

UK and the UPC: What Will Happen Post-Brexit?



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It is now around two years since the UK voted to leave the EU in a referendum, and around 9 months until it does in fact leave. Precisely how the UK will exit the EU and what arrangements will be put in place between the UK and the EU is very much still to be decided.

However, a provisional agreement has been made between the UK and EU in relation to a proposed transitional period after the UK's exit, during which the UK will comply with all current arrangements it has with the EU and adhere to EU regulations and directives, etc. This proposed transitional agreement addresses many aspects of intellectual property law that are currently harmonised across the EU, and particularly trade mark law in relation to which the UK is currently part of the EU-wide EU trade mark system operated by the European Union Intellectual Property Office under various pieces of EU legislation.

From an intellectual property perspective, one noticeable absence from the provisional agreement on the transitional period is any reference to patents or patent law. This is, of course, not unexpected since patents and patent law across Europe have no connection with the EU. Patents are either national rights granted on a national level under national law by national patent offices; or they are national rights granted on a centralised European level under the European Patent Convention (EPC) by the European Patent Office (EPO) and governed by national law after grant. In the context of Brexit, it is important to note that

neither the EPC nor the EPO are connected to the EU. The EPC is an international treaty and not a piece of EU legislation, and the EPO is an international governmental organisation and not an EU institution. Therefore, Brexit cannot have any impact on existing European patent law, nor on the effect of European Patents in the UK. This important fact was recently recognised by the President of the EPO, Benoît Battistelli, who has confirmed that "Brexit will have no impact on UK membership of the EPO. For a very simple reason - the EPO is not an EU agency but an independent international organisation, of which the UK is a founding member". Accordingly, European patent attorneys based in the UK will continue to be able to represent applicants before the EPO, even after Brexit.

One issue that has been the subject of much discussion since the Brexit referendum is its impact on the forthcoming Unified Patent Court (UPC) system, which is a proposed new international court intended to hear cases relating to European patents, including the proposed European Unitary Patent (UP). In particular, the debate has focussed on whether or not the UK can and will remain part of the UPC and UP system. Very soon after the referendum, in November 2016,

the UK government confirmed that it was proceeding with preparations to ratify the UPC Agreement (UPCA), sending a positive signal to users of the patent system during the uncertainty following the Brexit referendum. More recently, and more importantly, the UK has, as of 26 April 2018, ratified the UPCA, which leaves us waiting for only Germany to do likewise before the UPC system can start operating. As the UK is one of three states that are required to ratify in order for the UPCA to come into force, this is a significant sign that the UK intends to continue to be a part of the UPC system; after all, this gave the UK an effective veto on the currently proposed UPC system.

In some ways the UPC is similar to the EPO in that it is not an EU institution and therefore it may seem that Brexit could have no impact on the UK membership of the UPC. This is only partly true. It is correct that the UPCA is an international treaty, which is technically unrelated to the EU, but the contracting states to the UPCA are all EU member states and the UPCA contains a series of references to EU regulations and EU law, including the ultimate jurisdiction of the CJEU for certain matters. In fact, there are many provisions of the UPCA that currently require the contracting states to be EU members. In addition, the Unitary Patent itself is a patent that will exist by virtue of an EU Regulation (Regulation EU1257/2012) and there are other aspects of the UP system that are put in place via EU Regulations, such as translation requirements (Regulation EU1260/2012).

The effect of this interrelation between the UPC and the EU is that certain amendments to the UPCA would be required for the UK to continue to be a contracting state to it once it

leaves the EU. Also, to the extent that the UK intends to be a part of the UP, arrangements would need to be agreed between the UK and EU to facilitate the UK's adherence to the EU Regulations that are necessary for the UP.

As for the UPCA, the necessary amendments have already been identified. These primarily relate to uncoupling the contracting states from a requirement to be EU member states. This may sound straightforward, and indeed Alexander Ramsay, Chair of the UPC Preparatory Committee was recently quoted as saying: "Some of the wording [of the UPCA] will have to be amended after the UK leaves the EU but I would very much like Britain to participate in the UPC in the long term." However, the prospect of such amendments is likely to re-raise concerns that initially led to the UPCA being restricted to EU member states. In 2009, when both EU and non-EU Member States such as Switzerland and Turkey were potential parties to the UPCA, the European Commission requested the CJEU to give an opinion on whether such a UPCA would be compatible with EU law. The CJEU, in Opinion 1/09, held that it would not. In 2011, the European Commission stated that "as a result of Opinion 1/09 of the CJEU it appears that the participation of third countries must be excluded." The UPCA was then amended to limit participation to EU Member States only and the European Council concluded in 2011 that the removal of non-EU Member States facilitates "the respect by the UPC of Union law". The result was that Switzerland and Turkey were excluded from the UPCA when it was signed on 19 February 2013.

Intermixed with these questions is whether the UK's publicly stated Brexit stance of ending the jurisdiction of the CJEU in the UK is compatible with the UPC system, which will presumably always be subject to CJEU jurisdiction. There is one school of thought that tried to draw a distinction between UK courts being bound by the CJEU (which they will not be following Brexit), and an international patent litigation court such as the UPC, of which the UK is a part, being bound by the CJEU. There is some rationale to this distinction, particularly given that UK national patents will be unaffected by the UPC

The UK has to date been a major player in putting in place everything necessary

for the UPC system. The UK has been responsible for the UPC IT systems, and UK law has contributed significantly to the legal principles being adopted in the UPC Rules of Procedure, which themselves have been contributed to significantly by UK lawyers. UK patent law and patent judgments are well respected across Europe and the experience of the UK judges who will form part of the UPC judiciary is seen as an important factor in lending the UPC credibility from day one. As a result, there is an apparent desire across Europe for the UK to remain a part of the UPC after Brexit and an apparent desire also from the UK to do so.

Whether or not the UK can remain part of the UPC system after Brexit then becomes a political question. Despite the encouraging sounds from the UPC Preparatory Committee, is there the political will from the UPCA contracting states to amend the UPCA to enable the UK to continue its part without being an EU member state? Is the UK willing to form an agreement with the EU in respect of the relevant EU Regulations?

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system and that all international cooperation requires some form of dispute resolution institution. However, it is possibly a tricky political issue for the UK at this time.

In essence, the UK's continuing participation in the UPC is certainly possible following Brexit, though there will be some changes to its legal basis. All current indications are that such changes are likely to be made and agreed to facilitate the UK's continuing participation, which is likely to be seen as good news for the UPC system as a whole and is certainly welcomed by the UK patent profession. As and when this is enabled for post-Brexit, it may even allow other countries that are keen to join, such as Switzerland, to do just that. **LM**

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