

# 'Period of provisional application Unified Patent Court Agreement can start this year'

Kluwer Patent Blog  
June 22, 2020

Kluwer Patent blogger

Please refer to this post as: Kluwer Patent blogger, "Period of provisional application Unified Patent Court Agreement can start this year", Kluwer Patent Blog, June 22 2020, <http://patentblog.kluweriplaw.com/2020/06/22/period-of-provisional-application-unified-patent-court-agreement-can-start-this-year/>

The provisional application period of the Unified Patent Court Agreement can start before the end of this year. That is the expectation of Winfried Tilmann, consultant at Hogan Lovells and one of the founders of the court. In an interview with Kluwer IP Law, Tilmann comments on the German government's initiative to re-ratify the UPCA and the possibility of a last minute turnaround of the UK - which has said it no longer wants to be part of the UP system. He does not believe the Federal Constitutional Court (FCC) in Germany may think the UPCA violates the German constitution.

Was the long awaited decision of the FCC to declare void the German ratification of the UPCA a great disappointment for you?

"It came as a surprise. It was for the first time that the CC (1) granted a citizen the right to appeal against an act of Parliament invoking the disregard of alleged voting rules and (2) required a 2/3 majority for a transfer of competences in the context of international cooperation based on international law."

The German Minister of Justice and Consumer Protection, Christine Lambrecht, reacted surprisingly quickly to the decision of the FCC last March. Less than a week later she declared: "I will continue to work to ensure that we can provide the European innovative industry with a Unitary Patent and a Unified Patent Court." Observers said it shows how strong the lobby is behind the creation of the Unitary Patent system. Some pointed at the similarities between an article you published in GRUR 2020, 441 and the explanatory note of the Ministry of Justice accompanying the new draft ratification bill for the UPCA. (see comments below [this earlier blogpost](#)) Are you the architect behind the lobby and the memorandum?

"Germany, together with the large majority of EU member states, is pursuing this project of international cooperation in EP unification, protection and control for 40 years now and patentees worldwide are waiting for such completion of the European patent system to come for the same long period. As far as I can see, German inventors and industry are continuing their strong support for this modern system completing, at the court level, the central grant system of the EPC. The project does not need a lobby to persuade the German government, since it is determined at its own will. And the German government does not need advice on how to move forward, because it knows."



What is your opinion about the draft bill and the German intention to re-ratify the UPCA as soon as possible?

"I agree with both."

What about the position of the UK? It completed the ratification process despite the Brexit referendum of 2016, but earlier this year the UK government announced it will not participate in the Unitary Patent project. However, there has been no official statement to that effect. Should the German government contact the UK government and/or the UPC Preparatory Committee before completing the ratification procedure - which will launch the entry into force of the UP system - in order to prevent the UK becomes a member of the UP system against its will?

"The UK, until now, has not effectively withdrawn its UPCA membership based on signature and ratification. It has signalled its intention to do so only informally. The other CMS must stay prepared for both, a withdrawal and a last minute turnaround to stay which would be most welcome. It is for the UK to act. Germany's ratification bill must proceed independently in order to allow the entry into force of the Protocol on provisional application so that the set-up preparations can continue. When these are completed, Germany may deposit its instrument of ratification with the EU Council."

Do you agree that, regarding the UK withdrawal from the UP project, the Vienna Convention on the Law of Treaties (VCLT) will apply, as there are no withdrawal provisions in the UPCA? And that, in view of article 56(2) VCLT, the UK will stay a member of the UP system at least 12 months from giving 'notice of its intention to (...) withdraw from' the UPCA?

"It follows from the definition, in Art 2(g) VCLT, of the word 'party' used in Art 52 that Art 52 is applicable only after the Treaty has come into force. It may be derived from Art. 25(2) VCLT governing provisional application that before that date cancellation by a State is possible by simple notification."

The explanatory memorandum of the German draft bill says the London branch of the UPC division could be relocated provisionally to Paris and Munich, pending a decision on its final destination. Who is competent to decide about the final destination?

"Any change of Art. 7(2) UPCA and Annex II would be subject to ratification by all CMS. This would postpone the beginning of provisional application and entry into force for a considerable time. Better to live, for the time being, with the legal situation as created by a UK withdrawal: The remaining parts of the central division (not London) may be established and will be able to perform the London duties in the beginning. The distribution of these duties between the two instances remaining may be decided upon by a so-called 'subsequent agreement'. According to Article 31(3)(a) VCLT, in the interpretation of international treaties, account shall be taken of any subsequent agreement between the contracting parties on the interpretation of the treaty or the application of its provisions. The draft bill also rightly mentions the provision of Article 31(3)(b), according to which account must be taken, in the same way, of any subsequent practice in the application of the treaty which shows the agreement of the contracting parties on its interpretation. No ratification of such accord being necessary."

The German draft ratification bill repairs a formal issue, the fact that there was no two-thirds majority when the Bundestag and Bundesrat ratified the UPCA. The FCC suggested however, there may be substantive deficits as well with the agreement, most notably the point that unconditional primacy of EU law, as stipulated in Article 20 of the UPC Agreement, may violate the German constitution. Shouldn't the German government have taken this into account?

"There is no indication ('Anhaltspunkt', mn 166 CC-decision) whatsoever that the German legislator, by means of the ratifying bill, will be giving the UPC the power to apply EU law even if it is in breach of German constitutional law. Such a will cannot be assumed, if only because, according to the proposed draft bill, the explanatory memorandum of the ratifying law expressly contradicts such an assumption."

A consultation has started on the new draft bill. Is it normal in Germany not to publish the names of the organizations and associations that are being consulted? What kind of feedback can be expected?

First question: yes. Second question: It is expected that the feedback will be overwhelmingly positive.

What is the next step after the consultation period?

After evaluating the comments the Justice Ministry will prepare the Bill (with or without changes) for an approval by the Cabinet. After approval the bill will be sent to the Bundestag and the Bundesrat (the chamber of Länder-representatives) for discussion and eventual decision. Both will have to decide by a two thirds majority. Finally, the President will sign the bill and the Protocol. The latter will trigger the provisional application of the UPCA-parts necessary for establishing the UPC. When preparations are completed, Germany will deposit its instrument of ratification with the EU Council.

When do you think the German ratification procedure can be completed?

"By the end of this year the bill is expected to have been passed so that the provisional application period may start."

You've been a staunch supporter of the Unitary Patent project. Why is this system so important in your view? Is it really beneficial for SMEs, as has often been said in the past by its supporters, or is it mainly beneficial - in the words of a critic below [this blogpost](#) - for "the Big" industry and lawyers who hope to fill their pockets when litigating before the UPC?

"First question: I share the view of patent owners worldwide. The system completes the European patent system raising it to the same level as the systems of the US and China.

Second question: The SMEs belong to the beneficial owners of the new system. Accused of infringement they may be sued only before one court and may challenge the validity of the plaintiff's patent there. If their own patents are infringed, they may bring their case before the same one court, also in that respect avoiding costly multiple national actions. The same applies for not so small entities."