

Kluwer Patent Blog

UK backs out of the Unitary Patent system – a blow, the end of it, or just tactics?

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The announcement of the UK government that it won't participate in the Unitary Patent system has sent a shock wave through the European patent community. One issue is obvious from the reactions to the UK decision: the future of the system, which had been uncertain for some time due to the Brexit and the German constitutional complaint against the UPCA, is taken for granted even less than before. And there are other questions: how should the withdrawal take shape legally? What to do with the pharmaceutical section of the UPC central division, now that it cannot be in London?

Does it make sense to proceed with the Unitary Patent system without the UK? That is the biggest issue right now, Kevin Mooney, chairman of the rules and procedure committee of the UPC Preparatory Committee [said last week in reaction to the UK withdrawal](#).



“Yes”, is argued by different patent experts in articles published on the blogs last week. Gylène Kiesel Le Cosquer, president of the CNCPI, an organisation of IP lawyers in France, told [JUVE Patent](#): “We have always said that the UPC should be with the UK. But if the UK is no longer willing to cooperate, the remaining European countries must move forward with the construction of the UPC.” Colleagues from Germany and the UK reacted in a similar way in [JUVE’s](#) article.

Bird & Bird partner Wouter Pors, a long-time supporter of the UP and UPC, told [WIPR](#) he thinks the EU and the participating member states are still determined to continue with the project: “Of course, the UPC will be less attractive without the UK, but it will still cover all the major EU member states and will, therefore, have considerable added value compared to national litigation.”

Others, however, are less adamant about the benefits of a UP system without the UK. The website [law.com](#) discussed the ‘Deep Shadow’ over the Unified Patent Court and quotes Morrison & Foerster partner Otis Littlefield as saying: “A ‘setback’ is probably an understatement at the end of the day (...). I think that could be the end of this system.”

In a reaction [below a post](#) on this blog last week, ‘Max Drei’ wrote: As a UK patent attorney in Germany, my sense is that the UPC was only seen as useful for as long as all three of the EU’s “Big Three” were committed to it.

Huge blow

“Whether there is a future for the Unitary Patent system is probably too early to say”, according to Alexander Robinson, associate at Mathys & Squire. He told Kluwer IP Law: “The official confirmation that the UK will not be part of the project is undoubtedly a huge blow given the size of the UK market and the experience and influence of its patent judges and practitioners. What happens now will depend, at least in part, on how industry perceives the value of a single patent and single court system which do not include such a significant patent market.”

In reaction to questions of Kluwer, president Koen Bijvank of the European Patent Litigators Association (EPLIT) said: “In my view the UP system would still be beneficial to users of the patent system, even if the UK did not participate. So I would welcome initiatives from the remaining member states to find a way forward. This would require modification of the current UPC Agreement and I would hope that this will not be taken as a pretext to renegotiate the entire system.”

Negotiations

Bijvank touches upon an issue that has been pointed out by other supporters – and adversaries – of the Unitary Patent project as well. The UPC Agreement will have to be adapted to the new situation, which could be a catalyst for a new, lengthy and difficult round of negotiations, in which all old issues are open for discussion again. And could even mean a new round of ratifications by Member States is necessary.

The number of states that stay out of the system, for instance, could be a reason for renewed negotiations. Important countries such as Turkey and Switzerland were excluded as non EU member states, Spain didn't join because of the language regime, Poland and the [Czech Republic](#) backed out because the UP and UPC system turned out to incur high economic costs, rather than benefits. And now one of the most important states behind the creation of the UP system, the UK, has backed out as well.

[On its website](#), the EPLIT writes that it “remains committed to support the establishment of a pan-European court for adjudicating patent disputes. Ideally, such court would have jurisdiction not only for EU states but also for other European countries, including the UK.”

Magnus Stiebe, a Swedish patent attorney who has worked in Spain for Balder for many years, made another proposal in a [comment below a post](#) on this blog: “I think that now time has finally come to implement a unitary EU patent with ENGLISH as the ONLY language. With the UK gone, what almost all of us who are remaining have in common is ENGLISH as our SECOND LANGUAGE. SO LET'S BE PRACTICAL!”

London central division to Milan, Paris?

An obvious issue to be solved is the relocation of the life sciences section of the central division, which had been allocated to London. Milan has repeatedly made clear it is very interested in housing this division; but the [Italian government doesn't seem to support this](#) – it put forward Turin as an alternative candidate – and other member states and cities may be interested as well. There is also a possibility that the entire way the central division is organized – with sections in Paris, Munich and London – will be discussed again.

Alexander Robinson: “I would not be surprised if the loss of London prompted a rethink about whether a decentralised “central” division makes sense at all.” In the JUVE Patent article, Guylène

Kiesel Le Cosquer says: “Originally, the UPC’s headquarters were to be in Paris only. The division of the UPC’s headquarters into three countries is the result of a political compromise that only dates back to 2012. (...) Therefore, personally, I think that France has to defend the return of the responsibilities of the central London division within the Paris division.”

Politics

In the meantime, what will happen with the UP system doesn’t only depend on what the patent community wants, Robinson stresses: “Ultimately, the future of the project – if it has a future after the BVerfG’s decision concerning the complaint against ratification of the UPCA – is essentially a matter of politics, and therefore inherently unpredictable. Will continuation of the UPC project in some form be seen as a desirable political outcome, for instance as a signal of EU progress after Brexit? Or, conversely, will the political price of dropping the project altogether be seen as negligible?”

Politics, rather than an absolute refusal to allow the jurisdiction of an international patent court which can refer cases to the CJEU, may even be behind the whole decision of the UK government to announce its withdrawal from the UP and UPC, according to Koen Bijvank: “Perhaps this is wishful thinking, but it is not impossible that the UK’s announcement was made only as part of the negotiations for a trade agreement with the EU. If so, there is still hope that by the end of the year the UK may change its position. I would think that any modifications to the UPC Agreement should not be made until there is absolute certainty about the position of the UK and its relationship with the EU.”



Could the UK’s announcement be a matter of tactics, as Bijvank suggests? What he brands as ‘wishful thinking’, is a point that is also made in the analysis of JUVE Patent: “Given the UK’s renewed calls for an IP chapter in any new trade deal [with the European Union], clearly patent law holds clout as a bargaining tool. As such, many lawyers say it is not the last to be heard on the matter.”

No provisions for withdrawal

Apart from the political side, there are a lot of legal questions which will have to be answered. The UK announcement that “Participating in a court that applies EU law and bound by the Court of Justice of the European Union (CJEU) is inconsistent with our aims of becoming an independent self-governing nation” does not have any legal effect. Debate has opened already, among others below posts on our blog, how the withdrawal must be arranged in practice. ‘Concerned observer’, for instance, wrote: “Can anyone explain to me how the CURRENT agreement can be amended to move the central division away from London? Revision of the UPC Agreement (to “improve the functioning of the court”) will not be possible under Article 87(1) until AFTER the later of: (i) seven years after entry into force of the UPCA; and (ii) the point in time when 2000 infringement cases have been decided by the UPC.” The UPCA doesn’t contain provisions regulating what should be done if a member state that has already ratified wants out.

From a legal perspective, Alexander Robinson points out one positive effect of the UK’s

withdrawal: “In some senses, the decision may come as a relief, providing as it does a degree of certainty. In particular, if the UPC had gone ahead with the UK as a member post-Brexit, the CJEU’s notoriously unclear Opinion 1/09 would potentially have continued to cast doubt upon the legality of including a non-EU member and I imagine that a referral to the CJEU on this point could well have arisen at some point, threatening to unravel the whole system. From that point of view, the UK’s self-exclusion may well be welcomed by at least some of those in the EU who still wish to press ahead with the project.”

The way forward will depend, of course, from another sword of Damocles that has been hanging over the UP system since March 2017, when a constitutional complaint was filed in Germany against the ratification of the UPC Agreement. The crucial ruling of the German Federal Constitutional Court (BVerfG) in the case is **expected in the next few months**. Robinson: “If the complaint is upheld, we are looking at further delays at the very least, if not cancellation of the project altogether. But we can probably expect there to be increased calls for the whole project to be revised or abandoned in any case.”

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