

## UPC implementation in the UK: considering the impact of the UK General Election

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### Overview

UK politics has, of late, been a source of significant discussion and debate across the world. The Brexit vote, followed by the results of General Election on 8 June 2017, has caused a period of unprecedented uncertainty across the entire political spectrum in a country otherwise renowned for its political stability. From a patent lawyer's perspective, the long-awaited commencement of the Unified Patent Court/Unitary Patent system has been at the forefront of that uncertainty. This article considers the impact that the election results might have on the UPC/UP project moving forward.

## Where we are now?

### The UK Government

Following the results of the 8 June election, what the UK has is a “Hung Parliament”. This means that the Conservative Party no longer has an overall majority of members in the UK Parliament. Without an overall majority, the Conservatives will either have to (i) form a minority government, which would mean that they could be outvoted if all other parties voted against them or, as current reports suggest, (ii) try and enter into a coalition (or “confidence and supply” arrangement) with another party in the UK Parliament, the Democratic Unionist Party (**DUP**) based in Northern Ireland. The DUP hold 10 seats and together with the Conservatives’ seats, those two parties would form an overall majority.

However, the political uncertainty that will ensue whilst any relevant power-sharing arrangements are hammered out will very likely lead to a delay in Parliamentary matters generally. Further, the wafer-thin majority that any coalition government would hold means that the UK Government’s previous plans may have to be re-thought and that it will generally take much longer for the UK Parliament to get anything done. Again, this is likely to lead to a significant delay in conducting the ordinary (e.g. law-making) business of Parliament.

### The UPC

Even before the 8 June election it was clear that, from the UK’s perspective, four steps still need to be completed before the UPC can “go live”. These are:

1. The ratification of the Unified Patent Court Agreement (UPCA) by 13 Member States including the UK, France and Germany;
2. 13 Member States including the UK, France and Germany must declare themselves bound by the UPCA’s Protocol on Provisional Application;
3. The UK Parliament must pass a Statutory Instrument (**SI**) implementing the Protocol on Privileges and Immunities of the Unified Patent Court; and
4. The Scottish Parliament must also pass a Statutory Instrument implementing the Protocol on Privileges and Immunities of the Unified Patent Court. The Scottish Parliament is a devolved institution which has the power to make its own laws governing Scotland as a separate country in certain “reserved” matters, one of which is intellectual property under the Scotland Act 1998.

As things stand, none of the above steps have been completed in their entirety (though the UK has completed step 2). Where the election could really have an impact though is on the timeline for steps 3 and 4, which in turn would hold up the UK’s ratification of the UPCA given that the UK Government cannot ratify before the two SIs have been passed by the respective national Parliaments.

## What's the timeline from here?

There are a number of reasons why approval of the necessary SIs could take some time. First and foremost, the SIs have not even been laid before the two Parliaments. In purely practical terms this is a problem. The Scottish Parliament breaks for its summer recess on 30 June 2017 and does not return until 3 September 2017. Similarly, the UK Parliament rises for summer on 21 July 2017 and does not return until 5 September 2017. In light of the election results and the political uncertainty that it entails, it seems very unlikely that the Scottish Parliament will turn its focus to the UPC in the next three weeks. Likewise, it seems unlikely (albeit more plausible than for Scotland) that the English Parliament will consider its SI before it breaks for summer in six weeks.

So, looking forward to September, when can we expect the SIs to be put before the two Parliaments and the UPCA to be ratified thereafter? We would have to say later rather than sooner. Politically, the UPC/UP project is unlikely to be high on the agenda for the new UK Government (the UPC was, for example, listed only as items 110 and 111 on "Labour's 170 questions for the Tories on Brexit" published in October last year). It may well be that the most we can realistically hope for is approval of the two SIs and ratification of the UPCA by the end of 2017.

## A more pro-European balance in the UK Parliament moving forward?

Aside from the issue of delay, the election result is not necessarily all doom and gloom for the UPC/UP project. The opposition parties, who gained significant numbers of Members of Parliament in the election, are far more pro-European in outlook. Neither Labour nor the Liberal Democrats (the two other major UK political parties) support a "hard" Brexit i.e. the UK cutting its ties with the EU and leaving with no negotiated exit deal on 29 March 2019. Indeed, the Labour Party (who are the major opposition with the second largest number of members) is against leaving the EU with no negotiated deal and favours a "softer Brexit" which involves a "strong emphasis on [the UK] retaining the benefits of the Single Market and the Customs Union". First, this suggests that the UK Government's current position that it will ratify the UPCA is unlikely to change. Second, having a more pro-EU Parliament means that the UK Government is more likely to be supported in putting in place the measures necessary for the UK to stay in the pan-European UPC/UP system post-Brexit in 2019. In particular, if the UK wishes to stay it must at least:

- Enter into various international agreements with the EU dealing with, for example, (i) amendments to the UPCA, (ii) the UK's ability to be part of the Unitary Patent, (iii) the Court of Justice of the European Union (CJEU)'s jurisdiction to accept preliminary references from UK divisions of the UPC and to hear infringement actions for breaches of EU law by those divisions;

- Accept the supremacy of EU law in a number of areas when litigating within the UPC/UP system in the UK’s divisions; and
- Come to an agreement on how to deal with international jurisdiction and enforcement within the UPC/UP system – that is, whether the UK keeps the Recast Brussels Regulation, or for example adopts some version of it where the UK essentially chooses those elements of the Brussels Regulation that it needs/wishes to keep.

Adopting such measures will, of course, still represent significant challenges politically in light of the UK’s vote to leave the EU and, even with a more pro-EU UK Parliament, there is a very significant amount that needs to be done in a short space of time if the UK is to remain part of the UPC/UP system post-Brexit. That said, taking such a course of action now is likely to be less politically controversial than previously. Even the DUP who, as mentioned above, will be the Conservatives’ likely ally for the next five years, have said that they want a “comprehensive free trade and customs agreement with the European Union” and that “no-one wants to see a ‘hard’ Brexit”. Further, it is in the interests of the DUP to remain friendly with the EU

since it wants a “soft” border between Northern Ireland and the Republic of Ireland post-Brexit.

## Conclusion

Ultimately, what the election result has done is throw further uncertainty into an already uncertain UPC/UP timetable. It is not unforeseeable that a Conservative and DUP majority government will adopt a “business as usual” approach and pass the UK Parliament SI earlier than expected. However, given the practical problems surrounding both (but in particular Scottish) Parliaments perhaps the best we can realistically hope for is for the two Parliaments to pass the relevant SIs by the end of this year, followed by a swift ratification of the UPCA by the new Conservative/DUP UK Government. However, if the past 12-months since the Brexit vote has taught UK patent lawyers anything, it’s that nothing is certain and that unexpected roadblocks (like a snap General Election followed by a Hung Parliament) may well fall in one’s way and delay matters. We will, however, be sure to provide regular updates on the timing of the UK’s approval of the SIs and ratification of the UPCA.

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