

Kluwer Patent Blog

'UK should postpone ratification of Unified Patent Court Agreement'

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The most sensible option for the UK is to postpone the ratification of the UPC Agreement until the 'Brexit' referendum of 23 June 2016 has been held, according to Luke McDonagh, Lecturer in IP Law at City University London. Mc Donagh told Kluwer IP Law there is nervousness in the 'very pro-EU IP Community in the UK' that the 'Leave' vote will win.

'Ratification of the Unified Patent Court (UPC) Agreement was planned this spring but since the 'Brexit' referendum will be held sooner than expected, it seems likely ratification will be delayed pending the result', according to Luke McDonagh, who wrote a [UK IPO report on the UPC system](#) in 2014.

'The UK IPO has not has not made a statement on this as yet, but it would seem to be the most sensible option, with the likely consequence of a majority favouring the 'Leave' option being that the UK would no longer participate in the Unitary Patent (UP) and the UPC. The reason for this is found in Opinion 1/09 of the European Court of Justice (CJEU), which holds that only EU member states may set up a Unified Patent Court. Post-referendum, the UK would begin negotiations to leave the EU.



Luke McDonagh

It is possible that ratification could take place prior to the referendum, especially if the opinion polls show a strong majority in favour of the 'Remain' option. This would have the advantage of speeding up the overall ratification process, as the UK (along with France and Germany) must ratify before the UPC can be fully set up. However, this could add uncertainty to the whole ratification process, given that UK participation in the UPC/UP is unlikely to continue if the UK leaves the EU, and opinion polls can sometimes be misleading.

Interestingly, a UK lawyer I spoke to recently said to me that he thought that if the UK ratified before the 'Brexit' actually happened, then under Opinion 1/09 this might be acceptable under EU law since the UK would have been an EU member state during the setting up of the court.

However, that seems a bit of stretch. For one thing, there is a system of making referrals from the UPC to the CJEU under the Article 267 TFEU procedure in cases of EU law – including the Biotech Directive. It is difficult to see how this would work with a non-EU member state court – i.e. the UK, post-Brexit – hosting a UPC central division. Effectively, post-Brexit, that UPC

division would be the only court in the UK that would still be operating under the Art 267 procedure. So participation in the UPC post-Brexit seems very unlikely, even if it is legally possible (which it may not be!).’

What are the chances of a Brexit?

The polls current show that the most likely result is ‘Remain’ but that it will be a very close call. A ‘Leave’ vote would not be a big shock given how close the polls are.



One key thing may prove to be that in order to vote in the referendum you must qualify to vote in a UK general election. Importantly, this excludes the vast majority of EU citizens living in the UK as they only have the right to vote in local elections, not general elections. This strikes me as being very unfair to EU citizens working in the UK, many of whom have been here for decades, and it might make a crucial difference to the result.

Are IP experts in the UK getting nervous?

‘As far as I can gather, the IP community in the UK is very pro-EU. I spoke with an IP expert working at a top IP law firm in London yesterday and he told me that he and his colleagues are nervous that the UK could vote to leave. They know that London is pro-EU, but outside London this is much less the case. The UK is very London-centric in terms of business, growth and GDP, and there is resentment in some parts of the UK about the London and Brussels elite. An economist once told me that London does more business with Frankfurt than it does with the rest of the UK, so that illustrates the divide very well.’

What would the consequences be for the IP industry if Britain leaves the EU?

‘The IP industry in the UK is strong and will continue to be so regardless of whether the UK leaves the EU. However, things would certainly change. The emphasis would likely return to national matters (and in the case of patents, national patents and the current European Patent validations, rather than the forthcoming Unitary patents). The Community (EU) trademarks regime would presumably cease to apply in the UK, which would be problematic for businesses and difficult to deal with for lawyers. Overall, I suspect that leaving the EU would create more negatives than positives for UK IP law firms.’

Apart from that, many businesses utilizing the IP system would prefer to be based within the world’s biggest market – the EU – so naturally they may look at moving to e.g. Dublin or Paris. On the other hand, the UK would still be seen as a large market even if not connected to the EU, so the number of businesses leaving might be smaller than feared.’

What would it mean for the Unitary Patent system, in which Britain has such an important role to play, with its central division in London, among others?

‘The most likely scenario post-Brexit would be that the UK would cease to participate in the UPC. This is a big problem for the UK, not least since a building supposed to host the UPC has just been leased by the IPO in Aldgate, east London! Presumably, the UPC functions currently due to be hosted in the UK would be transferred to Paris, the main central division, though Amsterdam might be an option.’

What will you vote in the referendum?

‘I will certainly be voting to Remain. I am a strong supporter of reform of the EU from within. As an Irish citizen I can see the benefits of EU membership very strongly, despite all its flaws. I also think being part of the EU has been good for the UK, and I hope the voters agree with me!’

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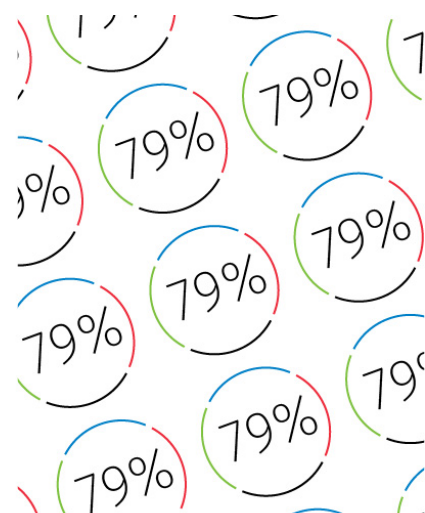
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