

The Unified Patent Court: all dressed up but no place to go?

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It is often said that 'tomorrow never comes'. Likewise, a recurring theme for some years has been that 'the UPC will start next year'. As 2019 is now well under way, it is time to consider whether this year we can be more optimistic than this, and how the turmoil in the UK Parliament affects that.

By Alan Johnson, *Bristows*

In answering this question we must look at two major factors. The first is the decision of the German Federal Constitutional Court (Bundesverfassungsgericht – BVerfG) on the constitutional challenge by Dr Stjerna to the legislation necessary to allow German ratification of the UPC. The second is Brexit. Both are expected to happen quite soon. However, neither is in fact at all certain.



In particular it is now anyone's guess as to what will happen about Brexit, following the UK House of Commons' decisive rejection of the draft Withdrawal Agreement on 15 January and the subsequent failure of the vote of no confidence in the UK Government on the following day. It is looking increasingly likely, however, that the UK will remain a member of the EU beyond 29 March 2019. There are even reports from Brussels that it may be postponed until 2020 to allow the British to continue to buy, unburdened by WTO tariffs, EU goods (of which we buy considerably more than vice versa) most notably perhaps German cars – the UK buys over €20 billion of VWs, BMWs etc a year – until a new deal can be reached which will pass through the UK Parliament.

The German constitutional complaint



Following the submission to the BVerfG in January 2018 of the last of the *amicus* briefs (all of which were rumoured to suggest rejection of Dr Stjerna's complaint), this 'UPC case' was included in the [list of cases](#) (published in February) that the BVerfG intended to decide in 2018. However, following the pattern of previous years, many cases listed (including, of course, the UPC one) were not decided. However, it is surely highly likely that the UPC case will be decided this year. This was confirmed by a recent report from Agence Europe that it had been informed by the BVerfG's services that no date was set for the decision but that it should fall in the current year – although the use of the word 'should' rather than 'will' is not exactly reassuring.

One possibility is that the BVerfG upholds Dr Stjerna's complaint in some fashion, but its decision requires some action to be taken in order for Germany to participate in the UPC: it has been said that parliamentary re-approval at least could be achieved relatively quickly. Hence, if any problem is fixed, or better still if the BVerfG rejects the complaint, Germany would then be able to ratify the UPC Agreement and consent to its provisional application.

Apart from Germany, only one more state must consent in order for the provisional application phase (PAP) to start, and several states appear to be in, or almost in, a position to do so. The PAP, during which final preparations for the start of the UPC system, such as recruitment of judges, would be completed, is expected to last six to eight months. Three months before the end of the PAP, Germany would then deposit its instrument of ratification of the UPC Agreement to allow the Agreement to commence immediately after the PAP and the Court to open. But the question even then is whether Germany would do all this, which brings us back to Brexit, since its decision as to whether to go ahead may depend also on whether the UK can be a part of the new system. Indeed, it might be considered irresponsible for Germany to cause the system to go ahead with major uncertainty hanging over it.

The UK/EU relationship

Although the UK ratified the UPC Agreement in April 2018 and the UK government has consistently confirmed since then that it intends to seek to remain in the UPC system after Brexit, there are differing views on the legality of the participation of a non-EU member state. However, it is clear that for so long as the UK is in the EU it can participate. The prospect of a delayed Brexit, therefore, is highly significant for the UPC as well as German car manufacturers.

Whilst some vehemently disagree, there is a good deal of consensus also that if there is a post-Brexit transition period during which EU law will continue to apply in the UK (as was included in the draft Withdrawal Agreement), the UK would be able to participate for that period at least. One reason for that view is that the EU Unitary Patent Regulation (creating Unitary Patent protection) requires a court (the UPC) in which to litigate Unitary Patents, and hence consent to all EU Regulations continuing to apply to the UK impliedly requires UK participation in the UPC.

The question of whether the UK, as a non-EU member state, could participate *after*, or without, any such transition period, can only be answered by the CJEU, but there appears no mechanism to ask the CJEU unless and until the system starts and is challenged. The fact that the UPC Agreement refers to a 'Member State of the European Union' could be solved by a simple protocol providing that by that term the parties meant a 'Member State of the European Union as of the date of signature of this agreement'. The main issue is whether a UPC with the UK as a member could still refer matters of Union law to the CJEU?



Further, absent certainty on the legality of the UK's ongoing ability to participate, would Germany, which holds the key to the project starting, be willing to proceed to start up the system with no certainty as to the legality of the UPC? Would it be confident that solutions could be found to this and other potential legal issues, such as the UK dropping out of the Brussels Regulation and not being a member of the Lugano Convention – one of which is a seeming necessity under the UPC Agreement (Article 31)?

This is where political will remains vital. With the possible exception of Italy, motivated perhaps by the opportunistic desire to see Milan seize the London branch of the Central Division, all UPC participating countries appear still to wish the UK to remain a part of the system. Critically, so too does European and British industry. And in the much repeated words of Dr Margot Fröhlinger on this topic, 'where there's a will, there's a way'.

In summary, the future of the UPC project remains unclear but a late 2019 start is still possible and a 2020 start all the more so, in both cases with a possibility – unthinkable a week ago – that the UK might actually be a full EU member state at that time.

One relative certainty is that there should not be any delay to the system's start due to practical problems: the various delays since the signature of the UPC Agreement in February 2013 having given plenty of time for preparations. The UPC Preparatory Committee recently reported: 'the technical and operational preparations for the Court are continuing allowing for the project to move at pace in the event of a positive outcome from the German Constitutional Court', such that one may hope that the immensely complex IT issues the UPC presents will have been sorted.

Such is the level of preparedness, that even such faintly ridiculous topics such as the colour of the judges' robes are apparently now under discussion, with blue (one wonders EU blue minus yellow stars) being proposed. Hopefully even if we do not see the start of the UPC in 2019, we shall at least know by then whether next year will actually see the UPC, or whether this is a case of being all dressed up with no place to go.