

On Ice And On Edge

It was only a year ago that the scandal-plagued EPO was the biggest worry for in-house patent departments. Today it is the UPC case before the German Constitutional Court that has them wringing their hands. A survey conducted by JUVE in early 2018 shows that the industry wants the court to provide clarity - and quickly.

BY MATHIEU KLOS

PHOTO: ANDREAS ANHALT

The disappointment is written all over Jürgen Dressel's face. The global head of the patent litigation group at Novartis in Basel is a strong advocate of the Unified Patent Court. "We've based our strategy on the UPC and the preparations will be complete any day now. We're ready for the new European patent court."

But once again the UPC has been delayed and Dressel is annoyed. "It's incredibly disheartening that the project has been stopped so abruptly after having come so far," he laments. An entire generation of smart, dedicated lawyers, judges and government officials have spent years labouring over this and have laid the foundation for a good

court, claims Dressel. "We won't get another opportunity like this for a long time. That's why the lack of transparency while the constitutional complaint in Karlsruhe drags on is so torturous."

According to a recent non-representative survey carried out by JUVE, the majority of industry representatives take Dressel's view. The industry has been calling for a Europe-wide patent court for decades and staunchly supported the UPC project. Despite the tribulations the project has suffered over the past 15 months, 54 percent of respondents would prefer to see the patent court open its doors sooner rather than later.

When talking to JUVE, in-house experts are quick to emphasise that they are in favour of the

European protection afforded by the unitary patent and the uniform enforcement of property rights. After all, the unitary patent and UPC would ultimately cover an economic area larger than the USA.

With the US patent system currently in crisis, major corporations worldwide are looking to – and gearing up for – the new court in Europe. One head of patent litigation for Europe at a Chinese mobile phone giant is holding fast to the UPC despite the labour pains. “It certainly remains an interesting alternative to the current patchwork of national courts,” he says. Silicon Valley is also keeping an eye on the situation in Europe: Ralf Uhrich, patent counsel for Europe at Google, recently told JUVE, “We hope the UPC will include the UK.”

Double dilemma

Industry representatives certainly have good reason to feel disheartened. Since the Brexit vote in June 2016, the project has gone through a never-ending series of ups and downs with considerable uncertainty as to whether or when it will go ahead. The industry has already invested a great deal of energy in preparing for the court. Many companies are simply taking it one day at a time, claiming the

Intolerable waiting game:
Jürgen Dressel, head of patent litigation at Novartis, is in favour of a quick ruling on the UPC constitutional complaint.



PHOTO: NOVARTIS

court is “essentially a good project, but let’s wait and see first whether it actually happens.”

The UPC’s problems began when the UK voted to leave the European Union: the UPC Agreement needs to be ratified by at least 13 of the 25 Member States, and that 13 must include Germany, France and the UK. Following the referendum, the original start date of April 2017 was quickly pushed back. But without approval from London, the court cannot open its doors. On the other side of the coin, the UK itself can only participate in the UPC if it ratifies the Agreement while it is still a member of the EU. Currently, it looks as though the UK will finalise the process after Easter and deposit the documents

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shortly afterwards at the EU Council in Brussels. In Germany, on the other hand, Bundespräsident Frank-Walter Steinmeier could have signed the UPC laws had the constitutional complaint from Düsseldorf IP lawyer Ingve Stjerna not slammed the brakes on ratification (*see Lone Warrior, page 13*).

Ever since, the UPC has faced a double dilemma: the German constitutional complaint is blocking the court from going ahead, and the longer it goes on, the greater the danger that it will be too late for the UK to take part. If the Karlsruhe court makes its ruling after the UK has left the EU, Britain's UPC dreams will go up in smoke and the entire project could be under threat.

The industry, however, appears impervious to such uncertainties and remains a fervent supporter of the UPC. A year ago JUVE asked company representatives for their opinions on the European patent system: 54 percent of respondents were and still are in favour of a quick start.

Businesses still remain eager for a single legal framework for patents in Europe. Indeed, in 2016, 62.5 percent of respondents said that, in a pinch, they would accept a UPC without the UK. In 2017 that figure has risen to 75 percent.

But this would still be a second choice: many of those in-house are adamant that the ideal solution would be a UPC that includes the UK, not only because of the country's extensive reach but also because of its experienced patent judges and lawyers. If this is not possible, say companies, there should be financial concessions on fees for the EU patent and court (*see: A Question Of Money, pg. 10*) and the London divisions for pharmaceuticals patents ought to be moved to Munich (*see: A Clear Preference For Munich, pg. 10*).

Change in leadership

If the London divisions were indeed relocated to Munich, the Bavarian capital would cement its reputation as the seat of European patent law. This is mainly thanks to the European Patent Office (EPO) – an agency that has attracted many negative headlines in recent years, but which is nevertheless the second cornerstone of the European patent system.

The EPO will also issue the unitary patent alongside the current European patent. Of late though, any publicity surrounding the EPO has been due to the tough leadership style of acting President Benoît Battistelli and his acrimonious feud with parts of the workforce, as well as the debacle surrounding the reform of the Boards of Appeal. Adding fuel to the fire was the accusation from patent experts that Battistelli's efficiency strategy was being pushed at the expense of quality in patent reviews.

Just last year, in-house patent experts still saw the EPO as a cause for concern: Around 79 percent

of respondents to the JUVE survey claimed to be unsettled by the developments, with many believing Battistelli to be at the root of the problem. A majority of 86 percent shared the opinion that the EPO President was not doing a good job. One year on, the furore has taken a backseat to other issues. Public debate is now dominated by the highs and lows of the UPC and Battistelli's term of office comes to an end in June anyway. But it still seems the controversial Frenchman is likely to go down as the most unpopular EPO president in history.

Indeed, his tarnished image has seen little improvement: Around 49 percent of respondents to the JUVE survey were of the opinion that he has not done a good job throughout the eight years of his tenure, with only 18 percent giving him a positive appraisal. However, a large group of over 30 percent abstained from providing an opinion in this question (*see: Out With The Old, In With The New, pg. 11*).

Clear mandate

In background discussions, in-house experts and patent attorneys from Germany, France, the UK and the Netherlands frequently express not only their relief that the era of Battistelli is coming to a close, but also their hopes that his successor will be able to steer the Munich agency back into calmer waters.

Meanwhile, designated President António Campinos, the former head of the European Union Intellectual Property Office (EUIPO), offers a ray of hope for the Munich patent authority. For in-house patent experts, however, he is still an unknown quantity. Only around 15 percent of these regard

Method

In late November 2017, the JUVE editorial team wrote to 1,500 people as part of a non-representative patent survey.

66 of those took part in the survey. For the second time, JUVE asked prominent in-house patent experts at international technology companies for their opinions on the European patent system. The participants come from industrial and mid-sized companies, as well as international giants from Silicon Valley, Japan, China and Korea. The companies represent all significant branches of the technology industry and file patents overwhelmingly at the European Patent Office. In addition, the editorial team conducted numerous one-to-one discussions with the heads of patent departments in order to gain an overall impression of the mood in the market.

the Portuguese native as the right man for the job, whereas 10 percent do not. 75 percent of respondents opted to withhold judgement.

One thing about which patent experts are clear, is what changes they expect from Campinos: Around 21 percent want him to provide for “more thorough research instead of quick granting procedures”, while 16 percent demand an “open dialogue with the workforce” and 15 percent desire “a complete separation of the Boards of Appeal from the Office.” A further 6 percent would like to see quick application procedures, greater consideration of technical facts in complaint procedures and less confrontation with the workforce respectively.

German patent attorneys and in-house experts often bemoan what they see as declining standards of quality in patents. The Office, however, refutes this. “There are no figures to support this claim,” Dr. Christoph Ernst, the new chairman of the Administrative Council at the EPO, said in a recent interview with JUVE.

Ernst has strongly urged the new EPO president to make the peaceful coexistence with staff a key tenet of his term, while also providing for greater quality in patent reviews. In this, he and the industry are of one mind. Above all, businesses want calm to be restored to the EPO so that patent examiners and judges can concentrate on granting

What If?

If the UK does not take part in the UPC, the industry knows what it wants: a reduction in costs and relocation of the British divisions to Munich.

A Question Of Money

If the UPC launches without the UK, the costs for the unitary patent should be renegotiated.

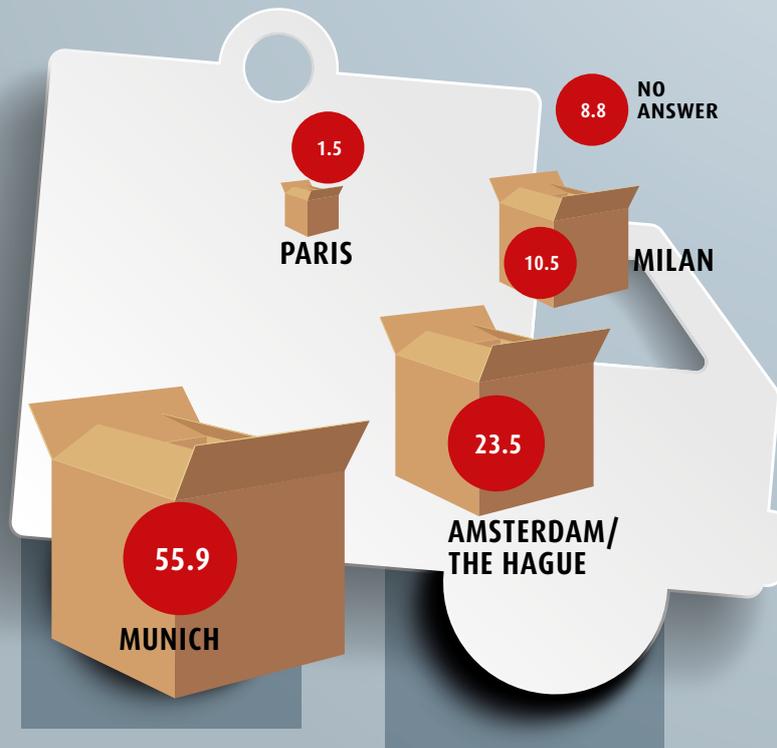


If the system launches without the UK then the court fees must also be renegotiated.



A Clear Preference For Munich

Where should the central divisions go if the UK cannot take part in the UPC?



Source: JUVE patent survey 2018, answers in percent

Out With The Old, In With The New

Industry representatives still take a critical view of EPO President Benoît Battistelli's tenure, which comes to an end in summer 2018. His successor António Campinos is still an unknown quantity.

President Benoît Battistelli has done a good job over the past eight years.



António Campinos is the right person to solve the EPO's problems.



Source: JUVE patent survey 2018, answers in percent



Benoît Battistelli



António Campinos

Infant terrible and ray of hope: Portuguese native António Campinos (49), who also has French nationality, will succeed the controversial Frenchman Benoît Battistelli (67) in July following the latter's eight-year term as head of the European Patent Office. Battistelli's term involved numerous reforms of the European patent system, including considerable intervention into the extensive privileges of EPO staff and the more efficient granting of patents. However, his term was also characterized by bitter conflict with parts of the workforce and the staff union SUEPO. Of particular note was the controversy surrounding the independence of the EPO Boards of Appeal. Campinos is set to resume the dialogue between the Office and workforce and ensure calm is restored.

PHOTOS: BLENDETT; EUROPASGES PATENTANT

high-quality patents. The structural reform of the Boards of Appeal implemented in 2017 was one of the EPO's most important projects. The Administrative Council had already initiated an extensive but incomplete separation of the EPO court from the Office in the year prior.

For the first time, the Boards of Appeal now have their own president, namely Sweden native Carl Josefsson. He manages both legal and administrative matters and is dependent on the EPO president only in terms of budgetary concerns and his reappointment. The separation is also a physical one, with the Boards of Appeal having moved from the centre of Munich to Haar on the eastern edge of the city.

Around 65 percent of the companies that took part in the JUVE survey are in favour of a complete separation between the court and Office. In 2016, that figure was as high as 83 percent. Only around 28 percent find that the reform has led to greater

independence for the EPO court. Nevertheless, 63 percent of respondents are happy with the current rulings from the Boards of Appeal.

On the whole, in-house patent lawyers view the EPO's work overwhelmingly in a positive light. In total, a good 66 percent of respondents consider the EPO to be a functioning entity. The Munich patent authority thus still plays a key role in the filing strategies of a large majority of companies (87 percent).

The final countdown

However, a short-tempered EPO president and the court status of the Boards of Appeal being brought into question by certain sections of the professional community, are now the least of the European patent system's worries. The constitutional judges in Karlsruhe are now scrutinising Ingve Stjerna's complaint. Time is of the essence. 17 of the 27 institutions – ranging from German constitutional bo-

dies to the EPO – invited to submit their views have sent an amicus brief to the court. The 2nd Senate and its rapporteur Peter Huber certainly have no shortage of reading material.

Experts predict a ruling would be possible in summer 2018 at the earliest – that is if the judges dismiss the complaint as unfounded, in which case the UPC can go ahead with the UK before Brexit is finalised.

However, if the judges agree in part with Stjerna, for example with his key criticism that the Bundestag required a two-thirds majority to ratify the international Agreement instead of a simple majority, this would be cutting it close for the UK. The Bundesrat and Bundestag (upper and lower houses of German parliament respectively) would have to reopen the bill and complete it by spring 2019.

If needs must

If the German Constitutional Court refers the case to the European Court of Justice because of concerns over European law, that would put paid to the UK's UPC ambitions – and quite possibly the entire project. The same applies if the judges schedule an oral hearing. “Then we can hope for a ruling in

2020 at the earliest,” says Ulrich Karpenstein, who is an experienced constitutional lawyer at Redeker Sellner Dahs.

In-house lawyers, however, hope it will not come to that. As in the previous year, a good 54 percent would still like to see a new initiative if the UPC fails. But in that case, they would want it to cover the same area as the European Patent Office – that of the 38 European EPO member states rather than the 25 EU Member States which are currently on track to take part in the UPC.

Lawyers and other in-house experts have been watching Karlsruhe for weeks in the hope that the judges might give some sort of sign. But so far there has been nothing from either the court or the complainant Stjerna. “There is no transparency in this case at all,” says Jürgen Dressel. “That the public has received no information as to the complaint itself or the duration of proceedings is frustrating.” With Brexit in mind he says, “The constitutional judges need to hurry up with their ruling.” Ultimately, this ruling in the patent field will affect the whole of Europe. But, says Dressel, “I’m not sure to what extent the judges are aware that a late ruling could endanger the entire project.” ◀

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