

# Kluwer Patent Blog

## Timings for the Unitary patent system, and impact on UK participation of a UK referendum on EU membership

Brian Cordery (Bristows) · Wednesday, January 30th, 2013

As has been well publicised, the end of 2012 was a time of considerable progress in the long history of the Unitary patent and Unified Patent Court (“UPC”) dossier, culminating in adoption of the Unitary Patent Regulation 1257/2012 and its accompanying Language Regulation 1260/2012. But what next? Built into the Unitary Patent Regulation is a triggering clause dependent on the UPC coming into existence. Hence, the next major event will be the signature of the treaty to create the UPC – 19 February 2013 is the scheduled date. However, it was reported on 24 January in *Rzeczpospolita*, one of Poland’s leading newspapers, that representatives of the Ministry of Economy and the Ministry of Foreign Affairs in Poland have stated that Poland will not sign the UPC agreement, at least at the outset. Whilst it seems unlikely that this move will lead other countries also to defer signing, it will be of concern to the Commission.

Following signature of the UPC, the 14th draft Rules of Procedure will be put out for a consultation (possibly only one month), albeit that the 12th draft is already widely available. Later this year, the CJEU is expected to make an important ruling. The legality of the Regulations has been challenged by Spain and Italy, but following a positive Advocate General’s opinion handed down on 11 December, the CJEU is expected to endorse the process.

After that, the timings are less certain. The Commission’s position is that ratification of the UPC treaty will be effected by sufficient states (UK, France and Germany plus 10 others) by November 2013 so that the system can be up and running by April 2014. This is unrealistic: the UK is unlikely to ratify before Spring 2014 at the earliest, and German elections are likely to interfere with its ratification process. Furthermore, some serious work remains to be done at a practical level to agree the fee structures for the Court, to appoint and train Judges, and to set up the Court infrastructure, not least of which will be the computer system allowing the various divisions of the court (probably around 10-12 initially in four to six different countries) to communicate effectively between each other and handle the electronic filing of documents which the system promises to use. A start date of 2015 is more realistic, but we will keep this under review.

As has also been widely reported this week, the British Prime Minister, David Cameron, has committed his Conservative party to a referendum in 2017/18 on membership of the EU, should they be re-elected. How might this commitment impact on the UPC?

Obviously the UK could delay ratification for all manner of reasons unconnected with this political development (for example until the cost of setting up the new Court system is known – and

Germany may take a similar view on that). But absent that, or other countries slowing the process down, this would mean that the system would have started up with a London branch of the Central Division in place, and Unitary patents being granted covering the UK, well before any 2017/18 referendum.

Were there then an “out” vote, the UK’s participation in the system would almost certainly have to be reversed. Based on the CJEU’s decision in March 2011, it would be unlawful under EU law for a country outside the EU to be part of the system. Also, any Unitary patents granted covering the UK would have to be re-assigned (somehow) as EP(UK) designations, and the UK would have to exit the Court system also, with the London branch of the Central Division going elsewhere, the London Local Division being closed, and the UK judges retiring from office. Whether the whole UPC system could collapse as a result of any UK exit is a little unlikely, but it would certainly create a degree of chaos as the UK’s involvement was unscrambled.

Whether the UK would actually stall ratification of the UPC as a result of this referendum commitment is inevitably speculative, but a great deal of political capital has been invested by the UK in obtaining a share of the Central Division and deletion of Articles 6-8 of the (then) draft Unitary Patent Regulation. Further, since the UK Prime Minister seems committed to remaining in the EU if at all possible, and bearing in mind the pro-European position of the Conservatives’ coalition partners, it seems unlikely that the Government would want to delay ratification for this reason. Whether, on the other hand, patentees would see this possibility as another reason to be cautious about applying for Unitary patents until the position is clearer, is another matter. Likewise, this may further encourage UK owners of existing European patents to opt them out of the UPC system during the transitional period.

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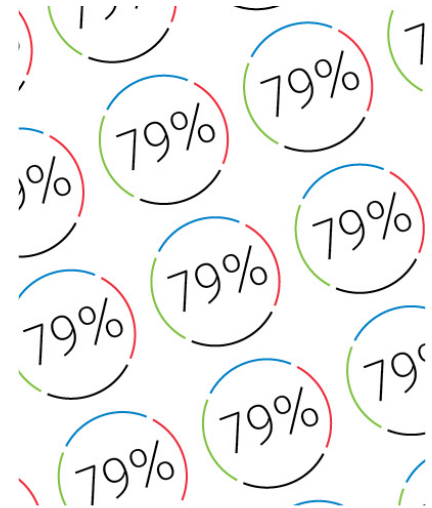
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