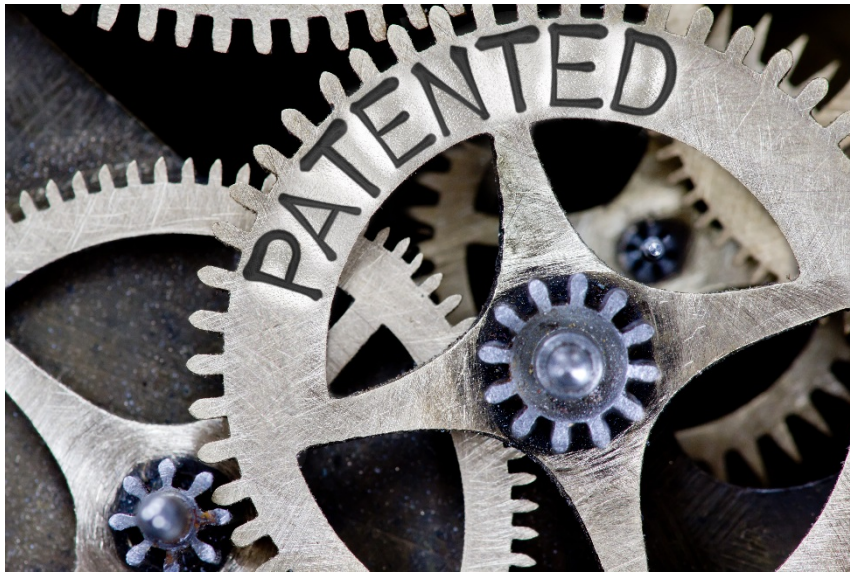


EU Patent and Brexit

Legal and Parliamentary Affairs



EU Patent and Brexit

IN-DEPTH ANALYSIS

Abstract

This In-depth Analysis resumes the possible scenarios concerning several Intellectual Property provisions of EU and international law in the event of a withdrawal of the United Kingdom with or without a proper withdrawal agreement. It tries to clarify the question how Brexit may affect the entry into force of the new European Patent with Unitary effect (EPUE), especially, if the Unified Patent Court Agreement (UPCA) can enter into force, even in case the UK has withdrawn from the EU. What would be the necessary steps to be taken by the EU in order to ensure the functioning of the future European Unitary patent and in case the UPC Agreement would have to be revised because of Brexit.

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LIST OF ABBREVIATIONS

CJEU	Court of Justice of the European Union
ECHR	European Convention on Human Rights
EP	European Parliament
EPC	Convention on the Grant of European Patents ("European Patent Convention 1973")
EPO	European Patent Office
EPUE	European patent with unitary effect
EU IPO	European Union Intellectual Property Office
European Patent	European Patent under the European Patent Convention of 1973 which does not benefit from unitary effect by virtue of regulation (EU) 1257/2012
The agreement	Agreement of 19 February 2013 on a Unified Patent Court (UPC)
The regulation	Regulation (EU) No 1257/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection
The Statute	Statute of the Unified Patent Court
UK	United Kingdom of Great Britain and Northern Ireland
UPC	Unified Patent Court
UPCA	Agreement on a Unified Patent Court
UPP	Unitary Patent Protection (European patent with unitary effect)

INTRODUCTION

Negotiations on the arrangements for the United Kingdom's withdrawal from the European Union have been conducted by the European Commission¹ on behalf of the EU, on the basis of the **European Council's guidelines**, and the subsequent mandate from the Council. The European Parliament, as it has to give its consent² prior to a **withdrawal agreement**³ for its part has also laid down key principles and conditions for its approval⁴.

The EU Treaties will automatically **cease to apply to the UK from the date of the effective exit date, no matter if a withdrawal agreement has been put into force or not** (Article 50.3 TFEU). Little difference would it make, would the draft agreement of 14 November 2018 on the withdrawal of the UK in force the day of the exit, because very little is said concerning patents. The draft withdrawal agreement is silent concerning Patents with one exception: The provisions of Regulation (EC) No 816/2006 of the European Parliament and of the Council of 17 May 2006 on compulsory licensing of patents relating to the manufacture of pharmaceutical products for export to countries with public health problems⁵ shall also apply, under the conditions set out therein, to and in the United Kingdom in respect of Northern Ireland.⁶

All Union law based on Article 118 TFEU and not mentioned in TITLE IV, Articles 54 -61 of the draft withdrawal agreement will cease to apply in case of a withdrawal agreement, and all legislation concerning EU intellectual property law will become obsolete vis-à-vis the UK anyway, in the event of a **“Hard Brexit”**.

On the other hand there is no doubt that the **UK remains signatory state of the [European Patent Convention](#)**⁷ (EPC), agreed in 1973 (and revised in 2000⁸). The membership (38 contracting states) of the EPC, **an international agreement distinct from EU Law**, extends beyond the membership of the EU⁹. In contrast with the European Union Intellectual Property Office (EUIPO) which grants European Union wide unitary designs or trade marks, the EPO today only grants a series of national patents. **Brexit will change nothing in that respect.**

The situation might be completely different though when it comes to the **European patent with unitary effect (EPUE)**, more commonly known as the **unitary patent**. This is a new type of “European” patent not yet in force which would be valid in participating Member States of the European Union. It would be granted through a mix of EU regulations, the UPC Agreement, the EPC, other international agreements applicable to patents and binding on all the Contracting Member States and national law (Article 24 of the UPC Agreement). This In-

¹ COM(2017)218

² Wyzomska, Blanke/Mangiameli, Art. 50, 27.

³ [Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as agreed at negotiators' level on 14 November 2018.](#)

⁴ [European Parliament resolution of 5 April 2017 on negotiations with the United Kingdom following its notification that it intends to withdraw from the European Union, P8_TA\(2017\)0102; EP resolution of 3 October 2017 on the state of play of negotiations with the United Kingdom \(2017/2847\(RSP\)\), P8_TA-PROV\(2017\)0361; EP resolution of 13 December 2017 on the state of play of negotiations with the United Kingdom, P8_TA-PROV\(2017\)0490; EP resolution of 14 March 2018 on the framework of the future EUUK relationship P8_TA-PROV\(2018\)0069;](#)

⁵ O.J. L 157/1 (2006).

⁶ Draft withdrawal agreement, protocol on Ireland/Northern Ireland, Annex 5, point 7.

⁷ Convention on the Grant of European Patents (European Patent Convention) of 5 October 1973 as revised by the Act revising Article 63 EPC of 17 December 1991 and the Act revising the EPC of 29 November 2000.

⁸ O.J. EPO 2001, Special edition No. 4, p. 55.

⁹ Bently, L., Radauer, A., p. 126.

depth Analysis tries to clarify the question how Brexit may effect the entry into force of this new EPUE, especially,

- if the UPC Agreement can enter into force, even in case the UK has withdrawn from the EU,
- what would be the necessary steps to be taken by the EU in order to ensure the functioning of the future European Unitary patent,
- and would the UPC Agreement have to be revised because of Brexit?

1. THE LONG HISTORY OF THE EU PATENT

Historically, a **patent is a public right granted by a sovereign state** which gives its owner the right to prevent others from making, using or selling an **invention** without permission. Patents encourage companies to make the necessary investment for innovation, and provide the incentive for individuals and companies to devote resources to research and development.

At present, in most EU countries, patents can be obtained by **two distinct routes**¹⁰. First, inventors can apply directly to **national patent offices** for patents that only apply in the national territory. Second, a person can apply to the **European Patent Office (EPO)**, based in Munich, for a "European Patent" which, in fact, constitutes a **bundle of national patents** because it has to be validated by each state in which the applicant wishes protection. The conditions for the grant of patents by the EPO are determined by the **European Patent Convention (EPC)**, agreed in 1973 (and revised in 2000). The membership (38 contracting states) of the EPC, an **international agreement distinct from EU Law**, extends beyond the membership of the EU.¹¹

After grant, European patents are subject to European and national law. National law applies, in particular, when it comes to enforcement. After the patent has been granted, it may be opposed by third parties – usually the applicant's competitors – if they believe that it should not have been granted. Appellate jurisdiction at European level is executed by the EPO itself via its boards of appeal. The **Boards of Appeal are the first and final judicial instance in the procedures before the EPO.** They have the task of reviewing contested decisions of the Office's departments. The appeals procedure is governed by the EPC, Part VI. The Boards of Appeal, though independent of the Office in their decisions and bound only by the EPC, are integrated in the organizational structure of the EPO. If a European patent is revoked by the technical board of appeal, there is no further legal remedy at national level. If, however, a patent is upheld at the end of the appeal procedure, **a competitor may institute national nullity proceedings** in a particular member state if, for example, he wants the patent to be declared invalid in that country. The boards of appeal cannot refer any questions of law to the CJEU because the legal systems of the EPC and the EU are not connected with each other. In case of litigation, this can mean divergent outcomes in the various jurisdictions of the EPC contracting states, as proceedings are to be heard before relevant **national courts**.¹²

This means that EPO also grants **patents for non-EU member states**. The terms on which members of the EPC grant national patents usually correspond with the terms of the EPC, so the practical effect of the EPC has been since 1973 to create a reasonable level of harmonization¹³. EPO is not bound by EU *acquis* and is not obliged to follow the rulings of the CJEU. In practice, however, EPO follows a similar pathway to European Union law. As an example, Article 6.2 of the Biotech Directive is almost verbatim reproduced in the Implementing Regulations of EPO (as a model). Moreover, the EPO tends to interpret patent laws in a manner similar to the CJEU.

¹⁰ Bently, L., Radauer, A., p. 113.

¹¹ Albania, Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Malta, Monaco, Netherlands, Norway, Poland, Portugal, Romania, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, and the United Kingdom, **but not the European Union itself**.

¹² Bux, U. (2015), p. 5.

¹³ Bently, L., Radauer, A., p. 113.

1.1. The making of the UPC

As EPO grants national patents, enforcement occurs in national courts, and **is determined according to national law**. The creation of a real "**community patent**" has therefore been a long-held desire within the European Communities and later the EU, with efforts to establish such a truly "European" system. Because of expansive translation costs into the official languages of the EU of a European Patent, the designing of a "European" patent has for a long period floundered. Compared to the US and Asian nations, the high cost of the European patent route was seen as being burdensome, even "a tax on innovation".

In 2000 the European Commission made a legislative proposal to create a **Community Patent through a Council regulation**¹⁴. The aim was to provide for a single patent title applicable in all EU Member States. In the initial proposal for a Community patent a "Community intellectual property court" was foreseen which was to have exclusive jurisdiction of actions and claims relating to the Community patent (Art. 30 of the proposal). For reasons of legal certainty, all actions relating to the Community patent should have come under the jurisdiction of one court, and the decisions of that court were to be enforceable throughout the EU. Judgments of a Chamber of First Instance of that court should have been subject to appeal to a Chamber of Appeal of that court. This became later the "**European and EU Patents Court (EEUPC)**" during the Council deliberations on the proposals. The EP agreed on the proposal in April 2002 with several amendments.¹⁵ It was complemented later by proposals for decisions conferring jurisdiction on the European Court of Justice (CJEU) in disputes relating to the Community patent and establishing the **Community Patent Court** and concerning appeals before the then CJEU Court of First Instance.¹⁶ On 3 March 2003, Member States agreed a common political approach but failed to reach a final agreement, including over the details of the **translation regime** which would have provided that patent proprietors would have to supply translations of the patent claims into all the official languages of the EU. This arrangement was rejected by stakeholders and users of the patent system as too costly and too risky. Several attempts for re-launching a real European "EU" Patent were blocked in the following years.¹⁷

Discussions in the Council were re-launched after adoption of the Commission Communication "Enhancing the patent system in Europe" in April 2007,¹⁸ but only since the entry into force of the Treaty on the Functioning of the European Union (TFEU) in 2009, the EU is explicitly competent for Intellectual Property, i.e. also for **legislation in the field of patents, Article 118 TFEU**:

¹⁴ [proposal for a Council regulation on the Community patent, COM\(2000\)412, O.J. C337/278 \(2000\)](#).

¹⁵ European Parliament legislative resolution of 10 April 2002 on the proposal for a Council regulation on the Community patent - P5_TA(2002)0163.

¹⁶ [Proposal of 23 December 2003 for a Council Decision conferring jurisdiction on the Court of Justice in disputes relating to the Community patent](#), COM(2003)827 and [Proposal of 2 December 2003 for a Council Decision establishing the Community Patent Court and concerning appeals before the Court of First Instance](#) COM(2003)828.

¹⁷ European Parliament resolution of 12 October 2006 on future patent policy in Europe - P6_TA(2006)0416; revised Presidency proposal for a Council Regulation on the Community patent, based on recent discussions in the Working Party on Intellectual Property, Council document no. 8588/09 of 7 April 2009- 2000/0177 (CNS).

¹⁸ Communication COM(2007) 165 final of 3 April 2007.

Article 118 TFEU

In the context of the establishment and functioning of the internal market, EP and Council, acting in accordance with the ordinary legislative procedure, shall establish measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union and for the setting up of centralised Union-wide authorisation, coordination and supervision arrangements.

The Council, acting in accordance with a special legislative procedure, shall by means of regulations establish language arrangements for the European intellectual property rights. The Council shall act unanimously after consulting the European Parliament.

A fresh start had become possible. The proposals of 2000 concerned by these changes were formally modified by the Commission in a communication published on 2 December 2009 (COM(2009)0665), adapting them to the Treaties which had come into force the day before. In December 2009, [Council adopted conclusions on an "Enhanced patent system for Europe"](#) and a general approach on the proposal for a **regulation on the EU Patent**. However, the translation arrangements for the EU patent remained out of the scope of these Council conclusions.

But by end 2009 it had become clear that a whatsoever **European Patents Court** would have to be based on an **agreement outside EU regulations**, and rather require the ratification by the Member States and take place in full compliance with their respective constitutional requirements.

This first attempt to negotiate a draft **international agreement to be concluded between the Member States, the European Union and third countries**¹⁹ parties to the EPC, creating a court with jurisdiction to hear actions related to European and Community patents failed in March 2011, when the CJEU rendered an opinion delivered pursuant to Article 218.11 TFEU, stating: *"... by conferring on an international court which is outside the institutional and judicial framework of the European Union an exclusive jurisdiction to hear a significant number of actions brought by individuals in the field of the Community patent and **to interpret and apply European Union law** in that field, would deprive courts of Member States of their powers in relation to the interpretation and application of European Union law and **the Court of its powers to reply, by preliminary ruling, to questions referred by those courts...**"*²⁰

The opinion by the Court according Article 218.11 TFEU, had been rendered following a request made on 6 July 2009 by the Council of the European Union.

1.2. Enhanced cooperation as the way forward

Meanwhile, and after the entry into force of the Lisbon Treaty, the Commission had prepared the next attempt²¹ to establish a true EU patent. But soon it had become clear that no compromise could be found with Italy and Spain on the language regime and initially twelve member states opted for enhanced cooperation according to Art. 329.1 TFEU in 2011.²² **The UK was one of those first countries pushing to establish enhanced cooperation** which

¹⁹ [Council Document 7928/09 of 23 March 2009 on a revised Presidency text of the draft agreement on the European and Community Patents Court and the draft Statute of that court.](#)

²⁰ [Opinion 1/09 of the Court \(Full Court\) of 8 March 2011, ECLI:EU:C:2011:123 \(point 89\).](#)

²¹ Commission proposal for a Council Regulation on the translation arrangements for the EU patent of 30 June 2010, COM(2010)350.

²² Commission proposal for a Council Decision, COM(2010)790 and accordingly Council Decision 2011/167/EU of 10 March 2011 authorising enhanced cooperation in the area of the creation of unitary patent protection, O.J.L 76/53 (2011).

were followed later by 13 more member states, meaning that the act was authorised for 25 out of then 27 member states.²³ The next step was that the Commission proposed the regulation of the European Parliament and of the Council implementing that enhanced cooperation for 25 member states (except Italy and Spain) in the area of the creation of unitary patent protection, based on Art. 118 TFEU.²⁴ In parallel and in the light of opinion 1/09 by the CJEU of 8 March 2011, the work of member states on **the draft agreement on a Unified Patent Court and draft Statute** continued.²⁵ In the report for the Legal Affairs committee of the EP of Klaus-Heiner Lehne of 10 January 2012 on jurisdictional system for patent disputes²⁶ the **creation of the Court by international agreement** was seen as an effective way to establish a patent litigation system for boosting growth through innovation and to help European business, in particular small and medium-sized enterprises (SMEs), to face global competition;. The respect of the **primacy and proper application of Union law by the Court** should be ensured by providing for the possibility of preliminary rulings pursuant to Art. 267 TFEU, infringement proceedings in accordance with Art. 258, 259 and 260 TFEU and by clarifying that the contracting member states should be liable for damages caused as a result of breaches of Union law by the Court²⁷. Furthermore, the proposed system would be situated within the judicial system of the EU, since contracting member states may only be EU Member States.²⁸

A first reading agreement on the package was reached in December 2011 (**pending a decision on the seat of the patent court**). On 29 June 2012, the European Council agreed the central division would be in **Paris**, and specialised sections in **London** and **Munich**. But the European Council also **called for provisions relating to the CJEU's competence to be deleted from the draft unitary patent regulation**: Articles 6-8 of the proposed regulation²⁹ (relating to the CJEU's competence) should be deleted from the draft unitary patent regulation. A compromise with the EP³⁰, whereby these provisions would be moved to the **separate court agreement**, was reached on 19 November 2012. After over 30 years of talks, the new regime was established on 11 December 2012, when the European Parliament in three separate voting sessions approved the "**EU patent package**" (**unitary patent, language regime and unified patent court**):

²³ Council decision 2011/167/EU of 10 March 2011 authorising the Kingdom of Belgium, the Republic of Bulgaria, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the French Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Hungary, Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Slovenia, the Slovak Republic, the Republic of Finland, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland to establish enhanced cooperation between themselves in the area of the creation of unitary patent protection, by applying the relevant provisions of the Treaties, O.J.L 76/53 (2011).

²⁴ COM(2011)215 of 13 April 2011.

²⁵ Council document 15289/11 of 7 October 2011.

²⁶ Jurisdictional system for patent disputes, 2011/2176(INI)

²⁷ [European Parliament resolution of 11 December 2012 \(P7_TA\(2012\)0476\) on jurisdictional system for patent disputes, point 8 iv.](#)

²⁸ European Parliament resolution of 11 December 2012, point 8 i.

²⁹ Proposal for a regulation of the EP and the Council implementing enhanced cooperation in the area of the creation of unitary patent protection COM(2011)215 of 13 April 2011.

³⁰ European Parliament legislative resolutions of 11 December 2012 on the proposal for a Council regulation implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements (COM(2011)0216 – C7-0145/2011– 2011/0094(CNS)), on the proposal for a regulation of the European Parliament and of the Council implementing enhanced cooperation in the area of the creation of unitary patent protection (COM(2011)0215 – C7-0099/2011 – 2011/0093(COD)) and on jurisdictional system for patent disputes (2011/2176(INI)).

-
- Regulation (EU) No 1257/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection³¹
 - Council Regulation (EU) No 1260/2012 of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements³²
 - Draft Agreement on a Unified Patent Court (UPCA) signed on 19 February 2013 in Brussels.³³

³¹ [O.J. L 361/1 \(2012\)](#).

³² [O.J. L 361/89 \(2012\)](#).

³³ <https://www.unified-patent-court.org/sites/default/files/upc-agreement.pdf>; [O.J. C 175/1 \(2013\)](#).

2. CONTENT OF THE THREE INSTRUMENTS

2.1. Unitary patent protection regulation

Regulation (EU) No 1257/2012 constitutes a special agreement within the meaning of Article 142 of the Convention on the Grant of European Patents of 5 October 1973.³⁴

According to its Art. 18.2, regulation (EU) No 1257/2012 should have been applied as of 1 January 2014, but as the date of entry into force of the Agreement on a Unified Patent Court (the 'Agreement'), is not known, the new regime is on standby: *"It shall apply from 1 January 2014 or the date of entry into force of the Agreement on a Unified Patent Court (the 'Agreement'), whichever is the later"* An application for a "European patent with unitary effect" (means a European patent which benefits from unitary effect in the territories of all the participating member states by virtue of Regulation (EU) No 1257/2012) **would be filed at the EPO as with the current procedure**. Once such a patent is granted and registered in the European Patent Register, it takes effect in the participating Member States of the EU. The European patent with unitary effect shall confer on its proprietor the right to prevent any third party from committing acts against which that patent provides protection throughout the territories of the participating Member States in which it has unitary effect, subject to applicable limitations. The scope of that right and its limitations shall be uniform in all participating Member States. A European patent with unitary effect as an object of property shall be treated in its entirety and in all the participating Member States as a national patent of the participating Member State.³⁵

The participating member states have entrusted the following tasks, amongst others, to the EPO: (Article 9 of regulation 1257/2012):

- the inclusion within the European Patent Register and the administration of the Register for UPP;
- the collection and administration of renewal fees for European patents with unitary effect;
- ensuring that requests by the patent proprietor for unitary effect for a European patent are submitted in the language of the proceedings as defined in Article 14.3 of the EPC;
- ensuring that the unitary effect is indicated in the Register for unitary patent protection, where a request for unitary effect has been filed;

2.2. Language regime regulation

Regulation (EU) No 1260/2012 would allow patent applications in any language, with a translation into one of the EPO's official languages (French, German and English). According to its Art. 7.2, it is not yet applicable (**only at the date of entry into force of the UPCA**). Translation costs would be covered for certain EU residents filing in another EU language. The applicant will have to translate the patent claims (defining the scope of the invention) on his own expenses. English has a privileged status according to Art. 7 compared to the other two

³⁴ Text of the Convention: [http://documents.epo.org/projects/_babylon/eponet.nsf/0/00E0CD7_FD461C0D5C1257C060050C376/\\$File/EPC_15th_edition_2013.pdf](http://documents.epo.org/projects/_babylon/eponet.nsf/0/00E0CD7_FD461C0D5C1257C060050C376/$File/EPC_15th_edition_2013.pdf)

³⁵ An Enhanced European Patent System- The Select Committee- The Preparatory Committee

EPO languages, French and German, as providing an **English translation is compulsory** in any case whereas any translation into another official language of the Union can be provided in case that the application is in English language Art. 7.2. The EP helped to reduce the burden of translation costs by ensuring an amendment that translation costs will be fully reimbursed for EU-based small and medium-sized enterprises, natural persons, non-profit organisations, universities and public research organisations, Art. 5.2.

2.3. Agreement on a Unified Patent Court - UPCA

The UPCA is an international treaty ("Agreement") which creates a specialised patent court (Unified Patent Court- UPC) with exclusive jurisdiction for litigation relating to **European patents and European patents with unitary effect** (unitary patents, EPUE). It was signed on 19 February 2013 by only 25 out of the then 27 EU Member States and will enter into force as soon as 13 states, which must **include France, Germany and the United Kingdom**³⁶, **have ratified it**. The state of the ratification process can be found in Annex, Table 1. France and the United Kingdom have ratified the Agreement on 26 April 2018, but not Germany. As 16 Member States have ratified as of 31 August 2019, it could enter into force as soon as Germany has followed suite. Germany's ratification was halted after a constitutional complaint was lodged on 31 March 2017³⁷. The complaint and Temporary restraining order by an individual addressed the democratic accountability of the regulatory powers overseeing the operation of the UPC and the independence of the judiciary in the context of German Federal Fundamental Law. It was admitted for decision by the Second Senate of the constitutional court and is on the 2019 agenda for final decision. It is possible, however, that questions of European law will be referred to the CJEU for preliminary ruling under the TFEU. Because of this legal uncertainties the Federal President has stopped the German ratification process by putting aside certification and publication of the federal law already voted in both chambers of parliament.

This raises the question of whether a ratification by Germany occurring after Brexit could still trigger the entry into force of the UPCA. However, it seems conceivable to allow the UK (a Member State at the time of its own ratification) to change its legal regime by allowing it to continue to participate in an international agreement.

Interesting to note, that if the UK would withdraw from the UPCA voluntarily before its entry into force, nothing would change: The three Member States in which the highest number of European patents have effect would be Germany, France and the Netherlands, the latter having already ratified on 14 September 2016.³⁸

If, on the other hand, Brexit would be effective after German ratification and thus the start of the UPC system, the legal effects are less certain. Depending on political negotiations, further presence of the UK in the European patent system would be possible. But it is also clear that the United Kingdom would have to accept the primacy of Union law, as the UPCA provides in its recitals 8, 12, 13 and in Article 20. This means also that, in order to ensure the primacy of

³⁶ Article 89.1 UPCA: ratification states must "include the three States in which the highest number of European patents was in force."

³⁷ Verfassungsbeschwerde gegen das Zustimmungsgesetz zu dem Übereinkommen vom 19. Februar 2013 über ein Einheitliches Patentgericht, 2 BvR 739/17.

³⁸ EPO has registered 39,915 valid patents (pending or in force), from the Netherlands, source: <https://patently.com/search/>

Union law, the CJEU has the primacy of European jurisdiction under the new European patent system.

Therefore Article 38 UPCA provides: (1) *The procedures established by the Court of Justice of the European Union for referrals for preliminary rulings within the European Union shall apply.*

(2) *Whenever the Court of First Instance or the Court of Appeal has decided to refer to the Court of Justice of the European Union a question of interpretation of the Treaty on European Union or of the Treaty on the Functioning of the European Union or a question on the validity or interpretation of acts of the institutions of the European Union, it shall stay its proceedings.* A solution that consists in transforming the UPC into a purely international court that applies union law would not be acceptable. But it is also true that a unified European patent litigation system without the UK would certainly not have the same weight.³⁹ Ultimately, much depends on the political negotiations on Brexit. As far as the legal possibilities are concerned, a solution should be found.

The UPC will be a new specialist patents court common to participating states and as part of their judicial system, Article 21. It will have competence to hear disputes regarding the validity and infringement of the new unitary patent. Member states can either host a local division or participate in a regional division with other member states, Article 7.4. E.g. A Nordic regional division. States may also choose not to have a local or regional division. In this instance, all cases for infringement in their territory will be heard in the central division (Paris). Cases will be allocated according to technology sectors as defined by the International Patent Classification applied to the patent:

According to the draft agreement, **the London section** should hear cases relating to chemistry, including pharmaceuticals and the life sciences, **Munich section** will hear cases relating to mechanical engineering, lighting, heating, weapons, blasting, Article 7.2 and Annex II. **Paris** (the central division) has the Presidents office and will hear cases textiles, paper, construction, electricity etc. **The Court of Appeal is based in Luxembourg**, Article 9.5.

The respect of the primacy of EU Law (Article 20 of the Agreement) and the proper application of EU law by the new Court should be ensured by providing for the possibility of preliminary rulings (Article 21 of the Agreement) pursuant to Art. 267 TFEU, infringement proceedings (Art. 22 of the Agreement) in accordance with Art. 258, 259 and 260 TFEU and by clarifying that the Contracting Member States should be liable for damages caused as a result of breaches of EU law by the Court (Article 23 of the Agreement). Decisions of the CJEU shall be binding on the Court.

The UPCA is an international Agreement, meaning that no EU court is created. Power of appeal decisions is taken away from EPO and its Boards of Appeal (see above 1.) which loses its quasi monopoly, as it will be a Court and finally the Court of Appeal which will review the decisions of the EPO (objections to granted patents. or refusing an application).

³⁹ EPO has a total of 1,201,526 registered valid patents (pending or in force), from which 42,961 originate currently from the UK, 82,218 from France and 205,376 from Germany, source: <https://patently.com/search/>

3. CAN THE UK BECOME AND STAY A MEMBER OF THE UPC ?

The UK government wants to leave the Single Market⁴⁰: “The UK’s aim is to finalise a design that allows for frictionless trade outside of the EU’s Customs Union and Single Market.” It also wants to leave the EU judicial system: “UK courts will no longer refer cases to the CJEU, with our Supreme Court truly supreme.”⁴¹

On the other hand, in midst of the Brexit process and after notifying the European Council of its intention to withdraw from the EU, the UK has ratified the UPCA on 28 April 2018. What happens to the agreement is hard to predict. The UPCA is an international agreement but was set up 100 % under the European Union's auspices, and membership is presently limited to EU countries, Recital 13. Therefore, the United Kingdom's future relationship with the UPC will be subject to negotiation with the European partners who expect the United Kingdom to accept the supremacy of EU law on UPC decisions while participating.

3.1 The UK government position

First of all, **the UK government believes that** the Unified Patent Court will not be in force before the UK leaves the EU,⁴² as the start date is dependent on the ratification of Germany.

In mid 2019, the government published a series of technical notices ⁴³, setting out information in case of withdrawal agreement but also in case of no deal. Reading these notes it seems that the government is aware that if the UK leaves the EU without a deal this might have implications on the UK patent system and supplementary protection certificate, the UPC and the EPUE and correspondence addresses and confidentiality for UK patents.

According to the guidance note [“Patents if there’s no Brexit deal”](#) two scenarios for the UPC will become likely:

- The UPC does not come into force. The UK has ratified the UPCA but ratification by Germany is still outstanding. If the UPC is never fully ratified, the domestic legislation to bring it into force will never take effect in the UK. In this scenario, there will be no changes for UK and EU businesses at the point that the UK exits the EU.
- If the UPC is ratified and comes into force, there will be actions that UK and EU businesses, organizations and individuals may need to consider. **The UK will explore whether it would be possible to remain within the UPC unitary patent systems in a ‘no deal’ scenario.** In the event that the UPC and EPUE come into force and the UK needs to withdraw from one or both systems, businesses will not be able to use the Unified Patent Court and unitary patent to protect their inventions within the UK.

UK business will still be able to use the UPC and EPUE to protect their inventions within the contracting EU countries. However in the UK, businesses will only have the option of protecting their inventions using national patents (including patents available from the EPO) and UK courts. UK business will still be open to litigation within the UPC based on actions they undertake within the contracting EU countries if they infringe existing rights.

⁴⁰ HM Government, EU Exit, p. 11.

⁴¹ EU Exit, p. 8.

⁴² <https://www.gov.uk/government/publications/patents-if-theres-no-brexite-deal/patents-if-theres-no-brexite-deal>

⁴³ <https://www.gov.uk/government/publications/ip-and-brexite-the-facts/ip-and-brexite>

EU business will not be able to use the unitary patent to protect their inventions within the UK but will be able to apply for domestic UK rights as they can now, via the UK Intellectual Property Office and the EPO.

3.2. The European Council/Council position

The position of the European Council and the contracting Member States of the UPCA on the possibility to cooperate with the UK in the framework of the UPCA is not known. One can only guess that the willingness of the Heads of State and Government will depend on the outcome of the negotiations on the Brexit. Although the draft withdrawal agreement of November 2018 is silent about Patents,⁴⁴ both parties have agreed, together with the draft withdrawal agreement, a (non-binding) [political declaration setting out the framework for the future relationship between the European Union and the United Kingdom](#). In its point 44 it is provided that both sides “**should provide for the protection and enforcement of intellectual property rights** to stimulate innovation, creativity and economic activity, going beyond the standards of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights and the World Intellectual Property Organisation conventions where relevant.” And in its point 47. that the Parties should establish a mechanism for cooperation and exchange of information on intellectual property issues of mutual interest, **such as respective approaches and processes regarding trademarks, designs and patents.**

Concerning the seat of the UPC, it is interesting to recall that in the margins of the European Council held on 22 June 2017, the Heads of State or Government of 27 Member States decided to relocate from London the **European Medicines Agency (EMA)** and the **European Banking Authority (EBA)** in the context of the United Kingdom's withdrawal from the EU. No reason has been given for this decision but it is without any doubt that the seat of an EU decentralised agency can be relocated by simply modifying the founding regulation (e.g. Art. 7 for EBA regulation) by an amendment of the EU legislator, European Parliament and Council.

The case of the UPCA is different, as in its Article 7, London is determined as one of the sections of the Paris central division of the UPC. The UPCA, as any international agreement can only be modified by unanimous decision of all the contracting states, including the UK. The case would be again different if the 2012 UPCA did never come into force with the UK as a Contracting Member State (e.g. because it has withdrawn from it as well). In that case it would be relatively easy to replace the section in London with another city.

An argument against the legal possibility for the UK to be a Member of the UPCA could be the purpose of it: the 1st recital of the UPCA makes clear that the **UPCA is an instrument for the benefit of the Internal Market**: “CONSIDERING that cooperation amongst the Member States of the European Union in the field of patents contributes significantly to the integration process in Europe, in particular to the establishment of an internal market within the European Union characterised by the free movement of goods and services and the creation of a system **ensuring that competition in the internal market is not distorted;**” In her “Lancaster House speech” delivered on 17 July 2017, the then Prime Minister set out her key priorities in the Brexit negotiations. The speech ruled out membership of the single market categorically. It is therefore questionable if a state which opposes the idea of the single market can be adhering to some of its instruments.

According to Recital 14 UPCA membership seems to be limited to EU countries. Also, the 2012 Patent package was a purely EU project, for the benefit of EU Member States and of the

⁴⁴ [Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as agreed at negotiators' level on 14 November 2018.](#)

Internal Market and originally under the TFEU (although the UPCA happened to become an international agreement).

3.3. The European Parliament position

The EP was not involved in the setting up of the UPCA, but analysing its standpoint expressed in [resolution of the European Parliament of 11 December 2012 on jurisdictional system for patent disputes](#), voted together with the Patent package⁴⁵ there seem to be three problem areas when it comes to continued membership of the UK in the UPCA: after its withdrawal:

- the fact that the UK is not a member of the EU;
- the underlying EU intellectual property law, constantly changing
- the role of the CJEU as last instance for litigations.

3.3.1. EU-Membership of the UK

The EP highlighted that:

“8 (i)- Contracting Member States can only be Member States of the European Union;

...

It appears that from the point of view of the legislator (EP) it is a patent court designed for EU member states, to create and rule on patents in EU member states, which comes under CJEU jurisdiction on questions of EU law. In the light of the history of the making of the UPCA, the UPC was conceived when the UK was still a member state and with sole member states as contracting states. It also was clearly conceived as a Court for Member States of the EU, as in 2012 nobody would have thought that the UK would make use of Art. 50 TFEU and unilaterally withdraw.

3.3.2. EU patent legislation

The EP was not part of the ratification process for the Agreement, therefore the EP resolution of 11 December 2012 is not binding:

“Substantive law

15. Is of the opinion that the Court should base its decisions on Union law, the Agreement, the European Patent Convention (EPC) and national law having been adopted in accordance with the EPC, provisions of international agreements applicable to patents and binding on all the Contracting Member States and national law of the Contracting Member States in the light of applicable Union law;”

On the other hand, the **EP is co-legislator for the underlying EU patent legislation** according to Art. 118 TFEU acting in accordance with the ordinary legislative procedure. It is clear that **the UPCA will apply and interpret EU patent law** in its up to date version in force, not only in the version of the day when the UK has left the EU. For example, patent-related EU legislation like the Biotech Directive.⁴⁶ It harmonises national patent laws regarding biotechnological inventions and specifies those inventions which are patentable on ethical grounds and those which are not. Will the UK authorities recognize rulings of the UPCA based on substantial EU law on the patentability of biotechnological inventions which has no effect

⁴⁵ European Parliament resolution of 11 December 2012 on jurisdictional system for patent disputes - P7_TA(2012)0476.

⁴⁶ [Directive 98/44/EC of EP and Council of 6 July 1998 on the legal protection of biotechnological invention, O.J. L 213/13 \(1998\).](#)

in the UK?⁴⁷ Especially as EU legislation is evolving and the UK legislator would have to incorporate modifications into national law every time “Brussels” has done so. As to the two Regulations (EU) No 1257/2012 and 1260/2012 of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection and on the translation requirements⁴⁸ they still are not applicable because applicability is linked to the entry into force of the UPCA (Articles 18 and 7). Once the UPCA has entered into force, the two EU regulations will take effect the same day, but they will cease to apply again in the UK on the day of the withdrawal of the UK from the European Union, as they are not covered by the draft withdrawal agreement UK /EU⁴⁹.

3.3.3. Cooperation of UPCA with the CJEU

The EP in its resolution highlighted also:

“H. whereas the Unified Patent Court must fully respect and apply Union law, in cooperation with the Court of Justice of the European Union as is the case for any national court;”

and

“8. Accordingly stresses that:-(iii) the Court should be a Court common to the Contracting Member States and subject to the same obligations as any national court with regard to compliance with Union law; thus, for example, the Court shall cooperate with the Court of Justice by applying Art. 267 TFEU;

- (iv) the Court should act in line with the body of Union law and respect its primacy...”

“3. Insists that the Court of Justice, as guardian of Union law, must ensure uniformity of the Union legal order and the primacy of European law in this context;”

The question, the UK has to ask itself is therefore: Can we participate in a UPC which relies on and refers to the CJEU? One of the main reasons, if not the primordial reason for Brexit was that the UK wanted to **take back control** of laws and bring an end to the jurisdiction of the CJEU in Britain and that those laws will be interpreted by judges not in Luxembourg⁵⁰

As to **enforcement of judgements of the UPC**, it is now deemed to be a court within the meaning of (Brussels I) Regulation (EU) No 1215/2012, this has been clarified by Regulation (EU) No 542/2014.⁵¹ It introduces new rules on the relationship between proceedings before certain courts that are common to several EU countries (such as the UPC and the Benelux Court of Justice) on the one hand and the courts of the EU countries under the Brussels I Regulation on the other. In order to ensure legal certainty and predictability for defendants who could be sued in those two Courts at a location situated in a Member State other than the one designated by the rules of Regulation (EU) No 1215/2012. This means that judgments handed down by the UPC should be recognised and enforced in line with the Brussels I

⁴⁷ a similar problem arises concerning supplementary protection certificate granted under Regulation (EC) No 469/2009, of the European Parliament and of the Council of 6 May 2009 concerning the supplementary protection certificate for medicinal products, O.J. L 152/1(2009) or under Regulation (EC) No 1610/96 of the European Parliament and of the Council of 23 July 1996 concerning the creation of a supplementary certificate for plant protection products, O.J. L 198/30 (1996).

⁴⁸ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012R1260&from=EN>

⁴⁹ [Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as agreed at negotiators' level on 14 November 2018.](#)

⁵⁰ Theresa May: The government's negotiating objectives for exiting the EU: PM speech, <https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech>, point 2

⁵¹ Regulation (EU) No 542/2014 of the European Parliament and of the Council of 15 May 2014 amending Regulation (EU) No 1215/2012 as regards the rules to be applied with respect to the Unified Patent Court and the Benelux Court of Justice, O.J. L 163/1 (2014)..

regulation (which will be applicable after Brexit in case the withdrawal agreement would come into force⁵²).

3.4. The point of view of the CJEU

CJEU Opinion 1/09 was requested pursuant to Article 218(11) TFEU on 6 July 2009 by the Council⁵³. The question was: **'Is the envisaged agreement creating a Unified Patent Litigation System (currently named European and Community Patents Court) compatible with the provisions of the Treaty establishing the European Community?'** It is partly read so that membership of the new system is open only to EU Member States. On the other hand, there is an increase in the number of votes that want to show a right-dogmatic way of facilitating the participation of the United Kingdom (and possibly other non-EU countries in the future as well).

Article 14a of the 2009 draft agreement provided⁵⁴:

'Applicable law

- (1) *When hearing a case brought before it under this Agreement, the [Patent] Court shall respect Community law and base its decisions on:*
 - (a) *this Agreement;*
 - (b) *directly applicable Community law, in particular Council Regulation ... on the Community patent, and national law of the Contracting States implementing Community law ...;*
 - (c) *the European Patent Convention and national law which has been adopted by the Contracting States in accordance with the European Patent Convention;*
 - (d) *any provision of international agreements applicable to patents and binding on all the contracting parties.*
- (2) *To the extent that the [Patent] Court shall base its decisions on national law of the Contracting States, the applicable law shall be determined:*
 - (a) *by directly applicable provisions of Community law; or*
 - (b) *in the absence of directly applicable provisions of Community law, by international instruments on private international law to which all Contracting Parties are parties;*
or
 - (c) *in the absence of provisions referred to in (a) and (b), by national provisions on international private law as determined by the [Patent] Court.*
- (3) *A Contracting State which is not a party to the Agreement on the European Economic Area shall bring into force the laws, regulations and administrative provisions necessary to comply with Community law relating to substantive patent law.'*

The Council question concerned a version of the draft agreement which allowed non-EU member states to be a party of the agreement, an international agreement to be concluded between the Member States, the European Union and third countries which are parties to the

⁵² Article 67 of the [Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as agreed at negotiators' level on 14 November 2018](#).

⁵³ [Opinion 1/09 of 8 March 2011, delivered pursuant to Article 218\(11\) TFEU](#), ECLI:EU:C:2011:123.

⁵⁴ [Draft Agreement on the European and Community Patents Court, Council Working Party on Intellectual Property \(Patents\), Council Document 7928/09 of 23 March 2009 on a revised Presidency text of the draft agreement on the European and Community Patents Court and the draft Statute of that court](#).

EPC.⁵⁵ Although the CJEU did not expressly say that the UPCA may only be lawfully entered into between EU Member States the provision has been scrapped in the 2011 version of the agreement and its consideration 14 now provides explicitly: “... *this Agreement should be open to accession by any Member State of the European Union; Member States which have decided not to participate in the enhanced cooperation in the area of the creation of unitary patent protection may participate in this Agreement in respect of European patents granted for their respective territory.*” By making that clear, the contracting states might have removed any legal doubts concerning the compatibility of the Agreement with the TEU and TFEU (see also Art. 2 lit b) of the Agreement).

But the CJEU considered the original agreement in breach of EU law, mainly because it conferred “*on an international court which is outside the institutional and judicial framework of the European Union an exclusive jurisdiction to hear ... actions brought by individuals in the field of the Community patent and to interpret and apply European Union law in that field.*” This would deprive courts of Member States of their powers in relation to the interpretation and application of European Union law and the Court of its powers to reply, by preliminary ruling, to questions referred by those courts and, consequently, would alter the essential character of the powers which the Treaties confer on the institutions of the European Union and on the Member States and which are indispensable to the preservation of the very nature of European Union⁵⁶.

When the Council put the question to the CJEU: “Is the envisaged agreement creating a Unified Patent Litigation System compatible with the provisions of the Treaty establishing the European Community?” most member states were in favour: The UK, during the hearing procedure before the CJEU, considered that the essential character of the CJEU’s powers was preserved within the litigation system provided for by the envisaged agreement (to be regarded as a mixed agreement), “since neither the exclusive jurisdiction of the Court nor the binding effect of its decisions are called into question”⁵⁷. The UK therefore pleaded that the draft agreement was compatible with the Treaties.

The answer of the Court was “No” in the end, because “... *the international court envisaged in this draft agreement is to be called upon to interpret and apply not only the provisions of that agreement but also the future regulation on the Community patent and other instruments of European Union law, in particular regulations and directives in conjunction with which that regulation would, when necessary, have to be read, namely provisions relating to other bodies of rules on intellectual property, and rules of the TFEU concerning the internal market and competition law.*”⁵⁸

⁵⁵ CJEU Opinion 1/09, point 78.

⁵⁶ Opinion 1/09 of 8 March 2011, point 89

⁵⁷ observations submitted to the Court by the United Kingdom, CJEU Opinion 1/09, point 45.

⁵⁸ [CJEU Opinion 1/09, request to the Court for an Opinion pursuant to Article 218\(11\) TFEU, made on 6 July 2009 by the Council](#), point 78, ECLI:EU:C:2011:123.

4. STAFF AND BUDGET OF THE UPC -OPEN QUESTIONS

Judges shall possess the qualifications required for appointment to judicial offices in a Contracting Member State (Art. 15.2 of the Agreement). This means a judge must also have the nationality of a contracting member state. Also, Art. 2.1 of the Statute provides: "Any person who is a national of a Contracting Member State and fulfils the conditions set out in Article 15 of the Agreement and in this Statute may be appointed as a judge." Will the CJEU accept that in future British judges will decide about the interpretation of EU law? Any decision of the Court panel, also those which have as a component member a British judge, covers the territory of those contracting member states (EU member states) for which the European patent has effect, Art 34 of the Agreement.

Art. 8.4 of the Statute of the UPC provides that the **Protocol on the privileges and immunities of the European Union** shall apply to the judges of the Court, i.e. also on British judges. Will UK authorities accept the primacy of EU law when it comes to national taxes and immunity of their own citizens who are judges at the London specialised section?

Finally, the budget of the UPC shall be financed by the Court's own financial revenues and, at least in the transitional period referred to in Article 83 as necessary, by contributions from the Contracting Member States. The budget shall be balanced. If the Court is unable to balance its budget out of its own resources, the Contracting Member States shall remit to it special financial contributions (Art. 36.1 and 36.4 of the Agreement). Concerning the London specialised section, Art. 37 of the Agreement provides that contracting member states hosting its sections or the Court of Appeal shall provide the facilities necessary for that purpose. During an initial transitional period of seven years starting from the date of the entry into force of this Agreement, the Contracting Member States concerned shall also provide administrative support staff.

As the court fees of the UPC as its revenue does not go into the EU budget and no contribution from the EU budget to the UPC is to be made, the fact that the UK will cede to make contributions to the budget as of end 2020, will have no effect on the setting up and operation of the UPC. The UPC system would be situated somehow within the judicial system of the EU, the member states and international law (EPC). But the creation of the new Patent Court system relies very much on the infrastructure and know-how of the Member States. Quality and efficiency of proceedings will depend of

- the selection of judges (pool of judges, qualifications, training, etc.)
- how are the judges selected and by whom?
- the composition of the courts and chambers.

5. CONCLUSION

The European Patent regulation of 2012 is EU law which establishes a 'unitary patent' enforceable in all participating Member States. The UPCA is an international agreement which provides for a unified court system with jurisdiction to resolve certain types of patent disputes, formerly entrusted to national courts and the EPO boards of appeal. Both instruments are linked and build upon the European Patent Convention. The EPC is an international agreement that empowers the EPO to grant bundles of national patents to applicants through a single application procedure. The future EPUE system will lead to an interwoven system of EPO, Member States and EU existing infrastructures and law. The respect of the primacy of EU Law (Article 20 of the Agreement) and the proper application of EU law by the new UPC is being ensured by the possibility of preliminary rulings (Article 21 of the Agreement) to the CJEU, pursuant to Art. 267 TFEU.

The recent ratification of the UPCA has proved that the UK intends to stay within the framework of a European Patent system that goes beyond the EPC, even after Brexit. In certain ways this sends a somewhat mixed message, as the UK wishes to leave the Single Market of the EU and the Jurisdiction of the CJEU. On the other hand, it seems not per se legally impossible that the UK can stay within the UPCA, even when not an EU Member State.

Now there are various scenarios for the UPCA in the case of a Brexit. It is clear that the UPCA would come in force immediately, once Germany has ratified. Even though if the UK would withdraw of the UPCA today, this would not hinder the UPCA coming into force. The three Member States with the most of patents in force (UK excluded) are Germany, France and the Netherlands. It is also understood that a solution for the London section has to be found in case of the UK has left the UPCA - before or after its entry into force. In case that the UK would wish to stay inside the UPCA, this pledge would have to be respected by EU Member States. On the other hand it is highly questionable that the UK itself would accept the arrangements of Article 20 and Article 21 of the UPCA which foresee the primacy of EU Law and its application being ensured by the possibility of preliminary rulings pursuant to Art. 267 TFEU, as the end of the jurisdiction of the CJEU in the UK was one of the main intentions of the whole Brexit process. Maintaining the UK within the UPCA would need innovative legal solutions, as the UPC is an international court applying EU law -and the reason for Brexit was all about not applying EU law any more. All EU actors are of the opinion that the CJEU would have the final say about interpretation of existing EU Law, that the primacy of EU law has to be respected and that the CJEU is the ultimate guardian of EU intellectual property law. On the other hand, the jurisprudence of the CJEU is not expressly excluding the possibility to allow a non -EU Member State forming part of the UPCA.

The UPC shall be financed by its own financial revenues and during a transitional period by contributions from the Contracting Member States. As any UPCA contracting state has the right to nominate judges, any British judge would decide about the interpretation and application of EU (patent) law. It would be only logical that the UK authorities accept the primacy of EU law when it comes to judgements which have been issued by UPC sections with the participation of UK judges, especially from the London specialised section.

Table Ratification details of Agreement on a Unified Patent Court⁵⁹

Party	Notification	Declaration/reservation
Austria	06-Aug-13	
Belgium	06-Jun-14	https://www.consilium.europa.eu/en/documents-publications/treaties-agreements/ratification/?id=2013001&partyid=B&doclanguage=en
Bulgaria	03-Jun-16	
Cyprus	-	
Czech Republic	-	
Germany	-	
Denmark	20-Jun-14	
Estonia	01-Aug-17	https://www.consilium.europa.eu/en/documents-publications/treaties-agreements/ratification/?id=2013001&partyid=EE&doclanguage=en
France	14-Mar-14	
Greece	-	
Hungary	-	
Italy	10-Feb-17	
Ireland	-	
Lithuania	24-Aug-17	
Luxembourg	22-Mai-15	
Latvia	01-Jan-18	
Malta	09-Dec-14	
Netherlands	14-Sep-16	https://www.consilium.europa.eu/en/documents-publications/treaties-agreements/ratification/?id=2013001&partyid=NL&doclanguage=en
Portugal	28-Aug-15	
Romania	-	
Sweden	05-Jun-14	
Finland	19_Jan-16	https://www.consilium.europa.eu/en/documents-publications/treaties-agreements/ratification/?id=2013001&partyid=SF&doclanguage=en
Slovenia	-	
Slovakia	-	

⁵⁹ <https://www.consilium.europa.eu/en/documents-publications/agreements-conventions/agreement/?aid=2013001>

Party	Notification	Declaration/reservation
United Kingdom	26 Apr 18	https://www.consilium.europa.eu/en/documents-publications/treaties-agreements/ratification/?id=2013001&partyid=GB&doclanguage=en
(Croatia)	EU accession after agreement	

FURTHER READING

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ANNEX 1**Figures: EPO patents from EU origin ranked by number -currently in force⁶⁰**

EU Countries by rank	Country Code	Total Count
Germany	DE	205 376
France	FR	82 218
UK	GB	42 961
Netherlands	NL	39 915
Italy	IT	33 739
Sweden	SE	32 689
Finland	FI	15 783
Austria	AT	15 615
Belgium	BE	13 317
Denmark	DK	12 341
Spain	ES	8 834
Ireland	IE	4 792
Luxembourg	LU	3 948
Poland	PL	2 236
Czech Republic	CZ	1 304
Portugal	PT	954
Hungary	HU	799
Slovenia	SI	758
Greece	GR	614
Malta	MT	455
Cyprus	CY	413
Slovakia	SK	263
Estonia	EE	208
Bulgaria	BG	173
Lithuania	LT	162
Romania	RO	155
Croatia	HR	103
Latvia	LV	99
TOTAL	EU	520 224

Source: figures kindly provided by [Patently.com](https://www.patently.com)

⁶⁰ at date 8 October 2019. Note that 3,683 EPO patents have no country of origin details. This means that numbers are subject to a 0.3% margin of error.

This In-depth Analysis resumes the possible scenarios concerning several Intellectual Property provisions of EU and international law in the event of a withdrawal of the United Kingdom with or without a proper withdrawal agreement. It tries to clarify the question how Brexit may effect the entry into force of the new European Patent with Unitary effect (EPUE), especially, if the European Patent Court Agreement (EPC) can enter into force, even in case the UK has withdrawn from the EU. What would be the necessary steps to be taken by the EU in order to ensure the functioning of the future European Unitary patent and if the UPC Agreement would have to be revised because of Brexit.