

# 'Brexit cannot be an argument to delay German ratification Unified Patent Court Agreement'

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'Why Berlin can't wait for Brexit in matters of UPC', is the title of a recent article on the website of the German law firm Kather Augenstein. Main point: if the Federal Constitutional Court dismisses the constitutional complaint against the Unified Patent Court Agreement, the German government will have to finish the ratification procedure immediately, regardless of the Brexit. It was a reaction to a government statement that it will put ratification on hold until after the UK's departure from the European Union. Kluwer IP Law contacted the author of the article, Christof Augenstein.

*Could you explain why you think there is no room for delaying German ratification of the UPCA?*

"The legislative project of the German parliament for implementing the UPC is complete. The only formal step that is missing is the signature of the Federal President. The only basis on which the Federal President can withhold his signature from a bill is because of doubts as to whether it is in compliance with the German constitution (*Grundgesetz*, often literally translated as 'Basic Law'). That is the reason why, after the intervention of the Constitutional Court, the President had not yet signed the bill.



If the Constitutional Court now explicitly confirms that the UPC does not contradict the German constitution and, thus, the implementing bill is legal, it is not possible for the Federal President to withhold his signature. In particular, the federal government cannot instruct or request any further delay. In contrast, the government as the executing body must respect the intention of the German legislator, and has no powers to amend it. It is, therefore, legally obliged to implement the will of the legislator. Brexit, in particular, does not provide any room for further discussion or deliberations as the bill passed after the Brexit referendum."

*If, from a purely legal point of view, this makes sense, does this mean you think it is politically wise/desirable for Germany to complete ratification and - as the last member state whose ratification is indispensable - allow the Unitary Patent system and the UPC to start functioning? Wouldn't this create legal uncertainty precisely because, as the German government has said, the opinion on the implications of the Brexit regarding the UPCA will have to be formed and agreed on at European level?*

"Some member states may wish to keep the UPC as a bargaining chip for the Brexit negotiations. Depending on the political objectives, it might be useful to delay the implementation of the UPC and, personally, I wouldn't discount the possibility that this will actually happen.

However, uncertainties will remain, even if the respective governments find a consensus. It is a fact that the UPC Agreement allows only EU member states as participants. Therefore, there is the legal argument as to whether it is sufficient that participants were member states at the time of ratification or whether they remain member states in the future. Realistically, the national governments are not in a position to clarify this. It would require a clarification in the text, which would then have to be adopted by all the participating member states again. Practically, this would not be feasible.



There will therefore, in any event, be a discussion about the applicability of UPC decisions in the UK. Imagine a generic company facing an injunction from a UPC division, banning sales in the UK. I am very sure that they will go to the courts in the UK and argue that the UPC decision is not enforceable. The stakes would be too high not to use this argument to seek to avoid an injunction. We will then see whether the UK courts respect the UPC system or deny its applicability to the UK. Until then, there will be no clear solution to this problem and arguments run both

ways.

Personally, I think that the UK can still participate, if they accept the UPC rules, including the primacy of EU law including CJEU decisions. I am still surprised that the UK public did not protest against the UPC as precisely this primacy of EU law was a big argument for Brexit."

*Are you a supporter of the Unitary Patent system?*

"Personally, I am very much looking forward to it, as litigators will be able to shape a completely new legal system. Judges will come from different legal systems, having different legal backgrounds. Given the rules of procedure, reporting and presiding judges will have a lot of discretion to apply these different approaches. Thus, we will have the opportunity to create a completely new legal system, incorporating the best approaches from various jurisdictions, improving the patent litigation system in Europe as a whole. It will surely be complicated to find the best solution, but at the same time very exciting to navigate clients through these challenges and discussions.

Patents are often litigated to find a worldwide solution. So, no doubt, Europe competes with other countries or legal systems, in particular the US and China. Given the number of consumers within the UPC member states, Europe will become more attractive to patentees. So, I believe that the number of cases will increase with the UPC."

*The UP system has often been presented as beneficial for SMEs, whereas it seems big industry has to gain most from this European-wide patent system. What is your view on this issue?*

"SMEs will be surprised about the costs and intensity of UPC litigation compared to the current position. Except for the UK, national litigation will be cheaper than UPC cases. Thus, I think that SMEs will litigate less, because they won't have the necessary financial resources. Indeed, I would agree that because of the additional weight of international disputes, the UPC will be used by big industry more than SMEs, for whom it may not be economical."

*How do you think the UPC will affect the legal market?*

"I think that it will be beneficial for national boutiques as they will now be able to cover most of Europe by themselves. One firm can resolve disputes in several countries. International firms will lose business, as internal coordination of several lawsuits is not needed anymore. You can already see that internal competition within international firms is increasing.

Having offices at the central division in London, Paris and Munich is nothing but marketing. Firstly, proceedings will mostly start at the local and regional divisions as they are primarily competent to hear infringement cases. Secondly, the panels at the central division are purely international. Judges will only arrive and meet for the hearings. There is no need for lawyers to be on site, because the judges are not."

*What are the chances for the system, taking into account the constitutional complaint in Germany and the hard Brexit prime minister Boris Johnson seems to be aiming for?*

"I think it will start with or without the UK, as harmonization and other effects of the UPC are still beneficial for rest of the member states. Of course, there will be uncertainties if the UK still plays a part. But, this will not outweigh the advantages."

*In your recent article you wrote that the only possibility to reconsider the UP system in Germany would be a new parliamentary vote. Are you hoping for such parliamentary initiative?*

"I don't think that a new initiative would result in major changes, as the options available to member states are limited. Thus, a new initiative seems useless to me."