

BREXIT: WHAT NOW FOR UPC AND IP IN THE UK AND ACROSS EUROPE?

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Legal Briefings - By **Sophie Rich, Partner, Joel Smith, Partner and Rachel Montagnon, Professional Support Consultant**

Following the vote to leave, the future of the unitary patent and Unified Patent Court is far from clear.

The UK currently remains within the EU. Only once it has notified the EU of its intention to leave, will the negotiation stage (at least two years) commence, during which time EU legislation will still apply.

Whilst leaving the EU would not change the UK's status as a signatory to the European Patent Convention (which is not an EU instrument), nor access to the European Patent Office for UK companies wishing to apply for European Patents in any of the currently possible designation States, it is likely to prevent the UK from being part of the new unitary patent and Unified Patent Court system. This could also delay implementation of the new system. Italy was the next largest patent validations state in 2012 (the assessment year) so it would take over as the next mandatory ratification state, if the UK were not to ratify before it left the EU.

Once the UK leaves the EU, EU level rights eg EU trade marks and EU registered and unregistered designs, will continue to apply in all the other Member States but a separate UK registered design or UK trade mark registration would be needed to cover the UK if not already registered (although UK unregistered design rights would apply automatically) which would have to be enforced separately to EU level rights. In relation to EU trade marks, the single right can be converted into multiple national rights if registered via an international registration, so may not entirely be lost if action is taken in advance. Otherwise brand owners would need to register national rights in advance of the UK's exit from the EU. It may be of course that provision is made either by the UK government or the EUIPO, to ensure continued protection in the UK for those currently relying on the EU-wide rights for protection.

So, in the short term, in intellectual property terms generally, things will continue as before and in the longer term, as long as UK level rights have been acquired, protection should continue in relation to the main IP rights. However, there are likely to be changes to many areas of IP currently regulated by EU competition law and also to other allied regimes where the UK will need to consider if laws enacted to implement Directives should continue in their current form.

The big question mark is over the fate of the UPC and unitary patent. It seems highly unlikely that the UK can or will ratify the UPC Agreement (UPCA) in its current form. But that means that the UPC cannot come into force until the UK has left the EU. At that point Italy can take over from the UK and have its ratification count as one of the mandatory three. To resolve this before the UK left the EU would require renegotiation of the UPCA and the re-signing (and then ratification) of it by the remaining participating Member States.

There is much discussion of the reduced attractiveness of the new UPC/unitary patent system without the UK's participation (remember that Spain, Poland and Croatia are not participating in the new system either). There has even been talk of the proposed fees for unitary patents being reduced to reflect this which could cause problems for the funding of the whole system. These concerns may lead to some sort of compromise deal, but again this would require the renegotiation of the text of the UPCA and re-ratification and it is also hard to see how an agreement that was required to incorporate reference to the CJEU would be able to involve a state outside the EU (or be acceptable to a post-Brexit UK government).

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KEY CONTACTS

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