



European Patent Reform

As in all recent years, the unitary patent and Unified Patent Court (UPC) dossier has been among the Federation's highest priorities in the last 12 months, following the long-awaited agreement between the European Parliament and Council in late 2012 which resulted in the unitary patent and language Regulations being adopted in December 2012, and signature of the UPC Agreement on 19 February 2013.

Despite the complications of Brexit, 2017 had begun with optimism for the dossier and an announcement by the Preparatory Committee of a working assumption that the system would start in December 2017. However, just before our last report, on 12 June 2017, a serious impediment to UPC start-up came to light. It transpired that on 31 March 2017, a challenge to the legality of Germany acceding to the UPC had been filed, including a request for an interim injunction to prevent the adoption of the relevant German legislation. As a result, the German Constitutional Court (the BVerfG) had advised the German President on 3 April not to sign the UPC Agreement (UPCA).

Despite the passage of more than a year since then, details of the challenge remain officially unpublished, and the challenger, Dr Ingve Stjerna, a German Rechtsanwalt, has been secretive about the precise nature of his challenge, even threatening some form of action against anyone publishing information. So far, the most official information has been provided by a spokesperson for the BVerfG, who revealed in August 2017 that the challenge is based on grounds that the relevant legislation exceeds the limits on the transfer of sovereignty under the constitutional right to democracy derived from Art 38(1) of the Basic Law for the Federal Republic of Germany (Grundgesetz, GG). According to this spokesperson, the challenge asserts the following alleged breaches:

- Breach of the requirement derived from Arts. 23(1) and 79(2) GG that the adoption of legislation amounting to a transfer of sovereign powers to European institutions must be decided by a qualified majority of two thirds of the Members of the Bundestag (German parliament) and the Bundesrat (Federal Council).
- Democratic and rule of law deficits with regard to the legislative powers of the organs of the UPC.
- Lack of independence and democratic legitimacy of the judges of the UPC.
- Incompatibility of the UPC with EU law.

Additional information has also slowly emerged, not least because of the numerous responsive briefs filed toward the end of 2017 at the invitation of the BVerfG, and which have been published in many cases. These serve to confirm that these four points are a good summary of the challenge.

It had been hoped that the case would be decided within a relatively short timeframe. However, as of the date of this report, there is still no firm indication as to when it will be decided beyond the case having been listed (in February 2018) for hearing in 2018. However, even this does not necessarily mean that the case will definitely be decided in 2018, since the 2018 list also includes cases previously listed for hearing in 2017. More importantly still, whilst numerous commentators have expressed the view that the challenge should fail, this is, of course, also uncertain. What is certain is that unless and until the challenge is resolved (and only then, of course, if it is in favour of the system) the UPC cannot start. Further, even

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if the challenge is dismissed (and even though there is no right of appeal which would have added to the delays) the need for the UPC to have a Provisional Application Phase (PAP) means that further significant delay in start-up is inevitable. Lack of clarity as to a potential start date for the PAP also makes planning that phase difficult (notably the interviewing of some 234 candidate judges) and hence will extend its duration and mean an even greater delay overall. The best estimate is that the PAP will need to last between 6 and 8 months. It is generally believed that German ratification could be implemented during the PAP, but some commentators have suggested that this ratification would follow the end of the PAP, rather than occur during it. If that is correct, the total period of delay before the system could start fully following a positive BVerfG decision could be close to a year which would make a pre-Brexit start impossible.

The timetable going forward is therefore highly uncertain. At the optimistic end of the spectrum, the challenge could be dismissed within weeks, such that Germany could permit the PAP to start almost immediately. If German ratification then occurred during the PAP, before the end of November, the UPC could start on 1 March 2019 (i.e. pre-Brexit), with the sunrise period for opting out starting in late 2018, shortly after German ratification. At the other end of the spectrum, the challenge could succeed, leading to an uncertain period of further delay whilst the constitutional position is resolved (assuming this is even possible, for example by re-passing the UPC ratification legislation or even passing a suitable constitutional amendment). Such a process could add many additional months or years to the UPC start up and could easily push the start date back to 2020 or even beyond. In between these extremes is the not unlikely prospect of a positive decision later in 2018, meaning that the system could not start fully pre-Brexit, a topic to which we return shortly.

In the interim, following the UK's commitment, made in November 2016, to ratify the UPCA despite Brexit, there were some delays which gave rise in some quarters to suspicions that the UK was going to renege, or was attempting to use UPC ratification as a Brexit negotiating card. For that reason, with the pre-ratification legislative steps finally completed in early February 2018, and with the appointment of a new IP Minister, Sam Gyimah MP, the IP Federation formally requested that the UK should ratify the UPCA as soon as possible - see [PP 1/18](#) dated 26 February 2018. The UK then ratified on 26 April (perhaps not coincidentally World IP Day). With sufficient non-mandatory countries having also ratified the UPCA (now 14 in total - the latest being Latvia in January 2018), the only remaining impediments to UPC start-up are that two more countries need to approve the UPCA's Protocol on Provisional Application (something highly likely to be achieved within the coming months), and, of course, the German constitutional challenge.

Effects of Brexit

It is generally recognised that, if the UPCA comes into effect before Brexit, the system may lawfully start and continue *pro tem* with the UK as a full participant. This is certainly the UK Government's expectation (at least until 31 December 2020, the date on which the UK's post-Brexit transition period ends). As matters presently stand, it remains just about possible, but increasingly unlikely, that the UPC can start pre-Brexit. However, if the BVerfG's decision is delayed beyond August at the absolute latest, this will not be possible due to the reason mentioned above that a 6-8 month period will be required for the PAP, during which it will also be necessary for Germany to ratify the UPCA. This leaves three other possible scenarios for UPC start-up:

- PAP started pre-Brexit
- PAP started post-Brexit, but pre-31 December 2020
- Major delay with no progress pre-2021

Leaving aside the possible consequences of loss of political will if there is a very extended delay, plainly the complications of Brexit impact on the UPCA more with each successive scenario. It is more easily arguable if the UPCA starts in part before Brexit (i.e. with the commencement of the PAP) that there is no need for any pre-commencement changes to the Agreement and it can lawfully come into effect, than a scenario where the PAP starts post-Brexit. Overall, therefore, the future of the UPC remains as uncertain as it seemed on 24 June 2016, albeit for very different reasons. However, there is reason to be optimistic that

the BVerfG will hear the case in 2018, dismiss the challenge, and hence permit the PAP to begin pre-Brexit. In any event, the IP Federation remains committed to supporting the project, and similarly committed to the continued efforts to resolve the important matter of the UK's long-term participation which, post-UK ratification, can begin in earnest.

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