

Kluwer Patent Blog

Brexit hearing: plea to open up Unitary Patent project for non EU member states

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If a Brexit agreement is reached with the European Union, the UK can stay in the Unitary Patent system during the transitional period and likely be part of the system once this comes into effect. This was argued last week by Kevin Mooney of Simmons & Simmons, who is closely involved in the creation of the Unified Patent Court.

Kevin Mooney and Stephen Jones, president of the Chartered Institute of Patent Attorneys (CIPA), gave evidence to the EU Justice Sub-Committee of the House of Lords into Brexit's effect on the plans for the Unified Patent Court and Unitary Patent ([video](#)).



Mooney: “Under the terms of the withdrawal agreement as it stands, the UK will remain a contracting member state for the whole of the transitional period [probably until the end of 2020, ed]. So our status as a contracting member state of the UPCA hasn’t changed. If the Unified Patent Court comes into effect during the transition period – the likelihood is that it can – then we will participate in the court, our judges will participate, our lawyers will participate.”

The problem will be at the end of the transitional period, Mooney explained. “There has to be mechanism for ensuring that at the end of the transition period we remain as permanent members of the UPC project. And that is what the government has committed to explore. (...)

I understand why they use the word explore because the mechanism for ensuring that, is not entirely clear. But there is the political will to do it.

A hard Brexit would complicate things, according to Mooney. “A different situation arises if there is no withdrawal agreement, because in March we will cease to be a contracting member state. The likelihood is that the UPC will come into force at the end of 2019 after we have left with no withdrawal agreement. So the challenge for the government is a different one, it will be to seek to agree with the Union and other member states a mechanism by which, as a self-contained object, we can remain in the project. I suspect that to be far more difficult.”



CIPA president Stephen Jones added that “deal or no deal, it should be possible – if we want to participate in this international court and other member states and the EU agree – it would be better that we and (...) potentially other countries, such as Switzerland, should participate in the international court. That would be to the greater good of all participants. The legal opinion [Gordon Pascoe] that we obtained, indicates that there is no legal obstacle to that as

such. If there’s a political will to do it, it can be done.”

Jones and Mooney acknowledged that there are opposite views as well. Kevin Mooney: “So far as the CJEU is concerned, there are academic views to say that it is impossible for a non EU member state to participate in this project. And I believe that you refer to the opinions from German academics last week [Matthias Lamping and Hanns Ullrich of the Max Planck Institute, [paper](#)]. They take the view that it’s not possible. They take 170 pages to express their view. If it were a simple matter that only EU member states can participate, I wouldn’t expect to have to read 170 pages.”

According to both Mooney and Jones, changes to the UP system in order to incorporate a post-Brexit UK, should open the door for participation of other non EU member states as well. Jones: “Now we think that actually it shouldn’t just be the UK. It would be extremely useful and advantageous to everybody, including British businesses, if the UPC also included countries like Switzerland.”

If the UK doesn’t participate, the damage will be very considerable, according to Stephen Jones: “It would lessen the effectiveness of the court and there would be less confidence in the court as a tribunal, because the addition of the UK judges and the expertise they have will actually be beneficial to that institution and the UK gains benefit from that.

Kevin Mooney: “There are people who are really quite angry because there is a severe risk that the UP project will fail if the UK – with its judges and their influence and the economic contribution towards the budget of the court, which is not inconsiderable – doesn’t participate. My personal view is that there is a real risk it won’t go ahead, and that would be a tragedy.”



Still, Mooney has hope the UK can participate, despite the Brexit and further complications caused by the German Constitutional challenge against the Unitary Patent system. “It has been very disappointing that that has delayed the court coming into effect. The rumours that I heard (...) are that we can..., we hope to expect a decision in December and that it is likely to be favourable. I stress they are rumours, gossip, nothing concrete from the court. But if that were to happen, (...) the timetable for the court coming into effect could begin, and I believe the court could come into existence at the end of next year.”

In this scenario, the UK would be in the Unitary Patent system at its start – at least if there is a Brexit withdrawal agreement. But what will happen next? If no solution is found to keep the UK in the system once it has ceased to become an EU member state?

Mooney: “(...) if we have to come out after the court has come into existence, then we get in a very interesting situation. The court is in existence, we have participated, but we’re no longer a contracting member state. I really don’t know what’s going to happen, the UK could voluntary withdraw, or (...) the Commission could compel the other states to force us out. Neither is a very attractive prospect.”

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