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"Unitary patent" and court system – Compatible with Constitutional Law?

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This article reflects the personal opinion of the author.

While the delivery of the Statement of Position of the Advocate General in the CJEU nullity proceedings against the two Regulations on the "unitary patent" is delayed, the German Federal Government seems to prepare for the ratification of the international Agreement on the Unified Patent Court. That the fee situation is still unclear and that there is no final version of the Rules of Procedure yet do not appear to be regarded as obstacles, nor do the constitutional complaints in a number of European countries and the complaints to the European Court of Human Rights raised against the procedures at the European Patent Office (EPO). Since the Court Agreement relies on the activities of the latter and on the legal sources underlying these activities, such violations of fundamental rights would be continued by it. In case of an international Agreement, German law provides for the possibility to request an assessment of a ratification's compatibility with fundamental rights by the Federal Constitutional Court, prior to the ratification statute entering into force. This means of legal redress, which can also be available to legal persons with a seat outside Germany, and some aspects of the "unitary patent package" with relevance under constitutional law will be explained below.

I. Proceedings C-146/13 and C-147/13: Advocate Generals' Opinion is delayed

On 1 July 2014, at the end of the oral hearing of Spain's complaints against the two Regulations on the "unitary patent" (proceedings C-146/13 and C-147/13) it was announced that the Advocate General, *Yves Bot*, would deliver his Statement of Position in these cases, i. e. his proposals for a decision, on 21 October 2014. To all appearances, this date will not be met, a new one has not yet been scheduled. The reason for the delay is unknown.

As it has been described elsewhere (cf. *Stjerna*, "Unitary patent" and court system – The oral hearing on Spain's actions at the CJEU" as well as "New problems ahead?", p. 4 f. respectively, accessible in German and English in section "unitary patent" at www.stjerna.de), the decisions of the CJEU could turn out to be problematic for the ratification of the "Agreement on a Unified Patent Court" (afterwards "Court Agreement" and "UPCA") regardless of whether they reject or allow the complaints, this especially with regard to the mandatory ratification by Great Britain and the stipulations made by the British Prime Minister insofar. As is known, he said in the House of Commons that it was a fundamental requirement for the British approval of the Unified Patent Court (afterwards "Patent Court") that

> *"the new patent should be redrafted so that it did not get snarled up in the processes of the European Court of Justice."*

The protocol of this statement can be accessed here (Col. 586). Whether this condition is satisfied and the CJEU will truly not claim competence for the interpretation of the "unitary patent" Regulations will be decided in said proceedings C-146/13 and C-147/13. Therefore, from Great Britain's point of view, it would seem absolutely imperative to wait for the decisions of the CJEU prior to ratifying the UPCA as to make sure that the self-defined requirements for ratification are fulfilled.

On the other hand, one could also imagine to circumvent the meaning of the cited statement and the problems apparently attached to it by proceeding to ratification already prior to the handing down of these decisions. Creating such faits accomplis would render any implications of the CJEU judgments irrelevant for the ratification of the Court Agreement, avoiding an otherwise possible dead-end for the time being, although the motivation underlying such step would be evident.

The delay in the delivery of the Advocate General's Opinions could offer the time necessary for such course of action. In this case, the ratification of the Court Agreement in Great Britain should be announced shortly. Let us wait and see.

Of course, the postponement of the Statement of Position can be a mere coincidence. However, as the procedures in relation to the "unitary patent package" so far have repeatedly shown that the realisation of the plans is sometimes even put above the law, any distrust is justified.

II. Status of ratification

As is known, the entry into force of the Court Agreement requires its ratification by at least 13 Contracting States, which must include Germany, Great Britain and France (Art. 89 (1) UPCA). After successful ratification, the State in question will deposit its instrument of ratification with the Council of the European Union (Art. 84 (2) 2 UPCA) and will notify the European Commission accordingly (Art. 84 (3) UPCA).

So far, five ratifications appear to have taken place: By Austria (notification to the Commission on

6 August 2013), Sweden (5 June 2014), Belgium (6 June 2014) and Denmark (20 June 2014) as well as, of the mandatorily required states, France (14 March 2014). Further Contracting States can be expected to work on the required draft legislation.

With regard to Germany, the Federal Ministry of Justice and Consumer Protection, in a press release from March 2014 (accessible here, in German language), informed as follows:

> *„The Minister emphasized that the work for implementing the EU Patent Package has advanced significantly. Therefore, a start of the new system still in the coming year would be realistic. After the summer break, he intended to present a draft for a statute for the ratification of the Agreement on the Unified Patent Court."*

It will be interesting to see this draft, since it will have to satisfy "*the respective constitutional requirements of the Member States"* (Art. 84 (2) 2 UPCA), in case of the Federal Republic of Germany most of all its Constitution ("*Grundgesetz*", afterwards "GG"). However, for some aspects of the Court Agreement, this compatibility can legitimately be questioned.

III. Structure and procedures at the EPO: Compatible with the *Grundgesetz*?

The Court Agreement is closely associated with the activities of the EPO and the European Patent Convention (EPC). This follows, on the one hand, from the competence of the Patent Court for disputes in relation to the "unitary patent" as the granting authority of which the EPO is meant to function and, on the other, with regard to its competence also for "classical" European patents without "unitary effect" granted by the EPO (cf. Art. 3 lit. c) and d) UPCA). The EPC is part of the sources of law to be applied by the Patent Court (cf. Art. 24 (1) lit. c) UPCA). This association of the Court Agreement with the EPO and the EPC could prove to be problematic in terms of its ratification, as the structure and design of the procedures at the EPO are currently objected, in proceedings in several European countries, as violating fundamental rights. Due to said connection between EPO, EPC and UPCA these objections are likewise relevant in relation to the latter.

1. EPO and European legal system

As one reason for their nullity actions against Regulations Nr 1257/12 and 1260/12, Spain refers to the involvement of the EPO in the grant and administration of the "unitary patent", against the background of the level of legal protection offered there being considered insufficient in terms of the principle of the Rule of Law.

a) The EPO's position as an intergovernmental body

Here, one important factor is the institutional position of the EPO as an organ of the European Patent Organisation (cf. Art. 4 (2) EPC), namely an agency created by an intergovernmental Agreement "outside" the European legal and administrative structures. Above all, this causes its decisions to be rendered outside of the institutional and judicial system of the EU Member States which are hence not subject to judicial review – the appeal bodies of the EPO lack a judicial nature –, also references for a preliminary ruling to the CJEU are not possible.

b) The legal position of the EPO in the legislative proceedings for the „unitary patent package"

Unfortunately, in the legislative proceedings on the „unitary patent package", the EPO has not dealt openly with this situation, but rather tried to conceal it (cf. the verbatim protocol "The Parliamentary History of the European Unitary Patent", accessible as an English [afterwards "verbatim protocol EN"], German or original language version at www.stjerna.de).

On 11 October 2011, in a public hearing on unitary patent protection in the Legal Affairs Committee of the European Parliament the President of the EPO, *Benoît Battistelli*, commented on this (a video recording is available here). He said (verbatim protocol EN, para. 419, from 15:12:15 of the video recording, translation from French):

> *"First of all, I would like to recall that, contrary to widespread opinion, granting decisions of the European Patent Office can, even if they have been confirmed by the Boards of Appeal of the Office, be challenged in the national courts. And these national courts currently have the option to direct to the European Court of Justice a referral question. By this I want to emphasize that we do not stand outside the European Union legal order, although the European Patent Office is not an EU institution. Due to the actual realities and mechanisms and due to the fact that 27 of our Members are, at the same time, part of the European Union, we are nonetheless integrated into the legal framework defined by the EU."*

With regard to the relationship of the EPO and the CJEU, he stated (verbatim protocol EN, para. 464, translation from French):

> *"Now on to the question in terms of our relationship to the European Court of Justice. As indicated already, we do not have our own jurisdiction. In the current system, the situation is that a patent granted by us becomes a national patent and that the responsibility for this patent lies with the individual Member States. Here, the rules apply that are equally binding for the Member States when it comes to abiding by Community law in relation to national law, i. e. the national courts send referral questions to the CJEU."*

The question as such about the EPO's relationship to the CJEU remained unanswered, instead the competence of

the Member States' national courts to request preliminary rulings from the CJEU was put forward, once "*a patent granted by us becomes a national patent".* That the competence of these courts, first of all, requires that a European patent is granted went unmentioned. The same applies to the fact that occasionally, for instance in Germany, the competence of the national courts additionally requires that potential EPO opposition proceedings have been completed, which, as is well-known, can be very time-consuming.

In said hearing, the former Member of the European Parliament *Françoise Castex* (S&D group) asked Mr *Battistelli* for the EPO's relationship to EU law and to what extent compliance with latter would be guaranteed in relation to the grant of a future "unitary patent" (verbatim protocol EN, para. 455, from 15:48:03 of the video recording, translation from French, emphasis added):

> *"(…) Now it is a fact that the majority of our Member States are, at the same time, also Members of the European Union. Therefore, if the EU institutions make a statutory regulation on this or that area, then our Members States, which are at the same time EU Member States, are obliged to abide by these regulations and to implement them in practice, and also for us, the European Patent Office, these provisions are binding at the substantial level.*
>
> *Let me give you an example which leads to controversy frequently, namely biotechnology. The European Union has adopted a Directive on the protection of biotechnological inventions. The European Patent Office was among the first to implement this Directive in its legal provisions, i. e. into the framework of rules which it applies every day and this – allow me to point that out – even before many Member States transposed this Directive into their national law. Thus, if you decide to lay down rules and principles in this and that field, our Member States which are also yours, have the responsibility and obligation to abide by what has been decided at EU level. In the same form, we do integrate these rules into the daily practice of the European Patent Office. Therefore, one can say that the European Patent Office abides by all fundamental rights, all ethical and moral principles, everything constituting the common European legal corpus.*
>
> *Some may regret that the European Patent Office is not an EU institution, but this is reality. It is a fact and I think it will not take Europe forward to challenge this now. All the more, as the patent organisation represents a successful component of the European project. Please permit me to say that that one should not further dwell on theoretical discussions of principle. It is a fact that there are intergovernmental European realities which do also contribute to Europe's success. And the European Patent Office is, on the one hand, an instrument providing to the European economy one of the best patents worldwide and it is, on the other, one of the vectors for Europe's international importance on the patent field."*

Accordingly, the President warranted the compliance with all legal obligations, especially with those resulting from European law, by the EPO. However, he did not mention the missing possibility of judicial review in relation to the factual compliance with this promise, merely stating that the missing integration of the EPO in European legal and administrative structures – to be added: and the deficiencies as to the Rule of Law resulting from this – would have to be accepted, having regard to the importance of the EPO for the European patent system.

c) The position of the Advocate General in her Statement of Position in proceedings 1/09

The fact that the legal position of the EPO is problematic with regard to the provision of adequate legal protection as required by European law had been formulated already by CJEU Advocate General *Juliane Kokott* on 2 July 2010 in her Statement of Position in the CJEU opinion proceedings 1/09 (accessible here). In it, she commented (ibid, para. 71 f., translation from French):

> *„In fact, the decisions of the EPO concerning patents can only currently be reviewed by the internal chambers of appeal created within the EPO, excluding any judicial appeal before an external court. There is no possibility of the European Court of Justice ensuring the correct and uniform application of Union law to proceedings taking place before the chambers of appeal of the EPO.*
>
> *The European Union should not either delegate powers to an international body or transform into its legal system acts issued by an international body without ensuring that effective judicial control exists, exercised by an independent court that is required to observe Union law and is authorized to refer a preliminary question to the Court of Justice for a ruling, where appropriate."*

In her statement, Ms *Kokott* also made suggestions on how to resolve these deficits (ibid, para. 73, translation from French):

> *"These requirements can certainly be satisfied in different ways. A possible extension of the competences of the future PC [Patent Court] to include administrative proceedings against decisions of the EPO is just one of the options that may be contemplated. Another option that may be contemplated is the creation of an administrative patent court which should be authorized, unequivocally, to refer to the European Court of Justice for a ruling on a preliminary question."*

Thus, as one possibility, the review of EPO decisions by the Patent Court was envisaged.

d) Solution of these problems through the UPCA?

When looking at the competences of the Patent Court provided for in the UPCA, it becomes apparent that these do not cover all decisions of the EPO.

There are competences for actions for the revocation of patents – the "classical" European patents as well as those with "unitary effect" – and supplementary protection certificates (Art. 32 (1) lit. d) and e) UPCA) as well as for *"actions concerning decisions of the European Patent Office in carrying out the tasks referred to in Article 9 of Regulation (EU) No 1257/2012."* However, there is no general competence of the Patent Court for reviewing all decisions of the EPO. With regard to decisions rejecting the grant of a European patent, for instance, the present regulations continue to apply. Here, the applicant is still limited to proceedings at the EPO, with all the mentioned structural deficits.

To that extent, the situation on legal protection, objected as insufficient in the Statement of Position from proceedings 1/09, remains unchanged and the question arises as to why, prior to a full resolution of all these central aspects which concern legal positions protected by fundamental rights, with the UPCA a further international Agreement should be put into effect which will cause a perpetuation of this doubtful situation.

2. Pending constitutional complaints against the procedures at the EPO

That these problems not at all relate to merely *"theoretical discussions of principle"* without any practical relevance and that the abidance by the EPO to *"all fundamental rights"* as pledged apparently seems to be incomplete, is evidenced by a number of complaints in which procedures of the EPO are currently objected in Member States of the EU as violating fundamental rights. At the German Constitutional Court (BVerfG), there are currently pending at least three constitutional complaints in which the legal structure of procedures at the EPO as well as a number of decisions rendered on this basis are claimed to be unconstitutional.

a) AR 2435/13

In proceedings AR 2435/13, relating to the German part of European patent EP 0 722 730, a number of provisions from the EPC, the Implementing Regulations to the EPC and the Rules of Procedure of the Boards of Appeal and of the Enlarged Board of Appeal are objected as being incompatible with basic legal requirements under the Rule of Law and therefore held to be unconstitutional. Apart from a violation of the fundamental right of effective legal protection (Art. 19 (4) GG) as well as the procedural fundamental rights to one's lawful judge (Art. 101 (1) 2 GG) and the right to be heard (Art. 103 (1) GG), the applicant asserts violations of the principle of the Rule of Law and the principles of independency of judges and of legal clarity. Additionally, the complaint claims as unconstitutional a decision of the Boards of Appeal, due to a violation of the fundamental right to property (Art. 14 GG), the right to one's lawful judge and the human right to a fair trial.

Similar constitutional complaints were filed with regard to the respective national designations of said European patent in the Netherlands and in Great Britain. Furthermore, complaints were filed at the European Court of Human Rights against Germany (docket no. 57999/13), the Netherlands (docket no. 60300/13) and Great Britain (docket no. 57362/13) for a violation to the right to a fair trial (Art. 6 (1) ECHR)

b) 2 BvR 421/13

The second constitutional complaint pending at the BVerfG (2 BvR 421/13) pertains to the European patent EP 1 429 968. Here, with regard to the circumstances of an opposition decision of the Technical Boards of Appeal and the respective appeal decision of the Enlarged Board of Appel, the applicant argues a violation of her fundamental right of effective legal protection, of the right to one's lawful judge and of the right to be heard as well as of the fair trial principle, resulting from a "*general and apparent structural deficit as to legal protection"* (translated from German).

c) 2 BvR 2480/10

The contents of the third pending constitutional complaint (2 BvR 2480/10) are unknown.

d) Legal consequences in case of unconstitutionality

The consequences of a successful constitutional complaint differ, depending on whether its subject is a decision or a statue. While a decision which has been found to be unconstitutional will be set aside and referred back for new decision (§ 95 (2) of the Federal Constitutional Court Act, afterwards "BVerfGG"), an unconstitutional statute is void (§ 95 (3) BVerfGG).

In case of success, especially the constitutional complaints targeting the EPC could therefore have serious consequences. As an international Agreement being in force, the EPC cannot be nullified by a national court, since a decision relying on the national law of a Contracting State cannot eliminate the mutual agreement of all Contracting States on which the international Agreement is based. However, as a consequence of such finding by the BVerfG the German Federal Government, pursuant to Art. 172 EPC, would have to press for a renegotiation by the Contracting Parties of the aspects found to be unconstitutional in order to resolve the unconstitutional situation. Afterwards, this new version of the EPC would have to undergo ratification in each of the Contracting States as to become valid there, respectively. How provisions found to be unconstitutional would have to be dealt with until then is unclear, usually

– at least under German law – they are inapplicable until a new regulation is put into effect.

Presumably, before dealing with the pending constitutional complaints in substance, the BVerfG will at least wait until the CJEU has handed down its decisions in proceedings C-146/13 and C-147/13. Although the subjects of these proceedings are different – European regulations at the CJEU, intergovernmental legislation at the BVerfG – and although the objected aspects are not fully identical, general statements of the CJEU on aspects also raised in the proceedings at the BVerfG would certainly be relevant. However, as mentioned in the beginning, the CJEU decisions can now be expected to take some more time.

The most recent interlocutory decision R 19/12 of the Enlarged Board of Appeal (accessible here, German language), in which a confusion of administration and judiciary at the EPO, and thus a contradiction of the rule of law, has in principle been admitted, shows that the proceedings are by no means unpromising.

IV. Impact of the pending proceedings on the ratification of the UPCA?

It cannot be excluded that the German legislator will go forward with the ratification of the Court Agreement even without prior judicial clarification of the mentioned constitutional issues by the BVerfG and CJEU.

However, more and more voices are deeming the UPCA incompatible with the *Grundgesetz*, due to its close association with the EPC and its deficient legal protection and are rejecting a ratification of the UPCA (cf. the article by Prof. *Siegfried Broß*, a former judge at the Federal Constitutional Court and in the Patent Senate of the Federal Supreme Court, in ZGE 2014, p. 89 ff.).

V. Legal protection against the ratification of an international Agreement

In case the German legislator should start the ratification process on the UPCA prior to a final judicial clarification of the mentioned questions, this would constitute the only case under German law in which an affected natural or legal person can put forward a statute directly to the BVerfG for review, without having to exhaust all other remedies before. This is only possible in respect of a statute for the ratification of an international Agreement.

The reason for this is that, on the one hand, there is no legal remedy against a Federal statute, and, on the other, that the legally binding effect for Germany under international law, brought about by the coming into effect of the ratification statute, cannot be eliminated even in case of a subsequent finding of unconstitutionality, as described above in relation to the EPC. In order to avoid such binding effect in relation to an unconstitutional Agreement, the affected natural or legal person can file a constitutional complaint and request the BVerfG to prohibit the organs in question from undertaking the measures necessary for the ratification statute to enter into force, if necessary by interim measures.

The requirements for relying on this unusual and effective remedy will afterwards be described in more detail.

1. Admissibility requirements for a constitutional complaint against a ratification statute

For such assessment by the BVerfG, it is necessary, first of all, that the ratification statute has been formally adopted by the legislative organs without having entered into force, i. e. at least the last step of depositing the ratification instrument needs to me missing.

a) Possible violation of fundamental rights by the exercise of public powers

For the admissibility of such constitutional complaint, the applicant needs to demonstrate that at least he cannot be ruled out to be violated in a legal position protected by fundamental rights by the "exercise of public powers". The ratification on the UPCA would be such exercise of public powers, it would also interfere with several legal positions protected by fundamental rights.

First of all, for all owners of patents and patent applications which are meant to fall into the competences of the Patent Court it cannot be ruled out that they might be violated, for instance, in their procedural fundamental rights, their right to an effective legal protection as well as their right to a fair trial.

For the owners of patent applications filed and of patents granted prior to the envisaged entry into force of the UPCA which are meant to fall into the competences of the Patent Court pursuant to Art. 3 lit. c) and d) UPCA, there would be an additional aspect. Patents and patent applications are protected by the fundamental right to property in Art. 14 GG (cf. BVerfG E 36, 281 (290 f.)), part of which is that an effective legal protection has to be guaranteed for the property position. For the mentioned patent applications and patents, the type of legal protection against infringement provided for at the time of filing or grant respectively, the way to the national courts, is intended to be retroactively shifted to the Patent Court by the UPCA. The owner can only avoid such competence by making use of his right to opt-out under Art. 83 UPCA for which he shall, at least at present, be required to pay a fee. This retroactive shift of competences could also mean an interference with the fundamental right to property.

b) Concern

The applicant himself needs to be concerned by the objected exercise of public powers, he must be affected in his own rights, it is not possible to assert third party rights in one's own name. This concern furthermore needs to be current, i. e. it must be given already or still, and it must be caused directly by the ratification statute and without the necessity of a further act of execution.

c) Applicant‘s eligibility to file a complaint

In principle, everyone („*Jedermann*“) considering himself to be violated in his fundamental rights by the objected exercise of public powers is allowed to file a constitutional complaint. With regard to the fundamental rights presently in question, a natural person is fully entitled to file a constitutional complaint. The situation for legal persons is a little more sophisticated.

According to Art. 19 (2) GG, fundamental rights only apply to domestic legal persons and only insofar as “the character” of these rights allows this. The BVerfG has recently allowed a legal person being seated in Italy to rely on the protection of property under Art. 14 GG, referring to the principle of non-discrimination under Union law (Art. 18 TFEU) (decision of 19 July 2011 – 1 BvR 1916/09). Accordingly, at least legal persons having their business seat in one of the EU Member States can be expected to be fully eligible to file a constitutional complaint in relation to the fundamental right from Art. 14 GG also in the present context. But even for legal persons not fulfilling this requirement, but conducting business operations in Germany, some are holding that they should be eligible (cf. *Zuck*, EuGRZ 2008, p. 680 ff.).

The other fundamental rights in question, especially the procedural fundamental rights from Art. 101 (2) 2 and Art. 103 (1) GG can fully be claimed also by legal persons, regardless of where there business seat is.

d) Time limit

A constitutional complaint against a statute needs to be filed, in general, within one year after its entry into force (§ 93 (3) BVerfGG). Since in case of a statute for the ratification of an international Agreement the aim is to prevent the deposit of the ratification instrument, the complaint anyhow needs to be filed immediately after it has been adopted by the legislative organs. Therefore, the mentioned time limit will usually be no obstacle.

2. Merits of the complaint

If the mentioned admissibility requirements are given, the BVerfG will assess whether the fundamental rights claimed as violated would, in case of an entry into force of the Agreement, indeed be infringed and would, if that is the case, prohibit the German Federal Government to deposit the ratification instrument.

VI. Outlook

It is remarkable that Contracting States start the ratification of the Court Agreement although core elements like the fee structure or the Rules of Procedure have not yet been finally specified, not to speak of a resolution of the constitutional issues. After the CJEU decisions in matter C-146/13 and C-147/13 now appear to be delayed, prior to ratification a detailed assessment of the UPCA in the light of constitutional law is required more than ever.

The EPC and the complaints currently pending against it for a violation of fundamental and human rights clearly demonstrate the consequences which a rushed ratification can lead to. Thus, it would be desirable that the German legislator takes the time necessary for a detailed assessment of the existing questions, as to avoid such consequences from the outset in relation to the UPCA. However, due to the great time pressure which characterised the project “unitary patent package” from the beginning and which nobody really understands, this is not to be expected.

It is therefore particularly advisable for the user circles to familiarise themselves with the aforementioned possibility to obtain a judicial clarification of the open questions. Just in case.

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