Powell Gilbert

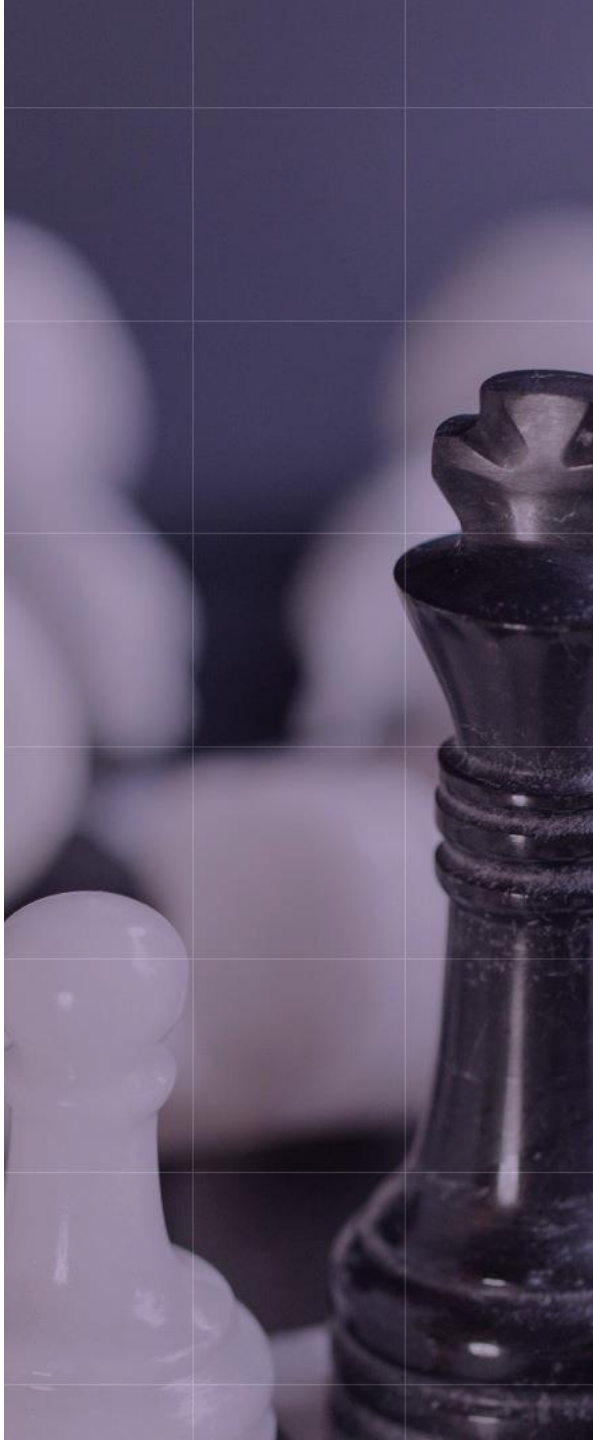
The Unitary patent, the Unified Patent Court and Brexit

State of play – 14 March 2017

Unitary patent ready to go

On 15 December 2015, the Select Committee which represents the EU member states participating in the new Unitary Patent, has formalized a series of agreements comprising:

- the implementing rules
- budgetary and financial rules
- the level of the renewal fees
- the rules concerning the distribution of the renewal fees between the EPO and the participating member states



Ratifications UPC Agreement

- Enters into force when 13 contracting States including **FR**, **UK** and **DE** have ratified
- 11 ratifications so far:

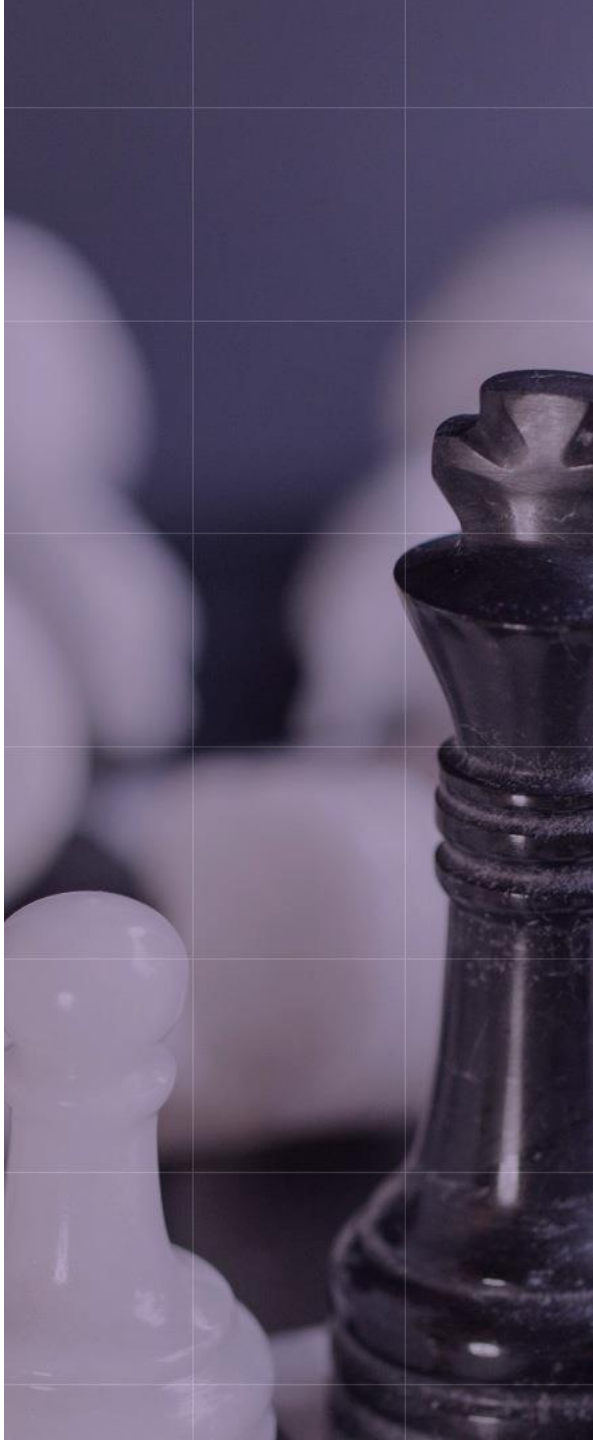
  AU, **FR,** SE, BE, DK, MT, LU, PT, FI, BU, NL
- Ratifications proceeding in **DE** and **UK**
  - The **UK** Parliament approved on March 2016 the draft Unitary patent – Statutory Instrument that will implement the Unitary Patent and Unified Patent Court in UK law
  - Late 2016, UK Government announced intention to ratify UPCA despite Brexit; signed Protocol on Privileges & Immunities Dec 2016.
  - PPI laid before parliament Jan 2017
  - UK ratification process expected to be complete by April 2017
  - **DE** parliament voted to ratify UPCA on 10 March 2017, to be confirmed in a further parliamentary vote

Geographic coverage

- **Unitary patent**
  - Single EP having unitary effect across the 25 participating Member States (EU - Spain, Poland, Croatia).
  - Litigate unitary patent in a single court, the UPC (similar to UK IPEC procedure)
- **EPs and national patents will still be available**, but:
  - EPs may be litigated before the UPC unless opted out within first 7 years.

Membership

- Poland and Spain are still not in
- Italy is entering the system
- Current non-EU members like Switzerland, and prospective non-EU members like the UK, could be relevant as well



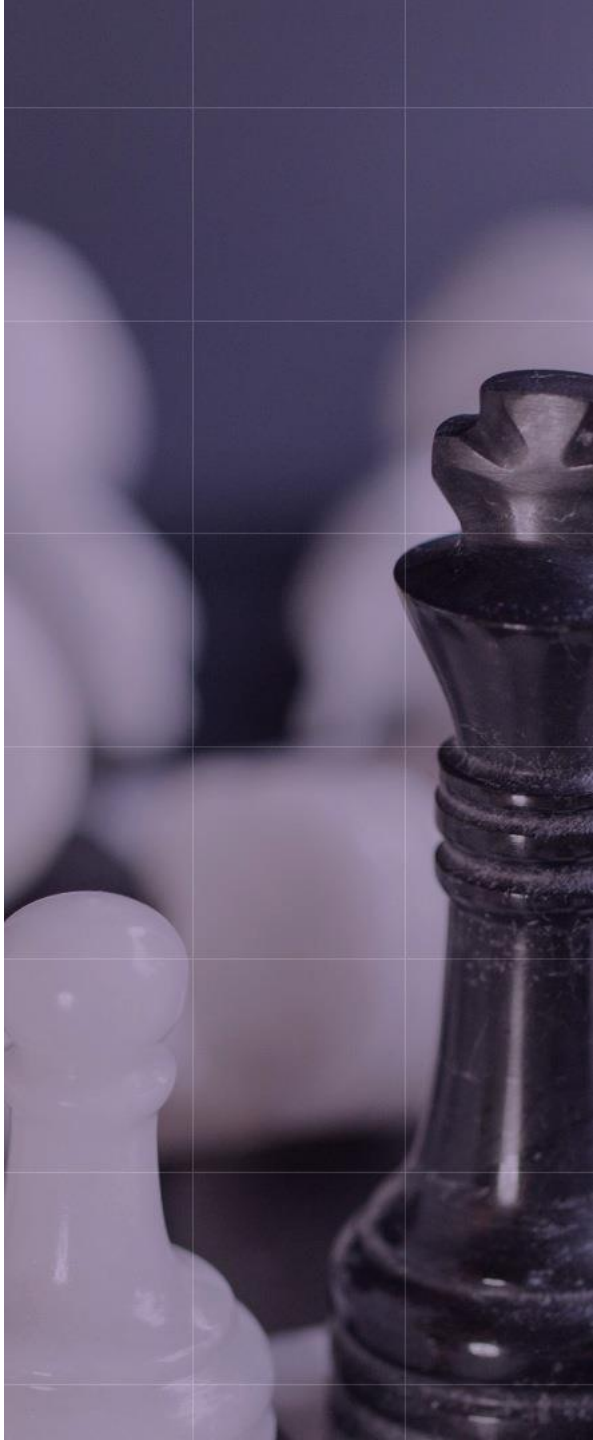
So what does this mean?

- Europe will finally be one market for patents covering 400m people
- One court case can decide infringement and /or validity for much of the EU
- A harmonized approach – with greater certainty and less fragmentation than the current system
- In theory a quicker, simpler, cheaper enforcement of IP rights to protect a valuable market!

Protocol for the provisional application of the UPCA signed on 1st October 2015

"This protocol will allow some parts of the UPC Agreement to be applied early. This includes final decisions on the practical set up of the Court, for example, the recruitment of judges and testing of IT systems. The provisional application phase will also be used to allow for early registration of opt-out demands."

Shall enter into force the day after 13 Signatory States of the UPCA including Germany, France and the United Kingdom, have either ratified, or informed the depositary that they have received parliamentary approval to ratify, the UPCA



Current Preparatory Committee Timeline

Provisional Application Phase – Spring 2017 (May?)

UPCA in force – **December 2017**

Early September 2017 – Sunrise period for opt-outs

In the meantime, finale Prepcom meeting March 2017

Will hand over to Administrative Council when PAP commences

Recruitment of judges/ staff will resume

IT system still a work in progress!

Realistically, courts open for business.... **January 2018**?

Court fees and recoverable costs

- On 25 February 2016 the Preparatory Committee agreed the Rules on Court fees and recoverable costs for the UPC (subject to legal scrubbing)
- The document Rules on Court fees and recoverable costs comprises an amendment of Rule 370. A table of fees, a scale of ceilings for recoverable costs; and an Explanatory Note.

https://www.unified-patent-court.org/sites/default/files/agreed_and_final_r370_subject_to_legal_scrubbing_to_secretariat.pdf

IT System

- Unified Patent Court Case Management System is on its way

https://secure.unified-patent-court.org/login

- User workshops in Stockholm, Luxembourg, Dusseldorf, Munich and Rome between October and December, Paris in January 2016.

- Case Management System mailing list

http://unified-patent-court.us9.list-manage.com/subscribe?u=ce522772fa2293932d95a6e0f&id=a1f94756ea

- Currently dealing with forms!

The judges: appointment

"(1) The **Advisory Committee*** shall establish a list of the most suitable candidates to be appointed as judges of the Court, in accordance with the Statute.

(2) On the basis of this list, the Administrative Committee shall appoint the judges of the Court acting by common accord.

(3) The implementing provisions for the appointment are set out in the Statute."

*14 (2) The Advisory Committee shall comprise patent judges and practitioners in patent law and patent litigation with the highest recognised competence. President: Lord Robin Jacob

Representation

- Lawyers admitted to national bar association of a contracting MS and an EU national Ro P Art 286 (1)
- As its meeting of 3 September 2015, it approved the following draft European Patent Litigation Certificate and Explanatory Memorandum:

www.unified-patent-court.org/images/documents/Draft-EPLC-2015-07-01-final-clear.pdf

www.unified-patent-court.org/images/documents/Explanatory-memorandum-EPLC-2015-07-01-final-clear.pdf

Code of Conduct

17 May 2016: Proposal for a Code of Conduct for the UPC (3rd draft) has been submitted by EPLAW, EPLIT and epi to the Preparatory Committee

1. Relationship with the Court
2. Fair conduct of proceedings
3. Contact with Judges of the Court
4. Demeanour in Court
5. False or misleading information
6. Privileged information
7. Dealing with witnesses and party experts
8. Change of representation

Judges' selection

- Call for expression of interest by the Preparatory Committee fall 2013
- 1300 candidates
- At its 6th meeting (8 July 2014) a list of suitable candidates was approved by the Preparatory Committee
- Legally qualified judges
  - 170 eligible
  - 184 eligible with training (training in Budapest x 2)
- Technically qualified judges
  - 341 eligible (training at Ceipi)

- Advertisement for judges – closed July 2016
- Interviews/ appointment and training in RoP and judgecraft
- Judges will appoint first President

But it is not all plain sailing

Irish voters face referendum on EU patent law

Plans to introduce a single unified system for patent recognition this year...

BUSINESS & TECH

Labour Party Leader Pat Rabbitte prepares to cast his vote inside the polling station in Clondalkin in west Dublin. Picture by Johnny Green PA Archive/PA

http://www.newstalk.com/Irish-voters-face-referendum-on-EU-patent-law

And the UK position post-Brexit?

- The UK's ratification does not imply that a decision has been made about the UK's involvement in the court once the UK has left
- There are two main options:
  1) UK stays in the UPC, which requires a revision of the UPCA and various regulations
  2) UK exits the UPC, which requires a transitional arrangement for UPs that cover the UK
- A third option is that Brexit is reversed and the UK stays in the single market and UPC – no change. Politically unlikely at present

Shaping the decision on the UPC, as well

Legal “base” needed for UPC

A non-exhaustive list

- Single market: basis of rules regarding free movement of goods, and exhaustion
- Brussels Regulation: The mechanism used to regulate jurisdiction of Courts internally within the EU
- Supremacy of the CJEU: so that a harmonised body of EU law can be developed centrally
- Enforcement Directive: Harmonised remedies
- Automatic direct effect of EU regulations: to allow UPC regulation to apply

Elements which are OK under Brexit?

- Single market: EU says probably not
  - Theresa May: the UK “cannot possibly” remain within the European single market, as staying in it would mean “not leaving the EU at all”
- Brussels Regulation: Not without the Treaty of Rome
- Supremacy of the CJEU: One of the two big reasons for Brexit
- Enforcement Directive: Not without the Treaty of Rome
- Automatic direct effect of EU regulations: Not without the Treaty of Rome

- And last but not least, CJEU opinion 1/09 will be relevant