

## UPDATE ON THE UPC AND THE UNITARY PATENT

### UK in a position to ratify the UPC Agreement, Germany blocked by constitutional complaint

The idea to create a new single patent right with unitary effect across all participating European countries (the Unitary Patent, "UP"), and a new European court with jurisdiction across the participating countries to enforce patent rights via one action on a European-wide basis (the Unified Patent Court, "UPC") has been discussed intensively.

In order to establish the new system, the UK, Germany and France (those being the EU Member States with the highest number of patent filings) need to ratify the UPC Agreement. Furthermore, all three countries as well as the State of Luxembourg (which will host the appeal court) have to ratify the UPC's Protocol on Privileges and Immunities. France ratified the UPC Agreement on 14 March 2014 and the UK surprisingly announced in November 2017 that it would ratify the UPC Agreement despite Brexit.

On **8 February 2018**, the UK's Privy Council approved the Unified Patent Court (Immunities and Privileges) Order 2017. Except for certain aspects devolved to Scotland, this completes the necessary legislative steps for the UK to be in a position to ratify the UPC Agreement. However, in November 2017, when announcing the plan to ratify, the responsible UK Minister signalled that the UK will need to "negotiate a new relationship with the UPC" post Brexit. It remains unclear what this will mean in practice.

All eyes are now on Germany, where the German Constitutional Court received a complaint against the UPC in June 2017 after the German Parliament passed a law on the implementation of the UPC Agreement.

The German constitutional Court invited 27 organisations to comment on the matter by December 2017. Seven institutions and associations responded, including the German government, the EPO, the EPLAW (European Patent Lawyers Association), the DAV (*DeutscherAnwaltVerein*, German Bar Association), BRAK (*Bundesrechtsanwaltskammer*, Federal Bar Association), GRUR (*Deutsche Vereinigung für gewerblichen Rechtsschutz und Urheberrecht*, German Association for the Protection of Intellectual Property) and EPLIT (European Patent Litigators Association). Some of the opinions are publicly available and all of these conclude, in essence, that the complaint should be rejected as inadmissible and/or unfounded.

Although the German Constitutional Court has not yet scheduled a date for the decision, the opinions of the German associations give new hope that the Unitary Patent project will still succeed, but with new delays and an uncertain timeline.

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