

Kluwer Patent Blog

'The signs are ominous' for the UK's participation in the Unified Patent Court

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It's been almost four years since the United Kingdom voted to leave the European Union and debates started among patent specialists what consequences this would have for the UK's role in the Unitary Patent system. Last Friday the Brexit finally became a reality and on Monday prime minister Boris Johnson [gave a speech on the future UK relationship with the EU](#). Kluwer IP Law interviewed Luke McDonagh, senior lecturer in IP and constitutional law at City, University of London, about the latest developments.

Has Johnson's speech brought any clarity about the UK's participation in the Unitary Patent and Unified Patent Court?

"In my view it is much less likely that the UK will participate in the UPC as a result of the new government's policy. There seems to be a hard line on issues relating to the CJEU's jurisdiction, which is tethered to the UPC on EU law matters. It is still early and the UK government may soften its approach as the deadline approaches, but the signs are ominous."

Johnson has stated he doesn't accept the jurisdiction of the European Courts. Although it has often been argued this means the UK will have to leave to UP system, similar statements were made in the past by, for instance, former PM Theresa May. This didn't stop her government from approving the ratification of the UPCA. What's your impression? Is this an issue that could be the subject of negotiations?



"On the Irish border question, in Autumn 2019 Johnson essentially accepted the EU proposal on Northern Ireland remaining in the EU single market for cross-border issues - effectively creating a quasi-border in the Irish sea, putting Northern Ireland into a different economic

zone to Great Britain. This was the very same proposal that May had rejected as one that no Conservative and Unionist Prime Minister could ever accept. Yet Johnson did it – and (seemingly) got away with it. He is a better salesman than May, and has a much larger majority, so he has more ‘wiggle room’ than she had.

The UPC, however, is way down the list of pressing matters for the EU-UK Free Trade Agreement. If overall negotiations go well, the UPC might be slipped in as a positive step for judicial cooperation between the EU and UK. But if negotiations are fraught, which looks likely, the UPC will probably fall by the wayside as far as the UK is concerned.”

Johnson has called for a Canada-style free trade deal, saying the UK will return to the Withdrawal Agreement if such a deal is not reached. Can you explain what that would mean for the UK’s patent regime?

“Because of the EPC being outside of the EU legal order, there will be little change to patent grants/oppositions regardless of what trade deal the EU and UK reach. However, there may be changes to the enforcement of legal rulings (including on patents) if the UK falls outside the EU Brussels Convention/Regulation and the EFTA Lugano Convention. The UK may also choose to diverge on biotech standards if there is a very loose EU-UK legal relationship in the future. The legal regime for parallel imports and exhaustion will be in doubt.”

How good or bad, in your view, are the Brexit and Johnson’s plans for the UK’s position in the worldwide patent industry? Britain has already lost the [European Medicines Agency](#), for instance.

“The loss of the EMA was a body blow but it has generated remarkably little commentary in the UK press. The loss of the UPC life sciences division would be another blow. On the positive side of things, the new UK government has suggested it seeks to invest a greater share of GDP in R&D which would be welcome since UK R&D investment lags behind other European states. But it remains to be seen whether and how this will occur in practice.”

According to the [EU’s draft negotiating mandate](#), which was published on 3 February 2020, (point 50): “The envisaged partnership should establish an appropriate mechanism for cooperation and exchange of information between the Parties on intellectual property issues of mutual interest, such as respective approaches and processes regarding trademarks, designs and patents.” Do you think this text is problematic for the UK government? Could you explain?



Luke McDonagh

“I don’t think this is a problematic area for the UK government. The exception is Geographical Indications – if the UK signs up to a deal that recognises the EU’s GIs this would limit the ability to strike a trade deal on e.g. agricultural imports with the US. But I do not see the patents

sphere as a problematic one for EU-UK talks. It is far more challenging for UK-US talks, where the US will undoubtedly push for the UK to pay higher prices for patented drugs on the NHS, which will be controversial.”

Will Aldgate in London be the location of the UPC’s central division in charge of chemical, pharmaceutical and life science sectors, somewhere in the future?

“The building is already there and has hosted mock trials and events. Milan wants to host the division if the UK gives it up.”

Is the UP and UPC project dead?

“It is not dead - nor will the UK be the factor that kills it, as there seems to be support for the project to continue even without the UK, with Milan primed to take the UK’s central division. However, if the German Constitutional Court holds the UPC unconstitutional, then it will certainly die a death - because the UPC cannot function without German involvement. We should have clarity on this issue later this year.”

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