Procedural aspects of the UPC constitutional complaint in Germany

Will the German Constitutional Court admit/try the constitutional complaint against acts implementing the UPC Agreement? We highlight the procedural particularities informing the outcome.

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With a view to the pending constitutional complaint brought in Germany against certain legislative acts implementing the Unified Patent Court (UPC) Agreement and the current public debate, it may be worthwhile pointing out some peculiarities of the proceedings before the German Constitutional Court, and in particular the procedure for "**admission for decision**", the hurdle at which the vast majority of complaints fall.

While the highest civil court in Germany is the Federal Court of Justice ("Bundesgerichtshof", whose X. Senate deals with patent cases), the Constitutional Court (Bundesverfassungsgericht) deals specifically and only with constitutional law issues. In particular, unilke eg the UK Supreme Court, it is not a superior appeal instance. Very broadly speaking, the Constitutional Court deals with alleged infringements of rights as laid down in the German constitution (Grundgesetz). This pertains both to citizens´ basic rights (Grundrechte) as well as the competence and rights allocated to public institutions as the Bundestag or the Federal States (Länder).

The organisation and working of the Constitutional Court is regulated in the Bundesverfassungsgerichtsgesetz (BVerfGG), an English translation of which can be found on the court´s website. The Constitutional Court has its own rules of internal procedure (Geschäftsordnung).

The Constitutional Court comprises two Senates with eight Justices each, their maximum tenure being 12 years. Both Senates appoint chambers (Kammern) comprising three Justices. There are currently four Chambers within the 1st Senate and three within the 2nd Senate.

The specific procedural rules concerning constitutional complaints (Verfassungsbeschwerden) can be found in secs. 90 et seq. BVerfGG. Importantly, such a complaint is subject to admission for decision. Sec. 93a BVerfGG reads as follows:

- a constitutional complaint shall be subject to admission for decision
- it shall be admitted
  - in so far as it has general constitutional significance,
  - if it is indicated to enforce the rights referred to in sec. 90(1); this may also be the case if the complainant would suffer a particularly severe disadvantage if the court refused to decide on the complaint.

Initially, a Chamber (not the full Senate) decides whether to refuse or to admit the complaint. This requires a unanimous vote. In certain cases, namely if the complaint is “manifestly well-founded” (since the constitutional issue is “acte clair”), the Chamber proper may grant the complaint. However, this does not apply to a legislative act being declared null and void (see, sec. 93c(1); 3rd sentence BVerfGG). If the Chamber does not unanimously refuse to admit the complaint (and neither grants it in the exceptional case of sec. 93c(1) BVerfGG), the question whether it should be admitted is decided by the Senate.

The decision of the Chamber is issued without oral hearing, cannot be appealed and no reasons must be given if the Chamber refuses to admit the complaint (see sec. 93d(1) BVerfGG). As one legal commentator writes, each Chamber **is** “the Constitutional Court” (Zuck, Das Recht der Verfassungsbeschwerde, 5. ed., n. 917b) which is why, where the Chamber is unanimous, there is no appeal or referral to the Senate. The decision does not need to provide reasons because of the very heavy workload of the Justices: roughly 6000 constitutional complaints are filed each year.

Within the Chamber, the rapporteur submits a proposal for a decision (typically prepared by a member of his research staff, “wissenschaftlicher Mitarbeiter”), which is provided to the other two members of the Chamber. If need be, the case is discussed (since, as pointed out, the decision of the Chamber shall be unanimous). A decision is taken without a hearing/oral proceedings. Should one member of the Chamber disagree, the case is forwarded to the full Senate to decide upon the admission. The Senate will admit the complaint if at least three (of the eight) Justices vote accordingly (see, sec. 93d (3), 2nd sentence BVerfGG). If the complaint is admitted, it is then formally served. Only then will the Senate start deliberations on the merits of the case.

It is worthwhile mentioning that evidently meritless complaints are not even being allocated a court reference (and, evidently, such complaint would not be provided the courtesy of requesting *amicus curiae* briefs). In the case at hand, the constitutional complaint has a court reference, namely 2 BvR 739/17.

As far as the **publicity of the proceedings** is concerned, the following procedural characteristics are worth mentioning:

- It is (only) the parties to the proceedings (die Beteiligten) that have a right of access to the files (sec. 20 BVerfGG). Unusual as this may seem with regard to the practice in other jurisdictions, the purpose of this limitation is to protect the personal right of the party in order to allow a complainant to present his prayer in an unprejudiced manner without inhibition.
- There is no general right of third parties to be heard in such proceedings, including by way of *amicus curiae* briefs. Accordingly, there is no obligation of the court to take account of any third party submissions provided voluntarily.

Under the law, the political institutions directly concerned with the complaint (as the federal constitutional organ whose act is challenged, in the case at hand, among others, the German government) shall have the opportunity to submit a statement (see, sec. 94(1) BVerfGG; see also sec. 77 in connection with sec. 94(4) BVerfGG). As for “*amicus curiae*”, sec. 27a BVerfGG stipulates that the court “may give expert third parties the opportunity to submit statements”. The presiding Justice already in the admission phase may provide the complaint to any such third party to comment upon it (see, sec. 23(2) BVerfGG; see also sec. 41 of the “Geschäftsordnung”). According to one of the leading commentators in the field, in practice, it is very rare that the court asks for *amicus curiae* briefs (see, Maunz/Schmidt-Bleibtreu/Klein /Bethge, Bundesverfassungsgerichtsgesetz, 52. ed., § 20 n. 12); according to Zuck, op. cit., n. 969, third parties are asked to comment in only around 3% of all complaints.

Whether a third party is an “expert” (sachkundig) is part of the discretion (or rather: margin of appreciation) of the court and cannot be challenged. The same seems to apply to the particular choice of respective expert parties by the court. An expert does not need to be “neutral” as long as it objectively provides of expertise in the field. The fact that an

“expert third party” is asked to provide comments does not make it a “party to the proceedings”, however. Also, the requested third party may refrain from furnishing a statement, such an reaction would not be in contempt of court.

Since the timing of the Constitutional Court´s proceedings has been the subject of much crystal ball gazing, a quote (author´s own translation) from the leading text book on constitutional complaints in Germany, Zuck (op. cit., n. 974), may be apposite:

> “The timing is difficult to estimate. Negative decisions can be made within days to a few months. This applies in particular to constitutional complaints which have only got past the AR register into the constitutional complaint register [ie, have been given a genuine court reference] "with difficulty". However, a long duration of proceedings - up to two years - does not indicate any prospects of success, but merely indicates that a greater effort is required for the (rejecting) vote or that there are other reasons for the delay. The most important positive indication for the complainant is actually the service of the constitutional complaint - with or without reservation - because it is clear that the constitutional complaint has in any case attracted some constitutional attention. As a rule of thumb, it can be assumed that the chances of success of the constitutional complaint thus increase to more than 50%, because an inadmissible or obviously unfounded constitutional complaint will not be served.”

Once the Constitutional Court has published its list of cases to be decided 2018, we may know whether the UPC complaint has been admitted and will be tried by the full Senate.

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