



## 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<sup>1</sup> 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.

To recap on events in 2017 and 2018, as of January 2017, it had been expected that the UPC would open on 1 December that year. However, the project was stalled by a challenge to the legality of Germany acceding to the UPC filed on 31 March 2017. This led to the German Constitutional Court (the BVerfG) advising the German President four days later (on 3 April) not to sign the legislation permitting German ratification of the UPC Agreement (UPCA) pending a decision on the merits by the BVerfG, something expected to take about 18 months to emerge. With no urgency to press on rapidly with UK ratification, and with an intervening General Election creating practical difficulties, the UK also deferred its ratification, but this was duly completed on 26 April 2018.

In the interim, in February 2018, the BVerfG listed the UPC challenge for hearing in 2018. However, despite this, 2018 ended with no sign of any progress. The case was then (in February 2019) re-listed for hearing later in 2019. Currently the case remains pending with no indication of when a decision might be anticipated, albeit the queue of cases ahead of it in the list is shrinking such that it appears reasonable to assume that a decision may issue in late 2019 or early 2020.

The significance of the ongoing delay is, of course, that there is now no prospect that the UPCA will come into force prior to Brexit, even if it is delayed until 31 January 2020 (as widely expected as of the time of publication of this report). Further, unless Brexit is delayed by a longer period, it is highly unlikely that even the precursor to the opening of the UPC, the Provisional Application Period (PAP), could commence before Brexit.

### *Effects of Brexit*

It is generally recognised that, if the UPCA does not come into effect (at least to the extent of the commencement of the PAP) before a "no-deal" Brexit, or before the end of a Brexit which includes a transition period of the type included in the deal offered by the EU but declined by the UK, then the UK's participation is at risk. This is because it has been argued by a number of commentators that it is a prerequisite of membership of the system that all states should also be members of the EU, and unarguably the UPCA was drafted upon the assumption that all states would be EU Member States. It is therefore debatable, even if the BVerfG rejects the constitutional challenge and thereby gives the green light to German ratification of the UPCA, whether Germany would proceed with ratification for fear that the CJEU might subsequently rule the whole system to be unlawful with UK as a participant. It is equally debatable whether Germany and a number of other states would wish to see the system start unless the UK was a participant.

Overall, therefore, the future of the UPC remains as uncertain as it seemed on 24 June 2016, albeit for very different reasons. However, there remains a strong political will in both the

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<sup>1</sup> In this regard the IP Federation Brexit Policy Position (Policy Paper PP 1/17 - updated 20 January 2017) remains definitive.

UK and more widely among other states that have ratified the UPCA that the system should proceed with the UK in it. The IP Federation remains committed to supporting the project, and similarly committed to the efforts to resolve the important matter of the UK's long-term participation.

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