

Kluwer Patent Blog

The Brexit deal and what it means for the Unitary Patent system

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What does the Brexit deal, which was reached by UK Prime Minister Theresa May with the EU earlier today, mean for (the British membership of) the Unitary Patent system? How important for instance is paragraph 38 of the [Joint Paper](#), which establishes the continued involvement of the CJEU in the UK? Kluwer IP Law contacted Bristows partner Alan Johnson, who wrote this guest post. He thinks paragraph 91 on cooperation in civil and commercial matters is at least as important.

By Alan Johnson

When the UK committed to ratification in November 2016, it did so knowing very well that the CJEU had a limited role in the UPC. It rationalised correctly, however, that the UPC was an international court and that accordingly the CJEU would not have a role to play in a domestic UK court. This acceptance has meant that unless a very hard line was taken later on regarding the role of the CJEU more generally, the UK would probably be able to continue to accept the small role of union law and the CJEU in the UPC.

Since November 2016, the UK has proceeded toward ratification as it promised. Whilst some have been critical of the slow progress, there has been a consistent series of steps forward, and nothing has indicated any change of UK policy.



Also, it should not be forgotten that the UK parliament approved ratification of the UPC long before the 23 June 2016 referendum, but the UK constitution requires the UK to have passed all necessary legislation before it actually ratifies, so the hold up has been in the passage of that legislation. This is in contrast to countries such as

France where the constitution is different and allows ratification before sorting out the required legislation. France ratified early on, but has still not put in place legislation concerning the P&I Protocol. Likewise, in July 2017 the UK approved the Provisional Application Protocol (PAP), which is more than can be said for some states who have ratified, such as Austria and Malta. The fact that the UK has to do things in a different order than other countries has given a false and unfair perception of delay.

The UK's commitment toward ratification has continued even in the last two weeks (before the Joint Report published today) with significant steps being taken in signing off on the last piece of legislation, the UK Statutory Instrument enacting the Privileges & Immunities Protocol. The House of Commons signed off a few days ago and the last parliamentary part of the process will be completed on Tuesday in the House of Lords with a Motion to approve the SI. The legislation then has to be formally approved by the Privy Council. Exactly when this will happen is unclear, but only because it meets only once a month, but probably this will happen at its first meeting of 2018 in January. So the UK looks like being ready to ratify in about mid-January and could well have deposited its instrument of ratification by the end of February – before the German BVerfG is likely to give its opinion on the Stjerna challenge.

So whilst it maybe does not really affect all of this, the way I would put it is that the agreement today to accept the CJEU jurisdiction for a post-Brexit period gives increased comfort that the UK will continue its acceptance of the CJEU's limited role in the UPC and be very happy to be a part of the UPC post-Brexit.

Another thing which may not grab immediate attention, but is really significant, is the statement in paragraph 91 of the Joint Report on cooperation in civil and commercial matters. The report says: 'There was also agreement to provide legal certainty as to the circumstances under which Union law on jurisdiction, recognition and enforcement of judgements will continue to apply, and that judicial cooperation procedures should be finalised.'

This was one of the things the UK wanted: there was a statement to that effect in the [Brexit White Paper](#) (paragraph 8.19 said: 'We recognise that an effective system of civil judicial cooperation will provide certainty and protection for citizens and businesses of a stronger global UK.'). But cooperation requires agreement, so the fact that the Joint Report says what it does is important. Whilst this is not stated explicitly, it sounds as if the UK and EU agreed that the UK should continue to be bound by the Brussels Regulation, probably by something akin to the Danish model. This is critical for UPC participation since the Brussels regime is an integral part of the UPC system.

So all of this bodes well for the continued participation of the UK in the UPC. If so, London can continue as planned to host its local division and its part of the central division. These branches of the international court will be able to make references to the CJEU if necessary, just like any other part of the UPC without any difficulties. Personally I think it will be rather a rarity as I don't think the need for references will arise very often at all, but if necessary they can be made.



So the main remaining problem is one of timing. This brings us to the BVerfG. It would be really helpful if it could make its decision in early 2018 and the system could start before Brexit - at least to the extent of the PAP starting. If so, the agreement could be brought into line with the UK's new status as a non-EU country. But even if these timings do not quite work out, the main question will be one of political will. It seems that there is a will to make the UPC work with the UK inside it, not outside. So I am not too worried if there is a further delay in Germany: it would simply be frustrating that there is delay - but then we are all too used to delay in this dossier.

Finally there is the question of the Unitary Patent. This is a slightly different matter than the UPC because the UP is an EU instrument. It is not so much the extra (but still limited) role of the CJEU in the UP system which concerns me as the legal mechanism which has to be found to enable the UK to be a part of that system. This is complicated and little work seems to have been done on it. Could the UK be a part of it post-Brexit? I do not know. But even if it cannot be a part of it, that should have no effect on the UPC system. The only issue would be that the UP would provide less value for money as patentees would have to apply separately for an EP(UK) as well as a Unitary Patent and pay separate renewal fees. But the patents would still be litigated together in the UPC.

So whilst some may regard Brexit as a problem for the UPC, ever since November last year I have seen it as just a complication, and we now have greater certainty than before that the UK will be in the system at the outset and post-Brexit too.

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