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UPC 2.0

Is there a chance for a new German Act of Approval to the UPCA?

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In its recently published decision dated 13 February 2020, the German Constitutional Court declared the German Act of Approval to the UPCA to be void.¹

The stated reason for the invalidity - the lack of a two-thirds majority of the existing members of parliament when adopting the Act - could be cured quite easily by a restart of the legislative procedure. However, would this be enough to make the Act of Approval survive a potential further constitutional complaint? And is there enough political will to restart the legislative procedure?

I.

The petitioner advanced ample arguments for the invalidity of the Act:

1) He succeeded with the argument that his right to “democratic self-determination”² has been violated by only 35 members of the *Bundestag* being present and voting. Therefore, the required 2/3 majority could not be reached. Parliament’s argument that the UPC was not meant to be an EU entity, thereby rendering such a majority unnecessary, did not carry. The German Constitutional court saw sufficient ties to the EU to require the 2/3 majority. The Constitutional Court’s Press Release No. 20/2020³ provides further information on this point.

¹https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2020/02/rs20200213_2_bvr073917.html

² deriving from Art. 38 (1) first sentence, Art. 20 (1) and (2) and Art. 79 (3) in conjunction with Art 23 (1) third sentence and Art 79 (2) of the German Grundgesetz (GG)

³<https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2020/bvg20-020.html>

2) The petitioner argued that his above-mentioned right to democratic self-determination is further violated by the inadequate legal status of the UPC judges. In the petitioner’s view, this inadequacy is caused by the procedure underlying the judges’ appointment as well as their brief 6-year mandate. In this point the Court ruled that a violation was not sufficiently substantiated, as the UPCA contains rules for the legitimation of judges and Germany’s participation in a supranational court in general has never been questioned before. It is likely that a sufficient substantiation will not be possible.

3) The petitioner argued further that the Rules of Procedure contain provisions that can be seen as a blanket authorization.⁴ This concerns particularly the rules on reimbursement of legal costs and other expenses in Art. 69 (1) UPCA to be adopted by the Administrative Committee without parliamentary contribution of the member states (Art. 41 (1) UPCA). Again the Court stated that the petitioner did not substantiate this point. Germany’s participation in the Administrative Committee is sufficient, so the Court.⁵ It held the limitation of the reimbursement to “reasonable and proportionate costs” as sufficient. There will hardly be a new attack in this regard.

4) The Court also dismissed the further pleaded incompatibility of the UPCA with European Union law. Such violation, if it existed, could not lead to invalidity under

⁴ Violation of Art. 38 (1) first sentence in conjunction with Art. 20 (1) and (2) in conjunction with Art. 79 (III) GG

⁵ The Court did not see the case as comparable with the cases regarding the Maastricht and Lisbon Treaties.

German constitutional law. Again, a new attack of the kind is not to be expected.

II.

Given that the Court has demonstrated its opinion on the proportionality of the rules regarding the legal status of judges, the competence of the Administrative Committee, the reimbursement of legal costs, and violation of EU-law, one could be optimistic that a potential future constitutional complaint regarding these points would be dismissed.

Yet the Court has explicitly not decided whether Art. 20 UPCA, regarding the “Primacy of and respect for Union law”, violates the German constitution.

According to the case law of the Court and the Court of Justice of the European Union, Union law has primacy only *in application* over national law but not an overall priority, and then only as far as the Union law is directly applicable for the member states. This means that national law that conflicts with EU law is not *void* but rather *inapplicable* in the specific case where Union law is primary. Art 20 UPCA states that “[t]he [Unified Patent] Court shall apply Union law in its entirety and shall respect its primacy”.

The Court did not make any statement on the interpretation of this “primacy” of Union law and its impact on the conformity with German constitutional law. In its decision it only calls it an unconditional primacy (“unbedingte[r] Vorrang[]”). One can only speculate how a future decision on this point would rule. The absence of a clear statement - after years of waiting for the decision - paves the way for a further delay in the event that the ratification of the UPCA restarted.

Even supposing that the UPC would start its work, the future UPC decisions as exercise of the transferred sovereign powers might also be used for a subsequent evaluation of the constitutionality of the UPCA, even if they are not revisable themselves by national courts.⁶

⁶ BVerfG, Beschluss vom 24.07.2018 - 2 BvR 1961/09

In addition, enforcement procedures of UPC decisions can be subject to the national jurisdiction as they are governed by the law of the respective member state where the enforcement takes place, according to Art. 82 (3) UPCA. This might give the opportunity to indirectly control at least the national effects of UPC decisions.

Even if it would be enacted, then, the future capacity and impact of the UPC elude prediction.

III.

Possibly, the uncertainty regarding the primacy of Union law and the future consistency of the UPCA can be accepted.

Yet there remains one further aspect that needs to be mentioned:

According to Art. 7 (2) UPCA, the central division with its seat in Paris shall have sections in London and Munich. Since UK withdrew from its participation in the UPC, a London section is no longer feasible. What does this mean for the ratification process and which procedural steps will it entail?

1) Should the Act be put to vote as it now stands, and should it pass parliament with the necessary 2/3 majority, a political refusal of ratification by the German Government or the President as well as a further constitutional complaint remain impossible. Specifying London as venue makes the UPCA and its Act of Approval incorrect but not unconstitutional, as it does not infringe the German Constitution or harm the fundamental rights of any specific petitioner.

The President and the Federal Government must not refuse their participation in the ratification process due to merely political reasons.⁷

A further constitutional complaint in this regard would be dismissed as a petitioner

⁷ https://grunecker.de/fileadmin/Grunecker/Informationen/UPC/Aufsaeetze/Grunecker_UPC_181219.pdf

could not substantiate a violation of its fundamental rights. So supposing that the future Act of Approval is free from any other deficits, the ratification seems theoretically secure after the Act has passed Parliament with the necessary 2/3 majority.

However, it is hard to believe that an Act bringing a UPCA into life would even be brought to vote while it still specifies London as one location for the central division.

2) Indeed, there is little possibility to rectify the mistake afterwards. Amending the UPCA by the Administrative Committee according to Art. 87 (2) UPCA “to bring it into line with [...] Union law” without the necessity of a re-ratification by all member states is not an option. Stating that a section of the central division is located in London does not conflict with Union law, it is merely incorrect.⁸ Even if Art 87 (2) UPCA were applicable, it would only cover the deletion of London but not the decision about a substitute.

3) As a procedurally secure solution, the UPCA could be amended formally by the UPC members. The change of the location for the previous London section sounds simple but, besides the question which member state should replace UK's role, such a change would entail a time-consuming new ratification process of all member states. Furthermore, while the UPC members will participate in an amendment of the UPCA, these states would be sure to voice opinions for an extensive revision of the already-criticized clauses that supposedly conflict with Union law or national law. We would inevitably arrive at a point requiring not only re-ratification but *re-negotiation* of the Agreement. And there is no end in sight; political winds in the various member states have already begun to blow in different directions.

IV.

In conclusion it remains to say that the

⁸ The question whether this should lead to an amendment by the Administrative Committee *a fortiori* shall not be discussed here.

success of the German constitutional complaint, combined with UK's interim withdrawal from the EU, have effectively derailed the ratification process and the final consequences remain uncertain. Momentum previously gathered toward ratification seems now to have been lost, and will likely be difficult to regain in the face of conflicting member interests and undecided legal issues, frustrating any efficient reconciliation in a new draft.

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