Parliament) had not passed the Ratification Act by a majority of two thirds of all members. However, the Constitutional Complaint was only successful because the Federal Constitutional Court for the first time granted the possibility of challenging such violations also by means of an individual constitutional complaint.

2 Apart from the formal criterion of the lack of a majority, the Federal Constitutional Court has explicitly rejected most of the other attacks against the Ratification Act. Unfortunately, it did not comment on whether the unconditional primacy of European Union law was compatible with the German constitution, the Basic Law (Grundgesetz - GG). However, it was precisely the primacy of Union law that the European Court of Justice (ECJ) demanded in its 01/09 opinion. Therefore, if the primacy of Union law were incompatible with the Basic Law, Germany could never agree to the Agreement on a Unified Patent Court (UPCA) because Germany could never follow the ECJ's guidelines. As a result, this would also mean that Germany would never be able to join a dispute settlement mechanism at European level. However, there are numerous indications in the decision, especially in the selection of the judges, which suggest that the Federal Constitutional Court judges take a Europe-friendly view. In any case, neither an individual nor a company will be able to resolve this issue on their own. After all, even after the latest decision on Friday, such general questions of unconstitutionality cannot be challenged by way of a constitutional complaint.

3 How things now proceed will depend decisively on whether the German government puts its concerns about the Brexit behind it and starts a new legislative initiative to ratify the UPCA in the short term. Since the Bundestag will be newly elected in autumn 2021, there is not much time left for this, however.

4 If the United Kingdom does not actually participate in the Unified Patent Court, adjustments would be necessary, since the text of the agreement explicitly refers to London as one of the

seats of the Central Division. As the Member States to the UPCA would have to ratify this new text again, it would be useful to clarify the participation of the United Kingdom (UK) definitively and bindingly before a new legislative initiative in Germany.

5 It is controversial whether adjustments would be necessary if the UK were to participate. In any case, the supporters of an adjustment in this case have received no new arguments from the Federal Constitutional Court. For, ironically, the Federal Constitutional Court has justified the admissibility of the constitutional complaint precisely on the grounds that the transfer of competences to an international institution is irreversible (see below, marginal no. 15). If this were true, the UK would no longer be able to reverse its ratification and would have to participate in the Unified Patent Court. Moreover, the UK deposited the instrument of ratification under the responsibility of a then Secretary of State Boris Johnson, another irony of history.

6 In conclusion, it should be noted that the Federal Constitutional Court has not set insurmountable hurdles for a Unified Patent Court. However, the future of the project will depend decisively on whether the Member States and, if so, which ones actually want the Unified Patent Court, so that the necessary steps can be implemented.

7 In detail:

I. The decision of the Federal Constitutional Court of 13 February 2020

8 Remedies of citizens against laws are internationally extremely rare and under the validity of the Basic Law also only possible to a limited extent. In order to be able to better classify the decision, it seems useful to place the decision in its constitutional context and briefly explain how an individual constitutional complaint can be used to review a general law.

1. Constitutional complaint as a legal remedy of the individual citizen

9 With the constitutional complaint (Article 93 No. 4a GG), the Basic Law allows every individual citizen to assert violations of fundamental rights before the Federal Constitutional Court. In addition to the classical fundamental rights such as freedom of religion (Article 4 GG) or the right to freedom of speech (Article 5 (1) GG), citizens can also assert so-called equivalent fundamental rights such as the right to access to justice, the right to be heard or the right to

vote. These equivalent fundamental rights are listed exhaustively in Article 93 No. 4a of the Basic Law.

a) Democratic participation as an equivalent fundamental right in the constitutional complaint

10 These equivalent fundamental rights include Article 38(1) of the Basic Law. Its first sentence reads:

> "Members of the German Bundestag shall be elected in general, direct, free, equal and secret elections. “

11 The Federal Constitutional Court has always understood this provision not only as a purely formal legitimation of the parliament, but also as a civil right that ensures democracy ("democratic content"). It therefore also guarantees the citizen's right to submit only to a state power that he can legitimise and influence (BVerfGE dated 21 June .2016 2 BvR 2728/13, marginal no. 123). On the one hand, this means that a core of state decisions must remain with the Bundestag (identity control, such as criminal law or the Bundestag's budget law). This means that the Bundestag cannot transfer competences indefinitely. At the same time, the limits of such a transfer must be clearly defined.

12 On the other hand, the Federal Constitutional Court examines whether the Bundestag, Bundesrat and Federal Government also monitor compliance with the transferred powers. In doing so, these bodies must not only actively participate in any transgression of the competences. They even must work towards compliance with the rules, if the competences have been exceeded (ultra vires control, most recently BVerfG dated 30 July 2019 - 2 BvR 1685/14, marginal no. 140).

b) No general abstract review of statutes

13 These relatively strict conditions are necessary in order to prevent the constitutional complaint as a legal remedy for every citizen from becoming a regular procedure for the review of statutes. Pursuant to § 76 of the Federal Constitutional Court Act (Bundesverfassungsgerichtsgesetz - BVerfGG), only the Federal Government, a government of a federal state or one quarter of the members of the Bundestag have the right of abstract review of a statute (abstrakte Normenkontrolle, Article 93(1) No. 2 of the Basic Law).

c) Article 38(1) of the Basic Law allows to invoke the proper conclusion

14 With its decision last Friday, the Federal Constitutional Court has now added a new category of admissible complaints. Thus, an individual citizen can also claim in a constitutional complaint about Article 38(1) of the Basic Law that the required majority was not observed in the transfer of sovereign rights, and that the transfer of sovereign rights was therefore not *formally* achieved in a proper manner. The Federal Constitutional Court does not examine a substantive criterion, i.e. whether a residual power of decision remains or powers are complied with, here. This possibility of invoking a purely formal criterion has not existed up to now (see also Frankfurter Allgemeine Zeitung of 20 March 2020 "Protection against disempowerment").

15 It was essentially guided by the consideration that the transfer of sovereignty is irreversible. Thus, once transferred, powers could regularly not be retrieved. Such a transfer therefore would always affect Article 38(1) of the Basic Law (BVerfG - UPC, marginal no. 97).

16 With this criterion, the majority of the Second Senate also sets itself apart from the decision on the rescue package of the European Central Bank, in which it rejected formal criteria within the framework of Article 38(1) of the Basic Law (BVerfG dated 18 March 2014, marginal no. 125). The latter did not deal with the (permanent) transfer of sovereign rights (BVerfG - UPC, marginal no. 99).

d) Dissenting Vote of three judges

17 The Dissenting Vote of three judges criticises precisely this extension of the possibilities of legal remedies in Article 38(1) of the Basic Law. They are of the opinion that the possibilities of legal remedies in constitutional complaints based on Article 38(1) of the Basic Law have become excessive with including such a formal complaint (marginal no. 13 Dissenting Vote). Under Article 38(1) of the Basic Law, a citizen could assert the loss of substance of her/his right to vote. However, this loss of substance was independent of the formal enactment of any statute (marginal no. 12 Dissenting Vote). The rights of the Bundestag had also clearly not been curtailed, since it had transferred competences within the framework of an ordinary legislative procedure. The substance of the individual citizen's right to vote was not diminished by the disregard of a formal criterion (Dissenting Vote, marginal 17).

18 This also makes it clear how controversial this further step must have been within the Second Senate. With 5 to 3 votes, the decision was reached with the narrowest majority that makes a law unconstitutional at all. In the event of a tie of 4 votes to 4, a law is considered to be constitutional. The Dissenting Vote is also remarkable because the Federal Constitutional Court actually tries to demonstrate unity in important decisions (Frankfurter Allgemeine Zeitung op. cit.).

2. Admissibility of the Constitutional Complaint on the grounds of lack of majority

19 The Constitutional Complaint was thus admissible, since the Düsseldorf lawyer had criticised, among other things, that the Ratification Act had not achieved the required majority. Laws on further European integration under Article 23 (1) of the Basic Law require a majority under Article 79 (3) of the Basic Law. This requires a majority of two-thirds of the Members of the Bundestag for the adoption of a law, i.e. not only of the Members present. It is undisputed that at the time of the vote only about 35 Members of Parliament were present, who had unanimously adopted the Ratification Act (BVerfG - UPC, marginal no. 27), but who, with more than 600 Members of Parliament at the time, were far from a majority of two thirds of all Members (cf. Frankfurter Allgemeine Zeitung, op. cit.).

3. The inadmissible grounds of the Constitutional Complaint

20 In the opinion of the Federal Constitutional Court, the other reasons do not justify the admissibility of the Constitutional Complaint. The Federal Constitutional Court does not limit itself to the formal examination, but in some cases explains in detail why the provisions of the UPCA are constitutional.

a) Appointment of the judges

21 The Federal Constitutional Court denies the admissibility of the Constitutional Complaint, in particular with regard to the appointment procedure for judges at the Unified Patent Court. The members of the Administrative Committee must appoint judges unanimously, which means that the representative of Germany of the Administrative Committee has an equal and decisive role. The Federal Constitutional Court emphasises in particular that it has never questioned Germany's participation in supranational courts. The comparison with national provisions is not

sufficient, in particular because "the same requirements of certainty and density of regulation cannot be imposed on an international treaty" (BVerfG - UPC, marginal no. 106).

b) Establishment of rules of procedure

22 With regard to the authorisation to adopt rules of procedure, the Federal Constitutional Court recognises sufficient democratic legitimation in that "an equal participation of Germany in the decisions of the Administrative Committee is basically ensured (Article 41(2) UPCA) and these decisions require a majority of three quarters of the votes (Article 12(3) UPCA)" (BVerfG - UPCA, marginal 111). In particular, Art. 41 UPCA does not allow to extend the competences of the Unified Patent Court (BVerfG - UPC, marginal 112). The limits of the authorisation are therefore set sufficiently clearly. Likewise, Germany is involved in revisions of the Convention under Art. 87(3) UPCA by means of a right of veto and the activities of the Administrative Committee are subject to parliamentary control (BVerfG - UPC, marginal no. 111).

c) Determination of upper limits for reimbursement

23 For the determination of upper limits for the reimbursement of costs, the Federal Constitutional Court refers to Art. 69 (1) UPCA. According to this article, the costs to be reimbursed must be "reasonable and appropriate". At the same time, Art. 41(3) sentence 2 UPCA requires a fair balance between the interests of the parties. In the opinion of the Federal Constitutional Court, these would be sufficient starting points for a concretisation of the upper limit (BVerfG - UPC, marginal no. 113).

d) Infringement of European Union law irrelevant

24 In the admissibility review, the Federal Constitutional Court denies the relevance of European Union law. Here again, the special features of a constitutional complaint on the basis of Article 38(1) of the Basic Law must be taken into account. Thus, the Federal Constitutional Court states that a violation of Union law cannot in principle lead to the admissibility of a constitutional complaint under Article 38(1) of the Basic Law since no requirements for national German laws result from European Union law. A violation of European Union law could neither lead to the invalidity of a national provision nor justify a violation of the Basic Law (BVerfG - UPC, marginal no. 114). Even if the Basic Law required that German institutions undertake to comply with

Union law, this did not mean that Union law itself became a standard for the examination of constitutionality (BVerfG - UPC, marginal no. 115).

4. Reasoning for violation of Article 23(1) in conjunction with Article 79 (3) of the Basic Law

25 The Federal Constitutional Court affirms a formal constitutional violation because the Ratification Act of the UPCA is in a supplementary or other close relationship to the integration programme of the European Union and therefore Article 23 (1) of the Basic Law is relevant, which requires a two-thirds majority in accordance with Article 79 (3) of the Basic Law.

a) Proximity to European Union law

26 The starting point of Article 23 (1) of the Basic Law is that a high level of integration had already been achieved with the Treaty of Maastricht. In principle, therefore, any further transfer of sovereign rights should be covered by a larger two-thirds majority of the Bundestag (BVerfG - UPC, marginal 121). Historically, it was a question of securing the integration into the European Union achieved by the Maastricht Treaty and of setting higher hurdles for the further continuation of integration (BVerfG - UPC, marginal 128).

27 The Federal Constitutional Court emphasises that new competences and tasks of the European Union have always changed the constitution. If the legislature transfers new tasks of jurisdiction to newly created intergovernmental institutions, a material constitutional change is "obvious" (BVerfG - UPC, marginal no. 131).

b) Proximity of the Unified Patent Court to the European Union

28 Subsequently, the Federal Constitutional Court lists numerous indications of the proximity. For example, it mentions the primacy of Union law in Art. 20 UPCA, the fact that the Unified Patent Court is bound by Union law, Art 24(1)(a) UPCA (BVerfG - UPC, marginal 147) or the fact that institutions of the European Union have significantly promoted the UPC (BVerfG - UPC, marginal 148) and are involved in its implementation (BVerfG - UPC, marginal 149).

29 Finally, it justifies the proximity with the fact that only Member States of the European Union may participate in the UPCA (BVerfG - UPC, marginal no. 150). In this context, however, the Federal Constitutional Court does not address the fact that the UK will no longer be a member

of the European Union in the future, but has already ratified the agreement and at least until recently intended to participate in the UPCA.

30 Furthermore, the Federal Constitutional Court states that the UPCA "europeanises" (BVerfG - UPC, marginal no. 152) parts of the Basic Law, namely parts of the judiciary under Article 92 of the Basic Law (BVerfG - UPC, marginal no. 157), in particular the functions of the Federal Patent Court with the Federal Court of Justice as an appeal instance (cf. Article 96(1) and 96(3) of the Basic Law, BVerfG - UPC, marginal no. 160). It sees this structure of the Basic Law modified by the competences of the Unified Patent Court under Art. 32 UPCA, the direct enforcement of decisions in Germany under Art 82 UPCA or the preservation of evidence under Artt. 59, 60 UPCA.

c) No clarification on the primacy of Union law

31 After the Federal Constitutional Court has found the unconstitutionality of the Ratification Act of the UPCA for formal reasons, it no longer concerns itself with whether the unconditional primacy of Union law under Article 20 UPCA raises further constitutional questions. This is because, as is customary in other German courts, it does not discuss further questions if one alternative already supports the decision.

II. Reflections on the future of the Unified Patent Court

32 The decision does not mean the end of the Unified Patent Court if the Member States have the will to create the new court. However, further delays can certainly be expected.

1. <u>New legislative procedure necessary in Germany</u>

33 From a purely legal point of view, the formal error can easily be corrected. The Bundestag would have to approve the Ratification Act once again with a two-thirds majority. At the moment, there is no reason to assume that the two-thirds majority should not be achieved. In 2017 all parliamentary groups were in favour of the UPCA. In the newly constituted Bundestag since then, only the parliamentary group of the nationalist Alternative für Deutschland (AfD) is against the UPCA. The AfD had applied for the repeal of the Ratification Act of the UPCA with a motion of 14 March 2018. However, it based its rejection on only two reasons, on the one hand the formal unconstitutionality, which will have been cured with the new quorum, and on

the other hand the alleged lack of independence of the judges; an argument that the Federal Constitutional Court also dealt with but rejected (see above, marginal 21). It is therefore doubtful whether the AfD group would maintain its negative position. In any case, it alone does not have enough seats to prevent a two-thirds majority.

34 It is also clear that a new legislative procedure must be initiated, i.e. various readings in the Bundestag and the approval of the Bundesrat, because the old legislative procedure still originates from the previous Bundestag. According to the principle of discontinuity, a new Bundestag cannot take over legislative procedures from the previous Bundestag. Even without broad public discussion and agreement within the parliamentary groups of the Bundestag, such a procedure usually takes several months.

2. Delays due to the withdrawal of the United Kingdom

35 Further delays are also to be expected. The German government has already stated that it wants to wait for the effects of the Brexit before the Unified Patent Court is set up. Boris Johnson, as Prime Minister of the UK, has also declared that he no longer wants to participate in the Unified Patent Court, despite the existing ratification. It could also be that he only wants to bring the Unified Patent Court into the Brexit negotiations as a bargaining chip.

36 In addition, London is mentioned in the UPCA as one seat of the Central Chamber, see Article 7(2) UPCA and the corresponding Annex II. If the UK does not actually participate, this part of the agreement would have to be revised. Rumour has it that Milan will replace London. However, the remaining Member States would have to agree on this. This vote will certainly take some time, as many government resources are tied up by the Corona crisis, especially in Italy.

37 The amended text would have to be ratified again by the participating Member States. It makes sense for the German government to already introduce the modified text into a new legislative project.

38 According to current media reports (Frankfurter Allgemeine Zeitung of 21 March 2020 "Coffin nail for EU patent reform" and JUVE patent of 20 March 2020), however, the Federal Government intends to attempt to remedy the lack of form before the end of this legislative period.

3. New elections to the Bundestag in autumn 2021

39 It could be critical that the Bundestag will be newly elected in autumn 2021. This means that the current Bundestag would have to pass the new ratification law before the summer break 2021. After that, the Bundestag will no longer meet for sessions, as the Members of Parliament are in the election campaign. If the German government therefore really wants to wait and see how the UK positions itself during the Brexit negotiations and/or how the remaining participating Member States agree, a new legislative initiative before the end of this year seems very doubtful. In other words, the German government would at least have to abandon its reservations about the Brexit and initiate a new legislative project within the next few weeks.

40 It therefore seems very doubtful whether the German government can launch a new legislative project in the short term and therefore the current Bundestag could pass a new ratification law before summer 2021.

4. Irreversibility of transfer under the UPCA would mean participation of the UK

41 If Boris Johnson has brought the Unified Patent Court into the Brexit negotiations only as a bargaining chip and Britain will still join in after all, other questions arise. Many observers believe that in this case, too, the text of the agreement would have to be adapted because in the foreseeable future the UK will no longer be a member of the European Union. It is clear that the text of the UPCA provides for the participation of only Member States of the European Union. The legal dispute is whether it is sufficient for the UK to have been a member of the European Union at the time of signature and ratification and whether there are no reasons why the UK could terminate the agreement. In any case, the new decision of the Federal Constitutional Court does not suggest an adjustment for this situation. The main reason for the new right to sue in the context of a constitutional complaint based on Article 38(1) of the Basic Law is precisely that the Federal Constitutional Court assumes that the transfer of sovereign rights to the Unified Patent Court is final and non-reversible (BVerfG - UPC, marginal no. 97 et seq., see above marginal no. 15). According to this reasoning, the UK could no longer withdraw its participation in the UPCA. However, Boris Johnson will probably not be impressed by the decision and will probably keep his promise that the ECJ will have no further say in the UK. After all, there would be no court that could sanction this violation.

5. Further constitutional review

42 It is regrettable that the Federal Constitutional Court did not comment on the question of the unconditional primacy of European Union law under Art. 20 UPCA. This fuels speculation that the Federal Constitutional Court might let the Unified Patent Court fail for this reason. The Düsseldorf lawyer has already announced new constitutional complaints.

a) Leaving open due to efficiency

43 The fact that the Federal Constitutional Court has left the question open follows the tradition of German courts to answer only questions relevant to the decision. If the decision is already based on one alternative, German courts do not deal with further arguments. Every German law student learns this kind of efficiency. In any case, we can conclude from this that leaving it open is not an indication of doubt. The Federal Constitutional Court simply did not deal with the question, after it was clear that the Ratification Act was already unconstitutional for formal reasons. However, one may ask whether this general approach of the German courts is efficient if it encourages uncertainty and ultimately motivates people to bring further lawsuits. Personally, I would like to see German courts rethinking their approach and not just thinking efficiency in the short term, but fully ensuring legal certainty in important decisions.

b) Further constitutional complaint inadmissible on the basis of the primacy of Union law

44 It is also clear that even after the new decision of the Federal Constitutional Court on the Unified Patent Court, a constitutional complaint which alone challenges the primacy of Union law would not be admissible. Even if the unconditional primacy of Union law under Article 20 UPCA were to violate the Basic Law, Article 38(1) of the Basic Law would not be affected. Neither would the right to vote be without substance, nor would an institution exceed competences. Formally, a further law would have a two-thirds majority, so that this ground for admissibility of a constitutional complaint under Article 38(1) of the Basic Law would not be relevant either.

45 The Federal Constitutional Court has expressly stated this with regard to the alleged violations asserted to date. No further ones are apparent.

c) Abstract review of a statute (abstrakte Normenkontrolle) extremely unlikely

46 Thus, a ratification law could only be checked by an abstract review of a statute. Pursuant to §76 of the BVerfGG, only the German Federal Government, a government of a federal state or one quarter of the members of the Bundestag can initiate such a procedure (see marginal no. 13 above). The Federal Government withdraws because it will have initiated the law. The federal states are not affected by the transfer of competences, as patent law falls within the exclusive legislative competence of the federal government under Article 73 (1) No. 9 of the Basic Law. The federal states with significant numbers of cases in patent law have secured seats in the local chambers, so it is not clear on what grounds a state government should take action. The representation of the federal states, the Bundesrat, gave its unanimous approval last time (BVerfG - EPG, marginal no. 28). This would leave only one quarter of the members of the Bundestag. With the exception of the AfD parliamentary group, the members of the current Bundestag support the project (see above, marginal 33). The AfD group has 79 seats out of a total of 709, which is less than a quarter. On its own, therefore, it cannot initiate a review of a statute. Cooperation between the AfD group and other parliamentary groups, especially the opposition parliamentary groups, appears to be ruled out for political reasons.

47 It is therefore more than unlikely that the Federal Constitutional Court will even review another ratification law because of the primacy of Union law.

d) Federal Constitutional Court generally in favour of European law

48 The content of such a decision is by its very nature difficult to predict. In my view, however, the predominant reasons speak for the Federal Constitutional Court not to intervene here.

49 The decision of the Federal Constitutional Court itself shows that it has a positive attitude towards supranational institutions. For the appointment of judges, it has explicitly laid down less strict rules than required by national law (BVerfG - UPC, marginal no. 106, above marginal no. 21). At the same time, the ECJ made it clear that the Unified Patent Court must give priority to European law (Opinion 01/09), which ultimately led to Art. 20 UPCA and the order of precedence in Art. 24(1) UPCA. In its decision, the Federal Constitutional Court also clarified that the European Patent Court is in a complementary or proximity to the integration programme of the European Union (BVerfG - UPC, marginal 144 et seq.), even if it says

elsewhere that the Unified Patent Court exists beyond the European Union (BVerfG - UPC, marginal 116). It therefore seems inevitable that a court in this proximity to the European Union must also take into account the rules of the European Union. If the Federal Constitutional Court therefore assumed that the primacy of European Union law violated the Basic Law, it prevented any unification of jurisdiction in Europe. For it is precisely this primacy that the ECJ demands. The Member States could therefore not cooperate more intensively in the field of justice. However, this would contradict the principle that the Basic Law must be interpreted in a Europe-friendly manner, which the Federal Constitutional Court expressly recognises (BVerfG - UPC, marginal no. 115 with further references). So far, the Federal Constitutional Court has not prevented the further harmonisation and intensification of the European Union either.

50 The references of the Federal Constitutional Court to the content of the UPCA also do not indicate scepticism. To the extent that it refers to individual provisions, enabling principles are sufficiently defined so that it does not express any doubts about the possibility of transferring tasks to the Unified Patent Court. Nor do the Rules of Procedure indicate to what extent they restrict fundamental rights under the Basic Law, such as the granting of legal protection or the right to be heard by a court. It should be noted that Article 23(1) of the Basic Law does not require an identical, but only a comparable protection of fundamental rights. Along these lines, the Federal Constitutional Court has repeatedly affirmed that it considers sufficient protection of fundamental rights to be guaranteed at the European level. For example, a successful constitutional complaint must even show to what extent the protection of fundamental rights within the European Union has declined and fallen below the earlier level with which the Federal Constitutional Court had recognised that the ECJ sufficiently guarantees fundamental rights (BVerfG, decision of 7 June 2000 - 2 BvL 1/97). The primacy of European Union law should therefore not lead to the invalidity of a ratification law on the UPCA, even from the point of view of securing fundamental rights in a comparable form.

Dr Christof Augenstein
Lawyer