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## DECISION OF THE GERMAN FEDERAL CONSTITUTIONAL COURT ON THE APPROVAL OF THE AGREEMENT ON THE UNIFIED PATENT COURT: NULL AND VOID!

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**We feel deflated too. We too are nettled.**

**To see the curtain down and nothing settled.**

There is no better way to put it than German poet Bertolt Brecht did, regardless of one's expectations.

A brief look at the initial situation:

Trademarks can be uniformly protected and uniformly enforced in Europe. The project to establish uniform patent protection throughout the EU has been running for several decades. In 2016, supporters of the project thought they were already on the home stretch when two unexpected new hurdles emerged: Brexit and a constitutional complaint in Germany.

The current British government announced last month that it would not introduce the unitary patent. Had the United Kingdom participated in the unitary patent, it would have had to accept that decisions of the European Court of Justice on certain legal issues have effect in the United Kingdom. It would have been exciting to see how Boris Johnson would have communicated this to his constituents.

Last Friday (20 March 2020) the German Federal Constitutional Court ruled on the constitutional complaint lodged against the ratification of the Convention on the Unified Patent Court (which is an important element of unitary patent protection within the EU).

To begin with, the constitutional complaint objected to the (rather formal) aspect that the law ratifying the Convention should have been adopted by a 2/3 majority of the members of parliament. In fact, only about 35 Members of Parliament voted at that time deep in the night.

Furthermore, several substantive provisions were objected to, some of which touch on complex aspects of the tension between EU law and national German law, and some of which touch on the more understandable question of whether the way in which the judges of the Unified Patent Court are chosen is compatible with German principles on the independence of judges.

The Federal Constitutional Court decided that a 2/3 majority would have been necessary to ratify the law. Accordingly, the law is void. No decision had thus to be taken on the remaining substantive objections of the constitutional complaint.

And this brings us to Bertolt Brecht: Nothing settled.

The opponents of the Unified Patent Court can rejoice for a short time; the constitutional complaint was successful, but "only" because of a formal error.

The supporters of the Unified Patent Court could take comfort in the fact that the 2/3 majority deemed necessary by the Constitutional Court will probably be achieved in a new vote; there was a general consensus in 2016 to implement the Unified Patent Court.

The question remains open, however, as to what will happen if the law is again introduced into the German Bundestag and then passed with a 2/3 majority. In its decision, the Constitutional Court also discusses the substantive objections presented in the constitutional complaint. Some of the complaints are considered unfounded, and some not sufficiently substantiated. The remarks on the insufficiently substantiated objections could be understood as pointing out where a new constitutional complaint must be touched up in order to increase the chances of success. The sword of Damocles of unconstitutionality could thus continue to hang over a new ratification law.

In addition to these national German problems, further issues came up in the meantime:

- Since the United Kingdom will not participate in the unified patent, this IP right will be less attractive. This should at least be reflected in lower annual fees for granted unitary patents. Pessimists are already questioning whether the unitary patent is attractive at all for applicants.
- Due to the withdrawal of the United Kingdom from the EU, it must be decided where the London chamber of the Unified Patent Court is to be located. The tug-of-war behind the scenes has already begun.
- A discussion has also already begun as to whether the Rules of Procedure for the Unified Patent Court should be renegotiated in order to clear them of many elements of common law – i.e. the rules which, because of Brexit, are a "farewell gift" from British lawyers and result in that the expected costs of proceedings are many times higher than what the parties are used to from German infringement or nullity proceedings.

All in all, it does not look as if the unitary patent will cross the finish line in the foreseeable future.



### QUESTIONS?

If you have any questions regarding this topic, please feel free to get in touch with your personal contact or Jochen Sties at [j.sties@prinz.eu](mailto:j.sties@prinz.eu).

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