

# Kluwer Patent Blog

## What will the Irish population vote on in the UPC referendum?

Miquel Montaña (Clifford Chance) · Tuesday, January 31st, 2023

As most readers will be well aware, Brexit has raised some fundamental issues for the Unified Patent Court (“UPC”) project, among which two points stand out. First, that, contrary to what it is envisaged in by Article 7.2 of the Agreement on a Unified Patent Court (“UPCA”), London will no longer be able to accommodate one of the sections of the Central Division. And second, that, for the entry into force, Article 89 of the UPCA requires thirteen instruments “[...] of ratification or accession in accordance with Article 84, including the three Member States in which the highest number of European patents had effect in the year preceding the year in which the signature of the Agreement takes place or on the first day of the fourth month after the date of entry into force of the amendments to Regulation (EU) No 1215/2012 concerning its relationship with this Agreement, whichever is the latest.” Taking into account that, according to the Vienna Convention on the Law of Treaties, the text of the treaty is definitively cast in stone at the time when the treaty is authenticated, Article 89 means, in plain language, that the ratification of Germany, France and the United Kingdom (“UK”) is required. This is further confirmed by the Protocol of Provisional Application, which mentions these three countries explicitly. Obviously, as a consequence of Brexit, the ratification of the UK is no longer on the table.

From a rule of law perspective, addressing these two issues would require an amendment of the UPCA. However, the architects of the UPCA seem to have decided to move the project forward *de facto* and continue to spend the money of European taxpayers, even if the conditions for the entry into force of the UPCA are not fulfilled. This has raised concerns among International Law experts. For example, a professor of International Law from the University of Vienna has written that:

*“Ultimately, such an amendment of the treaty text seems to be the only way forward to safeguard legal certainty. Any other attempts to circumvent the unartfully constructed ratification regime under Art. 89 (1) UPCA would provide considerable arguments against the legitimacy of the Unified Patent Court itself and, as a future consequence, against the legally binding character and enforceability of its judgments. [...]”*

Besides this rule of law / legitimacy concerns, the “looking somewhere else” approach that the architects of the UPCA are following, also raises other fundamental issues from the perspective of democracy. For example, in some countries, such as Ireland, ratification of the UPCA will require a referendum. But, if the UPCA is not amended to heal the scars left by Brexit, on which text will Irish citizens be asked to vote? The text that was authenticated (i.e. a Central Division with Sections in Paris, Munich and London), which is the only relevant text from the perspective of

International Law? The text that was authenticated with a warning that, in the end, one of the sections of the Central Division will not be in London but somewhere else? This would be astonishing because, as is well known, the two most contentious issues during the negotiation of the European patent with unitary effect / UPCA project were the language regime and the seats of the Central Division. In addition, one should not take it for granted that Irish companies will be indifferent to the prospect of having to litigate before a section of the Central Division located in London as opposed to, in, say, Milan. One would have thought that, before being asked to cast a vote, Irish citizens should have legal certainty on what they are going to vote in favour or against. And only the amendment of the UPCA could provide such legal certainty.

On another note, the suggestion that the competences of the London section could be assigned to other sections without amending the UPCA would not rank very high in the textbooks of European democracy, as it would ignore the opinion of national Parliaments and the outcome of other referenda. For example, in Denmark, citizens voted in favour of a UPCA that envisaged that the UK would be one of the participants and that one of the sections of the Central Division would be in London. For reasons that everybody knows, having the UK onboard was an attractive feature of the UPC. Trying to guess whether or not Danish citizens and / or the Parliaments of other Member States would have voted in the same direction if they had known that the UK would not be participating in the project is a voyage into the realm of speculation. The fear to ask them is a fear of democracy.

All in all, what it is clear is that, as matters stand, if and when a referendum on the UPC is organised in Ireland, Irish citizens will simply not know exactly what they have to vote on.

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