

Reactions to UPCA ratification bill Germany: ‘London can delay plan B for a UP system without the UK’

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Full support for the Unified Patent Court Agreement, complete rejection, long lists with points of concern. The German government has published the reactions to its consultation on the new draft ratification bill for the UPCA.

A new ratification process was started last March, after the German Federal Constitutional Court (BVerfG) declared void the process of 2017, because parliament hadn't approved the ratification bill with the required two-thirds majority. The government published a new draft ratification bill last month and opened it for consultation, with an updated memorandum, explaining among others why and how the UPCA can still enter into force now that the UK does no longer want to be part of it. One central issue: according to the memorandum, a decision about the London section of the central division can be made after the UPC comes into force; initially these cases can be heard in Paris and Munich.



It isn't clear how many “an die am Patentrecht interessierten Verbände und Institutionen” were given the opportunity to comment by the Ministry of Justice and Consumer Protection (BMJV), but 14 responses were apparently filed, their length varying from a few lines to 25 pages (Monika Schmidt).

Support

Not surprisingly, the European Patent Office hopes the ratification procedure in Germany can be completed as soon as possible, despite the Brexit: “These economic benefits for European companies and especially SMEs will not be affected by the announcement of the United Kingdom, one of the signatory states to the UPCA, that it will withdraw from the European Union and no longer wants to participate in the Unitary Patent. Because even without the UK, the UP package will lead to significant simplification and cost reduction for the companies of the participating EU member states, which is also largely recognized by European companies.” (full reaction [here](#))

There is unconditional support as well from the VDMA and ZVEI, representing mechanical and plant engineering as well as the electrical engineering and electronics industry; Der Verband der Forschenden Arzneimittelhersteller (the Association of Research-based Pharmaceutical Manufacturers); der Verband der chemischen Industrie e.V.; der Bundesverband der Deutschen Industrie.

The VPP – Vereinigung von Fachleuten des gewerblichen Rechtsschutzes simply writes: “We welcome the introduction of the Unified Patent Court very much and hope that the court can soon start its work.” The Vereinigung für gewerblichen Rechtsschutz und Urheberrecht e.V. (GRUR) would like to see the UPCA enters into force soon, and sees chances for strengthening the position of Munich as venue for international patent litigation. The Bundesverband IT-Mittelstand e.V. und patentverein.de e.V is a supporter of the UPCA as well, although they would like to see some changes unrelated to the Brexit.

Criticism

Other respondents are more critical, however. The Verband der Beschäftigten des Gewerblichen Rechtsschutzes (a union of IP law officials), rejects the UPCA, for reasons which are partly related to the Brexit. A quote:

“The present UPCA and the draft ratification bill are in conflict with many important basic principles of the German Basic law. Because of these shortcomings, we reject this agreement and expect the Federal Constitutional Court to reject it in a new round of review. We consider necessary a fundamental revision of the project.” (full reaction [here](#), German language)

The Bundesrechtsanwaltskammer writes, among others: “The ratification by the legislator should only take place after a new jurisdiction regulation [concerning cases originally planned for the London section of the central division] has been established.”

The Deutscher Anwaltverein thinks the “BMJV's plan to introduce this bill (...) raises a series of questions that warrant a critical opinion”.

“Another point to consider (...) is that the UPCA has clear features of the English (Anglo-American) legal procedure. As apart from Ireland, the only country with experience with this system is no longer part of the system because of the Brexit, some signatories may feel the desire or need to renegotiate the Agreement.”

“It is hard to imagine that the other contracting states would embrace the idea of shifting responsibilities from London to Paris and Munich, especially with a rather vague outlook that this will be reviewed after seven years at the earliest.”

“With regard to the specific German constitutional problems [concerning the supremacy of EU law, as laid down in the UPCA] certain groups have already publicly announced that they will have these checked by the BVerfG. It would be desirable, especially regarding the questions the BVerfG has already touched upon, to create more clarity. The draft bill gives some clues, but these are not entirely convincing (...) there is a not insignificant risk that the law falls through again and thus the entire project will be blocked or put at risk altogether. That should be avoided.”

The Foundation for a Free Information Infrastructure e.V. (FFII) filed a response as well, repeating its well-known arguments against the Unitary Patent project and adding its concerns regarding the way the Brexit is handled in the draft bill.

“1. The software patents granted by the EPO will be made enforceable; 2. Litigation will be more expensive, especially for defending SMEs; 3. A captive Unitary Patent Court. We have independent national courts and Supreme Courts for civil patent cases, we will have a captive Unitary Patent Court, with no CJEU nor the European Parliament as correctives; 4. Lack of compliance with the European Convention on Human Rights (ECHR); 5. Germany is violating the Brexit Withdrawal Agreement and its spirit.”

“Presenting a Treaty for ratification to the German Parliament with an interpretation of how the UPCA will be interpreted if the UK is no longer participating, is clearly violating the spirit of the Vienna Convention on the Law of the Treaties. In such a situation where there is doubt on the content of a draft Treaty in view of the upcoming departure of one of its Contracting Parties, the ratification of the Treaty should be suspended, and the Treaty needs to be renegotiated. That is the correct procedure under the Vienna Convention on the law of the Treaties.”

“If Germany is misled by the patent industry and ratifies the UPCA, this would be a serious breach of procedure under EU law by the German government, and a new constitutional complaint will be launched [the FFII has already announced it could file a complaint itself]. Germany would also expose itself to litigation from the EU institutions and other Member States.”

UK may not cooperate

The contribution of IP law firm [Bardhele Pagenberg](#) focuses on various interesting issues. It points out, among others, that although the withdrawal of the UK from the Unitary Patent system can only succeed with the help of London, the UK may not be interested in cooperating. Also, it questions the renewal fees for the Unitary Patent post-Brexit, the issue of the London central division and the lesser appeal of a UPC without the UK. (English version of their response [here](#))



“Germany must (...) ensure that a ratification triggering the UPCA to enter into force does not result in the United Kingdom remaining a Contracting Member State of the UPCA. It will hardly be possible for the United Kingdom to be excluded from the UPCA against its will and certainly not where unilaterally construed by a single Contracting Member State. (...)”

Recently, the United Kingdom's interest in the UPCA has fundamentally changed. As long as the United Kingdom was participating, the UK (or at least its public stakeholders) were strong supporters of the UPCA in the hope of strengthening London as a legal venue. In the future, the English courts will not only be in competition with other national patent courts, particularly those in Germany, France and the Netherlands, but also specifically in competition with the UPC, which ought to attract patent litigation of particular economic significance.

Thus, by all accounts, the London venue is already reflecting on how they can stand their ground amongst such competition. The United Kingdom has obviously understood that, by using clever tactics, it can delay a plan B for a system without the UK following Brexit. Now the United Kingdom no longer has any tangible interest in constructive cooperation to help overcome the consequences of Brexit for the UPCA. (...)”

About relocation of the London central division: “A solution that is to be found politically by the Contracting Member States and which is independent of the individual case and the opinion of single individuals (i.e. a universally applicable solution) is clearly preferable, not least in order to promote the users' trust in a court system that is only just being created.”

“The renewal fees have not yet been recalculated on account of Brexit, which raises important questions. The “commercial basis” for the cost comparison between bundle patents and Unitary Patents has changed considerably as a result. In the future, applicants will additionally have to pay the renewal fees for the United Kingdom, which will increase from GBP 70 to GBP 610 by the end of the term. This does not make an enormous difference for applicants validating their patents throughout Europe. However, a considerable majority of applicants validate their patents, at most, in the four States forming the basis of the “True Top 4” calculation. It can be safely assumed that this will be reflected by the course of action taken by applicants. This in turn ought to have an effect on the volume of cases heard by the UPC.”

“There is an understandable major interest as it were in a swift entry into force after many years' delay - but not at any price and not with such haste that would entail wholly unnecessary risks. After all, the quality and stability of the court system and the financial burden ultimately to be borne by European citizens are just as important values.”

Some of the points mentioned above can also be found in the response of [Monika Schmidt](#), who criticizes both the UPCA in general and the way the Brexit is being dealt with.

Next steps

What will all this lead to? The next step is for the Justice Ministry to prepare the bill, with or without changes, for approval by the German government. Then the draft bill will be sent to the Bundestag and the Bundesrat, which will both have to decide by a two thirds majority whether they support it. If they do, the President will sign the bill plus the protocol for provisional application. Completion of the German ratification procedure will automatically trigger the start of the Unitary Patent system. According to [Winfried Tilmann](#), consultant at [Hogan Lovells](#) and one of the founders of the court, this could happen [before the end of this year](#).

Earlier this week, in [answer to questions by MEP Patrick Breyer](#), the European Commission declared it is “of the view that the withdrawal of the United Kingdom from the European Union does not affect the ratification process of the Unified Patent Court Agreement in Germany. (...) The Commission would welcome a swift ratification of the Unified Patent Court Agreement by Germany.”

On behalf of the European business community, BusinessEurope, Eurochambres, Orgalim and SMEUnited sent a [joint statement](#) to European Commissioner Thierry Breton for the Internal Market, calling “for the swift ratification of the Unified Patent Court Agreement and the entry into operation of the European Patent system as soon as possible”.

Will this happen? The Unitary Patent project has faced unexpected setbacks before. As was pointed out in a [Bristows article](#), not only German associations which filed a consultation response, but also member states may have doubts about the German plans with the UPC. “Some indication of that (and other views on a unitary patent and UPC system without the UK) may be obtained in the consultation the European Commission is carrying out on an IP Action Plan. The IP Action Plan is published [here](#) as a “roadmap”, open for consultation from 10 July to 14 August 2020.”

Objections can certainly be expected from Italy. Last month, the Italian AIPPI published a [position paper](#), stating that the German proposal for the London section of the central division would be contrary to art 87 (revision of the Agreement) and the 1969 Vienna Convention on the Law of Treaties. The Italian AIPPI considers Milan is the ideal location for the London section.

