

# Is the Unitary Patent system worthwhile without the UK?

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Will the Unitary Patent project go ahead without the United Kingdom? According to Kevin Mooney, partner of Simmons & Simmons in London and closely involved in the creation of the Unified Patent Court, that is the biggest issue the remaining Member States will have to tackle now that the UK government has decided not to join the UP system.



Mooney heard the news Thursday morning from the IP Office in London, where the team that has been working on the creation of the UPC and UP for years had just been informed by the government.

On the phone in London, Mooney tells Kluwer IP Law he is "incredibly disappointed that the UP and UPC, which has been worked on for 12 years with great enthusiasm, which has been a lot of work and a very bumpy ride", will not be implemented in the UK. "It is especially disappointing because all of the European industry, all legal professionals and - until yesterday - also the UK government, were in favour of the Unitary Patent system."

For Kevin Mooney personally, the decision is a great deception as well. Everyone who has followed the steps toward the creation of the Unified Patent Court over the last years, has had at least one, more likely several meetings where Mooney, as Chairman of the Rules and Procedure Committee of the UPC Preparatory Committee, displayed his enthusiasm and told about the progress of the project. He was always full of confidence that despite the drawbacks, it would be a success sooner or later. "It was misplaced optimism, I'm afraid. I've devoted six years of my life to the Unified Patent Court. Over the years I've given 50 presentations about it; the only thing I had to change regularly was the expected opening date for the UPC. I never anticipated this would happen."

Not even in the last week, Mooney says. "But the current government has taken a much harder line than previous governments regarding the independence of UK courts from the Court of Justice of the European Union (CJEU). Previous governments had their 'red line' as well concerning the jurisdiction of the CJEU in Britain. But as the UPC is not a national court, they didn't consider it to cross this red line. The current government, however, has taken a very 'purist' form and argues any remote connection of the CJEU with the UK is to be prevented, ignoring the fact that the UPC is an international court."

## Germany

The biggest issue right now, according to Kevin Mooney, is whether other Member States want to go ahead with the Unitary Patent system. "There will be discussions about this over the next weeks", he expects. "Germany has a key position. If it takes the view that without the UK's involvement the UP system is much less effective and not worthwhile, it may not ratify the Unified Patent Court Agreement and everything may stop. The other possibility is - and I'd like to see that even without the UK's presence, because Europe has needed a new patent system for 50 years - that it will proceed with ratification of, first, the Protocol for Provisional Application and then the UPCA itself."

If the German government decides to go ahead with ratification, one of the obvious issues that has to be dealt with is the relocation of the London branch of the UPC's central division. "Italy has explicitly said is very interested in hosting this division, but The Netherlands and Denmark may be candidates as well", Mooney thinks.

However, it's very likely that any decision about the future of the Unitary Patent system and the Unified Patent Court will only be made after the crucial ruling of the German Federal Constitutional Court (FCC) about the complaint against the ratification of the UPCA (case 2 BvR 739/17); a ruling which is expected within the next few months. The complaint has delayed the creation of the UPC by years and could - if not dismissed - cause more delay or even mean the end of both the UP and UPC. It has been one of the many stumbling blocks for the Unitary Patent project, Mooney sighs: "Without that complaint, the UP system would already have been up and running."