

MB Milestones Special Edition

Unified Patent Court: UK creates facts – Fast Track, or not?



From Michael Munsch, Lawyer, Meissner Bolte Dusseldorf

In early 2020, the United Kingdom made it clear that it will not participate in the Unitary Patent System. In essence: participation would not be compatible with the goals of an independent and autonomous nation.

On 20 July 2020, the British government took the next step and deposited a declaration with the General Secretariat of the European Council, stating that it was withdrawing its ratification of the Agreement on a Unified Patent Court (UPCA) and the Protocol to the Agreement.

As can be seen from a submission to the House of Commons ([available here](#)), the UK Parliament believes that withdrawal of the ratification provides clarity about the status of the UK in relation to these

arrangements, paving the way for the remaining states to bring the system into force. It was assumed, the opinion goes on to say, that this withdrawal would enter into force with immediate effect:

“The United Kingdom considers that its withdrawals shall take effect immediately and that it will be for the remaining participating states to decide the future of the Unified Patent Court system”

One can only speculate on the precise motives behind making this statement at this moment. At best, it seems that the UK Government wishes to create certainty for the system and remove another obstacle holding back the Unitary Patent System.

Is that really the case? And if so, can it happen that quickly?

One thing is clear: the UPCA is not yet in force. This requires the ratification of at least 13 member states, which must include the 3 states having the most European patents in the year before the UPCA was signed (these were Germany, France and the United Kingdom). A total of 16 EU states have ratified the Convention to date, including France and the United Kingdom. As is well known, ratification in Germany has been delayed by a constitutional complaint. Currently, the Federal Ministry of Justice and Consumer Protection (BMJV) has submitted a draft bill for a law on the UPCA (“Ratification Act”); a next attempt at ratification is thus very likely.

Unfortunately, the UPCA does not contain any provisions regulating the withdrawal of a contracting party. In this respect, recourse to international law, in particular the Vienna Convention on the Law of Treaties, is necessary. In this context, Art. 25, 31, 54 and 56, among others, are under discussion, with Art. 54 and 56 being of particular relevance, as these regulate the termination of international treaties. According to Art. 54 para. 2, a withdrawal is possible at any time if all contracting parties agree to the withdrawal after consultation by the party wishing to leave. According to Art. 56(2), which regulates in particular the situation that the contract to be terminated - like the UPCA - does not contain a provision on termination, the intention to terminate such a contract must be notified at least 12 months in advance. "Immediately", as expressly announced by the House of Commons, is apparently not possible in this scenario.

For the progress of the Unitary Patent System, however, it is, on an overall basis, to be welcomed that the United Kingdom is making this move of its own volition and at a time when Germany has not yet ratified. The uncertainties that would otherwise have arisen with ratification by Germany and the possibly associated hybrid position of the United Kingdom in the Unitary Patent System can, thus, be avoided.

With successful withdrawal of the United Kingdom from this system, many questions remain unanswered, these include:

- How should the UPCA, which does not provide for a withdrawal of a member state, be adapted or should it only be interpreted?
 - Closely related to this is the question of what will happen to the central chamber of the Unified Patent Court which is planned for London. Whether this question can also be clarified by interpretation alone is at least questionable.
- How is the current draft law of the BMJV, which contains only minor additions when compared with the first version, to be classified and can it be introduced unchanged into the legislative procedure? On the one hand, it is also based on the currently valid version of the UPCA, on the other hand, there is still uncertainty as to the extent to which the Federal Constitutional Court has acknowledged the other constitutional violations complained of in the constitutional complaint and whether they are sufficiently taken into account in the current draft. In this respect, reference should also be made to the comments of the Federal Bar Association and the German Bar Association on the draft bill.

It should also be considered whether this move is merely a tactical move of the British, who fear an early ratification by Germany and thus the UPCA coming into force on the basis of the German draft bill. In view of the issues mentioned above, which now have to be solved as a result of the UK declaration, it could be a further (quite suitable) attempt to delay a European Unitary Patent System which, when it comes into force, will be in competition with the patent courts of the United Kingdom. This aspect cannot be completely dismissed.

Even if further delays were to occur, the UK's declaration should be seen to be a step in the right direction for the European Unitary Patent System as a whole. A Unified Patent Court with non-European members is not compatible with the objective of creating a uniform, independent and autonomous system. We will report again when further developments occur. ■

Further information:

Michael Munsch, Lawyer

Meissner Bolte | Kaiserswerther Str. 183 | 40474 Düsseldorf

T +49-211-81 98 48 0 | F +49-211-81 98 48 70 | mail@duesseldorf.mb.de