



The Unified Patent Court after Brexit

UK has announced not to apply the Agreement on the UPC¹

On February 27, 2020 the UK published "[The UK's Approach to Negotiations](#)²." In this 30 pages government report, Patents Policy or the Unified Patent Court agreement (UPCA), which the UK had ratified on April 26, 2018³ is not mentioned. Addressing the judicial oversight of the European Court of Justice (CJEU), point 5 of the "Approach" (Introduction, p. 3) points out that: "...the Government will not negotiate any arrangement in which the UK does not have control of its own laws and political life. That means that we

will not agree to any obligations for our laws to be aligned with the EU's, or for the EU's institutions, **including the Court of Justice, to have any jurisdiction in the UK.**" Following that announcement, specialized Intellectual property magazines and Blogs report that they received written confirmation from a UK government spokesperson on February 28, 2020 that stated: "I can confirm that **the UK will not be seeking involvement in the UP/UPC system.** Participating in a court that applies EU law and bound by the CJEU is inconsistent with our aims of becoming an independent self-governing nation."⁴ This would mean a U-turn by the Johnson Administration compared to the May Administration which always had stuck to the UPCA, even in the event of Brexit and **Great Britain had ratified UPCA in 2018 when she was Prime Minister**⁵. Not to forget that **Article 7 UPCA determines London as one of the three sections of UPC.** Normally the achievement of Brexit on 31 December 2020 should not have any effect on the entry into force of EPUE, but in case that the UK would officially notify of its withdrawal, the situation could be different.

Logo UPC



Source: www.unified-patent-court.org/

State of play of ratification of the UPCA

The UPCA is an international treaty which creates a specialised patent court (the [UPC](#)) with exclusive jurisdiction for litigation relating to European patents and European patents with unitary effect (EPUE). It was signed on 19 February 2013 and will enter into force as soon as 13 states, which must include France, Germany and the United Kingdom, have ratified it. UK has ratified UPCA in April 2018, so did France and 14 other Member States. Concerning **Germany, ratification is pending because a constitutional complaint** was lodged on March 2017. The complaint and Temporary restraining order by an individual addressed the operation of UPC and independence of the judiciary in the context of German Federal Fundamental Law. Judgement is now on the agenda for final decision of the Constitutional Court quarter of 2020. However, questions of European law could still be referred to the CJEU for preliminary ruling according to Art. 267 TFEU. Because of those legal uncertainties the Federal President has stopped the ratification process by putting aside certification and publication of the federal law implementing the UPCA already voted in both chambers of parliament. This raises the question of whether a **ratification by Germany occurring after Brexit** could still trigger the entry into force of UPCA. Until now, it was still conceivable to accept that UK (a EU Member State at the time of its own ratification 2018) to change its legal regime by allowing it to continue to participate in an international agreement like the UPCA. But with the recent announcements by the Johnson administration, the situation might have changed again, as it might be necessary to amend the UPCA concerning the London section.

Role of the Court of Justice (CJEU) in the UPCA

The **European patent with unitary effect (EPUE)**, is a new type of "European" patent not yet in force which will be valid in participating EU Member States. It will be granted through a mix of EU regulations, the UPCA, the European Patent Convention (EPC), other international agreements (WIPO) applicable to patents and binding on all the Contracting Member States and national law (Article 24 of the UPC Agreement). The CJEU has an important role in the UPC as the ultimate arbiter of EU law, because Article 20 of the agreement specifically states that the UPC "shall apply Union law in its entirety and shall respect its primacy". Article 21 UPCA states that the **UPC shall cooperate -especially by requesting preliminar rulings- with the CJEU** in Luxembourg to ensure correct application and uniform



interpretation of EU law and that **decisions of the CJEU shall be binding on the UPC**. Thus, being part of this system would have meant the UK accepting that EU law takes ultimately precedence over UK law in patent related matters.

Consequences of Brexit on the UPCA⁶

At this stage (March 2020) the following facts should be remembered:

- The UPC Agreement can enter into force, even after the withdrawal of the UK from the EU (after 31 January 2020, before and/or after 31 December 2020), as it is not EU law, but international law.
- It will enter into force as soon as 13 states, which must include France, Germany and the United Kingdom, have ratified it. As the UK and 15 other member states have ratified, it could enter into force.
- As long as it has not been ratified by Germany (the country with by far the most pending and valid patents, Art. 89.1 UPCA), it can not enter into force. Would the withdrawal of the UK from the UCA occur before its entry into force, the country with the most patents in force would be Italy.
- The UK governments assessment of the situation where the **CJEU ultimately oversees EU patent law and British individuals and UK authorities will be bound by the CJEU jurisprudence** is correct and such a situation would be inconsistent with what Brexit has been all about; “to take back control”.
- there is no doubt that the **UK remains signatory state of the European Patent Convention⁷** (EPC), agreed in 1973 (and revised in 2000⁸). The membership (38 contracting states) of the EPC, **an international agreement distinct from EU Law**, extends beyond the membership of the EU.
- In any case, without the UK, the entire EPUE system will be less attractive to use, an inevitable consequence of a G8 economy, with 330 000 patents in force, no longer being a part of UPCA. British lawyers who do not have audience rights in an EU member state will possibly not be able to represent clients at the UPC and UK judges will not sit on the benches of the UPC.

On the other hand, some consequences remain open and ultimately need a political decision:

- The announcement by British government sources that “*the UK will not be seeking involvement in the UP/UPC system.*” has added an additional layer of complexity to the matter, because as long as the UK has not officially taken back its signature under the UPCA, it is not clear if UPCA can enter into force at all, because of the issue of the London section.
- In case that the UK wanted to quit the UPCA, the section of the Central Division of the UPC with responsibility for life sciences, chemistry and metallurgy⁹ cases with seat in London, will have to be moved. **The London section would not be replaced automatically** with another seat, as this would need an amendment of the UPCA by unanimous agreement of all other Contracting Member States.
- Once the UK withdrawn from the UPCA, the three Member States with the highest number of European patents in force in 2012 (see Article 89.1 UPCA) would be Germany (414 754), France (336 434) and Italy (190 000). The problem is that Italy was not a signatory state in 2012 as it did not participate because of the restricted three language regime. It only acceded later and ratified the UPCA in February 2017.

¹ Draft Agreement on a Unified Patent Court, OJ C 175, 20.6.2013, p. 1–40.

² The Future Relationship with the EU - The UK's Approach to Negotiations, London, February 2020

³ <https://www.consilium.europa.eu/en/documents-publications/treaties-agreements/agreement/?id=2013001&DocLanguage=en>

⁴ <https://www.iam-media.com/law-policy/uk-no-upc>; <https://ipkitten.blogspot.com/2020/02/breaking-news-uk-will-not-participate.html>; <https://www.intellectualpropertymagazine.com/patent/upc-to-address-uk-after-german-ratification-139936.htm>; <https://www.juve-patent.com/news-and-stories/legal-commentary/what-now-for-upc-dismay-as-uk-government-rejects-participation>;

⁵ “Patent law: Theresa May's new Brexit battlefield”, <https://www.politics.co.uk/blogs/2017/02/28/patent-law-theresa-may-s-new-brexite-battlefield>

⁶ Bux, U., EU Patent and Brexit, p.15.

[https://www.europarl.europa.eu/RegData/etudes/IDAN/2019/596800/IPOL_IDA\(2019\)596800_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2019/596800/IPOL_IDA(2019)596800_EN.pdf)

⁷ Convention on the Grant of European Patents (European Patent Convention) of 5 October 1973 as revised by the Act revising Article 63 EPC of 17 December 1991 and the Act revising the EPC of 29 November 2000.

⁸ O.J. EPO 2001, Special edition No. 4, p. 55.

⁹ Article 7 UPCA and its Annex II.

Disclaimer and copyright. The opinions expressed in this document are the sole responsibility of the authors and do not necessarily represent the official position of the European Parliament. Reproduction and translation for non-commercial purposes are authorised, provided the source is acknowledged and the European Parliament is given prior notice and sent a copy. © European Union, 2020. © Image used under licence from www.unified-patent-court.org/

Administrator responsible: Udo BUX Editorial assistant: Christina KATSARA -Contact: Poldep-Citizens@ep.europa.eu

This document is available on the internet at: www.europarl.europa.eu/supporting-analyses

Print ISBN 978-92-846-6454-2 | doi: 10.2861/06438 | QA-04-20-139-EN-C

PDF ISBN 978-92-846-6453-5 | doi:10.2861/621223 | QA-04-20-139-EN-N