

2016: Countdown to the start of the Unified Patent Court

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The German ratification of the Unified Patent Court (UPC) Agreement will most likely be postponed until September 2016 and be decisive for the Unitary Patent (UP) system to go live. Wouter Pors, partner of law firm Bird & Bird, has said this in an interview with Kluwer IP Law. Thirteen ratifications are needed for the new European patent system to start functioning, including those of France, the UK and Germany. So far eight countries, including France, have ratified.

The UPC Preparatory Committee envisages to end its work by half 2016. What needs to be done before that moment?

'The Rules of Procedure of the Unified Patent Court are ready, but for the court fees and the recoverable costs. That now is the most important issue, which will be resolved before spring. The Preparatory Committee aims to have all the organizational, financial and other issues ready by mid-2016. At that point the [Protocol to the UPC Agreement](#), which allows some parts of the UPC Agreement to be applied early, should enter into force. This means that the Administrative Committee of the UPC will take over. Like the Preparatory Committee, it will consist of representatives of the Contracting Member States, probably even the same persons.'

The main open issue for the Administrative Committee is the selection and appointment of judges, followed by their education and training. The final selection needs to be done under the Protocol, which leaves only the last months of 2016 for the educational program. That is quite a challenge, but many patent experts have volunteered as teachers.'

Many countries have announced they will have local or regional divisions, and there are central divisions as well, of course. Will these all have been set up physically by 2017?

'The most important ones certainly will be. A number of countries have already selected the necessary buildings. The Netherlands are working very hard to have the division in The Hague ready on time. I think being ready when the court opens is crucial for the future success of any division.'

In a recent [IAM report](#), it was pointed out that so far there have been no signs from Germany when it will ratify the UPC Agreement. Is Germany, one of the two remaining member states whose ratification is obligatory, going to be a stumbling block for the entry into force of the agreement?

'No, the German ratification will most likely be the one that is used for the proper timing of the system going live. If the court is to open on 1 January 2017, Germany should deposit its ratification in September 2016.'

The UK is also one of the states which will have to ratify before the UPC can start functioning. In the meantime, a UK referendum on membership of the EU may be held in 2016. If UK citizens opt for a Brexit, what will be the consequences for the Unitary Patent system?

'If all goes well, the UK will have ratified the UPC Agreement before that can become a reality. Of course, if the UK leaves later on, there will need to be some important changes to the system.'

Quite a few countries (Bulgaria, Cyprus, the Czech Republic, Greece, Hungary, the Slovak Republic for instance, according to an [epi report](#)) don't seem ready at all for ratification of the UPC Agreement. Is this a problem?

'Some of these countries seem reluctant to ratify, as they fear the new system will negatively impact their national industry. In the Czech Republic for instance, the largest domestic proprietor has 91 European patents validated in the country, number 10 only has 7. The UPC court fees are much higher than their national court fees. These countries currently have only a few patent disputes. Some, like Bulgaria, have none.'

However, Europe-wide and global patent disputes can be settled without the participation of those countries. If for instance a medicinal product or a smart phone cannot be sold in the UPC jurisdiction, there is no viable business case for selling such products only in the EU Member States that do not participate in the UPC. The system will not be stopped nor slowed down by these countries not ratifying. It is hard to predict what the effect on their national economies will be, but is seems likely that multinational innovative companies will then be reluctant to invest in research and development in such countries. Rather, they will view them merely as a sales market.'

Critics have said the UPC is pro-claimant and pro-patent holders and the swift procedure for instance will cause problems for defendants, particularly SMEs. Is their criticism justified?

'The substantive provisions of the UPCA are quite balanced and the UPC itself is also expected to take a balanced view. The procedural rules are somewhat favourable to claimants, as they can choose the division and the language. However, the rights of defendants are guaranteed sufficiently. The most important difference is that the claimant can take his time to prepare his case, whereas once litigation has started, all parties are bound to strict deadlines (including the claimant). This however is not an effect of the UPCA or the Rules of Procedure; it applies to any system that has strict deadlines. Such deadlines are necessary to obtain a result within a reasonable amount of time. It works in favour of the patent holder in an infringement action, but against him in a revocation action.'

For an SME which is only active in one country, the system will be more expensive. That will not be the case for SMEs that operate on an international level. Besides, I expect that it will be easier to obtain funding for technology that is protected by a Unitary Patent, so start-ups may also benefit. They should always make a good assessment of their freedom to operate anyway.'

What will be the situation a year from now?

'The court will be fully operational. The opt-out register will contain many thousands of patents, but nevertheless I expect numerous revocation actions to be filed with the Central Division as soon as it opens. Infringement actions will follow soon afterwards, first in the divisions in those countries that also handle a lot of patent cases in their national courts. Everybody will be following the developments very closely in order to decide whether they prefer the UPC over the national courts.'

Wouter Pors is one of the speakers at the [Unitary Patent Package conference](#), 4 & 5 February 2016 in Amsterdam.

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