

# 'Deal or no deal, UK cannot stay in the Unitary Patent system post-Brexit'

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While the UK is holding its breath ahead of Parliament's vote on the Brexit deal, many patent specialists think a 'no deal' will be a fatal blow for the UK's ambition to stay in the Unitary Patent system. But according to Alfonso Sabán, attorney at law and political scientist in Madrid, it is obvious that, deal or no deal, the UK cannot stay in the UP system post-Brexit. He thinks the exceptional position of Spain, which has always refused to be part of the system, is something totally different. Kluwer IP Law interviewed Sabán. *You think it is obvious that the UK can no longer be member of the Unitary Patent system once it has left the EU. Can you explain?*

'From the very first moment, being a member of the European Union was a strict requirement to take part in the project. It is obvious that said requirement was intended to address "current members" and "future members" of the EU, as any other Agreement may do, but certainly not "former members". Saying that the UK can still be a member of the UPC Agreement because it was an EU member at the beginning of the negotiations - even though it is not an EU member anymore - is, in my humble opinion, complete nonsense. Law doesn't work like that.'



*In a recent article, you said it would create a "catastrophic precedent" to make an exception for the UK. Why do you think quite a few supporters of the UP system argue to the contrary, and say there are possibilities for the UK to remain in the system?*

'Because they give a proactive and pragmatic interpretation of the Agreement. And they might even be right, in strict terms of practicality and strategy. The UPC makes less sense without the UK and these people do not want the whole project to fall apart because of Brexit, which is a threat that we are facing. But any EU experts with a certain degree of rigour know that this is not a strong line of argumentation. Again: none of us (or maybe a few, among which I don't find myself) wanted Brexit, and we did not want it exactly because of reasons such as this. But now we have to act in accordance with the current situation, and never lose sight of the future. What may be done now will bind the EU if new problems arise in the future.'

*Do you think the UP system can survive without the UK? If so, what should happen with the central division court which is envisaged for London?*

'The UP system, just like the EU as a whole and many of its agreements, can evidently survive and work well without the UK. Of course losing the UK devalues any possible agreements and systems, because of the UK's size, economic strength and political relevance. The UP is no exception to this. But we are talking here about 26 EU Member States, and perhaps some more to join in future. The world doesn't begin nor end at the English Channel.'

*Having a central division court in London, should the UK finally be a part of the UP system - and even if it is, not being a part of the EU - is an idea that only politicians could have come up with. However, I would enjoy seeing the UPC judges show their EU passports when entering the court room.'*

*Spain has a special position itself: it has never wanted to join the UP system, it opposed the enhanced cooperation structure. I have understood you think it had very good reasons for that. But if Spain can be an exception, why not the UK post-Brexit?*

'Spain did not take part in the UP system using its legitimate right to stay out of the Agreement. Spain has always acted within the EU rules and has not attempted to avoid or twist them whatsoever. Spain can be an exception because the EU never made it mandatory to participate in the UP system.'

Actually, the UP system was conceived as a tool for patent applicants and owners, but now it looks like the EU will slowly make it mandatory for everyone - check the Regulations on the transitional periods. It looks like the system is not that perfect after all; but now that many applicants are saying out loud that they prefer to stay within the old system, the EU, knowing what's best for everyone (irony), will make it the only way to have patent protection in Europe. But this is perhaps another issue.'



On another note, it is worth saying that the socialist group in the Spanish Parliament did promote, on 7 March 2017, a non-legislative motion in favour of joining the London Agreement and the Unitary Patent system, which obtained support from all parliamentary groups, with the exception of the conservative PP. However, since the conservative group - at that time holding the government - did not support it, although it was the only one in the Chamber, the motion was not contemplated by the government and nothing was done.'

Now, with a government having a different colour, things could hypothetically go differently. Nevertheless, the current political situation in Spain leads us to think that this is possibly the last concern of our government, and consequently nothing will be done during this parliamentary term. It will be necessary to wait and see the arithmetic coming out of 2020 elections to make any predictions.'

*What do you mean if you say it seems the EU wants to make the UP system mandatory for everyone?*

'What I mean is that the original intention of the European law makers seemed to be to have a voluntary unitary effect. Now, remaining within the unitary system happens by default, and opting out is what needs to be done actively. Furthermore, once the transitional period (which may eventually last 14 years) has ended, the Unified Patent Court will be the only court to which a judicial action may be brought. I believe it would have been better to leave the decision in the hands of the industry, and let people and companies freely decide whether they want their patents to be enforceable and/or revokable unitarily or rather nationally.'

*In a hearing before the House of Lords last October, Kevin Mooney, who is closely involved in the creation of the UP system, said it should be opened up post-Brexit for both the UK and other non EU member states. Is that a good idea? Would Spain join in that case?*

'The current worldwide flow of patent law - in general terms - aims to the homogenize offices, systems, legal frameworks; as well as enhance coordination and cooperation among offices, institutions, applicants, etc. The EU is not and cannot be an exception to this increasing trend. Anything that might be cost effective and gives legal certainty and legitimate rights to inventors and patent owners is something that we, as IP professionals, must embrace. If the EU finds a way to accommodate non EU member states in the UP agreement while being consistent with the EU legal framework, why not go for it.'

I'm not sure what Spain would do in such a scenario. The translation issue has not been solved yet and it does not look like there will be an acceptable solution for Spain any time soon. Furthermore, litigation is also an issue and might even clash with the Spanish Constitution and what it says about jurisdiction concerning intellectual property rights. The Spanish Constitution could of course be changed, but as said before, given the current political situation in my country, I don't see the Parliament opening the Pandora's box of our Constitution because of a patent matter. However, this whole issue is of course a political battle and, as such, it may have very easy solutions that we may not be thinking of right now, such as increasing agriculture aids; new fisheries agreements or Gibraltar. Who knows.'