Proposed structure of the Unified Patent Court

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For decades, Europe has awaited a single EU patent and patent court system. In early 2016 this finally seemed in reach, with the unitary patent and Unified Patent Court (UPC) package on the home stretch and set to become operative in 2017. However, with the surprising Brexit vote on June 23 2016, the fate of the system became uncertain. One year on, as the dust has settled, it seems that the United Kingdom is still supporting the new court system and preparing for ratification. The UPC's operational start is now expected in 2018. Therefore, it may be beneficial to recall how the new court is structured.

Nature of UPC

The UPC will be a court common to the contracting EU member states and will thus be part of their judicial system. It will be established by the UPC Agreement, which was signed in February 2013 by 25 states (all EU member states except Spain, Poland and Croatia). The UPC will have exclusive competence for cases regarding infringement and revocation in respect of not only the new European patents with unitary effect (ie, 'unitary patents'), but also the existing and future 'traditional' European patents (although exceptions will apply during the transition period). The UPC's rulings will have unitary effect in the territory of those contracting states that have ratified the UPC Agreement. As such, the UPC is aiming to address the problems associated with litigating bundles of European patents on a national basis by establishing a specialised patent court with exclusive jurisdiction over litigation relating to traditional European patents and European unitary patents.

However, the UPC will have no jurisdiction over national patents or utility models.

Start of UPC – impact of Brexit

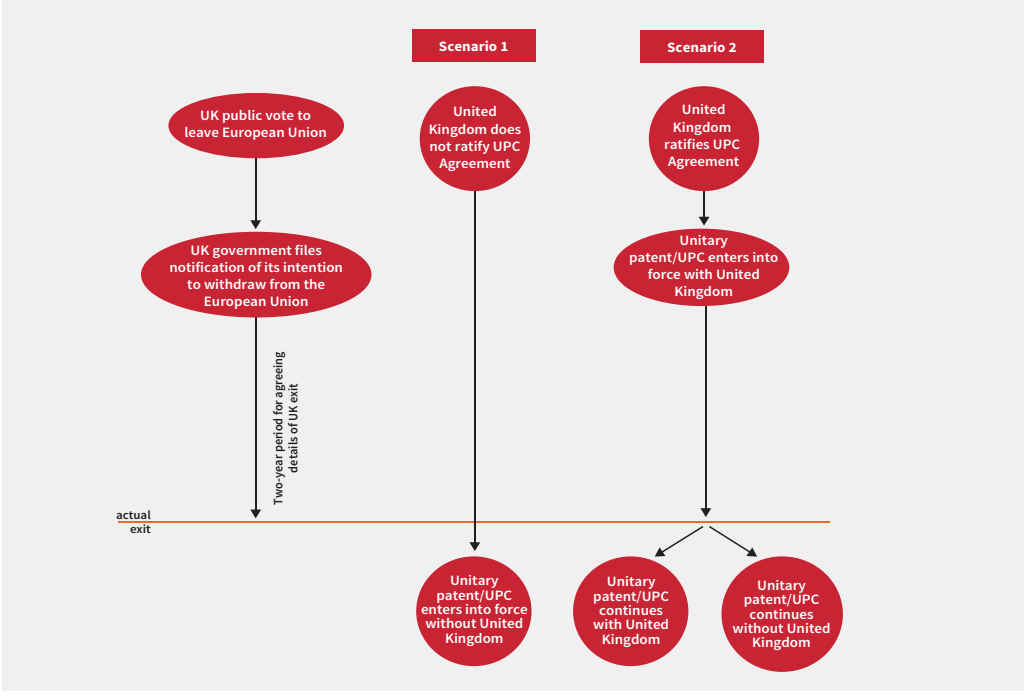
To enter into effect, the UPC Agreement must be ratified by at least 13 contracting states, including three member states with the highest number of European patent filings in 2012 (ie, France, Germany and the United Kingdom). Thus far, 14 states have ratified the agreement – including France, but notably not Germany or the United Kingdom.

The United Kingdom was close to ratifying the UPC Agreement, and with Germany expected to ratify shortly after UK ratification, the UPC was originally projected to become operational by the beginning of 2017.

However, after the Brexit referendum on June 23 2016, UK ratification became uncertain in view of the declared Brexit goal to escape the jurisdiction of the European Court of Justice (ECJ). But, in a surprising move, on November 28 2016 the UK government announced that it would ratify the UPC Agreement despite its plans to leave the European Union. Nonetheless, ratification was again delayed due to the snap UK general election in June 2017.

Besides the ratification issue, it is unclear whether the United Kingdom can remain part of the unitary patent/UPC system after its departure from the European Union, as the UPC Agreement is open only to EU member states. Hence, depending on UK ratification, the UPC may start early with the United Kingdom – at least until its departure from the European Union – or only after Brexit and without it (see Figure 1).

Figure 1. Possible scenarios for the unitary patent/UPC project after Brexit vote



Germany's ratification process is now also on hold, on the request of the German Federal Constitutional Court. However, this is expected to be merely a formal delay, rather than a real show-stopper for German ratification.

The UPC is now expected to start at some point in 2018.

Structure

Court structure

An illustrative chart of the basic court structure and panel composition is contained in Figure 2.

The UPC will consist of a court of first instance, a court of appeal and a registry.

The court of first instance will be made up of a central division and decentralised local or regional divisions. The seat of the central division will be in Paris, with sections in London and Munich.

A local division may be set up in a contracting state on its request. Contracting states hosting a local division will designate its seat. There may be up to three additional local divisions in one contracting state for every 100 patent cases per year heard in that contracting state. Accordingly, Germany – in which more than two-thirds of all European patent cases take place – may request up to four local divisions (eg, Dusseldorf, Mannheim, Munich and Hamburg). According to a study of the period from 2000 to 2008, Germany had a patent litigation case count of 6,739, compared to 1,002 in France, 326 in the Netherlands and 256 in the United Kingdom.

A regional division may be set up for two or more contracting states on their request. For example, Sweden, Estonia, Latvia and Lithuania have set up a Nordic-Baltic regional division in Stockholm.

The seat of the court of appeal will be in Luxembourg.

The role of the ECJ – the highest court in matters of EU law – remains unclear. Although it is clear that the court of first instance and the court of appeal may refer questions to the ECJ, it is unclear whether this includes questions on patent infringement or solely questions on the interpretation of EU law.

Panel composition

UPC panels will have both legally and technically qualified judges from all over Europe.

"The proposed complex rules of procedure are designed to ensure that a first-instance decision is rendered after a one-day oral hearing within one year"

Panels in the local and regional divisions will be made up of three legally qualified judges. In addition, it will be possible to allocate a technically qualified judge from a pool of judges including qualified patent attorneys, either on the request of one of the parties or on the panel's own initiative. Panels in the central division will usually be made up of two legally qualified judges who are nationals of different contracting member states and one technically qualified judge with qualifications and experience in the relevant technological field. The panel will be composed of three legally qualified judges only when hearing actions concerning certain European Patent Office (EPO) decisions (eg, issues concerning the request for unitary effect or opt-out).

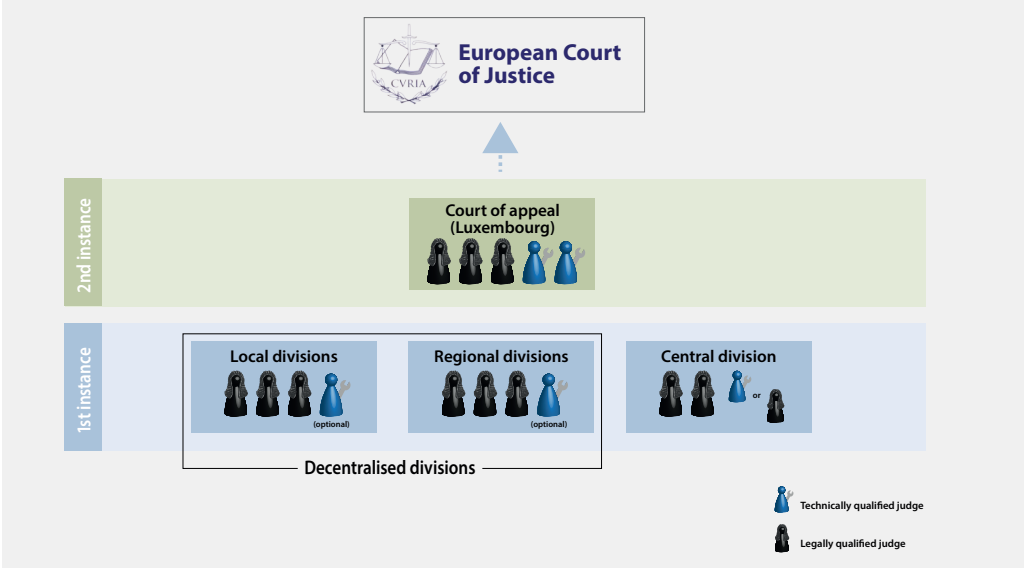
Panels in the court of appeal will be made up of three legally qualified judges who are nationals of different contracting member states and two technically qualified judges with qualifications and experience in the relevant technological field.

Language of proceedings

First instance: The language of proceedings in the local and regional divisions will be the official language or one of the official languages of the hosting state or the official language(s) designated by the hosting states sharing a regional division.

However, it will possible for hosting states to designate one or more of the official languages of the EPO (ie, English, German or French) in addition to or instead of the official language of the contracting state(s) as the language of proceedings of their local or regional division. Moreover, under certain conditions, it will also be possible to choose the language of the patent as the language of proceedings. For example, local divisions in Germany may allow English as an alternative to German as language of the proceedings.

Figure 2. An illustrative chart of the basic court structure and panel composition



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The language of proceedings in the central division will be the language in which the patent was granted.

Second instance: The language of proceedings before the court of appeal will remain the same as in first-instance proceedings, unless the parties agree to use the language of the granted patent.

Competence

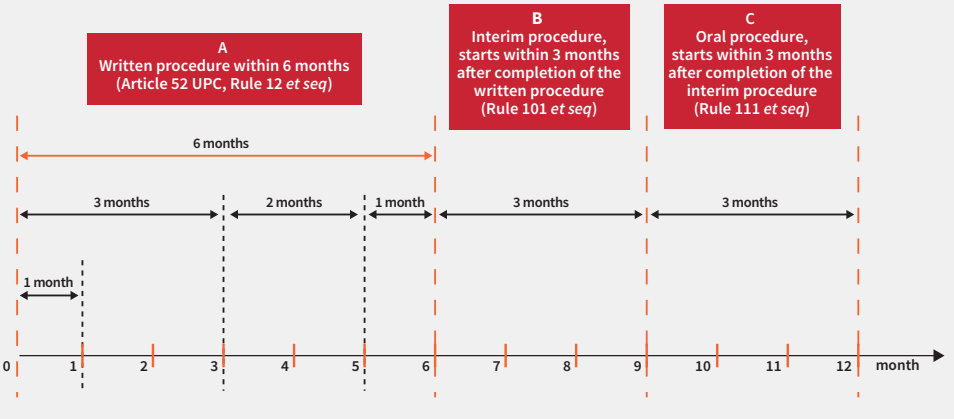
The UPC will have jurisdiction over not only the new unitary patents, but also traditional European patents in the respective contracting states of the UPC Agreement. Basically, the central division will have jurisdiction to hear independent actions of revocation nullity, whereas patent infringement actions will be heard before the local or regional divisions of the contracting state in which the infringement occurred or where the defendant is domiciled.

Counterclaims for revocation – bifurcation

Where an infringement action is pending before the local or regional division and a counterclaim is made for revocation of the patent at issue, the local or regional division will have three options:

- It may proceed with both the infringement action and counterclaim for revocation (and, if appropriate, request the appointment of a technically qualified judge with qualifications and experience in the field of technology concerned);
- It may refer the counterclaim for revocation to

Figure 3. The three main stages of proceedings before the court of first instance



the central division and then either suspend or proceed with the infringement case (similar to the German bifurcation system); or
- It may refer the entire case to the central division, on the parties' agreement.

The second option is referred to as 'bifurcating' the questions of infringement and validity (also known as 'double track' proceedings) and is seen as critical, as it may result in a pan-European injunction for a patent which is later found invalid. As Germany has an established tradition of bifurcation, practitioners in other countries fear that the German local divisions will often bifurcate and hence be especially attractive to the main users of the system. However, according to indications from German judges, this fear is overrated – at least for the German local divisions.

Transition period for traditional European patents

In view of the common competence for both new and traditional European patents, the UPC Agreement provides for a transition period to allow owners of existing traditional European patents (although not owners of unitary patents) to avoid the (untested) UPC in the beginning and increase acceptance by users of the European Patent Convention system. During the seven-year transition period, an owner of or applicant for a traditional European patent may opt out of the UPC's exclusive competence for infringement or revocation actions. Hence, national courts will have concurrent jurisdiction during this transition period. Unless an action has already been brought before a national court, owners of or applicants for traditional European patents that have opted out may (once) withdraw their opt-out at any time. The opt-out request must be filed with the registry of the UPC.

Court fees and recoverable costs

The proposed court fees will be made up of a fixed fee, combined with a value-based fee when the value of a case is above the set ceiling of €500,000. The value-based fees rise based on the estimated value of the case put forward by the claimant in the statement of claim.

A successful party is entitled to recover reasonable and proportionate costs. However, recoverable costs also have a ceiling depending on the value of the case, with a maximum award of recoverable costs set at €2 million for a case valued at more than €50 million. However, the court has some discretion to lower or raise the ceiling.

"The court fees provide for a rather inexpensive system, as long as the value of the case ranges low, and will ultimately offer cheaper pan-European litigation"

Rules of procedure

The proposed complex rules of procedure are designed to ensure that a first-instance decision is rendered after a one-day oral hearing within one year. To this end, similar to the German litigation system, the focus is on written procedures and the proceedings use a frontloading system (ie, the parties set out their full case in writing as early as possible in the proceedings, with new facts and evidence usually precluded on appeal). However, there is flexibility for complex actions which may require more time and procedural steps. This ambitious timeframe will be supported by setting up a new electronic system for UPC case management (which is a formidable challenge in itself).

Figure 3 shows a basic outline of the three main stages of proceedings before the court of first instance.

Written procedure

In the first stage, two briefs from each side are exchanged in electronic form, unless this is not possible for some reason, within a strict timeframe. The stage is conducted by the judge rapporteur, who may allow the timeframe to be extended.

Interim procedure

This stage is still conducted by the judge rapporteur. It is designed to prepare the case comprehensively for the oral hearing and to clarify the parties' positions with respect to the main contested issues. To this end, the judge rapporteur may hold an interim conference, which may take place via telephone or video.

Oral procedure

The judge rapporteur then summons the parties to the oral hearing and informs the presiding judge that the interim procedure is now closed. At

this point the presiding judge takes over the case management. The oral procedure takes place before the panel and should be completed within one day. The decision on the merits of the case should be issued as soon as possible after the oral procedure; in exceptional cases it may be pronounced immediately after the oral procedure. The written and reasoned decision on the merits should be issued within six weeks of the oral procedure.

Summary

While the unitary patent is effectively just another kind of European patent, the UPC Agreement breaks new ground in establishing the first pan-European patent court system. As such, it is hardly surprising that the UPC is the result of political compromises and, during the transition period, will add a further layer of complexity to the existing European patent system.

The UPC is a combination of established national litigation systems, which provides for centralised and decentralised courts with multinational panels composed of legally and technically qualified judges applying a balanced language regime. The procedural law which the courts will apply combines well-established traditions of different national jurisdictions and basically provides for a frontloaded written procedure which should render a first-instance decision within one year. The strict timeframe will be a challenge for the case management of judges, attorneys and parties alike.

The court fees provide for a rather inexpensive system, as long as the value of the case ranges low, and will ultimately offer cheaper pan-European litigation. However, depending on the forum and the language of proceedings, substantive translation costs may be incurred, not to speak of the uncertainty generally involved with translations.

The quality of the judges will be a key factor in the UPC's success or failure. While there is a training centre for the UPC in Budapest, experience is indispensable. It is unlikely that a high number of experienced judges who speak several languages will be available when the UPC opens for business. Moreover, mass opt-outs may deprive the UPC of cases, so that the freshly trained judges will need longer to gain sufficient experience.

There is a real risk of mass opt-outs, as owners of high-quality patents or owners of patents which do not need wide territorial coverage will most probably choose not to risk being subject to a single-action revocation, but wait until the UPC has been sufficiently tested. It remains to be seen what effect such a slow start will have on this long-awaited forum. *iam*

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