

**Unified Patent Court**  
**The German constitutional challenge**  
*Federal Circuit Bar Association*  
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## Ratifications

- The Unified Patent Court Agreement will enter into force when 13 Contracting States including “*the three Member States in which the highest number of European patents had effect in the year preceding the year in which the signature of the Agreement takes place (= 2012)*”, i.e. **DE**, **FR** and **UK** have ratified
- 14 ratifications so far (chronological order):  
AT, **FR**, SE, BE, DK, MT, LU, PT, FI, BG, NL, IT,EE and LT
- 2 ratifications still required: **DE** and **UK**

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## The German ratification process



- The *Bundestag* (Germany's parliament) and the *Bundesrat* (Federal Council) approved in March 2017 the acts required for Germany to ratify the Unified Patent Court (UPC) Agreement
- The remaining steps required for the acts to be promulgated were:
  - ▶ countersignature by the Federal government
  - ▶ **certification by the Federal President**
  - ▶ publication in the Federal Law Gazette (*Bundesgesetzblatt*)

12 June 2017

## The FAZ bomb

Frankfurter Allgemeine  
ZEITUNG FÜR DEUTSCHLAND

- On 12 June 2017 a journalist of the *Frankfurter Allgemeine Zeitung* disclosed that the *Bundesverfassungsgericht* (BVerfG: German Constitutional Court) suggested to President of the Republic to suspend the certification of the Parliament Act of ratification in Germany due to a constitutional complaint by a private person
- No other information was available at this time

August-September 2017

## Drip drip details

- Proceedings before the *Bundesverfassungsgericht* (BVerfG) are not open to the public during the preparation of the case
- Details were not available about the claimant's identity and the legal grounds of the complaint before August September 2017

## The complainant

On 6 September 2017, the German legal journal *Juve* disclosed that the complaint was filed late March 2017 by a Düsseldorf attorney, IP specialist, Dr. Ingve Stjerna



I ♥  
BVerfG

## The German Constitution



- „Das Grundgesetz (GG) ist die Verfassung für die Bundesrepublik Deutschland.“
- „The Basic Law is the constitution of the Federal Republic of Germany“

## The Bundesverfassungsgericht



The Federal Constitutional Court's duty is to ensure that the Constitution of the Federal Republic of Germany is obeyed.

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## The *Bundesverfassungsgericht*



*"Since its founding in 1951, the Court has helped to secure respect for and effectiveness of Germany's free and democratic basic order. This applies particularly to enforcement of the fundamental rights."*

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## Legal grounds of the constitutional complaint

*"In terms of substance, plaintiff is essentially asserting a breach of the limits to surrendering sovereignty that are derived from the right to democracy (Art. 38 (1), clause 1, Basic Law)..."*

Source:

<http://patentblog.kluweriplaw.com/2017/08/16/upc-finally-some-news-from-the-german-federal-constitutional-court>

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## Legal grounds of the constitutional complaint

*"... Primarily the following violations are asserted:*

- *breach of the requirement for a qualified majority (2/3)*
- *democratic deficits and deficits in rule of law with regard to the regulatory powers of the organs of the UPC;*
- *the judges of the UPC are not independent nor do they have democratic legitimacy*
- *breach of the principle of openness towards European law owing to alleged irreconcilability of the UPC with Union law."*

## No date set so far for a decision

*"... The proceedings are pending; a specific date for the decision is presently not foreseeable."*

*"The spokesman of the FCC told Kluwer IP Law that the deadline for submitting statements regarding the constitutional complaint against ratification of the UPCA is 31 October 2017. This means the decision on admissibility of the complaint – which is only a first step – will be made in November at the earliest."*



## Application for provisional measures

It has been reported that the challenge includes an application for “provisional measures” (a formal injunction to the Federal President of Germany not to promulgate the challenged acts)

21 September 2017

## Unified Patent Court News

*“A case is currently pending in the German Federal Constitutional Court (FCC) concerning the law passed by the German Parliament on the implementation of the Agreement on the Unified Patent Court (UPCA). This will cause delay to the German ratification of the UPCA and the Protocol on Provisional Application.”*

*We have, otherwise, been making good progress regarding the ratification of the UPCA where we now have 14 full ratifications and more in the pipeline, making it reasonable to expect that we will begin operations with closer to 20 contracting states. We are also very close to the 13 required ratifications of the Protocol on Provisional Application.*

***It is now difficult to predict any timeline.** We are following the situation and will publish a further update when additional information is available.”*

## Prepare however for entry into force

- Before entry into force
- Transitional period

## Prepare before entry into force

- National patent? Classical EP “bundle” patent?  
Unitary patent? Both (national + EP)?  
Language of filing?  
Order of applicants in the patent application?
- Review collaboration or joint research agreements
- Review co-ownership and licence agreements



## Prepare for transitional period

- To opt out or to stay in?
- If no opt-out, concurrent jurisdiction of UPC and national courts (claimant's choice)
- Applicable law may be different before the UPC and before national courts?

## Legal sources

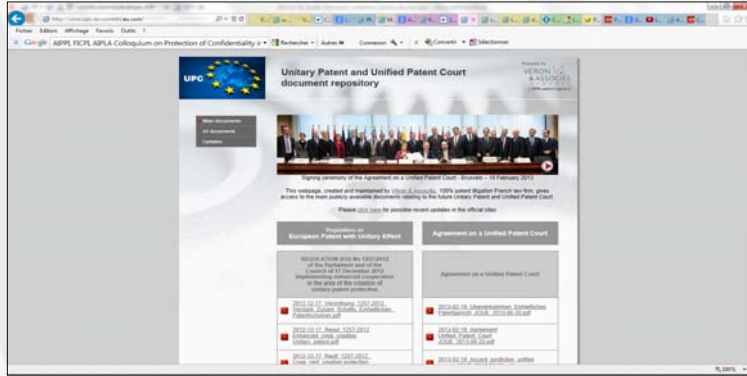
-  17 December 2012  
**Regulation** 1257/2012 enhanced cooperation creation of unitary patent protection
-  17 December 2012  
**Regulation** 1260/2012 (translation arrangements)
-  19 February 2013  
**Agreement** on a Unified Patent Court and draft Statute
-  19 October 2015  
Draft **Rules of procedure** Unified Patent Court (V18)



[http://www.upc.documents.eu.com/PDFs/2014-10-31\\_Agreement\\_UPC\\_DE-EN-FR\\_and\\_Rules\\_Procedure\\_UPC\\_DE-EN-FR\\_Draft\\_17\\_and\\_Trier\\_hearing.pdf](http://www.upc.documents.eu.com/PDFs/2014-10-31_Agreement_UPC_DE-EN-FR_and_Rules_Procedure_UPC_DE-EN-FR_Draft_17_and_Trier_hearing.pdf)

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The main publicly available documents can be found on  
[www.upc.documents.eu.com](http://www.upc.documents.eu.com)



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Thank you

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