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**Unitary Patent and Unified Patent Court stopped just before the Finish Line - Perspectives after the General Election in the United Kingdom and the Suspension of the Signing of the Implementing Laws in Germany. June 2017**  
Reported by Dr. iur. Tilman Müller-Stoy

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**The somehow never-ending story of the unitary patent system was just “enriched” by some further twists which will either kill or at least add significant delay to the start of the system as it is currently set up. Let’s look at this chronologically:**

### **Status before Brexit**

Before the Brexit referendum in June 2016, it was commonly believed that the unitary patent system, which was intended to be implemented in early 2017, would be delayed for an unforeseeable period if the UK decided to leave the European Union.

### **Status after Brexit**

After the Brexit referendum, what was unthinkable before became legally and politically feasible: The UK was said to be able to ratify the 2013 Agreement on a Unified Patent (UPCA) before leaving the EU. And the UK Government did indeed announce that it would continue to fulfil its obligations as an EU member as long as it remained a member. This was interpreted as an announcement of early ratification. It was expected anyhow that, by the date of its deposit of the instrument of ratification, Germany would ensure that the unitary patent system could start operation as soon as the administrative preparatory work would have been completed. The schedule was adapted slightly and the unitary patent was envisaged to become available by December 2017.

Initially, progress was in line with the envisaged schedule. Legislative proceedings in the UK and Germany advanced well. The UK Parliament adopted the Law amending the Patents Act and a Statutory Instrument necessary for ratifying the Agreement. Such Statutory Instrument is also required under the Protocol on Immunities for the Unified Patent Court. In an explanatory Memorandum for the Parliament, UK’s IP Minister Jo Johnson stated that the UPCA would establish a specialized, non-EU patent court under international law. However, the Memorandum did not mention the duty of the Unified Patent Court (UPC) to refer points of law to the CJEU pursuant to the Treaty on the Functioning of the European Union.

In Germany, the Law on the Ratification of the UPCA and an Implementing Law were approved by the second chamber of Parliament (Bundesrat), and on June 2, 2017, the Bundesrat approved the Protocol on Immunities. This concluded all necessary acts of Parliament. In subsequent steps, the Laws then ought to have been signed by the German Federal President, published and ultimately entered into force.

In the UK, the hope was expressed that the Government, still in office, would deposit the Instrument of Ratification early enough for the ambitious time schedule. However, on March 29, 2017 the UK’s Prime Minister Theresa May declared the UK’s intention to leave the EU, triggering the two-year period for exit negotiations. This was a first indication



*Tilman Müller-Stoy,  
Dr. iur.  
Attorney-at-law,  
Partner*

BARDEHLE PAGENBERG  
Partnerschaft mbB  
Patentanwälte Rechtsanwälte

Prinzregentenplatz 7  
81675 Munich  
T +49.(0)89.928 05-0  
F +49.(0)89.928 05-444  
info@bardehle.de  
www.bardehle.com

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that it could be a challenge to keep the UK's participation in the unitary patent system separate from exit negotiations. In addition, in April 2017 the UK's Prime Minister called for a general election to be held on June 8, 2017. In this election, the Conservative Party lost its majority in the Parliament and now has to rely on the support of the North Irish Democratic Unionist Party. In all likelihood, this will not facilitate decision-making. In addition, the laying of the Protocol on Immunities before Parliament has not been completed within the required period, meaning that it has to be repeated. According to an IPKat report of June 28, 2017 (<http://ipkitten.blogspot.de/2017/06/uk-upc-ratification-timetable-to.html>), even further steps are required under UK law, and none of them will start to be accomplished before the new UK Parliament sits again on September 5, 2017.

### **Additional Risk by German Constitutional Law Complaint**

The course of events in Germany was even more surprising. The Frankfurter Allgemeine Zeitung reported on June 12, 2017 that the German Constitutional Court (Bundesverfassungsgericht – BVerfG) had asked the German Federal President to suspend his signing of the corresponding Laws as early as on April 3, 2017. The request had been submitted first orally and then in written form.

Subsequently, it came to light that on March 31, 2017, an individual had filed a constitutional complaint against the ratification of the UPCA together with a request for an interim measure preventing the competent authorities from finalizing ratification proceedings before the Court has taken a decision on the substance of the case. The Court considered the complaint not to be hopeless

from the outset and the President promptly acceded to the request. Thus, ratification proceedings are now blocked in Germany.

It is virtually impossible to foresee the practical consequences of these events. At the outset, it is important to state that the President not signing does not have the retroactive effect of the previous legislative proceedings becoming meaningless. It is true that the principle of discontinuity has the effect of bills which have not been finally passed by the end of an electoral period having to be reintroduced into the new Parliament. However, in the present case, the current Parliament has already terminated its legislative work. The President's term of office is independent from the electoral period and he can sign the law at any later point in time. It is not unusual for the Parliament to adopt quite a few laws during the last few days of an electoral period, with the consequence of them having to be signed later.

As to the proceedings before the German Constitutional Court, one may assume that the suspension of the signature of the laws is related to the request for an interim measure. The Court will decide on this request in advance, balancing the disadvantages that would result from ordering an interim measure if the claimant loses his case with the disadvantages that would result from not ordering an interim measure if the claimant wins his case. Thus, the problem of the signature does not have to remain pending as long as the Court has not yet ultimately decided on the substance of the case. The short period between the constitutional complaint being filed and the request to the President being made indicates that the request was made before a detailed examination could have taken place.

### **Subject Matter of the German Constitutional Law issue(s)?**

As to the constitutional problems, no reliable information has yet become available as to the constitutional defects on which the claimant bases his case. On the one hand, these may be reasons related to the legislative proceedings, i.e. questions of competence or necessary majorities. Such defects in the legislative process might require a new start in the new Parliament after the German elections in September 2017. Since the project has not been controversial among the political parties to date, this may turn out to take some additional time but not to create serious problems.

On the other hand, the alleged constitutional violations may concern questions of judicial procedure in the unitary patent system, i.e. in particular whether citizens have access to a court review of administrative decisions, which would be in line with accepted constitutional standards. In this context, it has been mentioned that there are four complaints pending before the German Constitutional Court which are directed against decisions of the EPO. At least in one of those cases the claimant alleges lack of independence of the Boards of Appeal in the context of the principle of separation of powers. It is true that a new court, the UPC, has been created for unitary patents. However, this does not change the fact that the Boards of Appeal remain competent for decisions in grant and opposition proceedings.

In this regard, Spain had made the point in its complaint against the Regulation on the Unitary Patent that the administrative procedure before the EPO is not subject to judicial review to ensure the correct and uni-

form application of EU law and the protection of fundamental rights, which is said to undermine the principle of effective judicial protection. In its decision C-146/13, the CJEU emphasized that unitary protection has a strictly accessory nature which is to be achieved by attributing unitary effect to European patents in the post-grant phase. One may consider this argument as plausible for the creation of the unitary patent. However, this takes only account of the proceedings up to grant, not considering opposition proceedings, in which the EPO may revoke a unitary patent which is based on EU law. The CJEU carefully avoided the question of whether a legal title which is based on EU law can be revoked without the rule of law guarantees of EU law being complied with.

In the meantime, the situation has somewhat changed. A structural reform of the Boards of Appeal occurred which was aimed at improving the efficiency of the Boards and at the same time the perception of their independence. Some comments on the reform efforts suggest that these aims might not have been sufficiently met and balanced. Requirements as to efficiency, in particular in terms of cases to be dealt with, may get into conflict with the independence of a judge (performance-related reporting, performance-related payment and reappointment based on reporting). Furthermore, the President of the Office has the right to propose the President of the Boards of Appeal together with the Boards of Appeal Committee, which means that the President of the Boards of Appeal is dependent on the benevolence of the President of the Office. All these points were raised in the lawmaking process by the organizations of the users and the Presidium of the Boards of Appeal, albeit unsuccessfully. Therefore, a renowned au-

thor concluded: *“The reform does not appear characterized by an understanding for the functioning of the judiciary. [...] It remains doubtful whether the aim has been achieved to improve the independence of the judiciary and its members in the interest of a highly qualified review system in patent matters based on the rule of law.”* (Kathrin Klett, Neuorganisation der Beschwerdekammern in der Europäischen Patentorganisation, sic! 3/2017, 119, pp. 9-10).

It will thus be interesting to see whether the German Constitutional Court sees a reason to deal with structural problems of the Boards of Appeal. The earliest point of time for setting the suspension aside may be the decision on the interim measure. This may take several months. If the request for an interim measure is successful, speedy proceedings cannot be expected to ensue.

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### Outlooks

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Looking at the UK does not create much more optimism. Before announcing general elections, the UK government may have had the intention of depositing the instrument of ratification *“below the radar”* of a broad public as soon as possible, i.e. after the period for laying the Law on the Immunity Protocol before Parliament. Perhaps it is not less probable that it was the intention from the outset to make the unitary patent system part of the package for Brexit negotiations. Neither alternative is in contradiction with the declarations made by members of government.

In any case, a rapid ratification would solve none of the problems of the unitary patent system connected with Brexit. First of all, there is the repeated and unambiguous announcement of the Prime Minister that the UK will not accept the jurisdiction of the CJEU in the future (even after the result of the General Elections, e.g. a public statement by Theresa May on June 26, 2017), which is contrary to the duty of the UPC to refer points of law to the CJEU and to accept the EU law as interpreted by the CJEU. The

second problem is the participation of the UK in the unitary patent system, which is connected with the responsibility for the UPC, or its leaving the system. Just imagine the mess constitutional law complaints by the losing party against decisions (including injunctions) of the UK divisions of the UPC after the UK has in fact left the EU could create.

Thus, based on impatience or political calculation, there is an increasing number of voices in the other member states suggesting that it would not be a responsible course of action to create a court system based on the participation of the UK with the perspective that the UK will soon have to leave the system. It is argued that an attempt to keep the UK in the UPC system after Brexit could possibly be found to constitute a violation of EU law. Taking such uncertain paths could mean relying on vague hopes: The hope that some form of agreement will be found simply because one has to be found and the hope that everybody will play along, including the courts, which will have to decide on the soundness of fragile legal constructs. The

request of the German Constitutional Court to the German President may have been a shout of warning.

Still, the Chairman of the Preparatory Committee of the UPC tried to spread optimism by stating on June 27, 2017 *“I am hopeful that the period of provisional application can start during the autumn 2017 which would mean that the sunrise period for the opt out procedure would start early 2018 followed by the entry into force of the UPCA and the UPC becoming operational.”*

However, that seems to be rather wishful thinking (while of course understandable

from the perspective of the Preparatory Committee). Managing IP’s latest [Twitter poll results](#) show only 17 % of respondents believe the UPC will start in 2018, whereas 38 % said “2020 or later” and 35 % didn’t think it will ever come into force.

In any event, let’s hope that politics and courts get it right at some point in the not so far future so that a convincing and legally sound system will be put in place without losing too much of momentum, a system that many users rightfully still wish to have – put differently: blessed are the ones who do not see and yet believe (John 20:29) ...