

# Kluwer Patent Blog

## In the infamous words of The Clash – ? “Should I stay or should I go?” ?

Brian Cordery (Bristows) · Friday, June 3rd, 2016

by Claire Phipps-Jones

### ? “*This indecision’s bugging me*” ?

On 23 June 2016, UK voters will be asked “*Should the United Kingdom remain a member of the European Union or leave the European Union?*”. David Cameron has confirmed that following a vote to leave, a non-retractable notice will be served under Article 50 of the Treaty for the European Union. Following negotiation of its withdrawal agreement (or after two years, which may be extended), the EU treaties will cease to have effect and the UK will “Brexit”.

### ? “*If I go there will be trouble*” ?

In short, Brexit is unlikely to have any immediate effect on the existing system in the UK. Patentees will still be able to enjoy the choice of filing for national patents at the UKIPO or for European patents at the EPO (which is governed by a non-EU instrument, the European Patent Convention), and litigating those patents in the UK Courts.

Of course, some provisions of EU legislation currently have direct effect. In order to be maintained, and given the benefits of harmonisation of laws relating to IP and the regulatory regime, it is likely that such provisions will be transposed into national law with transitional periods. However, it is possible to envisage that, in some cases, the opportunity may be used to undertake some redrafting of legislation that is considered “broken” (for example, the SPC Regulation). In any event, it appears unlikely that a Brexit will result in significant divergence of the UK and European law.

A significant change only arises if or when the UPC opens for business.

### ? “*I’ll be here ‘til the end of time*” ?

The UK has not yet ratified the Unified Patent Court Agreement (UPCA). Following a vote to leave, while the UK legally could still ratify the agreement, it is likely to be politically untenable to do so. This is principally because the agreement requires the UK to respect the primacy of EU law and there would be a great deal of uncertainty as to what would happen when the UK subsequently had to leave the system following Brexit.

Without ratification, the UPC cannot start until (i) the UK ceases to be a member state (as its ratification is required by Article 89(1) for the UPCA to come into force) or (ii) the UPCA is renegotiated and (re-)ratified. Given the likely time period to negotiate its exit, were option (i) preferred, it would likely be a number of years before the UPC commenced, and would require the ratification of Germany, France and Italy (the then three Member States in which the highest number of European patents had effect). Of course, one would anticipate that the alternative (renegotiation of the UPCA) would also take some time.

### ? “*One day it’s fine and next it’s black*” ?

In any event, it’s almost certain that the agreement would require some amendment, as it currently states that a section of the central division is to be based in London, which seems unlikely were the UK not able to participate in the system. Given the debate prior to finalising the initial agreement, one would anticipate further conflicting views going forwards, perhaps with Milan staking a claim based on its new prominent position based on patent numbers, Munich pursuing a larger share of the central division, and the Hague seeking some of the riches having missed out first time around.

### ? “*Exactly who I’m supposed to be*” ?

Perhaps the biggest question is whether the UPC would go ahead without the UK, and if it does, what it would look like. The UK currently forms a significant portion (20-25%) of the UPC-competent market and has a formidable reputation for patent disputes. Whether the UPC will be such an attractive forum if it does not cover the sizeable UK market and does not involve the legally and technically specialised English judges and practitioners (with the exception of European Patent Attorneys) remains to be seen.

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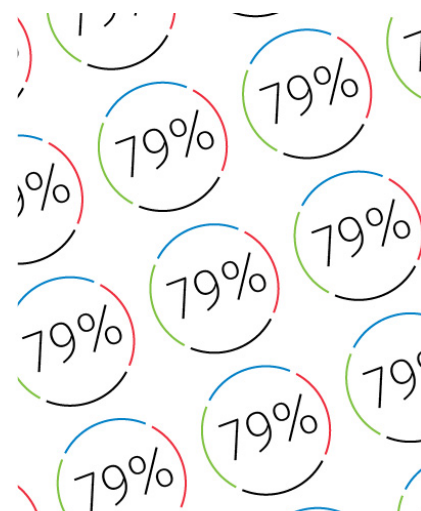
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This entry was posted on Friday, June 3rd, 2016 at 4:03 pm and is filed under [Brexit](#), [Unitary Patent](#), [United Kingdom](#), [UPC](#)

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