

Even in case of a Brexit, UK may join Unitary Patent system

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A Brexit would be harmful for Europe and a Unitary Patent system without the UK would be less appealing for Europeans as well as Americans and Asians. Most industries cannot afford that their products are only marketed in the UK and not in the other 24 UPC countries, so the system may still be quite effective, but the perception will be that it is handicapped. Besides, if a proprietor wants an injunction for the whole territory, he will have to pay for both UPC and UK litigation, which will make enforcement quite expensive. These are some of the observations of Bird & Bird Partner Wouter Pors regarding the upcoming UK referendum on EU-membership. Still, even in case of a Brexit, there could be ways to keep the UK in the Unitary Patent system, he thinks.

Some observers have said that if the 'Leave' vote wins, the UK could ratify the UPC Agreement to prevent a deadlock in the new system (as the UK is one of the obligatory signatories as long as it is an EU member). What is your view?

'Once the UK has left the EU, the UPC Agreement will enter into force as soon as it has been ratified by 13 Member States, including Germany, France and Italy, instead of the UK. A deadlock may indeed exist until the UK has actually left the EU, which might take several years, and there is no easy way out of this. Negotiating an additional protocol would also take time.

However, the UK could certainly ratify the UPC Agreement, even when it votes for a Brexit. Not to prevent the deadlock, that seems a bit too altruistic, but there may be other good reasons.



Article 50 of the Treaty on European Union provides that a Member State that decides to withdraw from the EU shall notify the European Council of its intention. An agreement setting out the arrangements for this withdrawal shall then be negotiated. The withdrawal shall take effect when the withdrawal agreement enters into force or two years after the notification. The European Council can extend the two years deadline, but that requires unanimity. Some sources in the Brexit camp have said that they first want to negotiate terms for a new cooperation with the EU before they send the notification that the UK wants to leave the EU. The clear advantage would be that there would be no two-year deadline, so it would give the UK a better position to negotiate. Of course, the EU has no means to force the UK to send in their notification.

Parliament is not and was never against ratification of the UPC Agreement. Refusing such ratification while the UK is still a full member of the EU would do political damage and would not improve the UK's position in its withdrawal negotiations with the EU. Besides, the withdrawal negotiations would of course be finalized before the UPC Agreement's (7 to 14 years) transitional period expires, so the Courts of England and Wales in the meantime would retain full jurisdiction on patent cases on traditional European patents, next to the UPC.

Scotland wants to stay in the EU as well as the UPC and actually would like to have its own local division, so they would support ratification. The only issue is whether British politicians would dare to join an EU-like system (even though it only is enhanced cooperation and the EU has no direct control over the UPC) while at the same time their general position will be that they are leaving the EU.'

Do you think the UK would try to keep its membership of the UP system, if it leaves the EU?

'There may certainly be a desire to stay within the UPC. One of the scenarios that seems to be under consideration is negotiating an extended European Economic Area Agreement, next to or as part of the withdrawal agreement. Such an agreement might include amendments to the UPC Agreement that would allow the UK to remain a Contracting Member State.

Legally this doesn't seem impossible, since the UPC Agreement is an international agreement that is independent from EU law as such. With regard to the participating EU Member States, the EU will of course not allow them to drop the provisions of articles 1 and 20 - 24 UPCA on the applicability of Union law. However, article 24(2)(b), which provides that "in the absence of directly applicable provisions of Union law or where the latter do not apply", international instruments of private international law should apply, may already provide an escape to avoid applying Union law to the UK territory after the UK has left the EU.

Of course, because of Article 20 of the [Treaty on European Union](#), the Unitary Patent could never cover the UK if they leave the EU, but the UPC might still have jurisdiction for the UK with regard to traditional European patents, if the proper amendments were made to the UPC Agreement.

Whether such negotiations are then likely to be successful is hard to predict. Obviously, the other Member States, the European Council and the European Commission will be reluctant to let the UK keep the benefits of the EU and loose the burden. That might trigger other Member States to want something similar. Therefore, the initial likely approach of the European Council will probably be quite harsh.

The UK might also try to just negotiate an amendment to the UPC Agreement that would allow it to stay a Contracting Member State. Absent any provision on this in the UPC Agreement itself, this would require the consent of all other Contracting Member States, even including Poland (which currently has no intention to ratify). This is less likely to be successful, since it would not be part of a larger package and of course the problem that Unitary Patents cannot cover the UK would remain.

Regardless of the outcome of any negotiations, once the UK has ratified, the UPC can open for business. If the UK then later on leaves the EU and the UPC, the UPC Agreement will have to be amended. Since in such case this will be a direct consequence of the UK leaving the EU and therefore of Union law, the Administrative Committee could make the necessary amendments on the basis of article 87(2) UPC Agreement.'

What will happen to the London seat of the UPC Central Division?

'Some have said that, since article 7(2) UPC Agreement provides that a section of the UPC Central Division will be in London, that could still remain the case if the UK leaves the EU. This of course is not possible. In international law, a State only has powers with regard to its own territory. Article 71a(2)(a) Brussels I Regulation provides that the UPC is a court common to several EU Member States and article 71a(1) provides that this court, when exercising its jurisdiction, shall be deemed to be a court of a Member State. Only States that are a member of the European Union qualify as a Member State under article 2(b) UPCA. There is no indication that such a court could have a seat outside the joint jurisdiction of the participating Member States.

Article 23 UPCA provides that actions of the UPC are directly attributable to each Contracting Member State, especially in view of the primacy of Union Law under article 20 and 24(1)(a) UPCA. Under article 22, the Contracting Member States are liable for infringements of Union law by the Court of Appeal. Now, if the UK would no longer be a part of the EU, but a seat of the UPC's Central Division would still be based in London, how could such liability be enforced, if the UK itself would no longer be bound to Union law? It is thus quite clear that, even though the UPCA does not specify this explicitly, a division of the UPC could never be based outside the joint territory of the Contracting Member States; that would be a violation of Union law.

Thus, the London seat of the Central Division will have to be moved. The Administrative Committee can make that decision and amend the UPCA under article 87(2) to bring it in line with Union law. Likely candidates would be Milan and The Hague.'

If the UK votes 'remain', when do you expect the UK will ratify the UPCA?

'In that case I expect the UK to complete the ratification process in the next few months. Full parliamentary approval is needed to have the Protocol come into force, which should happen no later than 1 November. The German and UK ratifications should then be deposited by December, allowing the UPC Agreement to enter into force on 1 May 2017 and the UPC itself to open the next day.'

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