Unexpected Post-Brexit IP Development: UK is to ratify the Unified Patent Court Agreement

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by Ron Moscona

On 28 November 2016, the UK Government made a surprising announcement at the meeting of the Competitiveness Council (an EU institution), stating that it intends to ratify the Unified Patent Court Agreement, marking its first commitment to a new EU initiative since the Brexit referendum in June. In a press release the UK Government stated that:

"*The UK will continue with preparations for ratification over the coming months. It will be working with the Preparatory Committee to bring the UPC into operation as soon as possible.*"

This is an unexpected development, as it appears to contradict much of the political rhetoric since the EU referendum result on 23 June 2016. The UPC system, which has been under intensive development for several years, will enable companies to defend their rights with a single patent and a single legal system across the EU. Most observers and legal professionals had considered the prospect of granting further supremacy of EU law and enhanced jurisdiction to the ECJ to be politically unlikely following the Brexit result. Therefore, it was generally thought that the UK would pull out of the UPC. The decision to ratify will require Parliamentary approval, so there is of course the potential for Parliamentary scrutiny and further delays. Before the referendum, it was anticipated that the UPC system would be in place by the end of 2017. It is difficult to assess whether in practice the patent court system would now progress towards the previous target for its commencement given the question mark over the UK's involvement in the UPC post-Brexit.

The UK was a driving force behind the UPC and one of the central divisions of the UPC (widely referred to as the "pharmaceutical court") was to be set up in London. However, given that the UK is to leave the EU, which means that it would be unable to participate in the UPC system (unless the agreement constituting the system is radically overhauled), it would seem questionable whether the EU would now wish to allocate a budget for implementing the UPC and whether the other participants to the agreement

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would wish to ratify it at this stage. The agreement requires the ratification of at least thirteen countries before it comes into force including at least the UK, France and Germany (which has not yet ratified the agreement and may decide not to do so).

The decision to ratify the UPC agreement has led to widespread speculation that the Government intends to seek a soft-Brexit and therefore keep close legal and regulatory ties to the EU following Brexit. However, Baroness Neville-Rolfe, the UK Minister of State for Intellectual Property, was keen to add in her statement that "*the decision to proceed with ratification should not be seen as pre-empting the UK's objectives or position in the forthcoming negotiations with the EU*."

The reasoning behind the decision is not clear, but it appears that the Government has decided to honour its treaty obligations whilst it is still a member of the EU. However, like many of the recent political movements, the Government's decision has raised further questions. It can perhaps be seen as a decision which at least keeps open the UK's option for long term participation in the UPC, with further discussions to take place as part of the wider Brexit negotiations. In practice, though, it is difficult to see the UPC kicking into action whilst Brexit negotiations are on-going.