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Brexit? Relocation of new patent court from London to Brussels?

Jan-Diederik Lindemans (Crowell & Moring) · Thursday, April 7th, 2016

The UK IPO (the British bureau for intellectual property) recently made clear to various stakeholders that the proceedings for British approval of the agreement on a Unified Patent Court, better known as the “UPC Agreement”) continue. The UK IPO mentioned however that the UPC Agreement will probably be voted upon only after the British EU referendum. The importance of the Unified Patent Court can hardly be overestimated. Just one decision of this court will open or close a market of approximately 500 million consumers for a company that either does or does not infringe a patent.

If the British vote to leave the European Union, various interesting, but also very difficult, legal and practical questions will arise, these will also relate to the UPC. It is not my intention here to go into the question of whether it would nonetheless still make sense for the British to approve the UPC Agreement or whether a UPC that is not competent for the United Kingdom would make any sense at all. I only address the following question: knowing that the UPC will have three central divisions (Munich, Paris and London), to where should the central division of the UPC, currently foreseen for London, be moved in case of a Brexit? The attentive reader will have immediately understood from this question that it is based on the assumption that if there is a Brexit there can be no UPC central division in London. There are however various (mainly British) authors who argue that nothing would prevent London keeping its central division. In theory this is correct, but in practice it seems to me to be wishful thinking. The decision of where to place the three central divisions was a politically sensitive one – the Netherlands and Germany, for example, were left feeling deprived. If the British leave the EU and, as a consequence, the UPC system as it currently stands, it can be assumed that there will be fierce lobbying by several UPC contracting parties to take the central division away from London. Apart from the prestige, there are of course enormous economic benefits attached to the choice of a possible successor for London (real estate, jobs, suppliers, hospitality, etc.) According to some studies this economic benefit could amount to some 200 million euro a year).

Perhaps contrary to what seems to be the case, Brussels should not be overlooked as a new home for this central division. There are, after all, several good arguments in its favor, like its geographic location and international accessibility. The centers of London, Paris and Amsterdam are for instance only a short train ride away from the European capital. The fact that Brussels is already home to certain European institutions is often used by various EU member states as an argument to put their own cities before Brussels as a candidate. Although this observation is correct, it in fact makes Brussels an obvious choice as ‘experienced expert’. The Dutch might counter this argument

by pointing out that The Hague, with its European Patent Bureau division as a clear example, is also home to different international organizations. However, be that as it may, this does not by itself make The Hague a more suitable location than Brussels, as will be discussed later on. Germany could argue that they should at least have the choice to switch the ‘life sciences, chemistry and metallurgy’ powers from London for the ‘industrial engineering’ powers which were awarded to them. On the face of it, this is a reasonable argument. However, this switch would be rather unhelpful. After all, London received the central division because it is an important center for the pharmaceutical industry. Not only as regards classic patent litigation, but also because the European Medicines Agency (“EMA”) is located there. The decision of where to relocate the EMA in case of a Brexit will no doubt play a role in the relocation of the London central division, or the other way around. Just as is the case for this central division, the relocation of the EMA to Brussels seems to be an obvious choice. Additionally, it could also be argued that Brussels has the necessary infrastructure for accommodating both the UPC central division and all the parties who will work for or with this division. One should not lose sight of the fact that Brussels boasts an international and highly educated professional population, most of which is extremely proficient in both English and French. Moreover, certainly as regards infrastructure, Brussels is cheaper than other obvious locations. This is not unimportant since the UPC will financially support its own operations. Last but not least, Brussels and its surroundings form one of the largest key centers for the European pharmaceutical industry: not only administratively, but also regarding research and development (there are more clinical trials in and around Brussels than anywhere else in Europe), production, and export (1/6 of the pharmaceutical production in the EU).

It would be naive to presume that the arguments above will make Brussels the ultimate successor of London. However, it should be made clear, for example to the Belgian decision makers taking part in the negotiations regarding a possible new seat for the London central division, that Brussels is at least equally attractive as a candidate as any other European city with the ambition to have the central division on its territory.

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