

UPC – Ratification Process not affected by Brexit

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Still more Constitutional Law than IP

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Not Britain but Germany is the bad boy of Europe. Due to a constitutional complaint against the German Ratification Act on the UPCA¹, the President of Germany has stopped the formal steps, which have to be undertaken to bring an act that has passed parliament into life. As a consequence, there is no ratification of the UPCA so far.

Now, the reporting judge for the constitutional complaint, Justice Peter Huber, announced that a decision should be expected in early 2020.² Both planning and gossip have started for the time after an – assumed – dismissal of the complaint.

Rumor has it that Germany wants to withhold ratification even after a dismissal until it is clear whether the system shall start with the UK, without the UK or at all. The basis of this rumor seems to be a response of German Government concerning a request of the parliamentary group of the “Free Democratic Party” regarding the impact of Brexit on the UPCA and the planned procedure in this context³. The crucial part states that Brexit and its impact play an important role on the implementation process of the UPCA and that

the forming of an opinion is not yet finalized.⁴ In Germany, this led to the thought of a halt of ratification until the situation is clarified. In France, this has already been translated into a fact. Here the “Compagnie Nationale des Conseils en Propriété Industrielle” informed its members about a supposed announcement of the German minister of justice that “Germany” will not proceed the UPCA ratification until Brexit-conditions are completely clarified.⁵

However, is this possible in light of the rights and obligations of the Federal Government and the President?

For answering this question, three procedural steps have to be considered separately: the countersignature of the German Ratification Act by the Federal Government, the execution of the German Ratification Act by the President and the signature and deposit of the instrument of ratification itself by the President:

¹ „Gesetz zur Anpassung patentrechtlicher Vorschriften auf Grund der europäischen Patentreform“.

² *Thus, the Constitutional Court will – even if only likely – decide after Brexit. We do not want to deal with the question whether the Constitutional Court will touch the concerns of Lamping/Ullrich or the ideas of Gordon/Pascoe and Tilmann. We assume that the Constitutional Court dismisses the complaint without demanding amendment to the UPCA.*

³ Drucksache 19/11707

https://dipbt.bundestag.de/doc/btd/19/121/191210_6.pdf -

⁴ *“Die Frage des Austritts des Vereinigten Königreiches aus der Europäischen Union (sogenannter Brexit) und dessen Auswirkungen auf die europäische Patentreform spielen eine wichtige Rolle beim weiteren Implementierungsprozess des Übereinkommens über ein Einheitliches Patentgericht. Es müssen die tatsächlichen und rechtlichen Auswirkungen eines Austrittes im Hinblick auf das Übereinkommen geprüft und auf europäischer Ebene abgestimmt werden. Diese Meinungsbildung ist derzeit noch nicht abgeschlossen, nicht zuletzt, weil wesentliche Faktoren des voraussichtlichen Austritts derzeit noch nicht bekannt sind.”*

⁵ CNCFI - La Lettre interne Juillet Août 2019

1) National countersignature and execution

According to Art. 82 (1) of the German Constitution (GG), acts having passed parliament are “countersigned”⁶ by Government and subsequently “executed” by the President.

The countersignature by the Government has predominantly authenticating reasons to guarantee a textual accordance with the passed draft act. It is undecided if Government has the competence of a constitutional review of the respective act. However, in any event there is no right to review it with a political point of view. Such political reviews are reserved for Parliament, which has just passed the act.⁷

For the execution, it is the President who has the competence for a constitutional but not for a political review. The same reasons apply.⁸

Once the constitutional complaint is dismissed there is no room for constitutional concerns anymore. That includes the scenario where Brexit has occurred on January 31 and thus before a dismissal of the constitutional complaint. The Constitutional Court would have had found that ratifying the UPCA is constitutional even though the UK has left the EU. Quite some political issues might remain. Undoubtedly, Brexit will/would lead to numerous questions and problems regarding the further participation of the UK in the UPC system. However, it would not cause constitutional problems in Germany.

Therefore, Brexit discussions must not legitimate a refusal of countersignature and/or execution of the German Ratification Act.

But which timelines have to be met during the

⁶ During the research for this publication it could not be clarified if the process has been halted before or after countersignature. To reflect any possible delay it is supposed that countersignature has not occurred yet.

⁷ Maunz/ Dürig, Grundgesetz Art. 82 Rn. 95, 101f.; Sachs/Nierhaus/Mann GG Art. 82 Rn. 18 – 20.

⁸ Maunz/ Dürig Rn. 187; BeckOK Grundgesetz/ Pieper GG Art. 82 Rn. 16.

process?

German law does not provide deadlines for countersignature and execution of an act. This leads to the conclusion that these tasks have to be fulfilled without any delay.⁹ At least, it cannot take more than an “appropriate period of time”. This criterion of appropriateness prohibits delays that miss a basis in the circumstances of the execution process.¹⁰

Waiting for a Brexit decision is an exclusively politically motivated practice without basis within the execution process. After a dismissal of the constitutional complaint any doubts regarding the constitutionality of the ratification of the UPCA are moot.¹¹ Thus, the appropriate period can be determined according to the usual timelines that are necessary for finalizing the execution procedure without any exceeding delay. Usually, the time passing between an act having passed parliament (or an act having been declared not to violate constitution) and execution is about two to four weeks.¹²

2) Signature and deposit of the instrument of ratification

Again, the President needs to take action. German law and the UPC Agreement requires deposit of a signed instrument in Brussels, Art. 59 (1) GG Art. 89 (1) UPCA. It has never been decided if signature and deposit of an international agreement is only a formal competence of the Federal President or whether the President has a right to veto international agreements. However, as the political authority should

⁹ Sachs/Nierhaus/ Mann Rn. 4.

¹⁰ Maunz/Dürig Rn. 107 f.

¹¹ That does not mean that the legal issues the Constitutional Court has to tackle are small. When the constitutional complaint was filed the Constitutional Court only had to deal with the question whether the UPC can start with a country being a member of the EU but about to leave. Now, it will have to decide whether the UPC can start with a country no longer being a member of the EU. (And apart from that the arguments in the constitutional complaint itself remain.)

¹² Maunz/Dürig Rn. 226.

remain with Parliament and the President has already been included in the ratification process during the execution of the ratification law, one can hardly argue to use other guidelines for the competence of review at this advanced point of ratification.¹³

Hence, new developments can only have an impact on the ratification process if they lead to constitutional questions or if they could be harmful for the international standing of Germany.¹⁴ Both is not the case within the Brexit-discussions. Brexit is not a new development. When German Parliament passed the Ratification Act, the UK had already performed its Brexit referendum and was expected throughout Europe to submit its Art 50 EUV declaration. And international standing is not impaired by a swift ratification. On the contrary, all UPC member states are awaiting a decision of Germany to get the Unified Patent System started. Also, the UK has shown its willingness to find a Europe based solution by ratifying the UPCA despite unsolved Brexit-questions.

Thus, deposit must not be delayed.

3) Timelines

Searching for a realistic timeframe for the above-mentioned procedural steps the ratification of the Lisbon treaty might be a guideline. A decision on the constitutional complaint in this matter had been rendered on June 30, 2009 and even though an accompanying law had to be amended due to the decision, the ratification process (countersignature of Government, execution by President, signing of ratification instrument by President and deposit by President) had been finalized only three months later on September 25, 2009.¹⁵

Even if any possible procedural delays are mentioned, it seems adequate to allow a maximum of three months per procedural step, consequently nine months from the dismissal of the constitutional complaint until

¹³ Maunz/Dürig, GG Art. 59 Rn. 78 ff.

¹⁴ *ibid.*

¹⁵ Streinz/Ohler/Herrmann, *Der Vertrag von Lissabon zur Reform der EU*, § 2 Nr. 2.

the deposit of the instrument of ratification in Brussels, always keeping the circumstances of the individual case in mind.¹⁶ (Even that sounds outrageous given the normal pace of countersignature, execution and deposit.)

While we expect that January 31, 2020 will be Brexit day, time has shown that it cannot be excluded that this period ends even before Brexit. Yet, let us assume that there will first be Brexit and then a decision on the constitutional complaint.

4) What happens after ratification?

As Germany is the last among the UPC-states that needs to ratify the UPCA, the agreement will enter into force “on the first day of the fourth month after the deposit”¹⁷ of Germany’s instrument of ratification. There is a need for a provisional start, however. The UPC needs to be prepared and work on i.a. the establishment of courts, the appointment and training of judges and the adoption of the Rules of Procedure and the sunrise period. Ramsay, the head of the preparatory committee, has requested 6 to 8 months.¹⁸ This is ensured by the “Protocol to the Agreement on a Unified Patent on provisional application” (PPA).

The PPA has been accepted by 11 of the necessary 13 states¹⁹ and – according to further rumors – Austria is expected to ratify the PPA at any minute as needed due to Austrian law while it has already signed in January 2019. Also Germany has signed the PPA. Yet, to bring the PPA to life Germany

¹⁶ This estimated timeframe has to be shortened to 6 months if countersignature has already been done after all (see fn.6).

¹⁷ Art. 89 (1) UPCA – for instance deposit on May 23 results in a start on September 1st.

¹⁸ Conference: Premier Cercle, Munich, July 3rd 2018.

¹⁹ There is one peculiar aspect: Art. 3 PPA requires 13 states to sign as Art. 89 UPCA. Yet, Art. 3 PPA does not require the three largest validating states to be among the 13 states. Rather it explicitly demands Germany, France and the UK to sign. Thereby the UK might trigger the preliminary application of the UPCA without subsequently being part of the system. (We close our eyes and wish to disregard the issue.)

has to additionally either ratify the UPC agreement right away or inform the depository about parliamentary approval for ratification.

Now let us make a guess: On one hand the UPC needs time before actually starting. On the other hand Germany's Government and President need to act swiftly after dismissal of the constitutional complaint. Therefore, Germany should inform the depository about the parliamentary approval for ratification immediately after the dismissal. This would be sufficient for the PPA to enter into force according to its Article 3 (as it had already been signed by Germany).²⁰ Using the full nine months as the above calculated maximum plus three months between ratification and entry into force of the UPCA would lead to a period of one year for preparation and establishment of the UPC. Thus, should the constitutional complaint be dismissed, the UPC will start sometime late Spring 2021, as also recently estimated by Alexander Ramsay.²¹

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<https://www.consilium.europa.eu/en/documents-publications/treaties-agreements/agreement/?id=2015056>

²¹ <https://www.juve-patent.com/news-and-stories/people-and-business/the-upc-will-be-operational-in-early-2021/>

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