

'Opposition against Unitary Patent comes from fearful lawyers and critics who only have a theoretical interest'

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All Union law arguments against the Unitary Patent system, that are now on the table again because of the German constitutional complaint, have already been rejected in the recent past. Wouter Pors, partner of Bird & Bird, has said this in an interview with Kluwer IP Law. Pors hopes the Federal Constitutional Court (FCC) will reject the complaint and the UP system will start as soon as possible. 'It's like having a brand new car in the garage, but not being allowed to drive it.'

How much delay do you expect as a consequence of the procedure before the FCC against UPCA ratification?

'Let me start by saying that I am giving you my personal views and I have to admit that, after having put a lot of effort into supporting the revolutionary improvement which I think the UPC and the Unitary Patent are, I am frustrated by the way some people are trying to create confusion or throw sand into the gears.'

It is hard to predict how much delay the German constitutional case will cause. One can only hope that the Constitutional Court will take into account that 14 countries have already ratified, thereby indicating that they want the new system and the UK is consistently working towards ratification. I hope the Constitutional Court will also take into account that the CJEU has already looked at all the Union law issues 4 times until now (Opinion 01/09, the joint decision on the Italian and Spanish appeals in 2013 (C-274/11 and C-295/11) and the two Spanish appeals in 2015 (C-146/13 and C-147/13)); all arguments that are now on the table again have basically already been rejected.

In addition to that, I am not aware of any major industry or industry association saying that they wouldn't like to have the UPC. The sad truth is that the only opposition currently comes from lawyers who probably fear for their livelihood because they realise they can't face the competition in the UPC system and from other critics who only have a theoretical interest. For those critics, there are no valuable patent portfolios at stake. They don't have an interest in tech driven companies that for the majority of their stock value rely on intangibles, such as intellectual property.

In these times of uncertainty, it is easy to echo that there is uncertainty. It would have been helpful if the critics would have declared their position and motivation. I have always been clear about my position. So, it should be no surprise that I definitely disagree with the content of Mr. Stjerna's complaints and I hope they are rejected by the Constitutional Court.'

Is the delay bad for the new system? Are there advantages as well?

'Of course, the delay is bad. The UPC is basically ready to open for business, but now we have to wait for the outcome of the German constitutional case. Over the past years an increasing number of the major users of the patent system have become confident that the UPC will be their court of preference, as it offers substantial benefits over the current shattered national jurisdiction. Obviously, this means that they want to be able to actually start using it, but now everybody has to wait. It's like having a brand new car in the garage, but not being allowed to drive it. Of course, this is also a disappointment for the candidate-judges.'

The delay may be an advantage for law firms who are not ready for the new system, as they can continue business as usual for some time.'

Apart from the German procedure, it seems the Brexit could also cause problems. There is a debate whether the UK can stay in the UP system post-Brexit, and if it can keep its local division and branch of the central division. In the UK however, the parliamentary procedure to complete the ratification process goes on as planned. How is this possible?

'The UK currently is still an EU Member State and has said that it will continue to fulfil its obligations until the Brexit is a fact, which will be on 29 March 2019. A study commissioned by the UK government some years ago showed that the UPC has huge economic benefits for London. In addition, the UK has always played an important role in patent litigation in Europe and wants to continue that role. The UPC is not an EU institution, as it is based on a multilateral agreement. It is quite clear that the UK wants to continue to play an international role after Brexit, to which end it plans to conclude international agreements. Participation in the UPC is beneficial to both the UK and the continental European countries, since a strong Europe-wide system is very important for a good climate for research and development in Europe. Meanwhile, the Scottish parliament has completed all necessary steps for ratification by the end of October and the Westminster parliament can pick up the process for those final steps again as it has now appointed the members of the Joint Committee on Statutory Instruments on 31 October.'

I have no doubt that there is no legal reason why the UK couldn't stay part of the UPC after Brexit. There also is no reason to relocate the London local division or the London seat of the central division. These are not UK courts, but divisions of an international court. The fact that they – as divisions of this international court – would have to refer issues to the CJEU therefore as such doesn't affect the UK sovereignty. I have published about this before and so have others.'

Actually, most of the people who doubt that this is feasible do so without really having studied the issue. I'm always puzzled by lawyers who just say that there's a lot of uncertainty, without really dealing with the issue. I don't understand what purpose is served by that. When I was in Tilburg University, professor Schoordijk had a special term for that approach: "think laziness". However, there are so many of those messages on the internet, that they could be mistaken for an actual contribution to the debate, which they are not. Actually, I have seen very few well-founded arguments why the UK would not be able to continue its participation in the UPC.'

On the other hand, a continued participation in the Unitary Patent does require some additional legal measures, but this could be achieved as part of the Brexit negotiations. You need to keep in mind that the UK was one of the founding fathers of the Unitary Patent, which was only created when the EU itself was unable to come up with a solution. There is no desire to change any of the characteristics of the Unitary Patent, so the only issue is to create an additional formal legal basis to allow the UK to continue its participation. This discussion is totally different from the discussion on EU unitary rights, such as the EU trade mark; the Unitary Patent was not imposed on the UK by the EU.'

Are preparations for the UPC and Unitary Patent going on as planned at Bird & Bird, despite the German and Brexit issues? What do these preparations consist of?

'I can't say it's going on as planned, as we have to adapt the time schedule all the time, but it's certainly going on. Of course, we continue to share all the information that we can collect, since we have already been advising our clients on the consequences and opportunities of the UPC and the Unitary Patent for quite some time and we want to provide them with accurate and up-to-date information. We're also working on a comprehensive book and on some new software tools.'

The biggest challenge however is how we will organize our patent litigation practice in future. The UPC will be a real game changer. Firms that do not prepare may not survive. The message that I get from industry more and more is that patent litigation teams that operate independently on an office-by-office basis without an integrated European-wide approach will not be sufficient anymore. According to those views, teams should not be organized by geographic location, but based on expertise and client focus.'

If for instance you need to litigate an electronics case in Budapest, you shouldn't be solely dependent on the people available on the ground; you need to have them, but in my view, they should be integrated into an international dedicated team. You should realize that in the eyes of scientists (such as inventors) lawyers are really strange animals in this respect. Lawyers are used to practice national law and are therefore organized on a country-by-country basis, but scientists of course are not. There is no such thing as French physics, so there is no purpose to make national divisions in research and development in a multinational company.'

For lawyers however, this is a totally new concept. At Bird & Bird we have the advantage that we are aware of this and we are discussing it. I don't pretend that we have already completely solved the issue nor that we have already completely re-created ourselves as the truly European patent law litigators who have abandoned their national law roots, but we're discussing, and we will be ready to deliver when the UPC opens and the clients demand a new approach.'

By the way, I'm very curious what my competitors from the other patent law firms have to say to this.'

Are you still active at the Training Centre in Budapest? If so, can you give an impression of your experience there?

'There have been two extensive courses of training for judges with relatively little experience in patent litigation. This was sufficient to cover that group of candidates as it existed at that time. For me, this was a very positive experience, since we lectured to a group of bright judges with a keen interest in international patent law. Next to the official subject that I taught, I had in-depth discussions on some of the more complex issues of patent law during the coffee and lunch breaks. I'm looking forward to seeing those judges participate in UPC panels.'

The next stage is the educational program on the UPC procedures itself, but that will only start when there is more clarity on the actual appointments and the start date. Basically, the provisional application phase is needed for that.'

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