A bump in the road, a fork in the path or a nail in the coffin? What exactly is happening with the UPC?

The prospects of an early start to the UPC/UP package have already disappeared into the distance. While on some fronts progress is being made, on others new challenges arise. A shifting landscape means users of the system need to be more sure-footed than ever.

The year is 2012 and Christmas is approaching. In darkened rooms, desperate efforts are being made to resolve a debate that has been brewing for at least the past twelve months, and which threatens to completely derail a package of measures that have been more than 30 years in the making. At heart, there is an argument over the role of the CJEU in a new patent litigation framework. Can a compromise be found to satisfy all parties?

Back then, resolution was found by deleting Articles 6 to 8 of the proposed regulation establishing Unitary Patents, leaving substantive patent law to be harmonised through an intergovernmental agreement, which is not itself an instrument of EU law. This arcane detail may have seemed a mere technicality to those not closely involved in these debates, but the future of the fledgling Unified Patent Court (UPC) and Unitary Patent (UP) depended on it.

Plus ça change. Five years later the political landscape has changed immeasurably, but we are still hitting the same hurdles, albeit that some of them seemed to have been raised higher in the intervening years. Pragmatism meets idealism and some compromise is found. At least that’s how it used to work.

Where are we now?

After the debates of 2012, agreement was reached for a UPC/UP system to take effect across most member states of the EU. For this to come into force, ratification was required by 13 of the participating member states, including France, Germany and the UK.

France ratified some time ago. After the Brexit vote, all eyes were on the UK, and new life was given to the process when late last year the UK government confirmed they intended to proceed with ratification. This took many by surprise, not least because no resolution had yet been found to the UK’s position in the proposed system after Brexit took effect. In January 2017, the UPC preparatory committee issued an update on the expected timetable. The Provisional Application Phase was expected to begin in May 2017, the sunrise period for opting out European patents in
September 2017, and the court itself would open in December 2017.

Whether the timetable would have been met otherwise we do not know, but the calling of a snap election delayed the process of ratification in the UK. In an update on 7 June the preparatory committee accepted this, allowing that the court would not after all open in December, but not setting an alternative date.

What is the latest?

UK ratification appears to be back on its procedural track, with the UKIPO formally announcing that the necessary secondary legislation had been put in front of the UK parliament. However, news from Germany has put a serious question mark over when we can expect to see the system come into force.

The German constitutional court has asked the German government to suspend ratification until it has decided on a legal challenge to the package it has received from a private individual. The nature of the legal challenge and the identity of the complainant are not yet in the public domain, but the constitutional court has accepted that the complaint needs to be considered.

There is much speculation as to what the complaint may be (ranging from fundamental issues on the effectiveness of the judicial review provided by the system to technical aspects such as appropriate parliamentary procedure in Germany for ratification) but we do at least know that this will introduce a delay in German ratification. That delay will almost certainly be upwards of six months.

In response to this latest news, the preparatory committee on 27 June issued an update on their expected timetable. It is now hoped that the sunrise period might start in ‘early 2018’ with the full implementation of the package following three months later.

On the face of it, this appears an ambitious timetable given the circumstances, and it would be no great surprise if it slips somewhat.

Where does that leave us?

Delays are nothing new in this story. However, a new time pressure has been created by the Brexit process. The window is narrowing for all elements to fall into place to allow the UPC/UP package to come into effect before the UK leaves the EU. While it remains the baseline expectation that this will be achieved some time towards the end of 2018 or early in 2019, further delays may shut the window entirely. This matters because the package as it stands reflects two assumptions: 1) it is only open to EU member states and 2) the UK is one of those states. Adjustments will have to be made when the UK leaves the EU for the package to survive. If the package enters into force prior to this point it will make those adjustments obligatory. If it does not, it will be politically much easier to push the issue further into the long grass.

Although uncertainty is the order of the day, if the clouds do clear the process may well move quickly. Users of the patent system need to be prepared, and understand in particular their approach to opt-outs and requests for unitary effect.

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