

Unified Patent Court: Unknown complainant puts the brakes on ratification

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Worst Case Scenario: The people involved actually wanted the Unified Patent Court (UPC) to come into being before Brexit, but ratification by Great Britain and Germany was still not forthcoming, and the laws needed had still not been passed. Now that Great Britain has agreed, and the Bundestag has given the go-ahead (which effectively paves the way for the UPC), an unknown complainant has lodged opposition before the German Constitutional Court – and that puts the ratification process back on ice.

An unknown complainant has lodged opposition before the German Constitutional Court to put a stop to the ratification of the Unified European Patent Court, which has been years in the planning. What grounds have been put forward by the complainant are, up to now (07.07.2017), also unknown. The complaint before Germany's highest court is a kick in the teeth for the creation of a unified patent legislation in the European Union. Brexit set back the test phase by several months, which was due to start this year, and the constitutional complaint has thrown an even bigger spanner in the workings of the timetable.

Federal Constitutional Court asks Federal President Steinmeier not to sign off on ratification



The last of the three national laws needed were passed just recently by the [Bundesrat and Bundestag](#). That meant the national legislative process had almost been completed. The last step would have been the implementation law coming into effect with the signature of Federal President Frank-Walter Steinmeier. But at the behest of the Federal Constitutional Court (BVerfG), so far he has still not signed. This gives the Court the time to look into an emergency plea pending against the implementation law. It now turns out that as far back as 31 March an unknown private individual lodged a constitutional opposition. And not only against the national law, but also the agreement itself (File Ref. 2 BvR 739/17). The Frankfurter Allgemeine Zeitung (FAZ) carried the story in an [article on 12 June](#).

Unified Patent Court: The reason for the move?



The fact that the reasons for the move have not yet been officially made known means that there is a lot of speculation about what has gone awry with the workings of the law and the agreement. One of the reasons could be the reservations about the constitutional legitimacy of proceedings held before the European Patent Court, which sits in Munich. The problem is that the Executive (implementing the law) and the Judiciary (creating the law) were at **one location** and, in particular, had **one and the same presiding person** – EPO President Benoît Battistelli. Battistelli, who stands at the head of the administration **and** of the court division of the EPO, is said to have a personal and factual influence on the Executive and the Judiciary. And that means the investigation of EPO decisions by an independent court is not possible, or only with great difficulty.

The EPO has already had to field a lot of criticism on that count. Last year it was [announced](#) that one of the divisions was going to be relocated, so as to achieve at least a spatial separation. Among other things, the press release revealed that *“The move to another service building is therefore an important step in the efforts in safeguarding the EPO opposition system in the long term, and sustaining its strength”*, and *“Up to now, the Boards of Appeal have been accommodated in the main EPO building on the River Isar. The expansion of their organizational independence has always been an object of discussion. Administrative autonomy of the Boards has repeatedly come up for debate at the Administrative Council.”*

The putative move, which is supposed to take place within the next few months, could however also be interpreted to mean that the President is giving his critics less room for attack and at least wants to provide a sign of this by way of the separation. With regard to the institutional constitution of the Office, it will make no difference at all. Putting it bluntly: New location, same old hierarchy, same old way of working.

“Request” from the Federal Constitutional Court implies good chances of the complaint succeeding



*The Federal President's Office has confirmed that the President, "at the request of the Federal Constitutional Court of 3 April 2017, has postponed the scrutiny procedure of the approval law". The "request" is said to have been made **first orally and then in writing.** ([Text quotation from FAZ article](#))*

It is a rare event for the Federal Constitutional Court to make a request directly to the Federal President. But it gives the Court one thing above all else – time. Not only has a complaint been lodged, but in parallel also a plea for urgency, which on the one hand directly affects the future law for the Patent Court, but also the patent law reform itself.

And anyone can see that a massive project like this won't be decided in just a couple of days.

We are reckoning on a **decision in late summer at the earliest.** Until then, the efforts to establish the UPC and have it ratified remain where they are – on ice.