

Could the EU Unified Patent Court Start Working in December 2017?

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by Ron Moscona



The Preparatory Committee charged with the implementation of the Unified Patent Court (“UPC”) announced on 16 January 2017 that it anticipates that the UPC agreement would come into force in December 2017, at which point it is assumed the court will open for

business. The announcement coincides with a speech by Theresa May, the British Prime Minister, signaling that the UK will not seek to continue its participation in the European single market after it leaves the EU. The speech has been received as the first clear announcement by the UK Government that it expects negotiations with the EU to result in a “hard” Brexit, even though the Prime Minister also expressed the Government’s desire to enter into a comprehensive free trade deal with the EU that would allow tariff-free access to the single market for British businesses and possible other sector-specific special arrangements.

Much debate has taken place since the Brexit referendum in June 2016 on the question of whether the UPC could become reality notwithstanding the UK’s anticipated break from the EU. The UK Government’s official statements over the past few months suggest that participation in the UPC system does not depend on EU membership and the UK announced that it would ratify the UPC agreement later this year. However, it is still difficult to see how Brexit (particularly the hard version now envisaged by the Government) could be reconciled with continued British participation in the UPC system.

For one thing, the UPC agreement is based on the supremacy of EU law and the jurisdiction of the Court of Justice of the EU as its final arbitrator. PM May made it clear several times that Brexit means that the UK will no longer be subject to the jurisdiction of the ECJ. It is possible that the Government would be willing to make an exception insofar as European Patents are concerned, although this would seem to be a constitutional fudge.

In any event, even if Britain is willing to accept the supremacy of EU law and the jurisdiction of the ECJ in relation to European Patents (and the jurisdiction of an EU court

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system within its borders presiding, effectively, over all patent matters), the other EU member states that signed up to the UPC agreement still have to agree as well.

The UPC agreement will come into force if and when it is ratified by the UK and Germany (it has already been ratified by 11 other EU member states including France which is a required party). Given that the agreement includes the UK hosting the important pharma and life science section of the Court's Central Division, which is envisaged to be based in London, other member states may see the country's participation in the UPC as a prize for the UK. Given the UK's apparent desire to see the system becoming reality, and to continue its participation after Brexit, EU member states may use this issue as a bargaining chip in negotiations with the UK. Germany may decide therefore to delay its ratification of the UPC agreement until a final deal on Brexit (and on the new trading arrangements between the UK and the EU) is struck.

A different question might arise if both Germany and the UK ratify the agreement. The UPC agreement was open for participation only by EU member states. It is silent on the question of what happens when a party leaves the EU. If the agreement is indeed ratified before the UK leaves the EU, the question of what happens on the day after will be one more item on the list of issues for Brexit negotiations.

Notwithstanding the announcement of the Preparatory Committee, therefore, it remains somewhat premature to assume that the UPC will actually open up for business at the end of this year.