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Preparing for the Unitary Patent and Unified Patent Court: What to Consider Before Opting Out or Opting to Stay In

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Audrey Horton



Before the new Unitary Patent Package comes into force, patent owners will have to take two key decisions: what strategy to adopt for the management of their portfolio to take account of the new Unitary patent; and secondly, whether to opt some or all of their existing European patents out of the jurisdiction of the new Unified Patent Court.

The Present State of Play

The Unitary Patent Package, made up of the Unitary patent and Unified Patent Court (the “UPC”), will become a reality on the date of entry into force of the Agreement on the Unified Patent Court (the “UPC Agreement”). This will be on the first day of the fourth month after the thirteenth Member State has deposited its instrument of ratification to the UPC Agreement; the 13 must include the UK, France and Germany.

As of the date of writing (July 2017), the following countries have ratified the UPC Agreement: Austria; Belgium; Bulgaria; Denmark; Estonia (although it is yet to deposit the instrument); Finland; France; Italy; Luxembourg; Malta; the Netherlands; Portugal; and Sweden. Germany, Greece, Latvia, Lithuania and Slovenia have parliamentary approval, but have yet to deposit their notification of ratification with the Council of the European Union. Two key players, the UK and Germany, have not yet ratified.

In the UK, delay was caused by the Brexit referendum vote of June 2016 after which, on 29 March 2017, the UK initiated the two-year exit procedure envisaged by Article 50 of the Treaty of the European Union. Despite this, the UK indicated in November 2016 that it would ratify the UPC Agreement. Secondary legislation to give the UPC its legal personality in the UK, the UPC (Immunities and Privileges) Order 2017, has been laid before the Westminster Parliament (a similar instrument needs to be laid before the Scottish Parliament) and, once they have passed, the UK will be able formally to ratify the UPC Agreement. However, absent renegotiation of the UPC Agreement, the UK, when it exits the EU not earlier than March 2019, will not be able to participate in the UPC system, which only applies to participating EU Member States. For the majority of potential users of the UPC, the system will be less valuable without the participation of the UK. It is, therefore, hoped that the goodwill of all those involved in the project will overcome any political obstacles preventing amendments or further agreements to facilitate the UK’s continuing involvement.

In Germany, delay in the ratification process has been caused by a legal challenge brought by an anonymous individual before the Federal Constitutional Court. As a result, Germany has suspended formal ratification of the UPC Agreement until the Constitutional

Court has reached a decision in the expedited proceedings relating to the action. Germany also cannot notify its consent to the Protocol on Provisional Application until the Constitutional Court has ruled on the current challenge. This will delay the start of the provisional application phase and thereby the selection, appointment, education and training of judges. As a result, there will need to be a time interval of around six months between the German judgment and the doors of the UPC being opened in order to allow the necessary administrative arrangements to be put in place.

Assuming that the UK and Germany ratify the UPC Agreement in the course of 2017, it is at present anticipated that the UPC will open for business in the middle of 2018. However, uncertainties as result of the German constitutional challenge and the UK Brexit vote could mean the start date is yet again delayed.

In view of the new options for obtaining Unitary patents and tactics for litigating patents in Europe offered by the forthcoming UPC system, patentees are advised to develop a strategy for the management of their portfolio sooner rather than later.

Potential Filing Strategies: Unitary Patent, European Patent or National Patent?

The Unitary patent will be a new intellectual property right sitting alongside the present system of European patents and national patents. The Unitary patent will, in all respects, be a European patent for purposes of filing and prosecution, but within 30 days after grant by the European Patent Office, the patentee will have the option to designate it as having unitary effect. In such a case, the Unitary patent will provide uniform patent protection and equal legal effect in all the Member States which have ratified the UPC Agreement (the “Contracting Member States”).

A clear advantage of the Unitary patent is that it will cover all Contracting Member States in terms of infringement including injunctive relief, but this central enforcement must be balanced against its vulnerability to central revocation. This is in contrast to the current system for litigating European patents; patentees must enforce their patents on a country-by-country basis with all the associated costs, time delays and potentially conflicting decisions inherent in taking such piecemeal action. On the other hand, depending on the facts, the current system allows patentees to choose where they want to take action, that is, it allows for a certain amount of forum shopping. It also means that, unless an opposition is brought in the European Patent Office within nine months of the grant of the European patent, each designation has to be invalidated country by country.

Since Unitary patents can be invalidated in a single, central attack, patentees should consider using this route for strong patents where there is no doubt as to their validity and where protection is required across Europe; for example, pharmaceutical compounds. They can then be used offensively to obtain injunctions, including preliminary injunctions, in all Contracting Member States.

An important consideration to bear in mind is that Unitary patents will be subject to the mandatory exclusive jurisdiction of the UPC and cannot be opted out. European patents will also be subject to the jurisdiction of the UPC but, during a transitional period (see below), European patents can be opted out of the UPC's jurisdiction and litigated in the national courts. When an action is brought before the UPC in respect of a bundle of European patents, one single judgment will cover all designated patents in Contracting Member States which are joined in the action. It can therefore be much more efficient for a patentee with a European patent granted in a number of Contracting Member States to obtain a judgment through the UPC.

For patentees intending to obtain patent protection in five or more Contracting Member States, the Unitary patent will be cheaper than the equivalent European patent. There will be no validation fees for Unitary patents as there are with European patents and a proprietor will only have to translate the text into, at most, one additional language (other than the language of the European Patent Office procedure). Renewal fees will be the equivalent of national fees for the so-called "top four", that is, Germany, France, the UK and the Netherlands, in return for which patent protection will cover all countries which have ratified the UPC Agreement at the date of grant (currently as at July 2017, 13 Member States but it will be more by the time the UPC Agreement enters into force). On the other hand, it will not be possible to save renewal fees by abandoning individual designations in one or more countries later in the patent's life as can be done with European patents.

Alternatively, national patents may be appropriate if a patent is only needed in a few jurisdictions in Europe, for example, where a patent is relevant to a product developed for a particular market. National patents might also be appropriate where a product has been developed for the whole of the EU, but is too valuable a right to countenance central attack. The cost and speed of obtaining patents may also be a factor. The European Patent Office can be slow and costly in comparison to some national patent offices where the procedures are far less burdensome; for example, in Belgium, France and Italy.

National patents can also be used in tandem with Unitary patents in countries such as Germany where double patenting will be possible. This will allow patentees to test the waters first in the speedy German national court system allowing them to flush out prior art and judge the strength of potential attacks on the patent before venturing into the arena of the UPC where there is a risk of central revocation. If the patent survives any validity challenges, the patentee can follow up the national action by filing an action based on the Unitary patent in the local division of the UPC which will allow much wider enforcement.

A further factor to consider is the uncertainty, following Brexit, about the UK's participation in the UPC system. If the UK leaves the UPC system, it is possible that transitional arrangements would convert existing Unitary patents to European patent status in respect of the UK, and that might mean additional renewal fees without any reduction in the Unitary patent fees.

Therefore, it makes sense to consider the possible advantages and disadvantages of the UPC before making a decision about whether to choose Unitary patent protection *versus* the traditional European patent or national patent route.

A Brief Description of the UPC

The UPC system is unique and unusual in that, for the first time in the EU, a comprehensive court system, substantive law and procedural rules are being created from the beginning, starting as it were from a blank page. The creation of a brand new court system, rather than the use or adaptation of existing national court systems, has meant the development of a system which is suitable for the internet age. Litigation will be conducted online from the initiation of proceedings and at every stage afterwards using online forms.

The Court of First Instance of the UPC will comprise local and regional divisions, which will primarily hear patent infringement cases, and a central division dealing with the validity of patents. Contracting Member States can either host a local division or participate in a regional division with other Contracting Member States. Local divisions have been announced so far in Austria, Belgium, Germany (which will have four local divisions), Denmark, the UK, Greece, Ireland, Italy, France, Finland and the Netherlands. There will also (at the present time) be one regional division: the Nordic-Baltic division comprising Estonia, Latvia, Lithuania and Sweden. Contracting Member States may also choose not to have a local or regional division, in which case all infringement cases in their territory will be heard in the central division. While it is true that the UPC system is untried and untested, with at least initially the risk of unpredictable decisions, participants in the new system will, from the outset, have the ability to shape and influence the first UPC decisions.

The central division will have its seat in Paris and will have two specialist sections; one in London and one in Munich. Cases will be allocated to each section of the central division according to technology sector as defined by the International Patent Classification applied to the patent. London will hear cases relating to chemistry, including pharmaceuticals and life sciences (patents classified under IPC classes A and C). Munich will hear cases relating to mechanical engineering (IPC class F). All other cases will be heard by the central division in Paris.

The UPC Agreement also allows forum, or rather division, shopping. Infringement cases must be filed and heard before the local and regional divisions where the actual or threatened infringement has occurred or where the defendant, or one of the defendants, has its residence, or principal place of business or, if none, place of business. Actions against multiple defendants will only be allowed where the defendants have a commercial relationship and where the action relates to the same infringement. Nevertheless, this will often give a claimant broad scope for choosing which division to use and which defendants to join.

As a consequence, it might be possible to exploit, at least in the early days of the UPC, what has been referred to as the "*couleur locale*"; that is, different panels of judges in different divisions may, despite the fact that they should strive to apply the same procedures and substantive law, interpret the UPC Agreement and the Rules of Procedure differently, in part informed by their background and experience. For example, in cases where taking samples, or seizing products or documents for evidence is a priority, parties could, where appropriate, select divisions where the judges are familiar, from their national legal systems, with the *saisie* procedure, such as France or Belgium. Similarly, divergent approaches to confidentiality likely as a result of different national procedures may encourage parties to opt for those divisions known to be more familiar with the preservation of confidential materials in court proceedings.

Different approaches are also possible in relation to the criteria for the grant of a number of remedies. One example might be in relation to *ex parte* injunctions which are rarely, if ever, granted in the UK and are more common in civil law countries such as

Germany, France, the Netherlands, Belgium and Italy, leading to potential forum shopping in that respect also.

One of the major concerns that has been expressed in relation to the UPC system is the ability of bifurcate patent actions. Bifurcation of patent actions is at present possible in national systems in Germany, Austria and Hungary. It means that there is the potential for an “injunction gap”, which refers to the concern that weaker patents could be pushed through the infringement divisions quickly, leading to injunctions that benefit from presumed patent validity.

Bifurcation in the UPC system can arise when there is a counterclaim for invalidity in an infringement action, which then allows the local or regional division to decide which of four ways forward it should adopt, that is:

- keep both sides of the case;
- refer the counterclaim for invalidity to the central division and proceed with the infringement action;
- refer the counterclaim for invalidity to the central division and suspend the infringement action; or
- refer, where all parties agree, the whole case to the central division.

The possible impact and frequency of bifurcation should not, however, be overstated. The Rules of Procedure have made commendable attempts to limit the risk of abuse or at least to build in additional checks. Firstly, they have restricted the discretion allowed to the panel of the local or regional division; if the panel bifurcates the action, it has the discretion to stay the infringement action, but it must stay it if there is a high likelihood that the patent will be held invalid. Secondly, when the invalidity action is referred to the central division, it must accelerate the action. In this way, it is hoped that a decision on validity will be heard before the case on infringement. Finally, before giving judgment in a bifurcated case, the panel hearing the infringement action must again consider staying its decision or give judgment under a condition subsequent upon the invalidity decision. Conditions may include the rendering of security by the patentee before the order granting an injunction is binding.

It is possible that, over time, certain local or regional divisions may become known as pro-patentee or pro-defendant such that parties will attempt, so far as possible, to forum shop according to the perceived bias of the division, although the allocation of judges from different countries to the panels may militate against such a bias in any one division. Furthermore, with time, the Court of Appeal will ensure that any differences in interpretation of the Rules of Procedure arising between divisions will be ironed out.

While it is true that the UPC system is untried and untested with, at least initially, the risk of unpredictable decisions, participants in the new system will, from the outset, have the ability to shape and influence the first UPC decisions.

Potential Advantages and Disadvantages of the UPC

In drafting the Rules of Procedure for the UPC, the Preparatory Committee has tried to take the best aspects from civil and common law countries and has sought the input of users, practitioners and judges experienced in patent law and procedure. For a detailed account of the procedures of the UPC see chapter 1 of *The International Comparative Legal Guide to: Patents 2017, A Guide to Conducting an Action before the Unified Patent Court*, by Katharine Stephens.

Advantages of the UPC system include the following:

- Patentees will have the ability to apply for both provisional and permanent injunctions for all Contracting Member States, backed up by penalty payments for breach.

- The UPC is aiming for, and should result in, high-quality judgments. Local and regional divisions of the UPC will consist of panels of three judges (four if a technical judge is added to the panel) and many will be highly respected judges from national courts. Where countries are less experienced in patent litigation, the rules provide that two of the three legal judges will be from countries where judges are experienced in patent litigation.
- An extensive range of evidentiary procedures will be available, including search and seizure orders (“*saisies*”), specific discovery and cross-examination of witnesses and experts.
- Proceedings are intended to be fast, with actions to be heard within one year and hearings to be limited to one day.
- Most divisions of the UPC will permit proceedings to be in English except in the case of revocation actions where the language of the patent must be used and the patent is in French or German or, in local and regional divisions, where the small local operator rule applies.
- As only one action is necessary for all Contracting Member States, this avoids duplication of actions, court and legal fees. It should, however, be noted that the UPC is intended to be self-funding and court fees are high, compared with most national court systems. Infringement actions and actions for a declaration of non-infringement will have fixed court fees of €11,000, and revocation actions will have fixed court fees of €20,000. Additional, value-based fees will also apply to infringement actions and actions for a declaration of non-infringement for those actions with a value of over €500,000, rising on a sliding scale, to €325,000 for actions valued at over €50,000,000.
- Damages will be available in respect of infringements in all Contracting Member States, and, where the defendant is domiciled outside the EU, the UPC also has (under Article 71b(3) of the Brussels I Regulation (recast)) “long-arm jurisdiction” in respect of damage arising outside the EU from infringements inside the EU.
- Generally, the losing party will pay the winner’s (capped) legal costs. The value of the action estimated by the claimant at the outset of the action will be used to determine the ceiling of recoverable costs of the successful party. These ceilings are set at €38,000 for proceedings with a value or up to and including €250,000, rising to €2,000,000 for proceedings with a value of more than €50,000,000. The ceiling may be raised in some instances for particularly complex cases, but cannot exceed the maximum of €7,000,000.

Despite these advantages, there are some points against the UPC which may prove decisive for certain parties when considering their strategy. Firstly, as noted above, the UPC will be a strong court and will not be afraid to revoke patents when it finds them invalid. For those with weak patents, the UPC would best be avoided.

Another example surrounds the uncertainty over whether the UPC will be able to grant the full set of remedies used by a national court; in particular, there is a question mark over what declarations it can make. The UPC Agreement provides that the UPC can grant declarations of infringement and non-infringement, but no mention is made of other declarations. Uncertainty therefore surrounds remedies such as a fair, reasonable and non-discriminatory (“FRAND”) declaration linked to a global licence, recently granted in the UK in *Unwired Planet v Huawei*. This may mean that there is a preference for bringing proceedings based on national or opted-out European patents in the UK courts. Similar considerations will apply in relation to Arrow declarations which are recognised in the UK (by the Court of Appeal in *Fujifilm v AbbVie*) which may or may not be granted in the UPC system. Arrow declarations are a discretionary remedy which may be used to clear the way in cases where, because the patents potentially blocking a new product or process are not yet granted, a declaration of non-infringement

would not be available. Such declarations provide that the intended product or process was known or obvious at the priority date of the patent application of concern.

Finally, national law may provide broader protection for a defendant in certain instances; for example, the UPC Agreement adopts a minimum standard for the experimental use defence, often known as the Bolar exemption, whereas many Contracting Member States have adopted broader defences. This may lead to defendants being in the extremely unattractive position of knowing that, at present, if an action were to be brought in a national court, their products would not infringe, but that, if the same action were brought before the UPC, they might be held to infringe.

Transitional Provisions

When the UPC Agreement comes into force, all traditional European patents will be subject to the jurisdiction of the UPC. This means that central attacks on the validity of European patents will be possible in the same way as for Unitary patents. As the UPC Agreement changes the ground rules considerably, it was recognised that transitional provisions were needed for existing European patents and applications. Article 83 of the UPC Agreement therefore provides that, during the transitional period:

- the UPC will have jurisdiction co-existing with national courts over all European patents granted in Contracting Member States; and
- a proprietor can opt out its granted European patents and applications for European patents from the jurisdiction of the UPC.

The transitional period is seven years and can be extended by the Administrative Committee following a consultation of the users by up to another seven years.

By opting out its European patents, a patentee can avoid the jurisdiction of the UPC and therefore have the certainty that only the national courts will have jurisdiction. If a patentee does not opt its European patent out of the UPC system during the transitional period, an action can be started before either a national court or a division of the UPC.

How to Opt Out

The procedure for lodging an application to opt out is governed by Rule 5 of the Rules of Procedure. The application has to be made by all the proprietors (or applicants) for all Contracting Member States for which the European patent is designated.

The opt-out provisions apply to European patents, published applications and expired European patents. An opt-out will cover all national designations of a particular patent owned by the proprietor or proprietors. It does not, however, apply to divisionals; divisional patents are separate patents to the parent patent and therefore a separate opt-out has to be lodged in relation to each one.

A question mark was raised as to whether the opt-out applied to a particular patent only for the transitional period or whether the opt-out was for the lifetime of the patent. The better view is that it is for the lifetime of the patent, i.e. once the patent has been opted out, it remains opted out and subject always to the jurisdiction of the national courts (that is unless and until it is opted back in). The opt-out, therefore, lasts for the lifetime of the European patent and beyond, as it includes the time that the patent has expired, lapsed or been withdrawn.

A European patent (or application therefor) can be opted out at any time up to the very last day of the transitional period. However, an

opt-out cannot be made if an action has been commenced before the UPC, irrespective of whether the action has been concluded or not.

Sunrise Period for Opt-Outs

If a patentee wishes to retain the ability to take the national route and avoid any pre-emptive central invalidity attack being made by a competitor, they would be well advised to opt out as soon as possible.

Before the UPC opens its doors, there will be a sunrise period so that patentees can lodge their applications to opt out of the jurisdiction. Without such a period, the system would have been overwhelmed on day one and, during the time taken to process opt-out applications, some patents would have been vulnerable to a potential central attack even though their owners wanted to opt out, since the UPC Agreement states that the opt-out only takes effect upon its entry into the Register.

The sunrise period for opt-outs is a purely administrative matter and so could start any time; however, it is only likely to start once Germany and UK have ratified the UPC Agreement, which possibly means that it will start at the beginning of 2018.

Withdrawing an Opt-Out: “Opting In”

At any time, unless an action has been brought before a national court, the proprietors or applicants of a European patent who made use of the opt-out can withdraw it. Again, the withdrawal of the opt-out is only effective once it has been entered on the Register. Only one opt-out is allowed; once a European patent has been opted back in, no further opt-out can be made. However, this will still allow proprietors some flexibility. They can opt out to begin with to avoid a central invalidity attack with the option, at a later date, of opting back in if they wish to bring a central infringement attack.

If an action is started in a national court over a European patent, there will be no possibility of opting back in thereafter whatever the outcome of the litigation; whether the action is finished with no possibility of any appeal, settled or withdrawn, the effect is the same. The Preparatory Committee noted that the right to opt out will be “used and exhausted” after the first opt-out.

As noted, an application for a European Patent can be opted out. If it proceeds to grant with unitary effect, the opt-out shall be deemed to be withdrawn. However, since the request for a patent to have unitary effect requires a positive step, this will be unlikely to catch anyone out.

Uncertainties in Relation to the Transitional Provisions

The UPC Agreement, in relation to the transitional provisions, is not well written, which makes challenges likely at the outset. In particular, a question mark has been raised over whether the transitional provisions provide for the complete ousting of the jurisdiction of the UPC. This arises through the use of the word “exclusive” in Article 83(3) of the UPC Agreement, which states:

“a proprietor ... shall have the possibility to opt out from the exclusive competence of the Court.”

Therefore, the argument goes, if the opt-out is only an opt-out from the exclusive jurisdiction of the UPC, that would mean that, during the transitional period, the UPC has exclusive jurisdiction over European patents until an opt-out is triggered, after which they will be subject to the non-exclusive jurisdiction of the national courts.

However, Article 83(1) clearly provides for alternative jurisdiction of national courts and the UPC during the transitional period regardless of whether there has been an opt-out. Furthermore, the Preparatory Committee drafting the Rules of Procedure has sought to allay such fears by stating that the provisions of Article 83 are clear and provide for a complete ousting of the jurisdiction of the UPC. The Interpretative Note published on 29 January 2014, in setting out this option, does not have any force of law, but the view of such an eminent Committee is likely to be extremely persuasive.

Strategic Considerations on Opting Out

To remove the risk of central revocation it may be advisable to opt out European patents which cover economically valuable products, or which are needed to protect high licensing revenue, but where the validity of such patents is uncertain. Once opted out, even if the patent is invalidated in one or two jurisdictions, it may be possible to retain validity in others.

Where there are a number of patents protecting a single product, a possible strategy would be to leave one strong patent in the UPC system, to provide the means of obtaining a UPC injunction if required. Another criterion could be to leave those European patents already tested in opposition within the UPC system.

Other possible strategies could involve a combination of parent and divisional patents in different categories. For example, having a parent patent with unitary effect (or an opted-in European patent) with a broad scope and a divisional or divisionals with a narrower scope but opted out. Such a strategy could be costly, but offer considerable safety to a patentee and possibly be suitable for very important products.

Patentees should also be wary of giving their competitors too much information about the perceived relative strengths and weaknesses of patents in their portfolio through their opt-out strategy. Competitors and potential defendants will be monitoring the register of opt-outs through the UPC case management system, which is open to the public. Where patents are not opted out, they may then apply to revoke one or more of them centrally or where patents are opted out, defendants may grab the opportunity to start national proceedings in order to block such patents from being opted back in to the UPC system.

Considerations for Licensees and Licensors: Review Your Licences

Licensing, development and co-ownership agreements will, in particular, affect the right to opt out because the Rules of Procedure provide that only the proprietor (and, if there is more than one proprietor, all of them) can notify the decision to opt out.

Existing licensing and development agreements will not have anticipated an opt-out regime, while many agreements give to exclusive licensees broad powers to decide about the maintenance and prosecution strategy of the licensed patents. To avoid unnecessary disputes, patentees and licensees should examine their existing agreements – in particular their exclusive licensing agreements – to determine who should take the decision on opting out; for example, the licensee may have been granted (at least implicitly) the right to impose on the patentee a decision on whether or not to opt out. Patentees who are currently negotiating a patent licence would be well-advised to negotiate a stipulation about who has the right to make/impose a decision about opting out, otherwise there could be disputes between licensees with exclusive rights on certain fields of application, or with rights in certain specific jurisdictions, whose interests will clash with other licensees, or with the patentee.

The parties to any patent licence or development agreement should also be aware of the provisions relating to who can be a party to an action before the UPC. Many agreements make specific arrangements as to the conduct of litigation, but some do not. Article 47 of the UPC Agreement states that:

- unless the agreement provides otherwise, an exclusive licensee shall be entitled to bring actions in the same circumstances as the patentee, provided notice is given to the patentee; and
- a non-exclusive licensee can bring an action if the agreement expressly provides for it and notice is given.

As noted above, starting an action in either the UPC or a national court can fix the European patent in one or other system. As with the application to opt out, licensees and patentees should decide, in advance, what tactics they should follow, given that there may be some tension between them; an exclusive licensee would be more interested in being in the UPC system because it would benefit from the wide injunction, whereas a patentee might be more interested in preserving the patent and therefore want to protect it as best as possible from a central invalidity attack by opting it out of the UPC system. What both parties should avoid is being surprised by the action of the other which has consequences which cannot be undone and which they would prefer to avoid.

The Impact of Brexit

The question of whether the UK can continue to participate in the Unitary patent and UPC system after leaving the EU is a complex issue. The process of exiting the EU commenced on 29 March 2017 when the UK triggered Article 50 of the Treaty on European Union. The procedure will take at least two years to complete, which means that the earliest date on which the UK can officially leave the EU would be 29 March 2019. As a result the UPC, including the London central division, will open for business and the EPO may commence granting Unitary patents at a time when the UK remains a member of the EU. The precise impact of the UK then leaving the EU, currently expected in the course of 2019, is not clear. It is to be hoped that the UK government would not ratify the Agreement without at least the intention of long-term participation by the UK in the UPC system.

Article 84 of the UPC Agreement expressly states that the UPC is limited to participation by Member States. Therefore, most commentators have concluded that the UPC Agreement would have to be amended or a new international agreement would have to be negotiated in order to accommodate the UK after its withdrawal from the EU.

The Unitary Patent Regulation, the instrument of EU law which created the Unitary patent, would also require amendment. Such an international agreement would therefore have to replicate the wording of the Unitary Patent Regulation, including for example the provisions on exhaustion of rights, since inconsistencies would be incompatible with the concept of a Unitary patent providing uniform protection and having equal effect in all participating Member States. In practice, the UK's participation in the Unitary patent would also be conditional on the UK's participation in the UPC Agreement, since Unitary patents cannot function effectively unless disputes are decided by a single court system across all Contracting Member States.

The UK Government's White Paper, "Legislating for the United Kingdom's withdrawal from the European Union" states that after Brexit, domestic UK courts will no longer be required to follow the jurisprudence of the Court of Justice of the EU (the "CJEU"). The UPC is not a domestic UK court, but an international or supranational court, separate from the EU. Importantly, under Article 20 of the

UPC Agreement, the UPC must accept the supremacy of EU law in its entirety and this includes acceptance of competition law, fundamental rights arising under the Charter of Fundamental Rights of the EU and general principles of EU law, as well as specific patent rules in EU directives and regulations. Therefore, referrals to the CJEU could be required to be made in the course of patent litigation in the UPC. Politically, this aspect is likely to be problematic to the UK in the context of its continued participation in the UPC and the exit negotiations.

Conclusions

The UPC system has been the process of decades of negotiation and was in the very final stages of preparation to become a reality when

the political problems of Brexit in the UK and the constitutional challenge in Germany intervened. Although there are a number of currently unanswered questions about what will happen as regards the UK's participation in the UPC system when the UK leaves the EU after Brexit, the UK government has, to date, consistently indicated its intention to ratify the UPC Agreement. Furthermore, it has been stated that, from the little that is known about the grounds for the constitutional challenge in Germany, very few such cases are successful.

On balance, therefore, it is likely that the UPC system will come into force during the course of next year and will thereafter survive in some form. Industry should therefore proceed with the preparations discussed in the article in relation to their patent-filing strategies, making decisions regarding opt-outs, reviewing ownership and licence agreements, and considering future litigation strategies.



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