

Kluwer Patent Blog

Germany will not ratify UPCA as long as consequences Brexit are not known

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Even if the German constitutional complaint against the Unified Patent Court Agreement is dismissed, the German government will not proceed with ratification of the UPCA until the consequences of the Brexit are entirely clear.

The German Justice Ministry made this clear in answer to questions of parliament. In a letter earlier this month it stated: 'The issue of the withdrawal of the United Kingdom from the European Union (so-called Brexit) and its implications for European patent reform play an important role in the further implementation process of the Unified Patent Court Agreement. The real and legal implications of withdrawing must be examined with regard to the Agreement and agreed at European level. This opinion forming is currently not finalized, not least because significant factors of the expected exit are not yet known.' ([Drucksache 19/12106](#))

Questions (1 and 2) and answer in the original, German version:

- 1. Welche Auswirkungen hat nach Ansicht der Bundesregierung der bevorstehende Austritt Großbritanniens aus der Europäischen Union auf das Übereinkommen über ein Einheitliches Patentgericht?*
- 2. Hat die Bundesregierung bereits für den Fall, dass Großbritannien die Europäische Union verlässt und eine Ratifizierung des Übereinkommens in der aktuellen Form nicht mehr möglich ist, ein weiteres Vorgehen geplant? Wenn ja, wie sieht dieses weitere Vorgehen aus?*

Die Fragen 1 und 2 werden wegen des Sachzusammenhanges gemeinsam beantwortet. Die Frage des Austritts des Vereinigten Königreiches aus der Europäischen Union (sogenannter Brexit) und dessen Auswirkungen auf die europäische Patentreform spielen eine wichtige Rolle beim weiteren Implementierungsprozess des Übereinkommens über ein Einheitliches Patentgericht. Es müssen die tatsächlichen und rechtlichen Auswirkungen eines Austrittes im Hinblick auf das Übereinkommen geprüft und auf europäischer Ebene abgestimmt werden. Diese Meinungsbildung ist derzeit noch nicht abgeschlossen, nicht zuletzt weil wesentliche Faktoren des voraussichtlichen Austritts derzeit noch nicht bekannt sind.

So far, the German government had been reluctant to say anything about the influence of the Brexit on its own decisions regarding the UP project. As this blog [reported in November 2018](#), when pressed to explain what will happen if the constitutional complaint is dismissed and Germany is free to complete the ratification of the UPCA, a government spokesman only said: 'We will deal

with the ratification in a responsible fashion. The parameters have to be clear.’

Four grounds

Both chambers of the German parliament had already given their support to the UPCA when the ratification procedure was put on hold in March 2017 because of the complaint filed by patent attorney Ingve Björn Stjerna with the German Federal Constitutional Court. Stjerna’s claim that the UPCA is unconstitutional is based on four grounds, according to the FCC (see [this post of the Kluwer Patent Blog](#), among others):

‘In terms of substance, plaintiff is essentially asserting a breach of the limits to surrendering sovereignty that are derived from the right to democracy (Art. 38 (1), clause 1, Basic Law). Primarily the following violations are asserted:

- breach of the requirement for a qualified majority arising from Art. 23 (1), sentence 3, in conjunction with Art. 79 (2) Basic Law;
- democratic deficits and deficits in rule of law with regard to the regulatory powers of the organs of the UPC;
- the judges of the UPC are not independent nor do they have democratic legitimacy;
- breach of the principle of openness towards European law owing to alleged irreconcilability of the UPC with Union law.’

The Stjerna complaint has led to years of delay for the Unitary Patent system and could – if admitted – even derail it altogether. The future of the system (covering up to 25 European countries) had already been complicated by the outcome of the Brexit referendum of 23 June 2016, as the UP system was widely considered as a project for EU member states only. Since, the UK government and supporters of the UP system have argued the UK will be able to participate post-Brexit, but this is by no means certain.

The Federal Constitutional Court in Germany is expected to decide about the Stjerna complaint later this year or possibly at the start of 2020, as is more likely according to a [recent article of Fish & Richardson](#): ‘The Constitutional Court case is (...) now scheduled for decision in 2019, but that schedule is not binding. Announcement of the date for oral argument, perhaps within a few months from now, will be the best indication of the decision date, because it must be handed down within three months after the oral hearing. Given the August holidays, it seems most likely the decision will be in early 2020.’

The German parliamentary questions were aimed primarily at the costs of the UPC and Germany’s contribution to its funding. According to the letter of the Ministry of Justice, the most important contribution of Germany so far – 543 981 euro – went to the creation of the new IT system for the UPC, which has ‘almost been completed’.

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