

# Kluwer Patent Blog

## Paper EP: CJEU Opinion 1/09 doesn't exclude non-EU member states from UPC

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The jurisprudence of the Court of Justice for the European Union is not excluding the possibility to allow a non-EU Member State forming part of the UPCA. This is one of the conclusions in 'EU Patent and Brexit', a research paper which was requested by the European Parliament's Committee on Legal Affairs and commissioned, overseen and published by the Policy Department for Citizens' Rights and Constitutional Affairs. [The report was published on 5 November 2019.](#)

As the abstract clarifies: 'This In-depth Analysis resumes the possible scenarios concerning several Intellectual Property provisions of EU and international law in the event of a withdrawal of the United Kingdom with or without a proper withdrawal agreement. It tries to clarify the question how Brexit may affect the entry into force of the new European Patent with Unitary effect (EPUE), especially, if the Unified Patent Court Agreement (UPCA) can enter into force, even in case the UK has withdrawn from the EU. What would be the necessary steps to be taken by the EU in order to ensure the functioning of the future European Unitary patent and in case the UPC Agreement would have to be revised because of Brexit.'

The responsible research administrator is Dr Udo BUX of the EP's Policy Department for Citizens' Rights and Constitutional Affairs, although it is not clear whether he is also the author of the report. After setting out the history and components of the Unitary Patent system, the report's third chapter discusses the question: 'Can the UK become and stay a member of the UPC?' and explains the position of the UK Government, the European Council, the European Parliament and the CJEU.

Among others the report tells: 'The position of the European Council and the contracting Member States of the UPCA on the possibility to cooperate with the UK in the framework of the UPCA is not known. One can only guess that the willingness of the Heads of State and Government will depend on the outcome of the negotiations on the Brexit. (...)

An argument against the legal possibility for the UK to be a Member of the UPCA could be the purpose of it: the 1st recital of the UPCA makes clear that the UPCA is an instrument for the benefit of the Internal Market: "CONSIDERING that cooperation amongst the Member States of the European Union in the field of patents contributes significantly to the integration process in Europe, in particular to the establishment of an internal market within the European Union characterised by the free movement of goods and services and the creation of a system ensuring that competition in the internal market is not distorted;" (...) According to Recital 14 UPCA

membership seems to be limited to EU countries. Also, the 2012 Patent package was a purely EU project, for the benefit of EU Member States and of the Internal Market and originally under the TFEU (although the UPCA happened to become an international agreement).’

About the point of view of the CJEU, particularly Opinion 1/09, the report states: ‘It is partly read so that membership of the new system is open only to EU Member States. On the other hand, there is an increase in the number of votes that want to show a right-dogmatic way of facilitating the participation of the United Kingdom (and possibly other non-EU countries in the future as well).’

The report concludes: ‘There are various scenarios for the UPCA in the case of a Brexit. It is clear that the UPCA would come in force immediately, once Germany has ratified. (...) It is also understood that a solution for the London section has to be found in case of the UK has left the UPCA – before or after its entry into force.

In case that the UK would wish to stay inside the UPCA, this pledge would have to be respected by EU Member States. On the other hand it is highly questionable that the UK itself would accept the arrangements of Article 20 and Article 21 of the UPCA which foresee the primacy of EU Law and its application being ensured by the possibility of preliminary rulings pursuant to Art. 267 TFEU, as the end of the jurisdiction of the CJEU in the UK was one of the main intentions of the whole Brexit process.

Maintaining the UK within the UPCA would need innovative legal solutions, as the UPC is an international court applying EU law – and the reason for Brexit was all about not applying EU law any more. All EU actors are of the opinion that the CJEU would have the final say about interpretation of existing EU Law, that the primacy of EU law has to be respected and that the CJEU is the ultimate guardian of EU intellectual property law. On the other hand, the jurisprudence of the CJEU is not expressly excluding the possibility to allow a non-EU Member State forming part of the UPCA.’

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