

Federal Constitutional Court stops Unitary Patent: No judicial independence at the European Patent Office?

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The Federal Constitutional Court has sprung a surprise by putting German legislation for the European Unitary Patent on ice. But the real reason for the action is only indirectly associated with the new regulations; *Paetrick Sakowski* explains the background.

It's been a long and stony road so far towards the European Patent with unitary effect (hereafter the European Unitary Patent), and the Court that is supposed to go with it. Ever since the fifties there have been ideas floated about how to avoid conflicting models and tough negotiations among the Member States of the European Community (EC) and later the European Union (EU). The language arrangements, the distribution of the costs among the Member States, and reconciliation with Union law were just a few of the ongoing sticking points needing to be resolved.

In 2009, the [European Court of Justice \(ECJ\)](#) in a legal assessment turned down the proposed concept for the Unified Patent Court and the participation of third-party states. The course of events that followed did appear finally to have come to a breakthrough: In the context of enhanced co-operation in accordance with Article 20 of the Treaty on European Union (TEU), in 2013 25 Member States signed the agreement on the Unified Patent Court.

A complaint by Spain before the ECJ against the new system failed, and even Brexit, which initially led to fears of the end of the project, now appears to be only a delay, and not the farewell to the grand scheme. The implementation legislation in the participating Member States has come a long way in the meantime. All that is missing now for the start of the new system is ratification by Great Britain and Germany.

Specifically in Germany, which as an important country when it comes to patents had always pushed for the Unitary European Patent, it was assumed that there were no more substantial obstacles. At least not when the United Kingdom, after the delay caused by the premature parliamentary election, undertook ratification.

The fly in the ointment: The European Patent Office

But a few days ago it was announced that the [Federal Constitutional Court \(BVerfG\)](#) has asked the Federal President [not to sign the implementation laws, which have already been passed by the Bundestag and Bundesrat](#). The background to this is for the Court to have sufficient time to examine adequately a plea of urgency which is pending against the laws. [The Court did the same thing, for example, with the pleas of urgency against the laws relating to the European Stability Mechanism \(ESM\) and the fiscal agreement.](#)

The object of the constitutional complaint which is currently pending, and the related plea of urgency, may well be objections to the constitutional legitimacy of proceedings before the European Patent Office (EPO), which will also be responsible for the issuing of European Unitary Patents, and for oppositions lodged against them. Inasmuch as the EU legislations for the European Unitary Patent, the agreement on the Unified Patent Court, and the German implementation laws are all linked to the organization of the EPO, the same criticism with regard to constitutional law is being levelled as has already been the object of numerous constitutional complaints against decisions by the EPO. This year alone, four of these will have been heard before the Constitutional Court.

The fact that the EPO, as a supranational entity which has functioned for decades, is not reconcilable with the principles of the Basic Law, and that its decisions are therefore an infringement of basic rights, may at first glance be an astounding claim. Professor Siegfried Bross, former constitutional judge, and in 2010 himself involved in a decision on a constitutional complaint against an EPO decision (File Ref. 2 BvR 2253/06), is a prominent proponent of this critical view.