

Newsalert

IP, TMT and Data Protection Department

Obstacles to the European patent with unitary effect – The Federal Constitutional Court of Germany rules against the Act of Approval to the Agreement on a Unified Patent Court

Latest news on patent matters

1. *The European patent with unitary effect – Summary of the relevant legal framework*

The European patent with unitary effect is an intellectual property right established in December 2012 under two European Regulations (No. 1257/2012 and No. 1260/2012) for the purposes of creating the conditions for the grant of a patent benefiting from unitary effect within all the participating EU Member States, without the further need for national validation within individually designated countries (as currently required for European patents).

The legal framework is completed by the Agreement on a Unified Patent Court (the “Agreement”), having the purpose of establishing a Court – supranational and common to all the participating EU Member States – having exclusive competence over disputes concerning European patents and European patents with unitary effect.

The application of the Regulations is thus subject to the entry into force of the Agreement, which, however, is conditional upon the deposit of the instrument of ratification of the Agreement by thirteen Member States, including by the three Member States in which the highest number of European patents had effect in the year preceding the execution of the Agreement (i.e. France, the United Kingdom and Germany).

Currently, excluding the implications deriving from Brexit, ratification of the Agreement by Germany constitutes the most significant obstacle to the entry into force of the legal framework at hand. The decision of the Federal Constitutional Court of Germany is therefore highly significant in this scenario.

2. *The decision of the Federal Constitutional Court of Germany*

With decision published on March 20, 2020, the Federal Constitutional Court of Germany (Bundesverfassungsgericht, BVerfG) upheld the complaint against the Act of Approval adopted

by the German Parliament (Bundestag) for the ratification of the Agreement (the “Act of Approval”).

The “Zweite Senat” of BVerfG judged the adoption of the Act of Approval by the Bundestag as affected by a procedural fault, on the grounds that the Act of Approval would have required adoption by way of qualified majority of 2/3 of the members of the Bundestag (which instead was adopted unanimously by the Bundestag but only by 35 members present).

According to the BVerfG’s reasoning, the Act of Approval – and, through that, the Agreement – would amend the Constitution in substantive terms, namely in connection with the conferring of judicial functions and, more in general, sovereign powers; as a consequence, the Act of Approval had to be adopted by a qualified majority.

In light of the above, according to the BVerfG the Act of Approval is void.

3. Implications for the entry into force of the European patent with unitary effect

The decision at hand entails a significant standstill in the implementation process of the European patent with unitary effect: Germany should indeed start a new procedure for the adoption of the Act of Approval with qualified majority.

However, currently it is not possible to envisage whether or not and when the Bundestag will decide to act in that fashion, also considering the different geopolitical scenario brought about by Brexit and the implications on the overall project for a European patent with unitary effect.

To this regard, according to press sources a UK government spokesperson said that, after Brexit, the UK will not be seeking involvement in the UP/UPC system, as this would be inconsistent with UK’s aims of becoming an independent self-governing nation.

All things considered, the project for a European patent with unitary effect currently appears quite precarious.

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