

Kluwer Patent Blog

‘UK will not have to accept the supremacy of EU law by separate agreement if it ratifies the Unified Patent Court Agreement’

Kluwer Patent blogger · Saturday, November 26th, 2016

The United Kingdom can remain a member state of the Unitary Patent (UP) system after Brexit and it will not have to accept the supremacy of EU law by separate agreement, according to [Prof Dr Ansgar Ohly of the Ludwig-Maximilians-Universität of Munich](#). He explained this in a recent lecture at the European Patent Judges‘ Forum at San Servolo, Venice. Just ahead of the crucial meeting of the EU Competitiveness Council, 28 November 2016 in Brussels, where an [announcement is expected](#) about (non) participation of the UK in the future Unitary Patent system, Kluwer IP Law asked Dr Ohly how his audience viewed the future of the UP and UPC after the Brexit vote.

‘Most participating judges and lawyers seemed to agree that the UPC should be realized and that it would make great sense to realize it with the UK. This is not entirely new of course. But one of the points discussed controversially in Venice was whether the UK would have to accept the supremacy of EU law and the possibility of requesting preliminary references from the CJEU by separate agreement. I do not think so.’



Ansgar Ohly

This is clearly in contradiction with the [Opinion of Brick Court Chambers](#), which has been leading over the last months. According to the Opinion ‘the UK’s continued participation in the UPCA would require it to submit to EU law in its entirety as regards proceedings before the UPC. It would also need to sign up to an appropriate jurisdiction and enforcement regime (such as the Lugano Convention).’ Can you explain why you disagree?

‘The obligations to apply EU law in its entirety and (for the Court of Appeal) to request preliminary references from the CJEU arise from the UPCA, not from EU law. They are treaty obligations. Hence, by ratifying the CJEU the UK would accept these obligations. I do not see any need for another agreement to confirm this.

It is also important to note that even the London local division and the London section of the central division will not be UK tribunals, but integral parts of the UPC. Hence the fact that EU law becomes inapplicable in UK courts after Brexit will not affect the obligations of the UPC. The

jurisdiction of the UPC is also based on the UPCA, although I agree that, since the Brussels I Regulation will lose force in the UK after Brexit, the issue of jurisdiction and enforcement will have to be addressed.'

Another issue which has been discussed a lot since the Brexit vote, is whether the CJEU's Opinion 1/09 excludes the participation of non-EU states in the Unitary Patent system. What is your view?

'I do not think the CJEU's Opinion means that non-EU states cannot be part of the UP system. The key point of Opinion 1/09 is that the CJEU was anxious to protect the supremacy and autonomy of EU law, which were arguably put at risk by the ECPC Agreement, as it proposed at that time. In particular, the CJEU insisted that EU law would have to be applicable in its entirety, that the cooperation between the national courts and the CJEU had to be secured and that there had to be provisions on liability and responsibility for breaches of EU law. By adding the safeguards of Part I, Chapter IV, the drafters of the UPCA have accommodated these concerns. Nowhere in the opinion does the CJEU even mention the participation of non-Member States, although the participation of the EFTA states was envisaged at that time.'

What is the best way forward, legally speaking, for the UP system and the UPC?

'As you imply in your question, there is a legal and a political aspect. And obviously the question of whether to continue the UPCA with the UK is a highly political question for both sides. But legally speaking, I hope that the UK will ratify the UPCA while the UK is still an EU Member State. Once this is done, all remaining UPC issues caused by Brexit are minor and mostly technical. As we say in Germany: "Wo ein Wille ist, da ist ein Weg" – "Where there is a will, there is a way".'

What legal obstacles or problems do you see?

'I do not see any major legal obstacles. Very much as the UK will remain a party to the EPC, it can be a member state of an agreement setting up an international patent court. There would have to be some minor changes to the UPCA: the agreement would have to distinguish between contracting states and EU Member States, the effect of exhaustion would have to be extended to the UK and some details of state liability and responsibility for breaches of EU law by the UPC would need to be adjusted. But, as mentioned above: these are minor and rather technical issues.'

The legal aspects are only a part of the problem, as politics have an important role to play as well. Do you fear politics might kill the UP system?

'Well, you are asking a lawyer, not a politician. Obviously the main risks for a UPC system including the UK are political. But I hope that politicians will be sensitive to the needs of industry and patent practice, where the vast majority of actors seems to be convinced that a UPC system with the UK on board would just be economically most efficient for all participants. But if this turns out to be unfeasible, it would make sense to start the UPC with the remaining Member States. Non-Member States may get the opportunity to accede at a later stage – who knows?'

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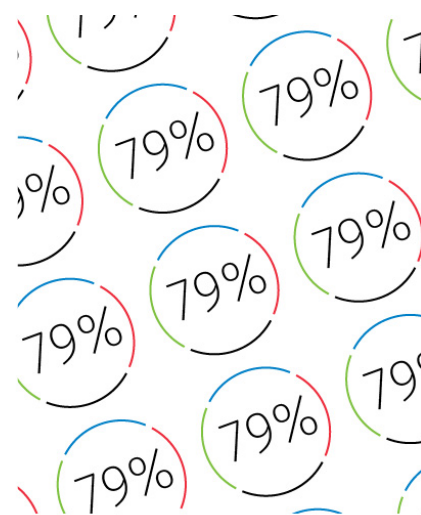
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This entry was posted on Saturday, November 26th, 2016 at 5:34 pm and is filed under [Brexit](#), [EPC](#), [European Union](#), [Unitary Patent](#), [United Kingdom](#), [UPC](#)

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