

December 21, 2016

Unitary Patent Inches Closer to Adoption with UK's Ratification Announcement

The Intellectual Property Office of the United Kingdom (UK)—together with the Minister of State for Energy and Intellectual Property and Prime Minister May—issued a press release on Nov. 28 confirming that the country will ratify the Unified Patent Court Agreement (UPCA) in the coming months. As a result, it appears that—despite the Brexit vote—the European Unified Patent Court (UPC) and European Unitary Patent will be available to patent stakeholders in 2017.

Proposed European Unitary Patent

As noted in a previous client alert, the Unified Patent Court Agreement (UPCA) is an agreement between member states of the European Union (EU) that fundamentally changes the European patent landscape for both applicants and litigants.

Specifically, the UPCA affords owners of a patent granted by the European Patent Office (EPO) an option to classify that patent as one having “unitary effect” throughout substantially all EU member states. More specifically, disputes arising from these “unitary” patents will be heard by a single court—the Unified Patent Court (UPC)—and decisions relating to those disputes, including infringement and invalidity decisions, will be binding in substantially all EU member states.

The UPCA was necessary to reform the existing European patent system because the treaty that established the EPO was negotiated separate from the EU. As a result, the UPCA expressly requires ratification by a majority of national governments of EU member states before the UPC is able to hear patent disputes. In particular, the UPCA requires ratification by at least 13 EU member states. In addition, ratification by certain member states—including the United Kingdom (UK)—is expressly required. Once the agreement is properly ratified, each signatory to the UPCA is required to accept—among other things—the supremacy of the Court of Justice of the European Union (CJEU) in addition to all other EU laws, rules, and regulations that impact the UPC and/or Unitary Patents.

As a result of the requirement that the UK ratify the UPCA before the UPC and Unitary Patent were implemented in the EU, the UK referendum on June 23, 2016, to leave the EU (the “Brexit”) left the future of the UPCA and the Unitary Patent uncertain.

However, five months after Brexit, on Nov. 28, the UK issued a surprising press release confirming that the country would continue preparations for ratification of the UPCA, despite the fact the country is engaged in the formal process of leaving the EU. Although a timeline for ratification by the UK was not announced, the common consensus appears to be that the agreement will be ratified in early 2017. Once ratified by the UK—and Germany, which began the ratification process formally in June—stakeholders expect the UPC to be fully operational in a little over four months.

The UK announcement was—in many ways—surprising, especially considering the nationalist motivations that culminated in the Brexit vote. In particular, many stakeholders were surprised because ratification of the

December 21, 2016

agreement specifically subjects the UK to decisions of the CJEU, at least insofar as those decisions relate to patent rights.

Nevertheless, as a result of the announcement, it appears that, despite the Brexit vote, the UPC and Unitary Patent will be available to patent applicants and litigants starting in 2017.

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