

Unified Patent Court: one year in

**After one year of existence,
is the UPC a patent killer?**

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**A changing landscape: German
courts in the maelstrom of the UPC**

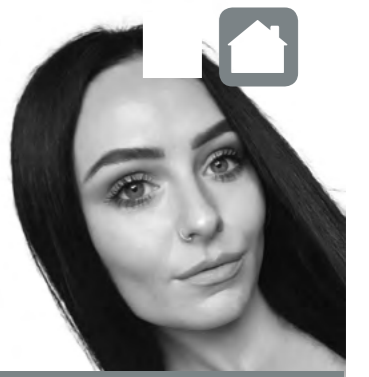
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a purely civil law system?**

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Editor's welcome



Entering into force on June 1, 2023, the Unified Patent Court (UPC) introduced a new framework for patent litigation in Europe. Made up of 18 EU Member States thus far, the UPC brings together legally and technically qualified judges to handle cases regarding the infringement and validity of Unitary Patents and European patents.

The benefits of the UPC's establishment are already evident, having been praised for its cost-effectiveness for claimants and defendants, its promise of economic growth according to estimates, and the speed with which decisions are made.



Made up of 18 EU Member States thus far, the UPC brings together legally and technically qualified judges to handle cases regarding the infringement and validity of Unitary Patents and European patents.



Concerns regarding the UPC have also been observed, with its reluctance to embrace common law tools for disclosure and evidence, its ability to invalidate patents in all participating countries, and uncertainty surrounding the changing landscape of national courts.

After one year of existence, CTC Legal Media brings you *Unified Patent Court: one year in*, an exploration into how the UPC has been functioning thus far by IP professionals across Europe. We bring you the first preliminary injunction

decision of the Local Division Vienna; insight into the rigorous examination of validity the UPC has displayed; the impact the UPC has had on German national courts; the significance of Italy securing the UPC Central Division's third seat; decisions made in the Netherlands regarding security of costs in UPC proceedings; details into the *Aarke AB v. SodaStream Industries Ltd* case, handled in the Nordic-Baltic Regional Division of the UPC; and how the UK's withdrawal from the UPC system could result in a purely civil law system.

Enjoy the issue!

Ellen Peet, Head of Digital

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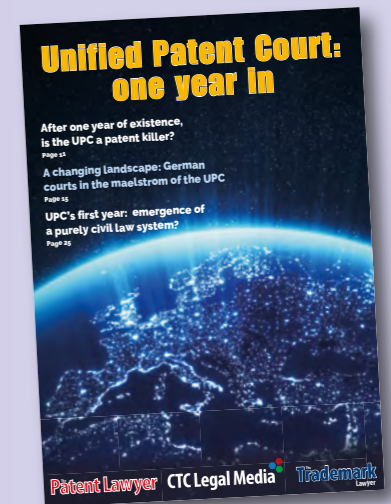
Petter Rindforth and Maria Zamkova of Fenix Legal share insight into how the Nordic-Baltic Regional Division of the UPC is operating thus far, detailing the handling of *Aarke AB v. SodaStream Industries Ltd* as a case example.

Mission statement

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UPC: one year in

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UPC preliminary injunctions: insights from Vienna

Jia Schulz-Cao of CMS Austria details the requirements for preliminary injunctions under the UPC system and offers insight into the first preliminary injunction decision of the Local Division Vienna.

The Unified Patent Court (UPC) has brought many changes to patent litigation. One of the most important legal measures that can be taken within the UPC framework are preliminary injunctions, which have already played a significant role in the decisions of various Local Divisions.

Within the UPC framework, preliminary injunctions are an essential legal instrument that enables immediate protection of the rights of patent holders. Preliminary injunctions allow the court to take fast actions to prevent ongoing or imminent patent infringements as well as to secure the evidence needed to enforce patent rights. Under the UPC system, the ability to obtain preliminary injunctions is essential to maintaining the effectiveness of patent protection and ensuring that remedies are available in a timely manner during legal disputes.

Preliminary proceedings

The Agreement on a Unified Patent Court (UPCA) stipulates several provisional measures that can be issued by the UPC. These include provisional measures for the preservation of evidence and the inspection of premises. Additionally, the UPC



Jia Schulz-Cao

may issue "freezing orders" that prevent a party from removing any assets from its jurisdiction. Injunctive relief may also be granted against the alleged infringer or an intermediary, under threat of periodic penalty payments, or with the order that the continuation of the infringement may only occur if security is provided to ensure compensation to the right holder. Finally, applicants may apply the UPC to order the seizure or delivery of products suspected of patent infringement, along with the precautionary seizure of movable or immovable property of the alleged infringer, including the freezing of bank accounts.

Structure and requirements of preliminary injunctions according to Art 62 UPCA

The structure and requirements for the application of preliminary injunctions before the UPC are mainly set out in Art 62 UPCA.

Art 62.2. UPCA explicitly mentions the court's discretion to weigh up the interests of the parties before rendering a decision in preliminary injunction matters, considering the possible damages that could occur to each of the parties. Art 62.4. UPCA establishes the same standard of proof and pleading as Art 9.3. of the Enforcement Directive, namely a sufficient degree of certainty that the applicant is the right holder and that the applicant's right is being infringed, or that such infringement is imminent. Art 62.5. UPCA refers to Art 60.5.-9. UPCA, which states that interim measures may be ordered, if necessary, *ex parte*, in particular where any delay is likely to cause irreparable harm to the proprietor of the patent, or where there is a demonstrable risk of evidence being destroyed. Hence, it sets out the general permissibility of *ex parte* provisional measures.

In a nutshell, the application for preliminary injunctions requires an imminent or continuing infringement of the applicant's rights. The applicant must provide reasonable evidence for the imminent and continuing infringement, whereby rather high standards apply, as all evidence and facts must be set out in the application.

Art 62 UPCA is accompanied by Rules 205 to 213 Rules of Procedure (RoP). First and foremost, preliminary injunction proceedings are written procedures and start with the application for a preliminary measure by the right holder.

The application for preliminary measures has to include a description of the action that will be initiated before the UPC, including facts and evidence relied upon in this action. The application has to be filed together with the legal grounds for the interim measures, setting out why they are necessary to prevent an imminent infringement or prohibit its continuation. The court has to examine and decide at its discretion whether to hear the infringing party or to hold an oral hearing.

The court can also order the applicant to provide adequate security for appropriate compensation for any injury likely to be caused to the defendant which the applicant may be liable to bear in the event that the court revokes the order for provisional measures.

Urgency requirement

Neither the UPCA nor the RoP explicitly specify an urgency period within which an applicant has to initiate preliminary proceedings. Rule 211.4 RoP merely stipulates that the court must consider any unreasonable delay in the application for a preliminary injunction. Thus, the court may assess whether an application for a preliminary injunction has been made in a timely manner, meaning that a certain time period with regard to the urgency of a preliminary injunction is present. Consequently, the urgency of the matter as a criterion for granting a preliminary injunction therefore arises from Rule 211.4 RoP.

Concerning the duration of the urgency

Résumé

Jia Schulz-Cao has been an attorney-at-law with CMS' IP team in Austria since 2018. His areas of practice are patent, trademark and unfair competition law matters for clients, mainly in the sectors life sciences, luxury goods, consumer goods, food and beverages. Jia's expertise covers infringement cases as well as transactional and licensing matters. Jia has gained comprehensive patent law experience as a trainee lawyer at the European Patent Office in Munich, Germany. He was a Senior Visiting Scholar at Tsinghua University, Beijing, and thus has extensive knowledge of Chinese IP law. He holds a PhD in Chinese trademark law.

period, it was anticipated that decisions by the Local Divisions could reflect practices of the national jurisdictions and that an urgency period would subsequently be established by case law. In a recent decision in *Dyson Technology v. SharkNinja* by the Local Division Munich, the filing of an application for interim measures within two months of first becoming aware of the potential infringement was deemed timely. This could set a precedent for subsequent preliminary proceedings also at other Local



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Divisions. Regarding the beginning of the urgency period, the applicant's knowledge of (imminent) patent infringement and of (possible) defendant(s) is decisive.

Ex parte preliminary injunctions

Ex parte provisional measures can be granted under requirements set out in Art 60.5.-9 UPCA.

In the case that an applicant requests the issuance of provisional measures without hearing the defendant, the application shall additionally contain the reasons for not hearing the defendant and information about any prior correspondence between the parties concerning the alleged infringement.

In fact, the Local Division Düsseldorf has already granted an ex parte preliminary injunction. In the case of *myStromer AG v. Revolt Cycling AG*, the defendant had filed a protective letter according to Rule 207 RoP. Since the court must consider the protective letter filed, it is questionable whether filing a protective letter might result in a higher chance for ex parte preliminary injunctions. In any case, the decision to file a protective letter should be taken carefully, as an insufficiently substantiated protective letter bears the risk of making it easier for the court to issue an ex parte injunction on the basis that it has no conviction in the defendant's argument.

Validity of the patent in dispute

Generally speaking, Art 62.4 requires the applicants to provide reasonable evidence with a sufficient degree of certainty that they are the right holder. Rule 209.2 (a) RoP states that the court shall take into account whether the patent in dispute has been upheld in opposition proceedings before the European Patent Office or has been subject to proceedings in any other court. The compatibility of Rule 209.2 (a) RoP with Art 9 of the Enforcement Directive has been questioned among scholars since a recent decision of the CJEU that the validity of a patent in dispute shall be irrelevant to the outcome of the preliminary proceedings. (CJEU 28.04.2022, C-44/21 – *Phoenix Contact GmbH & Co KG v. Harting*.)

Regarding the validity of a patent in dispute, the Local Division Munich clarified in its decision in *10x - Genomics Inc. v. NanoString Technologies Inc.* that "sufficient certainty" is understood as "preponderant" likelihood of validity. So far, the UPC deems a patent in dispute as valid if that patent was published many years ago and no opposition or action of revocation has been filed against it.

As Rule 211.3 RoP states that the UPC shall – in the exercise of its discretion – weigh up the interests of the parties, the validity of the patent in dispute is definitely an important aspect regarding the balancing of interests. The burden

“ So far, the UPC deems a patent in dispute as valid if that patent was published many years ago and no opposition or action of revocation has been filed against it. ”

of presentation and proof regarding validity lies with the defendant as they are claiming that the patent is invalid. Irrespective of this, claimants are well advised to submit evidence regarding validity in preliminary injunction proceedings according to Rule 206.2(d) RoP.

Insight into the first preliminary injunction decision of the Local Division Vienna

The Local Division Vienna has – up to the day of writing – only decided in one provisional measure matter, rejecting an application for a preliminary injunction in the case *CUP&CINO Kaffeestem-Vertrieb GmbH & Co. KG v. ALPINA COFFEE SYSTEMS GmbH*.

Schedule of proceedings

The patent in dispute concerned a milk-frothing device. The defendant planned to promote its device at a trade fair in October 2023. Being aware of this, the applicant applied for a preliminary injunction on June 27, 2023. The action by the applicant was served to the defendant on July 11, 2023, granting the defendant the right to file counterarguments within three weeks. The applicant was given the possibility to file an additional pleading after three more weeks. The parties were summoned to an oral hearing which took place September 13, 2023.

During the oral hearing, the defendant mainly argued that the applicant's patent was not infringed. Additionally, they claimed the matter was not urgent since the defendant's product had been on the market since 2019. It was claimed that the applicant's patent was invalid due to a lack of inventive step. In event, granting preliminary injunction shall be made under the condition that the applicant deposits financial means as security.

During the oral hearing, the court allowed a demonstration of the devices by both the defendant and the applicant, even though evidence of how the device is used was filed at an earlier stage. Demonstrations of the devices were made to specifically showcase the milk-frothing process to provide a clear understanding of the technical details and to contribute to clarifying the facts, which outlined the high technical standard of the court.

Based on the demonstrations and evidence filed by the parties, the court rejected the preliminary injunction during the oral hearing. As a side note, the judges clarified that unitary patents for which a lawsuit has been filed cannot be opted out of the UPC. The court clarified that Rule 5.6 RoP applies to provisional measures as well, therefore, an opt-out request after an application for preliminary injunction is filed is ineffective.



Learnings from Local Division Vienna

This decision rendered by the Local Division Vienna is likely to be a classic example of the schedule of proceedings in preliminary injunction matters. In particular, when it comes to granting parties in disputes opportunities to submit pleadings, the deadlines granted as well as in which circumstances an oral hearing should take place, very much reflects the UPCA and the RoP.

Generally, special attention should be paid to oral hearings as the judges being technically qualified may increase focus on the demonstration of devices potentially infringing the patent in dispute.

Key takeaways

From the preliminary injunctions decisions so far rendered by the UPC, it is apparent that Local Divisions may act very quickly and are not reluctant to grant preliminary injunctions on an *ex parte* basis. In that regard, parties should carefully consider the pros and cons before filing a protective letter.

Also, patent holders should act quickly if they

“ It is apparent that Local Divisions may act very quickly and are not reluctant to grant preliminary injunctions on an ex parte basis. ”

identify potential infringements of their patents. Merely identifying a patent infringement alone is not sufficient to obtain a preliminary injunction as urgency is an essential requirement.

Lastly, defendants should bear in mind that a simple attack on the validity of the patent in dispute is not necessarily a sufficient means of defense. The court has to be convinced that the patent in dispute lacks validity in order to reject a preliminary injunction application based on this argument.

In general, preliminary injunctions continue to be a strong instrument to enforce patents.

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After one year of existence, is the UPC a patent killer?

Jean-Baptiste Thiénot of CMS France addresses the rigorous nature of the UPC, offering insight into the first decisions affecting the validity of patents.

With the upcoming entry into force of the Agreement on a Unified Patent Court (UPCA), many companies wanted to protect their European patents from a 'central attack,' i.e., an action for revocation before the UPC. Indeed, a single decision by the UPC can destroy a patent in all European countries participating in the new system. This is a clear break from the previous system under which patentees were familiar with the 'patent-friendly' jurisdictions where patents generally managed to survive.

The fears raised by a 'central attack' were, therefore, understandable, especially since this new jurisdiction, as well as the approach - which would be adopted to assess the validity of a patent - were unknown.

A little over a year after its launch, the UPC's case law is beginning to take shape. Without claiming to be exhaustive, we offer here a quick presentation of the first decisions affecting the validity of patents.

Which patents can the UPC revoke?

The UPC has jurisdiction over actions based on 'classic' European patents and European patents with unitary effect. For 'classic' European patents, patentees can choose to opt out of the UPC's jurisdiction for a transitional period, which is expected to last at least until 2030, meaning that the UPC will not have jurisdiction over the patents in question for which the patentees opted out. Many companies have made this choice to protect their patents from a central attack before the UPC. National patents are completely outside the jurisdiction of the UPC. In certain circumstances, national patents could thus represent an interesting 'fallback' solution for patentees.



Jean-Baptiste Thiénot

Revocation action

The UPCA offers the possibility of initiating an action for patent revocation. This allows any interested person to obtain a court decision invalidating a patent in all countries that have ratified the UPCA, i.e., 18 EU Member States as of September 2024. These procedures fall under the jurisdiction of the Central Division of the UPC, which sits in Paris, Munich, and Milan. This procedure is already meeting with some success, with no less than 41 procedures initiated between June 1, 2023, and July 26, 2024. The most involved industrial sectors are life sciences and electronics. Most actions (36) were filed with the Paris Central Division.

This success is easily explained, in particular by the following reasons:

- The UPC has been able to attract the best judges in Europe. The 'Legally Qualified Judges' (LQJs) benefit from the reputation they have previously

Résumé

Jean-Baptiste Thiénot is Partner in the IP/IT team of CMS Francis Lefebvre. He mainly advises on industrial property law, particularly patent law. His activity covers litigation (infringement and nullity actions, employee invention issues) as well as advice and drafting of contracts (R&D contracts, assignment and licensing, and audit of rights portfolio) in various industrial sectors, particularly in the life sciences, mechanical, and electronic fields. He is frequently involved in cases relating to products subject to specific regulations (health products, cosmetics, spraying, etc.). Jean-Baptiste has also developed particular expertise in the protection of business secrets/know-how (litigation, implementation of internal protection policies) and the regulation of health products (medicines, medical devices, etc.). Jean-Baptiste Thiénot has been a lawyer since 2008. He joined CMS Francis Lefebvre in 2018 after practicing with the law firms Simmons & Simmons (2008-2011), Allen & Overy (2011-2013), and Bird & Bird (2013-2018).

acquired through their experience working in national courts. In the context of revocation actions, the LQJs are assisted by 'Technically Qualified Judges' (TQJs) who are also well-known on the market and who complete the skills of the panel. The UPC judges' expertise is obviously a guarantee of the quality of future decisions that will be rendered.

- The UPC is able to render decisions quickly: decisions on preliminary objections are generally rendered within two months, while decisions on the merits are rendered within a year. The UPC is, therefore, the quickest option to obtain a decision on the validity of a patent in comparison with national courts or with an opposition before the EPO.

Counterclaims for revocation

In addition to revocation actions, the UPC is also required to rule on the validity of a patent in the context of counterclaims for invalidity filed by defendants in relation to infringement actions. Unlike revocation actions, these counterclaims are filed before the local division hearing the infringement case. This is a different panel that may request the appointment of a TQJ.

The UPCA provides for a possibility of 'bifurcation', i.e., to deal with the questions of validity and infringement in separate proceedings. Bifurcation, which exists in the German judicial system, is generally considered to be a 'patent-friendly' measure. Before the UPC, this possibility has not been massively used so far and UPC local divisions have rendered decisions on both validity and infringement.

According to statistics published by the UPC, counterclaims for invalidity were filed in relation to 85 infringement proceedings pending before the UPC between June 1, 2023, and July 26, 2024.

In each of these proceedings, the UPC may cancel the patent opposed, which will affect all countries concerned by the infringement claim.

Provisional measures

In the context of decisions rendered following requests for provisional measures, the UPC cannot cancel a patent, with this decision falling within the exclusive jurisdiction of the trial judge. That being said, the UPC will be required to assess the validity of the patent in a more or less detailed manner depending on the importance of the measures requested, as specified below.

The decisions

After one year of existence, the UPC has already

“**The UPC is the quickest option to obtain a decision on the validity of a patent in comparison with national courts or with an opposition before the EPO.**”

rendered a significant number of decisions, but only a handful are decisions on the merits. Generally speaking, it is the quality and speed of the decisions that impress observers.

To date (and according to public information available), three decisions on the merits have been rendered in relation to revocation actions. Even if this number is limited, it is interesting to note that, in these three cases:

- The contested patent has never emerged 'unharmful.' Indeed, in these three cases, the UPC considered that the contested patents in their form 'as granted' did not meet the conditions of patentability for various reasons: extension beyond the content of the patent application¹, lack of novelty², or lack of inventive step³.
- In each case, the patentee had to amend its patent during the proceedings by means of 'auxiliary requests.' This allowed the patent to remain in force in an amended form in two cases. In the third case, the UPC considered that even the amended version of the patent did not meet the conditions and, therefore, revoked the patent for lack of inventive step⁴.

The UPC also issued three decisions in infringement actions. In each of these cases⁵, the defendant had filed a counterclaim for revocation of the patent, and the UPC, therefore, issued a decision on validity before ruling, if necessary, on the infringement. In these three cases, in the same way as in the decisions cited above issued in the context of revocation actions, the UPC considered that the patents asserted in the context of infringement actions were not valid in their form 'as granted.' The ground for invalidity retained was lack of inventive step. The patent was upheld in an amended form in only one case in which the defendant was convicted of infringement⁶.

These six first-instance decisions were handed down in July 2024, and we have no information regarding a possible appeal.

Finally, it should be noted that the UPC also examines the question of validity in the context of applications for provisional measures. The criteria to be taken into consideration were clarified by the CoA in the famous *Nanostring v. 10x Genomics* case⁷:

« (...) The court may invite the applicant for provisional measures to provide reasonable evidence to satisfy the court to a sufficient degree of certainty that the applicant is entitled to institute proceedings under Art. 47 UPCA,

that the patent is valid and that his right is being infringed, or that such infringement is imminent.

Such a sufficient degree of certainty requires that the court considers it at least more likely than not that the Applicant is entitled to initiate proceedings and that the patent is infringed. A sufficient degree of certainty is lacking if the court consider it on the balance of probabilities to be more likely than not that the patent is not valid.»

All grounds for invalidity may be raised by the defendant to create doubt as to the validity of the patent. The UPC will examine all the arguments in depth and will not simply note that the validity of the patent has already been confirmed in adversarial proceedings before the European Patent Office or national courts.

If the UPC considers that this degree of certainty is not reached, it must reject the applications for provisional measures. For example, in an order issued on June 19, 2024, the Local Division of The Hague denied an application for provisional measures by considering that on the balance of probabilities, the patent would likely be held invalid due to added matter in subsequent proceedings on the merits. Despite this high level of requirement, the UPC has already issued several decisions granting provisional measures, which clearly illustrates that the UPC's approach is balanced.

The finesse of the analysis is all the more remarkable given that these decisions were completed within very short timeframes. In this respect, it should be noted that the preparation of files is essential for companies because deadline extensions are rare, and all arguments and documents must be included in the first set of submissions.

Even if the patent remains in force, a decision refusing provisional measures due to doubts about the patent's validity will constitute a significant obstacle for the patentee in proceedings based on this patent before the UPC and, to a lesser extent, before other courts. This is certainly less true when the UPC checks the validity of a patent before ordering measures for the preservation of evidence or inspection of premises within the meaning of Article 60 UPCA. Indeed, before issuing a 'seizure order,' the UPC must only check whether the patent is in force and whether there are no pending proceedings challenging its validity, « there is no reason for the court to examine further the validity of the patent in question at this stage of the proceedings.»⁸

Conclusion

After just over a year of existence, observers are impressed both by the number of cases brought before the UPC and by the speed and quality of



“**The UPC has already issued several decisions granting provisional measures, which clearly illustrates that the UPC's approach is balanced.**”

the decisions rendered. In a few words, the UPC keeps its promises by conducting an impeccable examination of the cases brought before it. The UPC indeed systematically conducts a thorough examination of validity, both in the context of decisions on the merits as well as for applications for provisional measures. Without being a patent killer, the decisions rendered suggest that the UPC will not let the slightest weakness in a patent slip under the radar. These initial indications must be seriously considered by companies as part of the preparation of their strategy.

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¹ 2024-07-19, UPC, CD (Paris), *Meril v. Edwards Lifesciences* (CFI 15-2023)

² 2024-07-29, UPC, CD (Paris), *Bitzer Electronics v. Carrier* (CFI 263-2023)

³ 2024-07-16, UPC, CD (Munich), *Sanofi v. Amgen* (CFI 01-2023)

⁴ 2024-07-16, UPC, CD (Munich), *Sanofi v. Amgen* (CFI 01-2023)

⁵ 2024-07-04, UPC, LD Paris, *Dexcom v. Abbott* (CFI 230-2023); 2024-07-31, UPC, LD Munich, *Dexcom v. Abbott* (CFI 233-2023) and 2024-07-03, UPC, LD Düsseldorf, *Kaldewei vs Bette* (CFI 7-2023)

⁶ 2024-07-03, UPC, LD Düsseldorf, *Kaldewei vs Bette* (CFI 7-2023)

⁷ 2024-02-26, UPC CoA, Order in the proceedings for provisional measures concerning EP 4 108 782 (335/2023)

⁸ 2024-03-01, UPC, Paris LD, procedural order, *NOVAWELL c. C-Kore SYSTEM* (CFI 397/2023)



A changing landscape: German courts in the maelstrom of the UPC

Victor V Fetscher of Boehmert & Boehmert addresses the increased choice for patent holders to litigate in Europe with the inception of the UPC and what this means for the future of German national courts.

For decades, German national courts and, in particular, the courts in Dusseldorf, Munich, and Mannheim have been the "go-to places" for patent litigation in Europe. With the advent of the new Unified Patent Court (UPC) last year, however, the times of unchallenged leadership are coming to an end. With additional choices for patent holders to litigate in Europe, what role will German national courts play in the future, and how are they coping today? Join us as we dive into the changing landscape of the German patent realm.

National courts: German decline

The fact of the matter is that the number of patent lawsuits in Germany has been declining for some years now, even before the inception of the UPC. From a combined 895 newly filed patent cases in 2017 over Germany's three most important patent courts (Dusseldorf, Munich, and Mannheim), only 522 new cases were filed in 2023. The number of cases overall in seven German patent courts fell to 601 in that same year – the first time that number has dropped below 700 (Source: JUVE Patent).

While there are several possible explanations for this recent development, including the COVID-19 pandemic, the global economic recession, and an overall drop in patent litigation cases outside of Europe, the effects on the German courts are tangible. For example, the Regional Court of Mannheim saw a nearly 50% drop in cases in 2023 compared to the previous year, resulting in the court deciding not to pursue its earlier plans of having three complete chambers to hear patent cases. Instead, it felt the need to dissolve one of its chambers only months after a third chamber had been established.



Victor V Fetscher

Résumé

Victor V Fetscher, LL.M. (Tel Aviv) is an attorney-at-law and Associate at Boehmert & Boehmert, specializing in patent litigation. He is involved in both national and UPC cases with a special focus on preliminary injunctions.

There are also positive developments shown in these statistics. For instance, the Regional Court of Munich saw a remarkable increase in cases from 181 in 2017 to 215 in 2023, despite all other trends.

Still, the UPC has provided additional challenges, beyond filing statistics, with very experienced and renowned German judges leaving the national court system for the UPC. The Regional Court of Dusseldorf was particularly affected by this trend.

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with Judge Daniel Voß moving to the Local Division in Munich and Judge Bérénice Thom moving to the Local Division in Dusseldorf full-time, among others. The Higher Regional Court even dissolved one of its two patent senates due to the departure of Presiding Judge Ulrike Voß to the Munich Central Division of the UPC.

National courts: German resilience

While these recent events undoubtedly present a significant challenge for the German patent courts, a closer look reveals a resilient system that can (for now) offer considerable advantages over UPC proceedings and, therefore, might well be able to fight or possibly reverse this recent trend in the years to come.

First, there is the factor of cost. German court proceedings are infamously cost-effective, with small teams of attorneys being able to run concise cases, focusing strongly on the core of the disputes that do not run the danger of engaging in time-consuming (and therefore costly) side-battles. Additionally, the cost risk is far more controllable, with low and standardized fees being reimbursed to the winning party, compared to potentially full cost compensation of presumably very high attorney fees of the opposing party. Moreover, German patent litigation can be just as fast (or even faster) as UPC proceedings while still maintaining more flexibility on deadlines and the management of the case.

Second, UPC litigation bears the much-discussed risk of central revocation, i.e., losing

“ While these recent events undoubtedly present a significant challenge for the German patent courts, a closer look reveals a resilient system.”

the patent in suit in all relevant countries at the same time through one single court decision. For a European patent that is also validated outside of Germany – at least after the lapse of the EPO opposition period – this risk does not apply when litigation is conducted in Germany as German national courts are only competent to invalidate the German part of a European patent.

Third, an injunction in Germany is often sufficient to effectively block a competitor's product in all of Europe, given the size and central location of the German market. The injunction is also often granted prior to a final decision on the patent's validity due to the bifurcated system and the – slowly closing, but still existent – “German injunction gap.” Therefore, the additional costs and risks just described might simply not be justified if the desired result can be achieved just as well through German national litigation.

Finally, German patent litigation and case law have been developed over decades so that they offer significant reliability and transparency which the UPC obviously cannot compete with from the outset. While the first decisions of the UPC and the general handling of cases by UPC judges show a very high quality of decision-making, it will take time for reliable precedent to be established on many crucial questions of procedural and material law.

Therefore, overall, German national courts will have a significant role to play depending on the strategies and tactics of stakeholders – all while providing legally and technically sound judgments for lesser cost and risk.

UPC: German resurgence

Where one begins to falter, the other shall thrive: at least so far. Whereas the number of filings before national courts declined, the number of new cases before the German local division of the UPC is particularly high. Of the 373 cases filed with the UPC overall between June 1, 2023, and late May 2024, 260 were filed with the four Local Divisions in Germany (Munich, Dusseldorf, Mannheim, and Hamburg) – this accounts for 69.7% of all UPC claims. The Munich Division leads all other divisions with 143 claims, nearly 40% of the UPC's entire caseload (Source: JUVE Patent).

Furthermore, 28 of the 75 (37%) technically qualified judges, come from Germany, and of the 42 legally qualified judges, 15 come from Germany.

Here, the German resurgence begins. Not only has the UPC increased its German influence by bolstering the Munich and Mannheim Local Divisions with further appointments of legally qualified judges, but filings in the German language still make up for 44% of all cases, coming in second only to English, which constitutes 50% of the language of case filings. While the choice of English as a language seems to have been on the rise lately, German as a language, but also in terms of its legal tradition, will likely play a significant role in many future cases.

Thus, bringing all of these developments together, Germany as a hub for patent law is still going strong, despite and because of the seismic shift to the UPC.

Rulings: German fingerprints

The UPC rules of procedure, while taking into account the legal traditions of many participating member states, have a strong resemblance to many rules specifically governing German patent litigation. Although the UPC does not, for example, necessarily work with a bifurcated system (as the German system does – see above), many of the first rulings – while strongly emphasizing the unique character of UPC proceedings – still show at least some noticeable German handwriting.

One example of this is the concept of an “offering” as a patent-infringing activity under Art. 25(a) UPCA and how it is to be understood. The Local Division in Dusseldorf recently went with a very German interpretation.

According to Sec. 9 No. 1 of the German Patent Act (PatG), the patent shall have the effect that the proprietor of the patent alone shall be entitled to use the patented invention within the scope of the law in force. In the absence of the consent of the proprietor of the patent, any third party shall be prohibited from [...] offering [...] a product that is the subject matter of the patent or from either importing or possessing

“ While the UPC will certainly develop a case law independent of any national precedent, it seems safe to assume that German patent law and tradition will survive to a significant degree in this new system.”

such a product for the purposes referred to.

According to German case law, the term “offering” is to be understood in a broad and purely economic sense and includes any act committed in Germany which, according to its objective explanatory value, makes the patent-infringing object available to the demand in an externally perceptible manner to acquire the power of disposition.

Similarly, Art. 25(a) UPCA states that a patent shall confer on its proprietor the right to prevent any third party not having the proprietor's consent from the following: (a) [...] offering, [...] a product which is the subject-matter of the patent, or importing or storing the product for those purposes.

Although the wording of the law is very similar, it is entirely unclear that the term “offering” is to be understood as the German national courts do: in a purely economic sense. It could be understood in a legal sense – and reasonably so.

The Local Division in Dusseldorf concluded that “offering” in the context of Art. 25(a) UPCA and Sec. 9 PatG are similar, if not the same. According to the division, the notion of an infringing offer has to be understood in purely economic terms. “Offering” is an independent form of infringing the patent and cannot only be seen as an annex to other forms of infringement. An “offer” within the meaning of Art. 25(a) UPCA also includes, in particular, preparatory acts which are intended to enable or promote the conclusion of a subsequent transaction concerning an object protected by the patent, which includes the use of the object. (Dusseldorf Local Division, October 18, 2023 – UPC_CFI_177/2023).

While this is only a small example, and while the UPC will certainly develop a case law independent of any national precedent, it seems safe to assume that German patent law and tradition will survive to a significant degree in this new system.

The development of the UPC is an exciting moment in time, as everything is in motion and malleable – legal history is being made before our eyes. Whatever the future holds in that regard, and while times are certainly changing, some things are bound to remain and withstand any maelstrom.

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The state of play: Italy's role in the new European patent system



Paola Nunziata of CMS Italy underscores the significant impact of Italy securing the UPC Central Division's third seat and the promising potential it holds for the country's patent system and economic growth.

On July 1, 2024, the official inauguration ceremony of the third section of the Unified Patent Court's (UPC) Central Division was held in the Great Hall of the Court of Milan.

The establishment of this section represents not only an important recognition and an extraordinary opportunity for Italy but also a historic milestone.

Specifically, even though Italy has been, from the very beginning, one of the most committed advocates of the need to build a patent system capable of giving a new boost to the European market in terms of competitiveness, its adherence to such a system and its role have been subject to ups and downs.

In particular, in 2012, as a sign of protest against the choice of the European Union (EU) legislator to adopt only English, French, and German as the official languages for the description and registration of European patents with unitary effect, Italy decided not to join the enhanced cooperation. However, it later changed its stance and confirmed its adherence to the new patent system, with the awareness that the exclusion of Italian territory from the scope of the European patent with unitary effect would have condemned the country to isolation.

Moreover, Italy - the country with the largest number of European patents after Germany and France - applied to host the third section of the UPC's Central Division. If not for the UK's exit from the EU, this would have been based in London. Italy's candidacy was threatened by the possibility that the competences initially attributed to the London section would be distributed between the Central Division's sections of Paris and Munich instead of being assigned to a new section.



Paola Nunziata

However, also thanks to the diplomatic action of the Italian Government, on June 26, 2023, the UPC Administrative Committee decided that the third section of the Central Division should have its seat in Milan. On January, 26, 2024, the Milan Headquarters Agreement between the Italian Government and the UPC was ratified in Rome, and on June 1, 2024, one year after the start of operations by the Central Division's sections of Paris and Munich, the third section of the Central Division finally became operational.

Therefore, the city of Milan now hosts the third section of the Central Division, which will handle cases pertaining to IPC class A ("Human Necessities") without Supplementary Protection Certificates and a Local Division.

The jurisprudence of the Milan Local Division

With regard to the UPC's activity in Italy, as of July 31, 2024, for obvious reasons, given its very recent establishment, there have been no measures issued by the Milan section of the UPC's Central Division. Instead, on the same date, the Milan Local Division has issued 15 measures, of which, according to the UPC official website:

- Four relate to applications for preserving evidence and provisional measures (i.e., orders 500024/2023 and 500663/2023 of June 13, 2023, order 500982/2023 of June 14, 2023, and order 576298/2023 of September 25, 2023);
- One relates to an application under Rule 262A RoP for the protection of confidential information (i.e., order 23384/2024 of May 6, 2024);

- One relates to a request under Rule 262.1(b) RoP for having access to a copy of an application for preserving evidence and inspection. The request was filed by a representative before the UPC who did not assist any of the parties to the proceeding but was simply interested to see how the application was drafted (i.e., order 584786/2023 of December 4, 2023);
- Three are generic orders (i.e., orders no. 9710/2024 of April 8, 2024, 27218/2024 of May 14, 2024, and 40568/2024 of July 23, 2024);
- Six are orders issued in the context of infringement actions. In particular, orders 533610/2023 of June 26, 2023, 552793/2023 of July 21, 2023, and 552789/2023 of July 21, 2023, order the service of the statement of claim without the simultaneous service of the documents annexed thereto; the order 571090/2023 of September 11, 2023, rules on the issue of court costs in the event of termination of proceedings due to the abandonment of the action and the order 569313/2023 of September 27, 2023, concerns a request for access to documents pursuant to Rule 262.1 (B) RoP.

Despite almost all of the aforementioned orders containing interesting considerations regarding the interpretation and application of the new rules, for reasons of brevity, it is not possible to proceed here with a detailed examination of them.

An in-depth analysis, however, must be dedicated at least to order no. 500663/2023 of June 13, 2023, which was issued following an application for preserving evidence filed on June 12, 2023, by a German company, holder of a European patent valid for Italy, which, during an international textile trade fair in Milan, had been able to verify the interference of two machines exhibited by a competitor company with its patent.

Indeed, this decision, whereby the Local Division of Milan ordered the acquisition – through an expert appointed by the court and assisted by the bailiff – of all the technical, promotional, and commercial documentation relating to the

“**The Milan Local Division has issued 15 measures, of which, according to the UPC official website, four relate to applications for preserving evidence and provisional measures.**”

machines in question present at the defendant's stand, has the merit of providing the first detailed clarifications (taken up in the subsequent orders 500982/2023 and 576298/2023) on the requirements for the granting of preserving evidence measures pursuant to Articles 192 *et seq.* RoP, i.e., the *fumus boni iuris* and *periculum in mora*, as well as on the enforcement of such measure.

In particular, with reference to *fumus boni iuris*, after having specified that the relative occurrence must be verified through the assessment of certain sub-requirements such as jurisdiction, competence, the probable existence of the intellectual property rights asserted by the applicant, the probable existence of an infringement of such rights and the respect of the conditions outlined in in Article 192(2) RoP, the Milan Local Division ruled:

- Concerning jurisdiction, the relative existence, since actions for provisional and protective measures fall within the UPC jurisdiction under Article 32(1)(c) UPCA; furthermore, in the present case, the patent enforced was a European patent, whose holder did not exercise the right to opt-out;
- With regard to the competence of the Milan Local Division, the relative existence, given that (i) actions for provisional and protective measures fall within the competence of Local Divisions pursuant to Articles 32(1)(c) and 33 UPCA; (ii) the alleged infringement had been committed on the Italian territory and (iii) the application was

Résumé

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lodged before the Division where the applicant intended to start the merit proceedings (Article 192(1) RoP);

- About the IP rights claimed by the applicant, their likely existence, given that the applicant was the exclusive holder of the patent enforced and the patent was assisted by a presumption of validity, since no opposition had been filed before the European Patent Office and as resulting from a search in the CMS database, no protective letter was filed by the defendant company;
- About the infringement of the enforced patent, its likely existence in light of the documentation provided by the applicant, consisting of two brochures drawn up by the defendant for the technical and commercial presentation of its machines and a technical opinion drafted by an expert appointed by the applicant proving, on a prima facie basis, the patent infringement;
- About the requirements of Article 192(2) RoP, their existence, since the application contained (i) the indication of the required measure, including the exact location of the evidence to be preserved; (ii) an explanation of the reasons why the

“ Exactly one year after the creation of the UPC, Italy ranks third in terms of the number of requests for unitary effects relating to European patents. ”

required measure was necessary to preserve the evidence; (iii) the description of the facts and evidence on which the application was based; and (iv) the identification of the future action, i.e. an action on the merits aimed to establish the infringement committed by the defendant and to obtain injunctions, penalties, seizure, compensation for damages and the publication of the decision.

Then, with reference to the *periculum in mora*, in light of the need to preserve the evidence, the imminent conclusion of the fair and the risk that once the fair was over, the documents subject to the application for preserving evidence would no longer be available or could easily be concealed or destroyed, the Milan Local Division held not only that this requirement was existent, but that it was appropriate to proceed with an *inaudita altera parte* order.

Then, with regard to the enforcement of the provisional measure, to be carried out in accordance with Italian law as the national law of the place where the measure was to be executed, the Milan Local Division established that:

- The measure was to be implemented by an expert appointed by the Milan Local Division and chosen from the list of patent experts who usually collaborate with the Court of Milan (Art. 196(5) RoP);

- The court-appointed expert was to proceed with the assistance of the competent bailiff;
- The applicant was entitled to attend the operations through his lawyers and a technical expert of their choice;
- The court-appointed expert was to draft a written report of the activities carried out to be filed with the UPC, together with the documentation acquired;
- The documentation acquired was to be made accessible, until further order of the court, only to the applicant's attorneys and technical expert (Articles 58 UPCA and 196(1) RoP), with a prohibition on disclosing the information acquired to third parties;
- The evidence acquired was to be used only in future proceedings on the merits (Article 196(2) RoP);
- In application of the general principle of proportionality, if possible, the court expert and the bailiff were to proceed at times other than those scheduled for opening to the public or in any case of reduced flow at the defendant's stand.

Moreover, pursuant to Article 196(6) RoP, the Local Division ruled that the granting of the order for preserving evidence was not subject to the provision of security by the applicant. Indeed, the measure aimed at obtaining evidence of the alleged infringement does not, as such, have an afflictive or restrictive effect on the defendant's activities. Moreover, given the extreme urgency characterizing the case, requiring the applicant to provide security as a precondition for obtaining the requested measure could have jeopardized its implementation. Additionally, the applicant belongs to a large industrial group and was, therefore, in a position to repair any possible damage caused to the defendant in the implementation of the measure.

The effects of the new patent system in Italy

Finally, as a demonstration of the confidence Italian companies have in the new European patent system, it seems appropriate to point out that exactly one year after the creation of the UPC, Italy ranks third in terms of the number of requests for unitary effects relating to European patents.

Similarly, it seems appropriate to point out that proceedings relating to "Human Necessities" amount to 40% of the proceedings currently



“ According to official estimates, the assignment to Milan of the third section of the UPC's Central Division will likely generate an induced revenue of 350 million euros per year. ”

handled by the Central Division in Paris and that the number of proceedings filed before the UPC is destined to grow thanks to the trend already underway to use the European patent system with unitary effect because it is considered more advantageous. Therefore, given these circumstances, according to official estimates, the assignment to Milan of the third section of the UPC's Central Division will likely generate an induced revenue of 350 million euros per year.

In conclusion, as previously stated, the assignment of the third seat of the UPC's Central Division to Italy represents not only a historical achievement but also an incredible opportunity for the country's economic development.

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Security for costs in UPC cases: the Dutch approach



Rogier de Vrey and Yasar Çelebi of CMS Netherlands examine the framework governing security for costs in UPC proceedings and how the Dutch Local Division has approached this in recent decisions.

On June 1, 2023, the Unified Patent Court (UPC) became operational, marking a significant milestone for the European patent system. The Netherlands has been a strong advocate for the UPC. Dutch businesses and innovators can now benefit from a more cohesive and less fragmented patent litigation process, which should reduce the costs and legal uncertainties that are associated with protecting inventions and enforcing patents across multiple jurisdictions. The UPC includes a Court of First Instance, a Court of Appeal, and a Registry with local and regional divisions established in participating countries.

The Netherlands hosts a Local Division of the UPC in The Hague, which, as of mid-2024, has issued 15 procedural decisions and orders. Among these decisions, two orders given in the case between Plant-e Knowledge B.V. and Arkyne Technologies S.L. ("Plant-e/Arkyne") stand out because they provide valuable insights into how the UPC addresses requests for security for costs, a mechanism designed to ensure parties can recover legal and other expenses, especially in cross-border litigation where enforcing judgments can be challenging.

Before exploring these key decisions from the Dutch Local Division, it is essential to understand the framework governing security for costs in UPC proceedings. This framework includes the procedures for requesting security for costs and the precedents set by other Local Divisions.

Security for costs: a legal framework

During UPC proceedings, a party may request the court to order the other party to provide security



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for legal costs and other expenses. If the court grants this request, it will determine whether the security should be provided through a deposit or a bank guarantee (Article 69.4 of the Agreement on a Unified Patent Court (UPCA) and Rule 158.1 of the Rules of Procedure (RoP)). The court ensures procedural fairness by allowing both parties to be heard before making a decision (Rule 158.2; *AIM Sport Vision v. Supponor I*, August 28, 2023, UPC_CFI_0828/2023). The order will detail the rights of the parties to appeal and specify a timeframe for providing the required security. Failure to provide security within the specified time may lead to a default judgment (Rule 158.5).

When and by whom security for costs can be requested

A request for security for costs may be made at several stages of the proceedings. It can be introduced during a preliminary objection, with the judge-rapporteur handling such requests (*Edwards Lifesciences Corporation v. Meril Italy*, November 13, 2023, UPC_CFI_255/2023, para. 88-89). Security for costs can also be requested during the main proceedings, but it is not permissible in urgent proceedings (see *Genomics v. Curio Bioscience*, April 30, 2024, UPC_CFI_0430/2024).

Article 69(4) of the UPCA states that only defendants are entitled to request security for costs. However, Rule 158 of the Rules of Procedure of the UPC (RoP) broadens this scope, allowing any party, including claimants, to make such a request. This creates a conflict between Art. 69(4) UPCA and Rule 158 RoP. The Local Division of Düsseldorf addressed this conflict in *Genomics v. Curio Bioscience* (April 30, 2024, UPC_CFI_0430/2024), concluding that both defendants

and claimants can request security for costs. The court reasoned:

"Although Rules of Procedure must align with the UPCA according to Article 41(1-2) UPCA, this does not mean the Agreement automatically takes precedence over additional provisions made by the Rules. When the Agreement does not specifically exclude a provision, the Rules of Procedure may introduce supplementary rules. Therefore, Article 69(4) UPCA, which only contemplates security for costs for the defendant, is complemented by Rule 158 RoP, which extends the ability to request security to 'the parties,' thus including both defendants and claimants."

How security for costs can be provided

Security may be provided in the form of a deposit on the UPC account dedicated for security deposits or by a bank guarantee provided by a significant EU bank which is under the direct supervision of the European Central Bank (*NanoString Technologies Europe Limited v. President and Fellows of Harvard College*, October 30, 2023, UPC_CFI_252/2023). In a recent case, the request to approve a guarantee for the security for costs from a big bank in the US – which was licensed to operate in the US but not in the EU – was dismissed: the bank must have a license to operate in the EU (*ARM v. ICPillar*, May 21, 2024, UPC_CFI_495/2023).

Factors influencing the court's decision on a request for security for costs

When deciding whether to grant a request for security for costs, the court evaluates several important factors. These include the financial status and residence of the non-requesting party, the likelihood of success of the claims, the conduct of the parties, the case's importance and complexity, past compliance with cost orders, and the availability of insurance or other security measures.

Insights from case law highlight the relevance of these factors. For example, (i) the mere fact that the other party is domiciled in the US does not justify security for cost, and (ii) if insurance only covers the requesting party's own legal costs but not the costs made by the other party, it does not offer the required security for costs for the requesting party (*ARM v. ICPillar*, May 21,

2024, UPC_CFI_495/2023). Other lessons are (iii) that – although, in principle, the enforcement of UPC orders is possible in the UK – there is undoubtedly an additional (procedural) burden and uncertainty on the party seeking to enforce a UPC judgment in the UK compared to other EU jurisdictions and therefore the court will be more likely to order security for costs (*NanoString v. Harvard*, October 30, 2023, UPC_CFI_252/2023) and (iv) that the court will look at past financial issues and the potential of legal actions against parent or sister companies when indicating the financial stability of a party (*NanoString Technologies v. Harvard College*, October 30, 2023, UPC_CFI_252/2023).

Dutch decisions in *Plant-e v. Arkyne*: security for costs and the access to justice

The Dutch Local Division of the UPC has adjudicated two notable cases involving *Arkyne Technologies S.L. and Plant-e Knowledge B.V.*, centered on the issue of security for costs under Article 158 RoP and Article 69(4) UPCA. These decisions – dated February 13, 2024 (UPC_CFI_0213/2024) and

Résumé

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March 4, 2024 (UPC_CFI_0304/2024) – offer insight into how the court balances the protection of defendants' rights on security for costs with claimants' ability to enforce their patent rights in court (access to justice).

These decisions highlight that imposing security for costs should not unduly hinder a party's access to justice and underscore the importance of equitable treatment, ensuring that defendants are safeguarded without excessively burdening the claimant's ability to pursue legitimate claims.

As a rule, the Dutch Local Division finds that security for costs based solely on material unenforceability should be awarded in exceptional circumstances only. We would like to stress that this also means that the sole fact that one of the parties is based in the UK should not necessarily mean that the court will be more likely to order security for costs. There are examples of parties based in the US which in itself was not regarded as sufficient to award a security request.

Access to justice is an important right throughout the EU and elsewhere. For small and medium-sized enterprises (SMEs), enforcing their patents through the UPC could be significantly hindered if they are required not only to cover their own legal costs but also to provide security for the defendant's costs. Therefore, requiring security for costs from claimants can also conflict with the high level of protection for IP rights holders envisaged by the Enforcement Directive.

Additionally, the Dutch Local Division considers that Dutch procedural law prohibits imposing security for costs on plaintiffs residing in the Netherlands (and thus the EU), regardless of their financial situation. Granting security for costs to an EU resident would, therefore, set the UPC apart from some national courts as an SME would be able to enforce its patents in several national courts without a *cautio iudicatum solvi*. Imposing security on costs on claimants with an SME can prevent them from enforcing their patents through the UPC, contrary to its goal of facilitating patent enforcement by SME owners.

These landmark decisions by the Dutch Local Division underscore the importance of a balanced approach to security for costs. As the UPC framework evolves, it will be important to observe how other Local Divisions interpret and apply these principles and whether they will maintain a balance between protecting defendants' rights and ensuring claimants, particularly those from SMEs, have access to justice.

Confidential information

The second *Plant-e v. Arkyne* decision addressed a procedural detail as well. The court implemented an 'attorney's eyes-only' protocol to safeguard sensitive information (Article 58



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These rulings reflect a commitment to ensuring that the patent litigation system remains accessible and equitable, particularly for SMEs.
 ”

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UPCA and Rule 262A RoP) while assessing the necessity and extent of security for costs. This measure ensures that confidential business information remains protected, balancing the need for transparency with the necessity of privacy in complex patent litigation.

Conclusion

In conclusion, the recent decisions from the Dutch Local Division of the UPC underscore the nuanced approach necessary for managing security for costs. These rulings reflect a commitment to ensuring that the patent litigation system remains accessible and equitable, particularly for SMEs that might otherwise face significant barriers to enforcing their intellectual property rights.

Ultimately, the Dutch Local Division's approach provides a framework for other UPC Local Divisions. Observing if and how these principles will be applied in future cases is crucial for maintaining a balanced and effective patent litigation system that supports innovation while ensuring fairness and accessibility for all parties involved.



UPC's first year: emergence of a purely civil law system?

Rachel Fetches of HGF discusses how the UK's withdrawal from the UPC system could affect future judgments, with the use of common law litigation tools being sidelined in preliminary measures.

The UPC passed its milestone one year anniversary on June 1, 2024. While, at the time of writing, we are still awaiting the first substantive decisions on invalidity and infringement, there have been judgments from the Courts of First Instance and Court of Appeal (CoA) on preliminary measures and procedural matters that have given a flavor of how the UPC is likely to develop.

One of the aims of the UPC was to provide harmonization on patent law under the European Patent Convention (EPC). Divergence on key issues of patent law does sometimes lead to different outcomes for the different national parts of the same European Patent (EP). Parties can find it frustrating that analysis of potential outcomes (whether enforcement or freedom to operate) can vary widely between the key patent jurisdictions such as the UK, Germany, the Netherlands, Italy, and France.

As part of seeking to achieve harmonization, the UPC Agreement and Rules of Procedure (RoP) offered the promise of a pan-European litigation toolbox. Through the UK's involvement, the UPC's RoP encompassed a unique blend of common and civil law traditions. Following the UK's withdrawal, however, together with the delay in ratification by Ireland, it appears that common law litigation tools are being sidelined by the UPC.



Rachel Fetches

Language

Somewhat ironically, given the withdrawal of the UK, the English language has over the year become the de facto language of proceedings before the UPC. The late notification that English would be accepted as at least a second language of proceedings in all Local Divisions, including German, French, and Italian, meant that many of the first set of filings with the German Local Divisions were in German. Subsequent actions have increasingly been filed in English, and some (but not all) requests for changes in the language of proceedings have been allowed.

Part of this trend reflects the fact that the majority of EPs are filed in English. A practical consideration for litigants is that the multinational

Résumé

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UPC judging panels often deliberate in English. For urgent applications dealt with by a single standing judge, the message from the UPC's judiciary is to consider pleading in English to avoid delays in the translation.

Opt-out

The original scheme envisaged under the UPCA was that from the launch of the UPC, all EPs validated and in force in the UPC would, by default, be litigated before the UPC. Following an outcry from patentees, a transitional scheme allowing a patentee to "opt out" of the UPC's exclusive jurisdiction (for at least seven years) was created. By exercising the right to opt out of the UPC's jurisdiction, patentees can choose to maintain the status quo that each national part of the EP bundle must be enforced or invalidated before the national patent courts. In the three months before the UPC's launch, just under half a million applications to opt-out were lodged with the UPC's Registry. This seemed to indicate a degree of nervousness at litigating existing EPs in the UPC.

While challenges to the opt-out have been rare to date, in *Neo Wireless v. Toyota* the CoA upheld the Paris Central Division's decision to reject a preliminary objection that the patent had been opted-out validly. In this case, the patent had two proprietors (a US parent and, for the EP(DE), a German subsidiary), but only the US Proprietor had applied to opt out. The opt-out provisions provide an exception to the otherwise automatic transition into the jurisdiction of the UPC. Unless all proprietors exercise the opt-out, the "default position" of the UPC's jurisdiction stays in place.

In *CUP&CINO v. Alpina*, the Vienna Local Division held that an application for interim measures – here an unsuccessful request for a preliminary injunction – seizes the jurisdiction of the UPC (like an action on the merits). A subsequent application to opt out, seemingly made without authorization, was invalid.

In *AIM Sport Vision v. Supponor*, the application for the withdrawal of an opt-out (on July 5, 2023) was held to be ineffective where the EP in question had been litigated in German national infringement and invalidity proceedings that were pending when the UPC went live. This raises the possibility of national "torpedo" actions being filed against opted-out EPs by potential defendants worried about a future UPC action.

Stays pending EPO opposition

Another aim for the UPC was quick first-instance decisions. In the national courts, this can vary from 10 to 12 months (Germany (infringement-only), the UK, and the Netherlands) to as many as 24 months or more (France, Italy, and Spain) to get to a hearing at first instance. Indeed, German nullity proceedings

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automatically stayed pending EPO opposition, with many other national courts also likely to stay proceedings pending resolution of EPO opposition. Oppositions on average take 19 to 24 months for a hearing before an Opposition Division but appeals to the Technical Boards of Appeal can substantially add to the delay (two and a half years or longer).

The UPC has discretion to stay proceedings pending a decision of the EPO but there have been a number of decisions where a request for a stay has been declined. Both the Local Divisions and Central Divisions have held that proceedings must be conducted to normally allow the final oral hearing at first instance to take place within one year.

Thus, as a general principle, the UPC will not stay proceedings, even where the EPO has agreed to expedite opposition proceedings. If the UPC can continue to manage UPC proceedings to achieve the one-year target, this will be a significant improvement in speed to a judgment (infringement and validity) in the majority of UPC member states including Germany (revocation).

Preliminary measures

The UPC has the discretion to grant preliminary measures covering all UPC member states. It is clear from its first year of operation that the UPC is willing to grant preliminary injunctions and *saisie* requests, including on an *ex parte* basis.

In relation to PI requests, where these have been on an *inter partes* basis, the Local Divisions and CoA have had the benefit of full written submissions and arguments on both infringement and validity of the patent. These have been carefully weighed and where there have been doubts about the validity of the underlying patent, the PI has been denied.

With *saisie* requests aimed at preserving evidence of infringement, the Paris Local Division took the view that while the applicant had to provide reasonably available evidence of the alleged infringement, at an early stage there was no reason for the court to examine further the validity of the patent in question.

One notable aspect of the UPC's management of requests for preliminary measures is the speed of fully argued hearings and judgments, including appeal judgments. A multi-territorial injunction within two to three months or the ability to enter premises to seize evidence across the UPC within three to four weeks of the order is incredibly powerful.

Means of evidence

In common law jurisdictions like the UK, fact and expert evidence – both written and oral – are key to winning a case. In civil law jurisdictions, the importance and weight given to expert

evidence vary from it being treated as having little weight, to it being recognized as an important part of the action, with limited questioning from either the judicial panel and/or the opposing counsel. In the UK, although each party pays for their own expert, any expert's overriding duty is to the court and it is important that they don't become an advocate. The ability to cross-examine experts and witnesses adds time to the trial but provides assistance to the court and ensures a party's evidence reflects the honest belief or opinion of the witnesses or expert.

It is very clear from the UPC's RoP that one means of evidence includes expert reports (Rule 170.1(e)). Rule 170.2 states that means of obtaining evidence includes "appointing, receiving opinions from, summoning, and hearing and questioning experts." As in the UK, party experts in the UPC have a duty to assist the court impartially on matters relevant to their expertise, which overrides any duty to the party instructing them. The expert must also be independent and objective, and shall not act as an advocate for any party to the proceedings (Rule 181.2).

Despite the rules allowing for the use of expert evidence and the ability to question the experts orally, the commentary from UPC judges has been dismissive of the role and value of these procedural tools. There also does not yet seem to be any cases where a separate hearing has been set to question experts and it is unclear whether the Presiding Judges have allowed parties to put questions to experts.

Disclosure

Alongside expert evidence, the ability to obtain documents from the adverse party during litigation is a key reason that parties litigate in the UK Patents Court. Disclosure is usually issue-based (e.g., relating to alleged prior use). Unless infringement is admitted, the defendant must provide disclosure or produce a product and process description. The availability of disclosure in the UK gets around the difficulty in civil law jurisdictions where a party suspects that the other party has documentary evidence relating to a particular issue in dispute but has no means to introduce it into the proceedings. Disclosure can also be relied upon by the parties at trial to improve their cases, particularly since UK parties are obliged to disclose adverse documents.

While it is clear that the UPC is willing to grant measures to inspect and preserve evidence of infringement as a preliminary measure (*saisie*), it is not clear yet whether the common law tools and disclosure tools available during the proceedings are being utilized. Means of obtaining evidence include "requests for information" and "production of documents" (Rule 170.2(b)(c)). The

“Will the national law of the relevant division be the touchstone or will the UPC create a new approach that takes the best of all contracting states?”



UPC can also order the inspection of a place or physical object (Rule 170.2(f)) and order a third party to produce evidence (Rule 170.3(a)).

What does this mean for patent litigation in the UK?

In 2023, there have been robust levels of patent actions issued and coming to trial at the UK Patents Court, whereas in Germany, for example, we have seen a clear shift towards the UPC's local divisions rather than national patent courts. This shift has been mirrored by the movement of patent judges towards full-time roles at the UPC. This is an early indication of the future shift in focus for patent litigation in the EU. Despite the significant involvement of dual-qualified UK solicitors and UK-based European Patent Attorneys in UPC proceedings, those proceedings have reflected civil law approaches.

What we will see in the next 12 months is the UPC's approach to the substantive patent law issues. What approach will the UPC take on straightforward matters of infringement and validity? Will the national law of the relevant division be the touchstone or will the UPC create a new approach that takes the best (hopefully) of all contracting states? Will the EPO approach to added matter or inventive step (problem-solution) prevail – or only sometimes? How will the UPC approach contributory infringement, and what does a UPC doctrine of equivalents look like? How will the UPC approach injunctions for standard essential patents and issues of FRAND licensing? What will be the approach to second medical use patents and "clearing the way" ahead of a generic launch?

Both the UPC's approach to patent law and procedural litigation tools will remain an important factor in the choice of venue. While the UPC remains reluctant to embrace the common law tools for disclosure and evidence available, the UK will remain the primary EPC jurisdiction where disclosure and expert evidence are available and can be tested by cross-examination. This, together with the comparable speed of proceedings before highly specialized Patent Judges, and the quality of UK judgments, means that the UK Patents Court remains an important venue for patent litigation, whether in parallel or as an alternative to the UPC.

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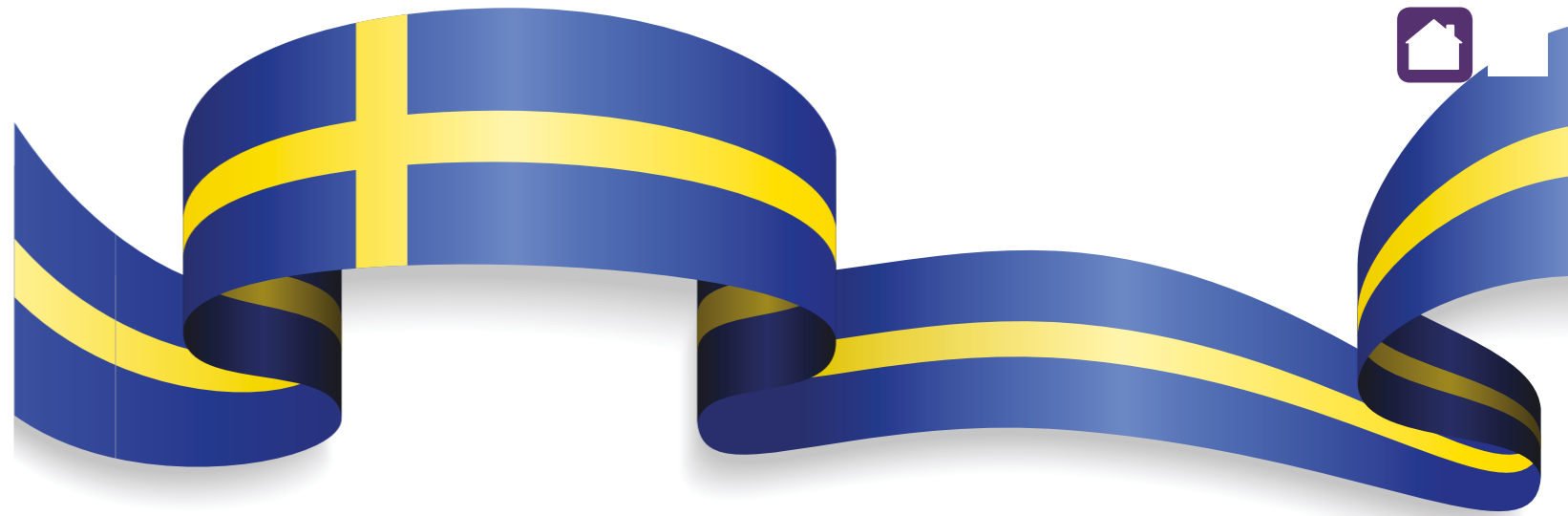
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UPC in Sweden: insights from the Nordic-Baltic Regional Division



Petter Rindforth and Maria Zamkova of Fenix Legal share insight into how the Nordic-Baltic Regional Division of the UPC is operating thus far, detailing the handling of *Aarke AB v. SodaStream Industries Ltd* as a case example.

Every six months, one of the European Union (EU) member states holds the Presidency of the Council of the EU, also known as the Council of Ministers. Sweden held the Presidency during the first half of 2023. It was an active and interesting period for intellectual property within the EU. At the end of the Presidency period, the Unified Patent Court (UPC) came into force, and on June 1, 2023, the Nordic-Baltic Regional Division opened its doors in Stockholm, Sweden.

Although "the Nordic countries" geographically include the sovereign states of Denmark, Finland, Iceland, Norway, and Sweden, there are important differences when it comes to the Unitary Patent in general and disputes.

First, Iceland and Norway are not members of the EU and are, therefore, not part of the system as such.

Second, Denmark and Finland have chosen to establish their own national Court of First Instance in Copenhagen (Denmark) and Helsinki (Finland), respectively.

The remaining Nordic country, Sweden, is part of the Nordic-Baltic Regional Division, together with the Baltic countries Estonia, Latvia, and Lithuania. The said division is based in Stockholm, Sweden, in the same building as the Stockholm District Court and the Patent and Market Court.

Any Nordic-Baltic Regional Division panel sits in a multinational composition of three legally qualified judges pursuant to Article 8(4) UPCA.

The panel in the Nordic-Baltic Regional Division consists of two legally qualified judges who are nationals of the member states of the regional division and one legally qualified judge from the pool of judges who is not a national of one of the member states of the regional division. The two



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national judges of Nordic-Baltic are Stefan Johansson (Sweden), Presiding Judge of the Nordic-Baltic Regional Division of the UPC since June 2023, and Kai Härmand (Estonia). Swedish technically qualified judges are Andreas Gustafsson, Anna Hedberg, Kerstin Roselinger, Anders Hansson, and Patrik Rydman.

The process language of the Nordic-Baltic Regional Division is English. The language issue is important, as most SMEs (small or medium-sized enterprises) can understand English but may not be so familiar with German, which was generally the most common language in the initial cases outside Sweden. The language of proceedings was considered and decided in the case No 580849/2023 – UPC_CFL_373/2023, Swedish company *Aarke AB v. SodaStream Industries Ltd* (a company based in Israel, represented by a German attorney).

On October 17, 2023, SodaStream Industries Ltd ("SodaStream") brought an infringement action against the Swedish company Aarke AB based on EP1793917 entitled "A device for carbonating a liquid with pressurized gas." Aarke AB – referring to R. 323 RoP – asked for a change of the language of the proceedings from German to English. On the merits of the Application, Aarke AB referred in particular to recitals two and six UCPA and outlined that the President of the Court of First Instance should consider when determining the language of the proceedings, the principles of fairness, equity, and proportionality, especially in the event where the Applicant – defendant in the main proceedings – is an SME for which the language chosen by the claimant raises a specific challenge.

SodaStream argued that the advantages of retaining the current language must be weighed

against the inconveniences for the respective parties as part of an overall assessment and that the requested change can only be decided under very particular circumstances and exceptional situations. SodaStream added that the protection from which SMEs benefit cannot apply to entities active all over Europe, as is the case for Aarke AB selling the embodiments attacked in more than 30 countries worldwide and offering information and support in the respective official languages of these markets, including German.

The President of the Court of First Instance in the proceedings before the Local Division Düsseldorf, pursuant to R. 323 RoP (the language of the proceedings), issued an order on January 16, 2024, stating that "the situation of the Defendant (Aarke AB) requires a particular consideration in the event that an SME is sued before the court in light of this legal frame. In the case at hand, the respective position of both parties – as known given the information provided at this early stage – is likely to create a significant imbalance in the way they can organize their defense and access to the court although they are equally confronted with a foreign language they don't use in their respective daily activities." The language of the proceeding was ordered to be changed into English.

In the order, Florence Butin, President of the Court of First Instance, also noted that "an important goal of the UPCA is indeed to take into account the situation faced by SMEs which have difficulties enforcing their patents and defending themselves."

This is also in line with the comment Stefan Johansson of the Nordic-Baltic Regional Division made when he was appointed as the Presiding Judge: "It is good that this important reform is finally becoming a reality, and it is especially nice that one of the courts is located in Stockholm."

The first case filed with the *Nordic-Baltic Regional Division* was *Edwards Lifesciences Corporation (claimant) v. Meril GmbH, Meril Lifesciences PVT Limited, Smis International OÜ, and Sormedica UAB (defendants)*, Case Number:

ACT_459769/2023. The case is proceeding and is one of a total of six patent infringement cases filed so far (as of July 31, 2024) with the court in Stockholm.

As of July 26, 2024, 47 cases have been filed with the Nordic-Baltic Regional Division. Most of them have been related to requests for amending patent or counterclaim for revocation (11 cases each), with infringement cases as No 3. However, the majority of the 47 cases are still at the stage where they are not fully public, and it is thereby not possible to identify the details of the disputes.

The high number of revocation counterclaims (11 compared to six infringement cases) is likely because, until April 2024, due to technical problems, if there were several infringing defendants in a case, each defendant had to file a separate counterclaim for revocation. As of April 5, 2024, this is now technically solved.

Résumés

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The duration of proceedings in the Nordic-Baltic Regional Division is difficult to state in the absence of any full decisions so far. Stefan Johansson has stated that the court will follow the 12-month goal. For cases in other local divisions, so far, the period between the filing of the action and the oral hearing has been between nine to 11 months.

At the same time, the judges must stick to the time frames and make quick and clear decisions, as the number of cases is continuously increasing. The Presidium of the UPC, therefore, recently decided to adjust the working time of some part-time judges as of September 2024. Hamburg Local Division is, not surprisingly, one of the three Divisions, the other two are the Ljubljana Local Division and the Nordic-Baltic Regional Division in Stockholm.

Furthermore, the number of representatives based in Sweden is increasing. As of August 1, 2024, there are 128 representatives, whereof 33 are lawyers authorized to practice in contracting Member States (Article 48(2)), and 95 are patent attorneys (Article 48(2)), mainly "Patent Attorneys with other qualifications" (83), but also "Patent Attorneys with Law Diploma" (5), and "Patent Attorneys with EPLC (European Patent Litigation Certificate)" (7). The latter is the future identification and qualification of patent attorneys, as since June 4, 2024, European patent attorneys

Above: Swedish Minister for Justice, Gunnar Strömmer, opens the doors of the Nordic-Baltic Regional Division.

can only register as UPC representatives upon presentation of an EPLC from any of four specifically identified universities in Europe. Before that date, "other qualification," according to Rule 12, was either successful completion of one of 13 specified courses from universities all over the EU or "having represented a party on his own without the assistance of a lawyer admitted to the relevant court." It is noted that all 83 Swedish patent attorneys who applied as "Patent Attorneys with other qualifications" have participated in one of the identified and accepted patent litigation courses.

So, what should we expect for the future of the Nordic-Baltic Regional Division?

The first decisions on infringement actions, as well as those on revocation actions, are expected by the end of 2024. As the Nordic-Baltic Regional Division is already the third most "popular" local UPC after the ones in Germany and France, it will be important to follow and study the Nordic-Baltic cases, in general, but also from an SME protection perspective. Perhaps, in the near future, the word "Nordic" in the Nordic-Baltic Regional Division will also include the two other Nordic countries: Denmark and Finland, thereby making the Nordic-Baltic Regional Division even more interesting from a general legal practice point of view.

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