

Kluwer Patent Blog

Brexit vote: 'Prepared path to Unitary Patent system might not exist anymore'

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Can the Unitary Patent system still enter into force? Is it attractive without the UK or will companies rather stick with the established patent system as in force right now? According to [Dr. Axel Walz](#), co-founder of the IP Dispute Resolution Forum (IPDR) in Munich, these topics have been discussed a lot among German colleagues after the UK vote of 23 June 2016 to leave the European Union. In an interview with Kluwer IP Law Walz said he thinks it is 'at least doubtful' whether EU law allows for the establishment of a Unitary Patent system with the inclusion of a non-EU-member.

What does the Brexit vote mean for patent protection in Europe? How bad is this?

'Obviously, the Brexit vote itself does not trigger any immediate legal impact, as the UK does not cease to be a member of the EU. But patent protection is a driving factor for future innovations and additional borders will create additional difficulties to protect intellectual property. Without the UK, the Unitary Patent system would become significantly less attractive. The United Kingdom is not only one of the most important markets in the EU, but also the third strongest EU Member State in terms of the number of patent applications. While, however, negative long term implications of the Brexit might still be mitigated by the outcome of political negotiations, the short term uncertainty is already something that innovative companies have to take into account right now.'

In an interview you said the Brexit vote might mean the end of the Unitary Patent system. Can you explain?

'First of all, the UPC Agreement has to be ratified by thirteen participating member states including the UK. In the aftermath of the Brexit vote, the UK may have very little incentive to do so without additional and complex negotiations, as the UPC Agreement indicates in Article 84 that the Unitary Patent system is exclusively available to EU Member States. Also, the two EU regulations that are responsible for the unitary effect of a patent, will not apply in the UK after the Brexit. If the UK aims to remain a member of the Unitary Patent system, new ways of extending the unitary effect to the UK as a non-member country will have to be explored and negotiated.'



Moreover, it has been agreed on that the central division of the UPC will have its seat in Paris, Munich and London. With the Brexit potentially approaching, it is still not clear whether a court with a seat in a non-EU state can actually render judgments that are enforceable in EU Member States. This questions needs careful assessment under international civil procedural law and eventually corresponding rules would need to be adapted. Should the participating EU Member States come to the conclusion that a central division shall not be located outside of the EU territory, an alternative seat to London will have to be agreed on. This could, as well, significantly influence ongoing negotiations.’

Do you see positive consequences as well? For instance, could a UP system without the UK mean that Germany will be a more important venue for patent litigation?

‘I do not think that there are positive consequences that could outweigh the negative impact of not having a UP system at all or a UP system without the UK. However, for European patent infringement lawyers, the UP system without the UK could result in more work as they will not face so much competition from UK lawyers. In the interest of European companies however, it would be preferable if the UP system can enter into force in 2017 as planned and desired.’

Scenarios are already being discussed to keep the UK in the Unitary Patent system by allowing non-EU-members in. EPO president Battistelli is a clear supporter of this option. On his blog he wrote ‘it is possible that Member States may allow the continued participation of the UK, even after the ‘Brexit’ takes effect’. What do you think of these plans?

‘At this point, every potentially beneficial scenario should be discussed and explored. However, we need to carefully assess first whether EU law, in particular Article 118 TFEU, and the CJEU Opinion 1/09, allow for the establishment of an UP system with the inclusion of a non-EU-member. It is indeed true that some argue that it would suffice that the UK ratifies the UPC Agreement while still being a EU Member State.

 However, as soon as the UK has exited the EU, the London based division of the Unified Patent Court would be a third country-court, and it is at least doubtful whether it could fulfill the necessary requirements: The CJEU, in its opinion 1/09, has required that the UP system entails a valid procedure on the basis of which the primacy of European law is guaranteed and that the Unified Patent Court divisions have to refer questions as to the interpretation of EU law to the CJEU. Also, the legal enforceability of the London based division’s decisions in EU Member States needs to be assessed thoroughly.

It is not hard to envision losing parties trying to invalidate decisions of the London central division on the grounds of an allegedly invalid legal basis and a lack of legal power of the court as such. That is all the more true as the London part of the central division is supposed to deal with patent cases in the biotech industry (i.e. including pharmaceutical and chemical patents). The value in dispute involved in these cases is typically extremely high and in view of the immense commercial value involved, respective cases are often litigated relentlessly.’

Others say it would ‘politically wrong and morally indefensible to ignore the Brexit vote and plough on with the UPC’. Or at least they say the reality of the Brexit vote and consequently a UP system without the UK should be accepted. What is your view?

‘As I said, every plausible scenario is worth exploring at this point. While I agree that the outcome of the Brexit vote has to be respected, I also believe that the decision of the UK people to leave the EU was not won in view of UPC related considerations. I therefore argue that there is still political room for negotiations to establish an efficient European patent protection and enforcement system that supports not only UK but all European companies. It would be in the UK’s interest to find a way to continue with the UP system and thereby strengthen the whole European economy. It will be interesting to see whether these interests will be pursued by the EU and the UK in the upcoming exit negotiations.

Irrespectively, parallel plans should be made for the eventual situation that the UP system needs to proceed without the UK. Even a small UP system, without the UK, provides for a better and more efficient patent protection system than the existing system.’

When do you expect it will be clear what is going to happen?

‘When we talk about the Unitary Patent system, we talk about an ongoing process that has just been stocked with a lot of new variables. The prepared path to the establishment of the UP system might not exist anymore and at the very least, the Brexit vote has shook up the existing timetable.

A lot will depend on the assessment of the UK government: Should they feel obligated to refrain from intensifying cooperation with the EU in the aftermath of the Brexit vote, we might see additional negotiations within the remaining EU members on how to replace the UK in the UP system. Should the UK signal that it would be willing to further participate in the UP system, much will depend on whether the EU will regard the UK’s participation in the UP system as cherry picking and thus not in line with the proclaimed hard stance in the Brexit negotiations.’

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