

Kluwer Patent Blog

Brexit referendum shock – what will be of the Unitary Patent system?

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With many others, the European IP community is in shock after yesterday's UK referendum. Though polls had indicated it was impossible to predict whether 'Remain' or 'Leave' would prevail, somehow it was difficult to believe the UK would really turn its back on the European Union.

For European patent specialists, it is hard to accept that the Brexit vote deals a blow to the Unitary Patent system, which should have started functioning next year. It will be delayed and weakened by the vote for a Brexit, as the UK cannot stay in the system if it is not an EU member. Some reactions on the outcome and views of what should happen as gathered by Kluwer IP Law:

'It is a black day for Europe and the UK, but certainly a black day for innovative companies with European patents. A lot of people have invested tremendous time and energy in the last six years in order to make the Unitary Patent and the Unified Patent Court happen. The whole purpose of the Unitary Patent is to have a cost-efficient patent with a broad EU coverage. (...) Currently, e.g. UK courts and German courts have different approaches to infringement by equivalence or indirect infringement. The purpose of the UPC was to make sure that there is a real "European" case-law on these matters, instead of a patchwork of national patent case-law.

Today, it is certain that Unitary Patents shall lack an important market, being the UK. For the UPC, things are less clear. Technically, the UK can still ratify the UPC-agreement and join the UPC-system for European patents, but it is to be doubted that the EU countries shall accept that the important biotech and pharma section of the central division shall be installed in London.



Due to the political uncertainty in the UK in the upcoming months, it is to be expected that the UPC project shall be faced with a new delay to become operational. That by itself is very unfortunate because all preparations to start the UPC are in a final stage. Nevertheless, with or without the UK, it will remain important for innovative companies to have a unified court which decides about their patents in Europe. So I do hope that we keep up the good work to let the UPC become operational as soon as possible.'

Pieter Callens, Eubelius

‘(...) It is theoretically possible that the UK could, while still an EU member, ratify the UPC, enabling it to open in 2017, and it is even possible that the London branch of the Central Division could open its doors, but that all seems politically highly unlikely. If the UK takes no further part the other countries could negotiate an amended agreement, which will require agreement on the location of the work which had been destined for the London branch.

The Unitary Patent will become less attractive and the fees both for that and in the court may need review to reflect the lower values involved. It had seemed that English would be used in many UPC proceedings, that being the language of the majority of European patents (and of the majority of the available art). The Swedish/Baltic division has said it will operate in English only, for example, and yet none but the Irish (if Ireland ratifies the UPC Agreement) will have English as their mother tongue.’

Bristows

‘(...) The only option I can see which does not significantly delay the Unitary Patent is that the UK ratify the [UPC] Agreement. Rationally a case can be made for ratifying even while leaving. It is in everyone’s interest to get a cheaper and easier patent system, even if only on the mainland. However, I’m not sure how high on the political agenda this topic will remain in the UK, given the numerous other issues that need to be sorted out. Moreover, this option would transfer further sovereignty, even if only temporarily.’

Sander van Rijnsouw, DeltaPatents

(...)’ [UK] Parliament is not and was never against ratification of the UPC Agreement. Refusing such ratification while the UK is still a full member of the EU would do political damage and would not improve the UK’s position in its withdrawal negotiations with the EU. Besides, the withdrawal negotiations would of course be finalized before the UPC Agreement’s (7 to 14 years) transitional period expires, so the Courts of England and Wales in the meantime would retain full jurisdiction on patent cases on traditional European patents, next to the UPC.

Scotland wants to stay in the EU as well as the UPC and actually would like to have its own local division, so they would support ratification. The only issue is whether British politicians would dare to join an EU-like system (even though it only is enhanced cooperation and the EU has no direct control over the UPC) while at the same time their general position will be that they are leaving the EU.’

Wouter Pors, Bird & Bird

‘The Office underlines that the outcome of the referendum has no consequence on the membership of the UK to the European Patent Organisation, nor on the effect of the European Patents in the UK. Concerning the Unitary Patent and the Unified Patent Court, the Office expects that the UK and the participating Member States will find a solution as soon as possible which will allow a full implementation of these so-long awaited achievements.’

EPO president Benoît Battistelli

‘My plan – Thursday evening – was to congratulate my colleague in the UK at breakfast. That breakfast has become a last meal (or so it feels now). We’re depressed here. One, if not the, best parts of patent litigation for me – and I think many others – is that it’s the opposite of today’s results. It’s outward looking, international...European. It allows you to meet so many interesting people from all over Europe (and beyond).



The UPC promised to bring exciting times. Something fresh, something to look forward to, also especially for the ‘younger’ lawyers. For myself and my friends from Germany, Britain, France, Hungary, Austria...

I’ve seen a poll – never trust them – reflecting that those who must live with the referendum result the longest wanted to remain, i.e. the younger generation. I think a poll restricted to patent litigators would not have shown such a generational gap. They are young at heart (and mind), whatever their age may be.’

European patent litigator, the Netherlands

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