



## **The Unified Patent Court**

2020 has been another turbulent year for the long-troubled European unitary patent and associated Unified Patent Court (UPC), yet progress appears to be being made. In January 2020, the European Patent Office stated that it was ready to register unitary patents. The UPC Preparatory Committee was preparing for the UPC to open with final preparations (such as the recruitment of judges) dependent on certain provisions of the UPC Agreement (UPCA) coming into force early to provide the “provisional application phase” (PAP). All this in the context of a pending complaint to the German Federal Constitutional Court.

It wasn't until March when the German Federal Constitutional Court ruled that the German legislation to enable Germany to ratify the UPCA was void because an insufficient number of members of parliament was present when it was voted upon. More fundamental constitutional objections were either rejected or not ruled upon, leaving the way open for the German legislature to try again.

The thorny question of whether non-EU countries such as the UK or Switzerland could participate in the UPC system was kicked into the tall grass in July when the UK confirmed that it would not be participating in the unitary patent and UPC system and withdrew its ratification of the UPCA.

Amidst all this turbulence, representatives of Germany and the other participating states agreed in September to progress plans for the UPC to come into effect in 2021 - potentially even early in the year - with a following wind. With this ambition, we saw a new draft bill of legislation to enable Germany to ratify the UPCA progressing through the German parliament. The Bundestag (lower chamber) approved the ratification bill by the required two-thirds majority in late November, and it now goes to the upper Bundesrat chamber for approval, before being signed by the German President. The legislation may be passed by the end of 2020, or at least before the current legislative period ends in the second half of 2021.

Yet this is only part of the story. Questions still remain following the withdrawal of the UK's ratification, not least because the UPCA explicitly places a section of the central division in London and this has not been amended. The new German bill includes some explanatory notes in relation to the UPCA expressing the German government's view that the UK's departure from the UPC was unforeseeable when the UPCA was signed, and that this departure should not prevent the UPCA coming into force for the remaining parties. The German position is that there should be no need to amend the UPCA, arguing that the UPCA could be interpreted such that the central division would comprise Paris (the seat) and Munich (a section),

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without London. This reliance on interpretation of the Agreement rather than an amendment is somewhat unorthodox, although perhaps understandable when an amendment would involve further negotiations and a potential opening of Pandora's box. It is understood that the Italian government has announced its intention to present Milan as a candidate to replace London, and there are indications that the Netherlands, and possibly other countries such as Denmark and Ireland, may also be candidates. Perhaps Pandora's box is ajar in any event.

For the UPC to open, not only must Germany's legislation come into force but two more countries must consent to the commencement of the PAP. A few countries, including Austria and Malta, are likely to be able to consent to the PAP at relatively short notice if they choose to do so. And so it appears that the only likely obstacle to the UPC system finally becoming a reality is another constitutional complaint in the German Federal Constitutional Court which could still prevent the German President signing the bill. There have been indications by the Foundation for a Free Information Infrastructure that a second complaint is likely, and it is notable that, in its decision on the first complaint, the Constitutional Court did not rule on the other constitutional grounds that had been raised. Of those, the ground which seems most likely to receive further consideration is whether the UPCA provisions which establish the primacy of EU law in the patent context are consistent with the German constitution. It is, however, not clear whether, even if a further complaint were filed, the Constitutional Court would ask the President to refrain from ratifying as it did before.

In any event, the next few months are clearly a critical period for the UPC system and we are all advised to fasten our seatbelts.

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