

# IP Report

## Patent Law



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### **Additional Comment on the IP Report "Unitary Patent and Unified Patent Court – Is it all over or is there a Plan B?": The decision by the German Constitutional Court regarding the UPC complaint**

Reported by *Prof. Dr. iur. Tilman Müller-Stoy* and *Dr. iur. Rudolf Teschemacher*

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The German Constitutional Court found the German Law on the Unified Patent Court Agreement (UPCA) to be null and void. It was passed in the German Bundestag without the necessary 2/3 majority, i.e. it suffers from a formal defect which can, however, be remedied by new legislative acts if there is still sufficient political support. Interestingly, the Court also published a dissenting opinion by three of eight judges.

The petition was also based on the grounds that the status of the judges and the appointment procedure did not comply with the rule of law. The Court concludes that this attack is inadmissible because the petitioner has not sufficiently demonstrated that a constitutional right was potentially violated. Inter alia, the Court observes that principles concerning the democratic legitimation of judges cannot be applied per se to the transfer of judicial competences to international bodies. The Court observes that a violation of the rule of law is a valid ground for the petition only to the extent to which the petitioner has shown a connection to the democratic principle as standard of review.

As far as the petition relies on the competences of the UPC's Administrative Committee to adopt the UPC's Rules of Procedure and the fixing of ceilings on reimbursable costs of representation, it is also held inadmissible. The Court considers the transfer of these competences not to be a blanket transfer of power within the

meaning of its previous decisions on multi-lateral trade treaties considering Germany's right to participate in the decisions of the Committee and in its right to veto any amendment to the UPCA agreement by the Committee.

As to the alleged violations of EU Law, the Court observes that the democratic principle laid down in the German Constitution is not violated. EU Law does not contain any formal or substantive requirements which could cast doubt on the validity of a German Act or even violate the identity of the German Constitution. The principle that the Court has to exercise its review cautiously and in a way that is open to European integration (europarechtsfreundlich) does not alter this conclusion, since, according to the Court's case law, this principle does not have the consequence that EU Law becomes a standard of review for German Law.

Importantly, the Court leaves open whether this might be different with respect to the fundamental rights as laid down in the European Charter of Human rights if a legal point is exclusively dealt with in European law in the process of European integration. In the present case, the UPC is an international body on its own outside EU Law.

This means that there will be further uncertainty and delay for the system. Whether the system is now dead simply remains open, also because of Brexit and the UK's



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declaration to not participate in the system which, in itself, makes revisions of the UPCA necessary. Since the UPCA has to be revised anyway, the opportunity could – and should – be seized to make the system more attractive. Issues to be considered are the criticized opt-out / opt-in regulations, sound grounds for the compulsory inclusion of European bundle patents, the good, but improvable rules of procedure, the (high) reimbursable attorney fees (which may be prohibitive for SMEs), the renewal fees for the Unitary Patent, as there is no valid reason for subsidizing national budgets via the renewal fee share in the Unitary Patent,

just to name the most important ones. In any event, the bottom line is: There are still many aspects that need to be considered and clarified before a version of the UPCA exists which can be considered for ratification. This will take time, even if there is sufficient political will. The Corona crisis is another delaying factor. Yet, that does not change anything about the fact that most of industry is rightly in favor of the system even without the UK, and time for improvements isn't a bad thing, is it?