

Update on Political Developments concerning the UPC and Brexit

The Unified Patent Court, Unitary Patent and Brexit all present IP holders with challenges and opportunities. Proper planning will help in overcoming the challenges and exploiting the opportunities presented. An essential plank to successful planning is understanding the timing of change. This newsletter provides an update which may be useful on that front.



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The Unitary Patent Package

Much has been written about the Unitary Patent (UP) and Unified Patent Court (UPC). However, progress in bringing the system into force has encountered a number of “bumps in the road”. The trigger for entry into force is the ratification of the UPC Agreement by the UK and Germany.

The first major threat to ratification was the UK’s vote to leave the EU. However, to the surprise of some, the UK has steadily proceeded with the

domestic legislation needed for ratification and is expected to be in a position to ratify the Agreement by the end of 2017.

Germany was also making steady progress towards ratification until the German Federal Constitutional Court (FCC) received a complaint alleging that Germany’s ratification would be contrary to the provisions of that country’s constitution. In response, the FCC requested that the German President delay ratification of the UPC Agreement by Germany until the complaint is resolved. Rather unsatisfactorily, the FCC has not made the complaint public, which means that outside observers have had to rely on second-hand reports and rumours to find out what the complaint contains.

Without going into the details, it appears that the complaint can be split into two strands, the first was that the wrong parliamentary procedure was used to pass the instrument of ratification (the vital vote took place at about 1:30 am when most of the parliamentarians were absent) and the second, more substantive, alleges that the new court fails to conform with German and/or EU law.

The FCC needs to decide whether or not the complaint is admissible and has requested that a number of German

organisations provide comments to them by the end of October 2017.

A decision on admissibility is expected by the start of 2018. If the complaint is held to be inadmissible (as is expected by most commentators) the bar on German ratification is expected to be lifted in the first quarter of 2018. In that eventuality, allowing for a period of provisional operation of the court of about 9 or 10 months, my best guess for the opening date of the Court would be in Q4 2018 or Q1 2019, with the “sunrise” window for filing opt-outs opening in Q3 2018. We would expect to have more certainty early in 2018 and will, of course, let our clients and associates know as soon as possible.

Brexit

The UK gave notification of its withdrawal from the EU on 29 March 2017. According to the withdrawal procedure (under “Article 50”), the UK will cease to be a member of the EU of 29 March 2019. The UK is currently negotiating a bespoke agreement with the EU, which will govern withdrawal and set the terms of the future relationship. There has been much talk of a transition period (or “implementation phase”) to give business and government time to adjust to the new regime. On 22 September 2017, the British Prime Minister gave a speech in Florence where she proposed an implementation period of “about

two years” (i.e. until about 29 March 2021) and conceded that the framework for this period would be “the existing structure of EU rules and regulations”. This means that we should have an outline of the UK’s future relationship with the EU by March 2019. After that follows a period of two years during which most of the current arrangements will apply and during which business will be able to plan for future arrangements.

Dates for your Diary

Q3 2018

- possible start of opt-outs for UPC

Q4 2018/Q1 2019

- earliest realistic date of UPC opening

29 March 2019

- UK leaves EU and enters implementation phase

~29 March 2021

- implementation phase ends

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