

# Kluwer Patent Blog

## 'It is unrealistic to think UK could ratify Unified Patent Court Agreement any time soon'

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The Preparatory Committee of the Unified Patent Court [reported](#) earlier this month that its work will be finished by the time of its meeting in October, and this will be its last. Due to the political reality of the Brexit vote and the legal uncertainty over its future participation in the Unitary Patent project, it is unrealistic, however, to think the UK can ratify the Unified Patent Court Agreement in the timescales envisaged before the referendum of 23 June 2016. Bristows partner Alan Johnson said this in an interview with Kluwer IP Law. He thinks the best option is to start working on an alternative system, which could include the UK and other non-EU-members such as Switzerland and maybe even bring Spain back into the system.

*How important is the report concluding that there are no legal obstacles for a post-Brexit UK to participate in the UP system?*

'There are two obstacles to UK ratification. The first is political. How can the UK government be seen to sign up to a system which gives new powers to the EU and CJEU over patent matters, including for the long term? This seems incompatible with the vote of the electorate to "take back control".

The second is legal. How sure are we that the UK could continue post-Brexit to participate – and on this bear in mind the serious consequences of the UPC and Unitary Patent system being declared unlawful? The opinion of Richard Gordon QC contributes to the debate, but that is all. It is a start. It is important to note that the opinion reaches this view "on balance". There can be no real certainty that the CJEU would actually agree. So the UK would face the very real possibility of joining the system and being ejected. Many people believe that is simply too big a risk to take, even if it were politically possible.'



Alan Johnson

*The UK has been urged to ratify the UPCA as soon as possible by the EPO, among others. You seem to think this will not happen. Why?*

‘One can understand the frustration from outside the UK (and indeed within the UK too) that this referendum vote looks like de-railing the work of the last 5, or arguably 17 years (Certainly since 2011, and arguably since 1999). We have seen a campaign recently to urge the EU Competitiveness Council to bring the project to a rapid conclusion. Some have supported this completely, such as the German Bar Association. Others such as EPLAW have taken a more measured approach, calling for work toward a more inclusive system.

I think the political reality and the huge uncertainty over the future participation of the UK just makes it unrealistic to think that the UK could really go ahead right now. It is no good just to say that everything will be ok, and you can join now and you won’t be kicked out. The UK would need more than just reassurance, helpful and well-meaning as that is. So the real question is what will happen next?’

*What should happen if the UK decides not to ratify, in your view?*

‘There are two real choices. Work together to find a solution which provides certainty that the UK can be a part of this project in the long term if that is what it wants – and accept that the UPC project will be delayed, probably until post-Brexit. Or the other states go it alone now.

The first option is far more positive. A system without the UK in it is plainly sub-optimal. So why not work on a more inclusive system? Instead of saying “everything will be alright: join now and we will sort it out”, why not just sort it out! Ok, it will cause delay, but the sub-optimal option is not going to be fast either, and anyway what is the real rush?

On the second option, is it really going to be easy to have everyone else agree where the London branch of the Central Division should be re-located? And will the re-ratification process really be much quicker second time around? It has taken over three years to get to where we have so far. Maybe it’s possible everything could be sorted out so that the UPC starts in 2018 without the UK, but I really doubt it.



And is there the political will to go down that route? Surely it is better to continue in the interim with what we have already in Europe and aim for something really better, and not just a second best system? Is a UPC without the UK even actually better than what we have right now? Some say yes, but others say it’s vital to have all three of the largest economies in the new system. And if we have a more inclusive system, maybe we can have Switzerland in it

too, and maybe even Spain might think again. That would be so much better.

It’s not a case of going back to the drawing board either. This is about putting together the suite of agreements, closely based on what we have now, and seeing how that looks. Is it legally OK – maybe get a new CJEU opinion to confirm this – and is it politically possible?’

*What does the Brexit vote mean for the recruitment of judges?*

‘The recruitment process is continuing. The training of candidate judges has continued this month in Budapest, although maybe some of those involved might now be thinking that this is no longer

such a good use of their time. But the view of the Preparatory Committee has been to continue with business as usual on this work too, at least until the end of November when the advisory committee dealing with recruitment of judges will have finished its work.'

*When do you expect clarity?*

'I doubt the UK will be rushed on this, any more than it will be rushed into giving its Article 50 notice. I am sure that the UK will do its best to announce a position as soon as it can, and maybe we will see some firm news within the coming weeks. If the answer (as I believe to be the case) is "no", or if there is a longer delay, then it is up to the other states to decide how to take matters forward. Probably some sort of mini-Diplomatic Conference among relevant ministers and negotiators would be needed to start discussions on what to do.

This brings me back to the question as to whether there is any political appetite for a system without the UK and whether instead the better approach might not be to start working immediately on putting together the agreements which would be needed to include the UK long term. We have waited a long time for a pan-European system. We had settled for a system which did not include Spain or Poland, not to mention Switzerland and the other dozen or so non-EU EPC countries, but a system without Europe's second largest economy either hardly seems pan-European to me. I sincerely hope that Brexit will provide an opportunity to go back to the original aim back in 1999 of a truly inclusive European solution.'

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