

Brexit – legal consequences for commercial parties

The long-awaited European Unitary Patent project is scheduled to go live in early 2017 – we assess the likely impact of a Brexit

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Issue in focus

The proposed Unified Patent Court (**UPC**) system and the associated Unitary Patent will offer businesses the opportunity to obtain a single, unitary patent valid in 25 EU Member States and to enforce their European patent rights, including existing, country-specific European patents, on a pan-European basis. Single UPC judgments will potentially cover all the 25 participating Member States. The UK is a participating Member State and has been one of the major drivers of this project, which offers an easier, more cost-effective and streamlined way to protect and exploit patent rights in Europe. A Brexit would put an end to the UK's involvement, with the result that the new Unitary Patent would not cover the UK, and UPC judgments would not extend to UK patents – a separate judgment would need to be obtained to cover UK patents.

This article is one of a series of specialist Allen & Overy papers on Brexit. To read these papers as they become available, please visit: www.allenovery.com/brexit.

Analysis

What would the immediate fall-out from Brexit be?

The UK has been a major participant in the UPC project and is looking forward to hosting one of its three central

division courts. UK IP Minister Baroness Neville-Rolfe has indicated that there are no plans to delay UK ratification of the UPC Agreement until after the referendum on EU membership, which may be held as early as June 2016. An “out” vote in the referendum must, however, result in the UK’s withdrawal from the Unitary Patent system as non-EU Member States cannot participate. The UPC Agreement makes no provision for what would happen to the London Central Division of the Court in this event. Some have speculated that it might be moved to the Netherlands, others that it might even stay in London, although English judges would presumably be unable to apply as only nationals of the UPC Member States can act as judges.



Does the UPC need the UK?

There is no reason why the UPC package could not work reasonably well without the UK, although perhaps it would be necessary to reduce the fees to take account of the fact that a major patent jurisdiction is no longer included. The absence of the UK's experienced patent judges might be felt. As the UK economy is one of the three largest in the EU, and it has long been regarded as a major patent jurisdiction, the absence of the UK is bound to diminish the value of the Unitary Patent itself. The loss of the UK in addition to Spain (which has not joined) may also make the system feel less like a comprehensive European system, reducing the convenience for international business. The absence of the major common law jurisdiction might also make some patentees from other common law systems less enthusiastic about using it, and any move towards making the English language less dominant could be unpopular (though this seems unlikely). However, although the need to obtain a separate patent for the UK will always be an inconvenience, it is hard to imagine that it will be important enough to make patentees go back to the old, fragmented system in relation to the remaining 24 UPC countries too.

Does the UK need the UPC?

In the event of Brexit the UK will continue to participate in the European Patent Convention (**EPC**), but European Patents (UK) will be litigated only before the national courts, not before the UPC. A patent judgment from the English High Court generally commands respect in other countries, and litigants value the speed with which English courts operate (if not always the expense). Currently, a judgment from the UK courts can provide an important impetus for settlement of international disputes in both the US and in Europe. It is quite possible, however, that the standing of an English Patents Court judgment internationally will diminish compared to a UPC judgment, which would represent the position in most of Europe. The UK is likely to become a less popular patent forum.

Furthermore, patents within the UPC system will be subject to the UPC Court of Appeal's judgments so that a consistent body of patent law will develop. This will apply not only to Unitary Patents but also, eventually, to all classic European patents in the Member States

participating in the UPC. If the UK Brexits it will stand outside this development. UK patent law may well diverge.

The wider picture –the post Brexit IP world

There is a wider point here about the UK's participation in European moves to harmonise intellectual property rights generally. The importance of harmonisation can hardly be over-estimated: intellectual property is invisible and only exists on a global scale because of common definitions and understandings. Provided it is sensibly done, the more harmonisation there is, the easier it is for international businesses to understand and commercialise these rights, to provide services across borders and to settle disputes involving IP. Although internationally there is a measure of harmonisation through international agreements such as TRIPs, this is much less specific and of less direct relevance to business than EU harmonisation measures have been.

In addition to unitary, pan-European rights such as the Community Trade Mark or Unitary Patent, the European Union has achieved significant European harmonisation in IP fields by means of directly applicable regulations as well as directives implemented into national laws.

There has been relatively little such EU harmonisation in the patent field, but some aspects are harmonised, an example being the Biotechnology Directive. The IP Enforcement Directive, which requires the EU Member States to provide a minimum level of enforcement for IP, including evidence-gathering measures that are crucial in proving infringement, is also very relevant in the patent field. The UK also participates in the EU regime on Supplementary Protection Certificates, which is crucial to life sciences companies.

English lawyers may sometimes resent the passing of well-loved "English" ways of doing things, and complain that harmonisation at EU level could frankly have been better designed. In many cases, however, harmonisation is a necessity for global commerce. The extent to which the UK would continue to participate in such harmonisation post Brexit may depend on how it exited. If it were to be part of EFTA and the European Economic Area (like Norway) it seems that many such present and future harmonising directives and regulations would continue to apply, though the UK

would have less opportunities to shape them. Similarly, it seems the UK would be able to participate in the EU regime on Supplementary Protection Certificates. However, membership of the EEA would involve agreeing to the four fundamental EU freedoms of free movement of goods, capital, services and people, the last of which may be unacceptable to a UK government. EEA members would presumably also have to agree to these arrangements. Alternatives involve varying types of bespoke bilateral agreements, the content of which is less predictable.

Interacting with the UPC and other EU patent courts from the ‘outside’

Upon Brexit, it may be possible for the UK to participate in the UPC Agreement by way of a bespoke bilateral or multi-lateral agreement with the EU and participating Member States. The timing, procedure, terms and political appetite for that are, however, wholly uncertain.

It may also be possible for the UK to continue as a member of the Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. This Convention largely mirrors the EU’s Brussels Regulation, excluding certain more recent amendments, and applies between the EU, Norway, Iceland and Switzerland (the EFTA states). Participation in Lugano could be important in trying to maintain the popularity of London as a court venue for IP disputes after Brexit, because it would provide for the enforcement of English judgments in other European jurisdictions. Potentially, it might also form a jurisdictional basis for English courts to grant preliminary cross-border European injunctions, although

they have been very reluctant to do this in the past. However, there is no certainty that the UK would be able to continue as a Lugano Convention member, particularly if it did not join the EEA (see above). In that event it would have to fall back on trying to agree bilateral jurisdiction agreements or rely on reciprocity under national law, a potentially uncertain exercise.

Does it matter?

We believe it is important for the UK to be part of the UPC, because the UPC will make things simpler for business by providing for a more consistent European patent law that is easier to enforce and to commercialise. This will contribute to making the UK a more attractive place for international companies to do business. If the UK is not a member of the UPC, separate judgments will need to be obtained in relation to UK patents and the new Unitary Patent will not cover the UK. The UPC system will also make it easier for UK businesses to enforce their patent rights in Europe, including the UK – it might be described as a “one stop shop” for patent enforcement across 25 Member States. In addition, [surveys confirm that there is significant buy-in to the new system by UK and global businesses](#).

A similar point applies to other European initiatives to harmonise in the intellectual property field: provided it is sensibly done, harmonisation leads to simplification of the complex web of different national IP rules that may constitute a hindrance to global business. The UK may exclude itself from this if it Brexit.

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Allen & Overy has advised and supported clients on all of the major financial crisis issues arising since 2008 which involved a potential EU exit, including the Cypriot and Greek crises. We also considered and commented on the issues arising in the context of the Scottish independence referendum in 2014.

We have high level contacts at the European Commission, the Parliament and the UK Ministry of Justice and regularly make representations to these bodies on matters of concern to our clients, both in response to formal consultations and on an informal basis. Further, a number of our partners and counsel are members of external committees with a role in influencing legislative change.

If you would like to discuss the issues raised in this paper in more detail, please contact of [Allen & Overy's UPC team](#) or your usual A&O contact.



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