



Is the UPC Brexit-proof?

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The UK's vote to leave the EU in a so-called Brexit referendum has triggered the question of whether the Unified Patent Court (UPC) project is dead or not. The short answer is: it is too early to take a stance. The longer answer shows why that is.

Political will

First, the success of the UPC project depends on the political will to pursue it. Many other topics will be high on the political agenda, so the UPC may not be at the top of the pile. On the other hand, the wasted investment in the UPC should it not be realised creates an incentive to go on with the project after all.

Different legal views

Secondly, there are different legal views as to whether the UPC is 'Brexit-proof'. Some refer to the UPC Agreement (UPCA) which states in Article 84 that only Member States can ratify the UPCA. They say that as long as the UK is a Member State it can ratify. After the UK triggers Article 50 of the Lisbon Treaty, it will take at least two years, and likely some additional months, before a Brexit will be reality. And since the UPCA does not hold a provision covering an exit, Brexit will not automatically kick the UK out of the UPC. At least - still according to this view - provided that the UK is able to and would acknowledge the supremacy of EU law (Article 267 TFEU).

There are others who doubt that the UK can participate in the UPC after a Brexit. They point to the Opinion 01/09 of the CJEU essentially saying that only courts of EU Member States can have jurisdiction in a UPC system, and to the fact that, in order to meet Opinion 01/09, Article 84 UPCA has been redrafted explicitly to stipulate that only Member States can ratify. The UK could perhaps ratify the UPCA and then withdraw, but there would need to be cogent reasons for it to do so.

Another legal complication

Thirdly, there is a possible legal complication, in that according to Article 89 UPCA, the UPCA will enter into force only after it has been ratified by the three Member States in which the highest number of European patents had effect in the year preceding the signature of the UPCA. Since next to Germany and France, the UK is among those three Member States, the UPCA cannot enter into force without ratification by the UK. This might be different if one disregards the UK retroactively. In that case, the third Member State is Italy. Another solution suggested to solve this problem is to amend Article 89 UPCA (although that will need time).

Still appealing for industry?

Last but not least a decisive factor in going forward with the UPC project is whether the potential users of the system - industry - still want to adopt it without the UK. Is it sufficiently attractive if one of the key jurisdictions does not participate? Might the Brexit uncertainties be too much next to the existing uncertainties including the opt-out regime, the language of

the proceedings, the quality of the judges and the availability of preliminary injunctions?

It could be more alive

It is too early to make any meaningful statements on what will happen with the UPC in a post-Brexit era. The international patent litigation group of DLA Piper, however, will continue monitoring the situation and keep you posted. Although the UPC is not dead, it could be more alive.

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