

What does **BREXIT** mean for the **Unified Patent Court?**

A perspective from industry insiders:

- ▶ **Kevin Mooney,**
Chairman of the Drafting Committee for the Rules of
Procedure, Unified Patent Court
- ▶ **Jan-Willem Goedmakers,**
Head of Intellectual Property, Stamicarbon

Brexit & The Unified Patent Court:

How does Britains exit from the EU impact the rest of Europe?

The results have shocked Europe and the rest of the world alike; Britain has voted to leave the European Union which has left the patent industry asking ‘**what does the future hold for the Unified Patent Court?**’

The Brexit vote has created **uncertainty** amongst attorneys as Britain remains in the top 3 countries with the highest number of patent validations last year and are therefore required to ratify the UPC before its courts can take effect.

Brexit has now placed the **UPC in a state of limbo** as Britain is technically still a member of the EU until the Article 50 negotiations are complete meaning the country’s ratification is still required. This has raised further questions amongst the patent community as attorneys ask ‘**will the UK ratify the UPC agreement?**’ and if not, what will this mean for the **future of the UPC?**

To uncover answers to the key questions facing the UPC and IP professionals, Legal IQ have spoken to Kevin Mooney, the Chairman of the Drafting Committee for the Rules of Procedure from the **Unified Patent Court**, and Jan-Willem Goedmakers, the Head of Intellectual Property at **Stamicarbon** to provide their expert opinions.

During their interviews, Kevin Mooney expressed interest in the UK ratifying the UPC agreement whereas Jan-Willem Goedmakers suggested that such a result is ‘unlikely’.

Read the full interviews to gain perspectives on “both sides of the coin” in this discussion on ‘**What does Brexit mean for the future of the UPC?**’.

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What does the future hold for the UPC?

Kevin Mooney, Chairman of the Drafting Committee for the Rules of Procedure at the Unified Patent Court, spoke to Legal IQ on Brexit's impact on the UPC and whether the UK will participate.

Legal IQ

Given the restrictions for non-EU members in the proposed UPC regime, what does this mean for the UK moving forward?

Kevin Mooney

It was common belief that non-EU members cannot be a part of the UPC project following the opinion of the CJEU (1/09) however, different legal opinions have now emerged. It is believed by some that non-EU members could now participate within the UPC and there is strong opinion that the UK should in fact be a part of the project. If the UK were to ratify the agreement, it could participate within the UPC whilst being a non-EU member can be explored. The UPC could go ahead without the UK but this would require renegotiation.

LIQ

Can the UK participate in the UPC while Article 50 negotiations are taking place? Do you think such a scenario is politically possibly?

KM

Strictly speaking, yes, the UK could participate whilst Article 50 negotiations are taking place but only if the UK were to ratify. The issue is whether the UK government will in fact ratify despite the EU vote. Ratifying this non-EU treaty will not affect the Brexit vote, rather it is key that the UK ratifies as this will provide the opportunity for non-EU countries to explore participation.



Kevin Mooney

Kevin specialises in contentious and non-contentious intellectual property matters, focusing specifically on patent litigation, especially in the pharmaceuticals industry.

Kevin has been part of an international team of lawyers working towards the creation of a new European patent court for several years and is currently the Chairman of the Committee tasked with drafting the Rules and Procedure of the Unified Patent Court (UPC). Kevin is the only UK lawyer who is a member of the Expert Group advising on the implementation of the UPC project. Kevin has organised and participated at the fore every year in Venice, for European patent judges and is advising the European Patent Office on judicial training.

He is also a member of the Intellectual Property Solicitors Association and a member of the American Intellectual Property Law Association.

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Strictly speaking, yes, the UK could participate whilst Article 50 negotiations are taking place but only if the UK were to ratify.

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LIQ

If the UK does not ratify the UPC agreement what does this mean for the UPC system?

KM

The UPC could renegotiate a system which excludes the UK but personally I believe it is more likely that the project will be lost in its entirety.

LIQ

Do you think a UPC which excludes the UK will be less attractive to the industry?

KM

A UPC which excludes the UK will definitely be less attractive to industry as UK lawyers and judges will not participate. Another factor which will make it less attractive is that the Unitary Patent will not extend to the UK which will undoubtedly make it less valuable. And finally, part of the central division of the court, which is based in London, will have to move out of the UK. As the London section directly deals with pharmaceutical and biochemical industry related cases, it will be key for those industries if a different location is needed.

LIQ

For institutions within the EU what do you think will be the main concern off the back of UK's imminent Brexit?

KM

A major fear is that the UPC will be lost. This is a project which we've been trying for 40 years to set up so the main concern right now is to ensure that this project does not fail. The UK's ratification is paramount in ensuring the UPC's success and a stepping stone in providing the option for non-EU countries to participate so this decision will have an impact on intellectual property within the EU and on a global scale.

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What does Brexit mean for the UPC?

Jan-Willem Goedmakers, **Head of Intellectual Property at Stamicarbon**, spoke to Legal IQ on Brexit's impact on the future of the UPC.

Legal IQ

Given the restrictions for non-EU members in the proposed UPC regime, what would this mean for the UK moving forward?

Jan-Willem Goedmakers

The UK is a member of the EPC and will continue to be as the EPC is not an EU treaty. So there will be the conventional European Patents which we have now and which can continue to be validated in the UK.

With respect to the Unitary Patent, in the current circumstances it seems unlikely that the UK will want to ratify the European Patent Court Agreement, as it would mean a transfer of sovereignty, which at the moment seems not politically opportune. Ratifying the agreement would also not directly benefit the UK as their membership of the UPC would cease upon leaving the EU.

Until the UK formally leaves the EU it is likely that the start of the unitary patent and the ratification of the Unified Patent Court agreement will be put on hold. Based on circulating information, it seems that although there are many discussions on how to proceed, the solutions will not be definite until the UK leaves the EU. Given the current political turmoil, I am careful to predict what will happen because many predictions already have been proven false; notably that Boris Johnson would become Prime Minister or that David Cameron would continue in his role of prime minister and party leader.

LIQ

Can the UK participate in the UPC while Article 50 negotiations are taking place? Do you think such a scenario is politically possible?

JWG

Although it may be technically and legally possible, I believe it's unlikely. Considering the current state of politics in the UK, until a new Prime Minister is elected (which won't be until September) there isn't anyone to drive the decision making. It is also likely that the UPC is not foremost on the mind of politicians as they have bigger fish to fry. When this situation calms - perhaps in a year - and Article 50 has been invoked, the Government is more likely to prioritise this. Theoretically, the Unitary Patent could come into effect, but there would be very little time for the UK to actively participate which makes it an unlikely scenario.

“With respect to the Unitary Patent, in the current circumstances it seems unlikely that the UK will want to ratify the European Patent Court Agreement”

LIQ

If the UK does not ratify the UPC agreement, which you have suggested is the more likely situation, what does this mean for the UPC system?

JWG

From my understanding, if the UK is no longer part of the EU the clause for ratifications states that the three countries with the most validations in the year prior to the ratification would have to consent. At the moment the largest Member States in terms of the number of patent validations are Germany, France and the UK. When the UK will be out of the EU,

Italy will take its place as the country with the third most validations which means that Germany, France and Italy would need to ratify for the Unitary Patent to take effect- it is only then that the UPC can begin. Once again, this can only happen when the UK has formally left the EU.

With regards to ratification from the other member states, Germany have said that they intend to be the last country to ratify to trigger the start of the unitary patent regime. At the moment 11 member states have ratified the UPC agreement including France. Once Italy ratifies and the UK has formally left the EU the Germany could pull the trigger to start the Unitary Patent regimen. This cannot happen during the discussions for Article 50 as the UK is still a member and therefore still in the top 3 for validation countries.

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Germany have said that they intend to be the last country to ratify to trigger the start of the unitary patent regime”

LIQ

Do you think a UPC which excludes the UK will be less attractive to the industry?

JWG

Generally “yes”; it will be less attractive because it excludes the large UK market for which patent holders wishing to have protection will have to validate their European patents. This means they have to pay maintenance fees for the UK as well as the unitary patent. The additional cost could be mitigated to some extent by reducing the cost of the Unitary Patent, but that will be another point for discussion for the other member states.

There were clear advantages of having the UK as part of the Unitary Patent as it has a large market and economy. In addition the UK has a strong established IP expertise and UK legal scholars have played a very

important role in defining the implementation and legal aspects of the unitary patent and unified patent court. When the UK leaves the EU and thereby the unitary patent regime, the UP will become less attractive. The exact impact to the users of the Unitary Patent will of course depend on the markets in which they are active.

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When the UK leaves the EU and thereby the unitary patent regime, the UP will become less attractive”

LIQ

For institutions within the EU, what do you think will be the main concern off the back of the UK's imminent Brexit?

JWG

If we were to consider this from the perspective of the European Patent System as it is now, nothing will change as the European Patent is independent of the EU. The UK is a member of the European Patent convention and will stay a member, so essentially we can expect very little change within the existing system (one without the Unitary Patent) for at least the next year or two.

With regards to whether the Brexit will affect other EU countries directly in terms of patent law, I do not think it will, as patent and trademark law are already well-established. The concern for these countries is more economics and trade-related rather than directly intellectual property related. There will be an effect on Trademark holders as the community trademark will no longer apply to the UK and holders of a community trademark will have to file a national trademark in the UK. The details of this will probably be a matter of negotiation between the EU and the UK after the Art 50 is invoked.

An important factor which is fairly evident when looking at information shared in the last few days is that British Patent firms are quite worried as they take importance in ensuring that no changes occur with respect to the EPC, as this will directly affect clients. British Patent firms have a very good reputation within Europe and while representing clients

before the European Patent Office. If these well-respected firms cannot participate and represent clients before the European Patent Office for the Unified Patent Court then it is possible that companies that use both the EPC and Unitary Patent will move to larger patent firms within the EU, perhaps in the Netherlands or Germany.

This could be something which may concern British Patent firms although it should not make any difference for the coming years. However, I can assume that companies are carefully considering who is chosen as their representative when the Unitary Patent does come into effect.

Another interesting aspect is the fact that London is currently the seat of an important division of the UPC. It seems unlikely that the other member states would allow the court to reside outside of the EU. I expect that there will be a lot of discussion as to the new seat of this court. Obviously this will be another loss to the UK patent community.

For these reasons and when considering the future of Unitary Patent and discussing the legal implications at seminars and conferences, I believe it does not make sense to ask speakers from British Firms who, in the past few years, have spoken with authority to continue to do so as the Unitary Patent will not apply to them. For updates on the Unitary Patent, it would make more sense to ask representatives from Patent firms in other member states of the EU as they are still stakeholders being involved in the UPC.

“when considering the future of Unitary Patent and discussing the legal implications at seminars and conferences, I believe it does not make sense to ask speakers from British Firms”

L IQ

Are there any positive aspects to Brexit with regards to Intellectual Property?

JWG

In terms of the EPC, nothing will change and it will stay the same, as it were, for a number of countries who are members of the EPC. Once a European

Patent is granted, it breaks into streams of national patents which do not change. This means that if one wants to chase an infringer, they would have to go after them in every single country. Similarly, if one wanted to invalidate they would have to do so in every single country. The driver behind the Unitary Patent was to make the process simpler and create more legal certainty sooner.

Some have criticized the unitary patent regime and have suggested that people are not going to like it. I understand that particularly pharmaceutical companies have been vocal in their criticism as they would prefer to have a bundle of national patents as it is more time consuming to defeat all those patents. On the other hand, others suggest that the UP will reduce cost, particularly for SMEs, and that the unitary patent is an advantage.

It is apparent that the cost reduction and legal certainty that the Unitary Patent offers is attractive, so this could be an incentive for the member states. Brexit has essentially thrown a spanner in the works and delayed everything by at least two years. For those critical of the unitary patent this could be seen as an advantage. For those who have waited a long time for a unitary patent the delay will be a disappointment. The question of whether the unitary patent will be successful or not without the participation of the UK is still up in the air.



Jan-Willem Goedmakers

Jan-Willem Goedmakers obtained a MSc Degree in Chemical Engineering at the University of Technology in Eindhoven, The Netherlands in 1988. He has been working in the patent field since 2002 and is currently head of Intellectual Property at Stamicarbon where he is responsible for all IP related matters. He is particularly focused on developing processes to optimize the cost efficiency & value of the internal patent department while securing the alignment between business strategy and patent strategy.

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