

Kluwer Patent Blog

Debate on Brexit and Unitary Patent system: 'Legal uncertainty must be avoided'

Kluwer Patent blogger · Saturday, July 23rd, 2016

One month after the UK referendum, discussion has deepened and several papers have been published about the Brexit vote and the Unitary Patent system. Is it possible to both save the system and keep the UK in?

EPO president Benoît Battistelli thinks the [best case scenario](#) would be for the UK to 'go ahead as soon as possible with the ratification of the UPC Agreement. This would allow the UK afterwards, in its EU exit negotiations, to obtain its continuous participation both in the Unified Patent Court and the Unitary Patent.' The European Patent Litigators Association EPLIT made a similar [appeal for swift UK ratification](#).

But in reaction to Battistelli's blogpost, Patent law specialist Deborah Bould of Pinsent Masons, pointed out that such a move by the UK is [politically unrealistic](#): 'This gives the UK no certainty about the future. For example, the



London seat of the UPC Central Division focussing on life sciences could be wound up on Brexit.'

The IP Federation in the UK is even more adamant. In a [position paper](#) published this week, it states that certainty regarding the future should be a prerequisite for further steps by the UK government and parliament: 'We support the Unitary Patent), and the Unified Patent Court with the UK participating on the current terms, including the location of the branch of the Central Division in London. Without a guarantee of continued UK participation post-Brexit, the UK should not ratify the UPC at present.'

We consider that ratifying the UPC to bring it into effect and subsequently being forced to leave the system would bring an unacceptable amount of uncertainty to industry across the UK and EU.'

Both Deborah Bould and the IP Federation think the Brexit vote should be a reason to consider opening up the Unitary Patent system for participation of non-EU-member states. According to Bould, 'it is a shame [that the UK is pressurized to ratify the UPCA, ed.] as the EPO could instead be leading an approach to negotiate a revised UPC Agreement allowing participation of the UK post-Brexit and potentially opening the system up to EPC contracting states more generally.' According to the IP Federation, 'the involvement of non-EU, European Patent Convention Contracting States in the UPC (e.g. Switzerland, Norway) would be a potential advantage to industry, and it may be advantageous for the UK to promote this.'

With their remarks, they touch on a crucial issue of debate since the Brexit vote (not taking into consideration the political aspects): Can the Unitary Patent package survive with the UK as only non-EU-member by making relatively small adaptations to the UPCA? Or would more rigorous changes - and subsequent severe delays for implementation of the system - be inevitable to keep a post-Brexit UK in?

EPO president Battistelli apparently thinks including just the UK is possible, and a scenario to save the system in this way was [described on this blog](#) by Bird & Bird partner Wouter Pors. But in a comment Leo Steenbeek from Philips, and [in another blogpost](#) Dr. Axel Walz of the IP Dispute Resolution Forum in Munich questioned whether this is a viable option.

The debate has left traces in the IP Federation's paper: 'Certainty is required to ensure that the UK's ratification would not threaten the validity of the UPC'. And the Institute of Professional Representatives before the European Patent Office (epi), in its 14 July Communication on the Brexit, states: 'The epi continues to support the Unitary Patent/UPC system as an attempt to further harmonize and simplify the patent system in Europe and would like to see the system to come into force. However, any solution to address the present situation of the UK should avoid to introduce additional legal uncertainties for users and affected third parties.'

Unfortunately, a month after the UK referendum, uncertainty rules. On 21 July 2016, law firm Simmons and Simmons [reported](#) a 'working party of representatives of the main UK industry and professional IP associations has been convened by its partner Kevin Mooney to consider the options. Mooney is also chairman of the Committee that prepared the draft Rules of Procedure for the UPC.

In the meantime, the plan of the UPC Preparatory Committee [to continue to progress as envisaged](#) with the work dedicated to the technical implementation pending more clarity about the consequences of the Brexit vote, has turned out to be problematic.

On 29 June 2016, less than a week after the Brexit vote, the UPC Preparatory Committee [agreed on the UPC protocol on Privileges and Immunities \(PPI\)](#), but, as has been pointed out [here](#) (in a comment) and [here](#), the protocol was only signed by Belgium, Germany, Denmark, France, Greece, Italy, Luxembourg, Malta, Netherlands,

Portugal, Sweden and Finland. 'The UK did not sign while without UK participation, it cannot enter into force.' Article 18.1 of the PPI expressly mentions the United Kingdom as one of the state parties whose approval is indispensable.

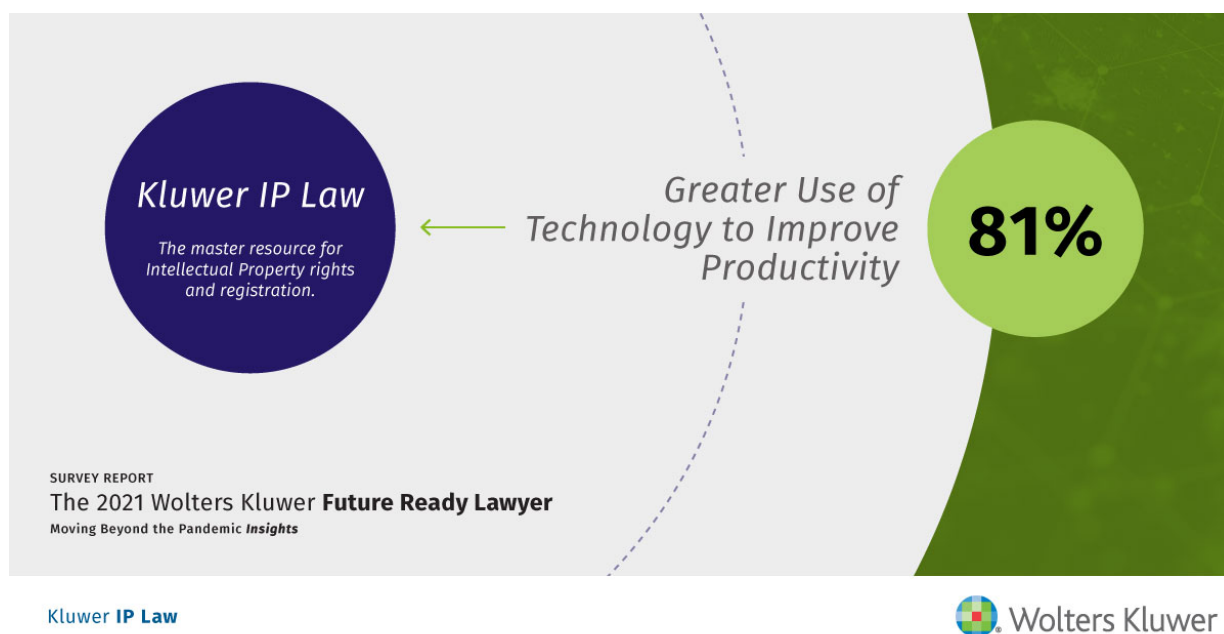
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