

WILL THE UNIFIED PATENT COURT FOR EUROPE HELP OR HARM THE ELECTRONICS SECTOR IN THE UK?

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The Unified Patent Court (UPC) is the result of an agreement between 27 European countries to create a single patent for Europe (the 'Unitary Patent'), with a single court (the UPC) to handle validity and enforcement matters. The creation of the UPC has spurred a great deal of debate in political and legal circles, as well as within industry, and many have questioned whether it is going to be beneficial to patent holders, or whether potentially it could be damaging to certain sectors of the UK economy.

Of particular concern has been the location of the UPC courts, and the approach to be adopted, which will 'split' infringement actions from validity actions into separate proceedings. This is known as 'bifurcation' and is the system that has been operating in Germany for many years. In effect, a different court will decide if you infringe a patent from the court determining if the patent is valid. This approach is not one familiar to users of the U.S. and English patent courts. The risk is that a company could be enjoined from selling a product found to infringe, only for the patent some time later to be held invalid (and by a different court).

A further concern is the structure of the court focusing on technologies in different locations, and as Paris is the forum for deciding cases related to electronics, the impact on the UK's electronics industry is unclear. However, many believe that Paris and France will benefit from a perception that they are the new centre of excellence.

The UPC will be comprised of different divisions, each of which will have its own judges, and territorial coverage, and the local/regional divisions will serve different functions to the central division. The Central Division will have exclusive jurisdiction to determine issues of validity for Unitary Patents, which, as set out more fully below, presents significant challenges for patent owners. The Central Division will hear cases from three locations, with each being responsible for certain technologies: London will deal with pharmaceuticals and chemicals; Munich will deal with mechanical engineering; and Paris will be responsible for the remaining sectors, including electronics. Regional divisions will cover multiple jurisdictions that group together; for example, the Nordic countries might form a single regional division, whereas

Holland intends to have a local division just for Holland.

Parties commencing proceedings in the UPC will need to consider the court structure, as well as the location of the defendant, which may have a consequence as to the language used in the case. Another consideration is the timeline for proceedings; the time from commencement of proceedings in the Central, Regional or Local division, to an appeal to the Court of Appeal (in Luxembourg), together with the possibility of one or more references to the Court of Justice of the European Union (CJEU), could mean the better part of a decade from start to finish.

The location of the Central Division in London, Munich and Paris may also present concerns for specific industries. In the legal community, we have seen a rise in the demand for a local presence centred on the locations of the UPC divisions. This echoes the demand for a local presence of legal advisers around the European Patent Office, despite the fact that qualified legal advisers across Europe are equally able to assist on respect of European patents. It remains to be seen, and is the source of concern for industry, whether new 'centres of excellence' will develop around the UPC divisions. If they do, London may benefit in pharmaceutical expertise, but will it be at the expense of other specialisms? Will we have a brain drain of expertise in the electronics sector to Paris, possibly to the detriment of the UK sector?

The 'Split Proceedings' issue

The serious risk of an injunction being granted on an invalid patent, arises because of the fact that the Central Division of the UPC will be able to determine questions of validity in respect of Unitary Patents. The court dealing with infringement may well deal with the matter at a far quicker pace than the Central Division (in whichever city i.e. London, Munich or Paris) which will proceed at its own pace. This has been the source of considerable concern for patent owners in the past. For example Nokia and Microsoft, have relocated their manufacturing and/or distribution centres outside of Germany, in order to avoid injunctions disrupting their businesses based on patents of questionable validity.

When an injunction prevents a defendant from selling its products, the immediate loss of revenue may mean that they cannot afford the ongoing costs of the separate proceeding to have the claimant's patent invalidated. Worse still, the crippling effect of the loss of revenue of the injuncted product may well put the defendant out of business with the attendant loss of jobs, and harm to that country's economy as a whole. For claimants relying on questionable patents, simply obtaining an injunction may be a victory in itself.

As electronic devices are rarely single component devices, the different components that comprise the device will invariably be covered by a bundle of patents. An injunction based on a single one of those patents will

mean that the device must be pulled from the market. While companies like Nokia and Microsoft could in the past limit exposure to such a situation, by moving their business to other jurisdictions in Europe, the impact of injunctions issued by the UPC is that they have pan-European effect. In that case, in Europe, there is no hiding place. The potential effect is to drive industry, before the borders of Europe. Perhaps if the courts, hearing an infringement action, are prepared to suspend the infringement case (and so delay the granting of an injunction), allowing the validity case to be heard, the risk will be mitigated. However, we are far from certain this will be the case in practice. Sadly, this is where politics interfered with sense. As one in house lawyer expressed it; "[A] politically acceptable UPC arrangement, is not the same as a better system." This is simply the price we pay for political compromise being required before the differing countries of Europe could decide on the new regime. And in such situations it is not surprising that those negotiating may not fully understand patents and the economic impact of an injunction.

Whatever the experience of the new regime, it makes sense to be thinking about it before you find yourself using it. The big players are ready: Are you?