

MB Milestones Special Edition

German Federal Constitutional Court declares law approving the unified patent court null and void



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A. German Federal Constitutional Court

The German Federal Constitutional Court declared today that the law on approval of the agreement on the establishment of a Unified Patent Court ("UPC Agreement") is unconstitutional: this was by Senate resolution (file no. 2 BvR 739/17). The law is thus null and void.

In essence, the court bases its decision on the fact that the Federal Republic of Germany, by approving the Unified Patent Court, cedes essential national sovereign rights, especially in the area of the judiciary, to a newly created institution based on European and International law. In order to preserve the right of democratic self-determination of the citizens, Article 23 I GG in conjunction with Article 79 II GG provides that a two thirds majority of the members of the Bundestag is required for such measures. Since the Bundestag passed the law by only a simple majority, the law needs to be declared null and void.

For details of the reasons for the decision, we refer to the official press release of the Federal Constitutional Court, which can be downloaded here: <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/DE/2020/bvg20-020.html>

B. Quo Vadis Unitary Patent Court?

The decision was eagerly awaited by the European patent law scene, as it was the last serious hurdle in the ratification process for the Unified Patent Court. In the event of a positive decision, the Federal Republic of Germany would have been able to ratify the UPC Agreement in a timely manner, and the Unified Patent Court could possibly have been operational by the end of 2020. At the same time, regulation (EU) No. 1257/2012 creating the European patent with unitary effect would have entered into force, which would have provided users with unitary patent protection in a substantial part of the European Single Market for the first time.

The start of the Unified Patent Court thus, once again, seems to be a long way off. Hopes for a strong Unified Patent Court, for which companies and practitioners have been preparing for years, were already considerably dampened at the end of February this year when Great Britain, one of the world's most important patent court locations, announced that it will no longer participate in the Unified Patent Court after Brexit.

It remains to be seen how things will now proceed with the Unified Patent Court and the European Patent with unitary effect. Of note: the specific issues with the German legislative process appear to be

surmountable. The Federal Constitutional Court also makes comment that it considers the European legal foundations for the creation of the Unified Patent Court to be fundamentally in place. It appears that it will not only require the renewed conviction of a majority of German parliamentarians for this major European project to begin. As another point, the UPC Agreement, an agreement under international law, may require some further adjustment. Whether the remaining participating

member states are willing to adapt the agreement and establish the court cannot be foreseen at present. ■

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