

'UPCA should be abandoned and substantive reform at EU level taken up'

Kluwer Patent Blog
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The March ruling of the Federal Constitutional Court (FCC) in Germany that the German ratification of the Unified Patent Court Agreement (UPCA) was void because it didn't get the required two-thirds majority, increased the uncertainty about the viability of the project. But the debate is far from over. Patrick Breyer, member of the European Parliament for the German Pirate Party, asked the European Commission earlier this month to confirm that, due to the Brexit, Germany no longer has the right to ratify the UPCA. In the meantime Thierry Breton, commissioner for the Internal Market, urged the EU last week to speed up plans for the single patent system. Kluwer IP Law spoke to Patrick Breyer.

On 5 May 2020 you sent *three questions to the European Commission concerning the Unitary Patent project*. You wrote: "According to EU case law (Court of Justice of the European Union Case 22/70), Member States must not enter into agreements with third countries that affect EU rules or alter their scope. The UK is now considered a 'third country' under Article 216 of the Treaty on the Functioning of the European Union. While the EU may jointly assume obligations with the UK with respect to patent litigation, Member States no longer have a right to do so." In your questions, you've asked the Commission 1) to confirm that Germany no longer has the right to ratify; 2) to advise the German Government not to ratify the UPCA as it stands; 3) Whether it would launch an infringement procedure against Germany if it ratified the UPCA in its existing form. What do you hope to achieve with your questions?

"The Unitary Patent is another attempt to validate and expand software patents in Europe. Software development is a key sector on which whole industries and markets depend. The agreement would reserve to the EU Court of Justice only a say in a few limited technical matters. The UPCA is an attempted takeover of EU institutional powers by external international organizations. This can undermine democratic control and threatens economic development and sustainability in Europe."



You've linked your questions to the Brexit. The UK, however, has announced its *withdrawal from the Unitary Patent*. Doesn't this mean that the problem of a participating 'third country' has been solved?

"To my knowledge the UK has not formally withdrawn so far, which would mean that Germany must not ratify at present. I also do not think properly excluding the UK from the arrangement is possible without changing the treaty."

Are you concerned German re-ratification will be pushed through parliament? Is there enough support for the UPC in Germany?

"This will likely depend on the German Greens. In the past they have agreed with the principle of a unitary patent system and voted in favour."

Just a week after the FCC's decision, the German minister of Justice and Consumer Protection, Christine Lambrecht, said she wanted to "continue to work to ensure that we can provide the European innovative industry with a Unitary Patent and a Unified Patent Court." According to a *report by law firm Simmons & Simmons* a new Act of Approval to correct the deficiency in the German vote is currently being drafted. And last week Thierry Breton, member of the same Commission you sent you questions to, urged the EU to speed up plans for a single patent system. It doesn't seem likely your questions will lead to the end of the Unitary Patent project, does it?

"Legal certainty is in the interest of all parties involved. The UPCA has successfully been challenged in court before. The actors should not risk this happening again. Union law gives the Commission all tools it needs."

Who would benefit from and who would be harmed by the Unitary Patent system, in your view?

"Patent trolls that abuse the system to make money would benefit, whereas small and medium sized businesses, as well as innovation as a whole, would be harmed."

Patents often function as a deterrent to innovation rather than as an incentive. The patenting of knowledge in areas like genetics and biotechnology, as well as software, renders it a tangible threat to the future of our society.

Monopolies on plants and seeds and costly legal disputes about often trivial patents already demonstrate how it is both innovators and consumers who have to pay the price."

Are you in favour of any patent system for Europe that is less complicated than the current system?

"This treaty should be abandoned and substantive reform at EU level taken up."

Patent law needs to be reformed or replaced with an approach that enables freer and fairer markets instead of continuing to further stifle innovation.

Patents should never be granted for 'inventions' that are trivial, non-substantial, computer programs, business models or works of nature. These types of patent impede the development of an information society and result in the privatisation of the commons. Small and medium IT companies throughout Europe prove that patents on software are no prerequisite to economic success. Innovation must be fairly rewarded, but this does not necessarily require the granting of monopolistic privileges that stifle innovation and negatively affect the access to essential goods.

Pirates oppose the frequent abuses of patent privileges, such as introducing spurious changes to medicines with expiring patent protection. Uncompetitive practices such as paying competitors in order to delay the marketing of generics should be actively prevented. Universities and research institutes should be able to carry out scientific research for health and medicine without being encumbered by patents."

How much time do questions like yours take to be answered? In other words, when do you expect a reaction from the European Commission?

"The Commission should answer my written questions within 6 weeks but often this time limit is not met."

If the Commission's answers are not satisfactory, in your view, what will you do?

"We may ask authoritative legal experts to look into the matter."