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Federal Constitutional Court: Urgent motion against the Implementation Act on the Agreement on a Unified Patent Court dismissed: Constitutional complaints are inadmissible in the main proceedings

(Federal Constitutional Court, decision of 23.06.2021, 2 BvR 2216/20 and 2 BvR 2217/20)

1 On 9.07.2021), the Second Senate of the Federal Constitutional Court dismissed two applications for a temporary injunction. The petitions were directed against the (second) Act Approving the Agreement of 19.02.2013 on a Unified Patent Court (EPCÜ-Custody Act II), which was adopted by the Bundesrat and the Bundestag with a large majority at the end of 2020.

2 The court based its decision on the fact that the constitutional complaints on the merits were already inadmissible. This means that there are no more obstacles to the execution of the EPCÜ-Custody Act II by the Federal President and the ratification of the Agreement on a Unified Patent Court. However, it remains to be seen whether new constitutional complaints will be filed after the law has been issued.

I. Background

3 The Agreement on a Unified Patent Court is an international treaty from 2013 and part of a European regulatory package on patent law. This agreement is intended to introduce a European patent with unitary effect - i.e. a new property right - at the level of the European Union. It also aims to establish a Unified Patent Court for disputes concerning European patents and European patents with unitary effect, which will have exclusive jurisdiction over disputes designated in the Agreement.

4 In order for this international treaty to become binding for the territory of the Federal Republic of Germany, a national implementation law is required. This law is the EPCÜ-Custody Act II. The EPCÜ-Custody Act II replaces the first implementation act (EPCÜ-Custody Act I) adopted by the German Bundestag in March 2017. The Federal Constitutional Court annulled this law in its decision of 13 February 2020, 2 BvR 739/17, due to errors in the legislative procedure. In terms of content, the EPCÜ-Custody Act II and the EPCÜ-Custody Act I largely correspond.

II. Objections raised

5 The decision of the Federal Constitutional Court was based on two proceedings (Ref. 2 BvR 2216/20 (complainants to I.1.-I.3.) and 2 BvR 2217/20 (complainants to II.)), which the court combined for a joint decision).

6 The complainants allege in particular a violation of their right to democratic self-determination under Article 38 (1) sentence 1 of the Basic Law in conjunction with Article 20 (1) and 20 (2) of the Basic Law and Article 79 (3) of the Basic Law. They claim a violation of the principle of the rule of law, of the fundamental right to effective legal protection, violations of Union law as well as an inadmissible interference with the constitutional identity protected by Article 79 (3) of the Basic Law by the primacy of Union law regulated in Article 20 UPCA. At the same time, they request that the Federal President be ordered not to execute and promulgate the EPCÜ-Custody Act II until a decision has been reached on the merits of the case, or, in the alternative, to prohibit him from executing and promulgating the EPCÜ-Custody Act II by way of an interim injunction.

III. Participation of the Federal Government, German Bundestag and Bundesrat

7 The Federal Government, the German Bundestag and the Bundesrat had the opportunity to comment on the applications for a temporary injunction. The Bundesrat did not make use of this opportunity.

8 The Federal Government commented on 07.01.2021. It considers the applications for a temporary injunction to be inadmissible and unfounded, because a weighing of the consequences would be to the detriment of the complainants. The Federal Government considers the constitutional complaints to be inadmissible, but in any case manifestly unfounded.

9 The German Bundestag commented on the proceedings on 08.01.2021. It considers the applications for an interim injunction to be inadmissible. The applications are also unfounded due to the lack of prospects of success on the merits. In any case, the weighing of consequences must be to the disadvantage of the complainants.

10 On 13.01.2021, the Federal President - in accordance with established state practice (cf. BVerfGE 123, 267/304; 132, 195/195 et seq. para. 1 et seq.; 153, 74/131 para. 90; cf. Schneider, in: Burkiczak/Dollinger/Schorkopf, BVerfGG, 2015, section 32 para. 268 fn. 478) – declared to the Federal Constitutional Court that he was prepared neither to issue nor to promulgate the EPCÜ-Custody Act II until the decision of the Federal Constitutional Court on the applications for a temporary injunction.

IV. Reasons given by the Federal Constitutional Court

11 The Federal Constitutional Court dismissed the applications for a temporary injunction pursuant to section 32 of the Federal Constitutional Court Act (BVerfGG) because the constitutional complaints are inadmissible on the merits. This applies both insofar as the complainants allege a violation of the principle of the rule of law, of the fundamental right to effective legal protection or violations of Union law (Federal Constitutional Court, decision of 23.06.2021, 2 BvR 2216/20 and 2 BvR 2217/20, section B.I.), and insofar as the complainant re I.1. sees in the provision of Article 20 UPCA an inadmissible interference with the constitutional identity protected by Article 79 (3) of the Basic Law (Federal Constitutional Court, decision of 23.06.2021, 2 BvR 2216/20 and 2 BvR 2217/20, section B. II. of the order of 23.06.2021).

1. Orders pursuant to section 32 BVerfGG

12 Pursuant to section 32 of the BVerfGG, the Federal Constitutional Court may issue temporary injunctions if this is urgently required to avert serious disadvantages, to prevent imminent violence or for another important reason for the common good. In decisions pursuant to section 32 of the BVerfGG, the court generally weighs the consequences. In this examination, the Federal Constitutional Court applies a strict standard, as such an order represents a considerable encroachment on the legislature's competences. This applies in particular if the suspension of the execution of a statute is requested because it or the prevention of its entry into force constitutes a substantial encroachment on the original competence of the legislature (Federal Constitutional Court, decision of 23.06.2021, 2 BvR 2216/20 and 2 BvR 2217/20, para. 50). Reasons for unconstitutionality are generally not taken into account in this weighing of consequences. The only exception is if a corresponding main action is inadmissible or

manifestly unfounded from the outset (Federal Constitutional Court, decision of 23.06.2021, 2 BvR 2216/20 and 2 BvR 2217/20, para. 49).

13 As a result, the Federal Constitutional Court rejected the urgent motions irrespective of any weighing of consequences because it considered the constitutional complaint inadmissible from the outset.

2. The right to democratic self-determination pursuant to Article 38 (1) BVerfGG

14 The Court is of the opinion that the complainants have not sufficiently substantiated the possibility of a violation of fundamental rights by the challenged Convention in view of the Senate's extensive case-law on Article 23 (1) of the Basic Law and, in particular, the decision of 13.02.2020 (BVerfGE 153, 74), which dealt with the Convention at issue (cf. Federal Constitutional Court, decision of 23.06.2021, 2 BvR 2216/20 and 2 BvR 2217/20, para. 52).

15 The complainant re I.1. asserts a violation of his right to democratic self-determination under Article 38 (1) sentence 1 in conjunction with Article 20 (1) and (2) and Article 79 (3) of the Basic Law in essence (see recital 72 et seq. for the complaint relating to Article 20 UPCA) by claiming that the Agreement violates the principle of the rule of law enshrined in Article 20 (3) of the Basic Law due to the organisational structure of the Unified Patent Court and the legal status of its judges. However, he does not explain to what extent this also affects the principle of democracy, which is subjectivised solely by Article 38 (1) sentence 1 of the Basic Law and is laid down in Article 20 (1) and 20 (2) of the Basic Law. In particular, it is not apparent to the Court to what extent the objections raised by the complainant against the organisational structure of the Unified Patent Court and the legal status of its judges are connected with the principle of democracy, which is the only objectionable principle under Article 38 (1) sentence 1 of the Basic Law. Thus, the complainant re I.1. did not explained in more detail to what extent the EPCÜ-Custody Act II violated the principle of the rule of law (Article 20 (3) of the Basic Law) and thus the principle of democracy (Article 20 (2), (3) of the Basic Law in conjunction with Article 38 (1) sentence 1 of the Basic Law) due to the intended organisation of the Unified Patent Court and the legal status of its judges.

16 The court cannot see in the complainant's submission that the integration-proof core of the constitution (Article 79 (3) of the Basic Law in conjunction with Article 23 (1) sentence 3 of the

Basic Law) is affected, since the complainant's subjective right (Article 38 (1) sentence 1 of the Basic Law) is limited to "*the core of the principle of democracy rooted in human dignity*" (Federal Constitutional Court, decision of 23.06.2021, 2 BvR 2216/20 and 2 BvR 2217/20, para. 55). The complainant could only assert this right with the constitutional complaint. The complainants would have had to show that the EPCÜ-Custody Act II would grant sovereign rights with a so-called "competence-competence", that a blanket authorisation would be granted without security or that the rights of the Bundestag would be substantially diminished.

17 The appellant's submission under I.1. is, however, limited to the representation that Article 6 et seq. EPC infringes Article 97 (1) of the Basic Law in conjunction with Article 6 (1) of the ECHR and the principle of the rule of law in Article 20 (3) of the Basic Law because of the appointment of the judges of the Unified Patent Court for six years, a possible reappointment and the insufficient contestability of a removal from office. To what extent this affects the principle of democracy remains unclear. The general reference to the principle of separation of powers, which according to the submission of the complainant under I.1. is supposed to be rooted in the principle of democracy, does not change this (Federal Constitutional Court, decision of 23.06.2021, 2 BvR 2216/20 and 2 BvR 2217/20, para. 59). It should also be noted in this context that, especially for international courts, special features apply which must be taken into account when transferring judicial tasks to intergovernmental bodies and which may justify deviations from the requirements of the Basic Law to ensure the independence of judges. Limited terms of office for judges are the rule in international courts and are often also linked to the possibility of re-election.

3. The fundamental right to effective legal protection under Article 19 (4) of the Basic Law

18 The complainants re I.2. and I.3. have also not substantiated a violation of Article 19 (4) of the Basic Law in conjunction with Article 97 (1) of the Basic Law and Article 6 (1) of the ECHR (right to effective legal protection). Article 97 (1) of the Basic Law and Article 6 (1) of the ECHR (right to effective legal protection). The Federal Constitutional Court ruled, that it is not enough to be potentially affected.

19 If the legislature authorises intergovernmental bodies or international organisations to exercise official authority directly against the persons concerned in Germany, it must ensure effective legal protection in accordance with the objective value decision contained in Article 19 (4) of

the Basic Law. This standard coincides with that of Article 6 (1) ECHR and the case law of the European Court of Human Rights, to which a Convention state also remains bound when it transfers sovereign rights to intergovernmental bodies (Federal Constitutional Court, decision of 23.06.2021, 2 BvR 2216/20 and 2 BvR 2217/20, para. 63).

20 A violation of Article 19 (4) of the Basic Law by the legislature can only be considered if the impairment has a current, i.e. actual and not only potential, effect on the legal position of the complainant. The mere prospect that the complainant might be affected at some point in the future is not sufficient in this respect (Federal Constitutional Court, decision of 23.06.2021, 2 BvR 2216/20 and 2 BvR 2217/20, para. 65).

21 Measured against these standards, the complainants under I.2. and I.3. have not shown that they are themselves, currently and directly affected in their fundamental right under Article 19 (4) of the Basic Law by the EPCÜ-Custody Act II (Federal Constitutional Court, decision of 23.06.2021, 2 BvR 2216/20 and 2 BvR 2217/20, para. 66). Measured against these standards, the complainants re I.2. and I.3. have not shown that they are themselves, currently and directly affected in their fundamental right under Article 19 (4) of the Basic Law by the EPCÜ-Custody Act II (Federal Constitutional Court, decision of 23.06.2021, 2 BvR 2216/20 and 2 BvR 2217/20, para. 69).

4. No violation of the promise of effectiveness and enforcement, Article 23 (1) of the Basic Law

22 Finally, the appellant re I.1. has also not sufficiently substantiated that the promise of effectiveness and enforcement of Union law (Article 23 (1) sentence 1 of the Basic Law) would be impaired by the provision on the primacy of Union law in Article 20 UPCA.

23 The Federal Constitutional Court states that this promise of effectiveness and enforcement includes granting Union law priority of application over national law in the Approval Act pursuant to Article 23 (1) sentence 2 of the Basic Law. However, this primacy of application only extends as far as the Basic Law and the Approval Act allow or provide for the transfer of sovereign rights. Compliance with these limits would be guaranteed by the Federal Constitutional Court within the framework of the identity and ultra vires review. The Basic Law does not permit an unrestricted primacy of application of Union law. This is binding for all

constitutional bodies of the Federal Republic of Germany and may neither be relativised nor undermined (Federal Constitutional Court, decision of 23.06.2021, 2 BvR 2216/20 and 2 BvR 2217/20, para. 74 et seq.).

24 The Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) did not contain any express provision on the primacy of Union law. Article 20 UPCA was therefore to be understood only in the sense that this provision was intended to dispel doubts as to the compatibility of the Convention with Union law. On the other hand, the provision did not contain any regulation of the relationship between Union law and national constitutional law that went beyond the status quo (Federal Constitutional Court, decision of 23.06.2021, 2 BvR 2216/20 and 2 BvR 2217/20, para. 77 et seq.).

V. Analysis and Outlook

25 It is gratifying that the Federal Constitutional Court has paved the way for the entry into force of the law implementing the UPCA and for the Unified Patent Court. With the decision of 23.06.2021, the Federal Constitutional Court decided not to issue any interim injunctions under section 32 BVerfGG that could (continue to) prevent the Federal President from signing the Act. The substantive decision not to issue an interim injunction is the judicial confirmation of what the Federal President has already done informally in recent months according to state practice, namely not to sign the law until the Federal Constitutional Court has made a decision on the application for an interim injunction. It is to be expected that the Federal President will now sign the law promptly, after having held back the signing for almost half a year.

26 It is meaningful that the Federal Constitutional Court has also taken a position on the constitutional complaints on the merits in its decision. This is because the Federal Constitutional Court is of the opinion that interim measures pursuant to section 32 of the BVerfGG are not to be issued because the constitutional complaints are already inadmissible. In other words, the assessment that the complainants have not substantiated the impairment of fundamental rights factually also leads to the inadmissibility of the constitutional complaints in the main proceedings. From a formal point of view, however, the Federal Constitutional Court has still to decide on these complaints as well, because the decision of 23.06.2021 relates solely to the urgent motions pursuant to section 32 BVerfGG. Although the Federal

Constitutional Court could decide differently in the main proceedings, it is extremely unlikely that the court will do so.

27 We asked ourselves which steps the complainants could take next and whether the rules of procedure allows any further steps:

1. Could the Complainants still catch up with the substantiation of the constitutional complaints?

28 Regarding constitutional complaints the scope of the statement of grounds is codified in section 92 BVerfGG. It states:

> "The statement of grounds of appeal shall specify the right alleged to have been infringed and the act or omission of the institution or authority by which the appellant feels that it has been infringed."

29 This means that a impairment of right that can be challenged by means of a constitutional complaint has to be asserted and substantiated (Hömig, in: Maunz/Schmidt-Bleibtreu, section 92 BVerfGG para. 2, 60th supplementation July 2020 (as of May 2011, supplementation 35)). The requirement to state reasons is generally also codified in section 23 (1) sentence 1 BVerfGG. According to this, a substantiated, coherent and plausible presentation of the constitutional legal situation is required, which is tangible for the judge and sufficiently concrete for the constitutional court's assessment (Hömig, in: Maunz/Schmidt-Bleibtreu, section 92 BVerfGG para. 2, 60th supplematation July 2020 (as of May 2011, supplementation 35 with further references)).

30 The designation of the allegedly violated right is one of the minimum requirements of a constitutional complaint and can therefore only be made up within the time limit for filing the constitutional complaint (Federal Constituional Court, decision of 12.04.1956, 1 BvR 461/55, VerwRspr 1956, 646; this follows also from section 23 (1) and sections 92, 93 BVerfGG, see Hömig, in: Maunz/Schmidt-Bleibtreu, section 92 BVerfGG para. 2, 60th supplementation July 2020, (as of May 2011, supplementation 35)). Amendments to the statement of reasons and the addition of reasons are (only) permissible within this period (Federal Constitutional Court, decision of 23.01.1990, 1 BvR 306/86, GRUR 1990, 438, 439).

31 However, a constitutional complaint that is not sufficiently substantiated at the end of the time limit cannot be subsequently completed in such a way that it can be regarded as sufficiently substantiated from the beginning and thus admissible (Hömig, in: Maunz/Schmidt-Bleibtreu, section 92 BVerfGG para. 53, 60th supplementation July 2020 (as of May 2011, supplementation 35)). The deficiency is therefore not reversible.

32 An insufficiently substantiated constitutional complaint is inadmissible (Federal Constitutional Court, decision of 25.04.2001, 1 BvR 1104/92, NVwZ 2001, 1261, 1262; Hömig, in: Maunz/Schmidt-Bleibtreu, section 93 BVerfGG para. 74, 60th supplementation July 2020, (as of July 2013, supplementation 41)).

2. Does anything else follow from the fact that the law (as of today) has not yet entered into force?

33 Regarding the question of whether amendments can be made in the ongoing main proceedings, it is decisive, as just explained, how long a constitutional complaint can be filed.

34 Individual constitutional complaints that do not fall under the provision of section 93(3) of the BVerfGG may only be filed and substantiated within one month pursuant to section 93 BVerfGG. Pursuant to section 93(3) BVerfGG, constitutional complaints directed against a statute or against “another sovereign act” which is not subject to legal remedies may be filed within one year of the coming into force of the statute or the enactment of the “another sovereign act”. The one-year period pursuant to section 93(3) of the BVerfGG regularly begins from the date of coming into force of the statute.

35 Since the EPCÜ-Custody Act II is a statute, the time limit is generally determined in accordance with section 93(3) BVerfGG. However, the statute has not yet come into force. It is therefore open to question whether a time limit already runs before it comes into force, or which point in time is decisive for its running.

36 A time limit could possibly begin to run according to section 93(3) 2nd var. BVerfGG.

37 According to its wording, section 93(3) of the BVerfGG also applies to constitutional complaints against “other acts of sovereignty”, (2nd var.), insofar as there is no legal recourse against them. It does not seem impossible to include a statute that has been passed but not yet

promulgated. For constitutional complaints against "other acts of sovereignty", the one-year period begins with the enactment of the act of sovereignty. However, section 93 (3) BVerfGG has so far remained without practical significance (Höming, in: Maunz/Schmidt-Bleibtreu, section 93 BVerfGG para. 74, 60th supplementation July 2020, (as of July 2013, supplementation 41)). Against this background, it is unlikely that this rule of procedure will be applied to statutes that have not yet entered into force.

38 If one disregards the provision of section 93 (3) 2nd. var. BVerfGG, however, the systematic of the BVerfGG speaks in favour of the fact that the period has not yet begun and only begins at the time when the law comes into force. This result is also consistent with the meaning of the time limit and the requirement to state reasons:

39 The time limit for filing a constitutional complaint serves to provide the person who believes that his or her constitutional rights have been violated with the period of time he or she needs to examine the prospects of a constitutional complaint and to be able to substantiate the legal remedy accordingly. On the other hand, the length of the time limit and its beginning take into account that clear conditions should be created as soon as possible and permanently after the entry into force of a law (cf. Hömig, in: Maunz/Schmidt-Bleibtreu, section 93 BVerfGG para 2, 60th supplementation July 2020 (as of July 2013, supplementation 41)).

40 However, as long as a statute has not yet come into force, the need for legal certainty weighs less heavily.

41 The main objective of the requirement to state reasons is to relieve the Federal Constitutional Court of time-consuming and costly information gathering. If, however, further constitutional complaints can still be filed, there is no need, at least from this point of view, to exclude the submission of reasons before the expiry of the time limit or the judgment.

42 Thus, as long as the court has not yet pronounced a judgment, it must take into account a supplemented statement of reasons, since only the objective unconstitutionality at the time of the decision is relevant for the decision (cf. Hömig, in: Maunz/Schmidt-Bleibtreu, section 95 BVerfGG para. 6, 60th supplementation July 2020, (as of January 2017, supplementation 50)).

3. Why did the Federal Constitutional Court not directly decide the main proceedings of the constitutional complaints?

43 In principle, it would have been possible to decide directly on the main proceedings. In this event, the motion for interims measures would have become irrelevant (Grasshof, in: Maunz/Schmidt-Bleibtreu, section 32 BVerfGG para. 1, 60th supplementation July 2020 (as of January 2004, supplementation 23)).

44 The reason that the Federal Constitutional Court did not decide directly on the main proceedings could be that the parties must be granted a hearing before a decision on the merits is made. This was possibly not feasible due to the existing urgency regarding the decision pursuant to section 32 BVerfGG (cf. Graßhof, in: Maunz/Schmidt-Bleibtreu, section 32 BVerfGG marginal no. 195, 60th EL July 2020 (as of July 2002, EL 21)).

4. Does the decision of the Federal Constitutional Court of 23.06.2021 have binding effect on the main proceedings?

45 The proceedings pursuant to section 32 BVerfGG are only intended as a provisional regulation and therefore have a different subject-matter than the main proceedings (Walter/Grünewald, in: BeckOK-BVerfGG, section 32 BVerfGG para. 11 (10th edition, as of 01.01.2021)). The main proceedings are therefore a separate matter. Therefore, there should only be a factual binding but not legal binding. It is highly likely that the court will judge the main case independently.

5. Can the complainants withdraw the complaints?

46 As a result of the maxim of disposition, the complainants can terminate the main proceedings by withdrawing the constitutional complaints. This possibility exists in any case if there is no public interest in a decision on the main proceedings (Bethge, in: Maunz/Schmidt-Bleibtreu, section 90 BVerfGG para. 12, 60th supplementation July 2020, (as of February 2018, supplementation 53) with further references).

If you have any further questions, please do not hesitate to contact us for a discussion!

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