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The Uncertain Future of the Proposed European Unitary Patent after “Brexit” Vote

The future of the proposed European Unified Patent Court and European Unitary Patent have been jeopardized by the Brexit vote because ratification of the proposal by the United Kingdom is expressly required before the proposed system can be implemented. However, despite uncertainty regarding the future of the proposed system, it is clear that patent filings and patent filing strategies in the European Patent Office (EPO) and the United Kingdom Intellectual Property Office are currently unaffected by the Brexit vote.

Proposed European Unitary Patent

In February 2013, after decades of protracted and contentious negotiation, 25 of 27 European Union (EU) member states signed the Unified Patent Court Agreement (Agreement), setting in motion profound changes to the European patent landscape.

The Agreement proposes to confer an option to owners of a European patent to file a request that the patent be classified as a European patent with unitary effect or, more simply, a “unitary patent.” Once the request is granted, the unitary patent will be enforceable throughout all participating EU member states, without requiring separate national validation, translation, or maintenance fee payments.

In addition, the Agreement proposes to establish a Unified Patent Court (UPC), a specialized court that will be empowered with exclusive jurisdiction to issue judgments and orders related to infringement and validity of European patents and unitary patents. Decisions issued by the UPC will be binding in all EU member states, reducing the complexity and cost of European patent litigation for both patent owners and defendants.

The Agreement requires ratification by at least 13 EU member states before the UPC can be implemented.¹ The 13 ratifications must include the three member states “in which the highest number of European patents had effect” in the year preceding receipt of the final ratification.² As of this writing, these member states are Germany, France and the United Kingdom; ratification of the Agreement by at least these three countries is expressly required.

In addition, the Agreement expressly states that the UPC will have jurisdiction only within EU member states; a country that is not a member of the EU cannot join the UPC, nor can citizens of such a country apply to become judges of the UPC.

Common consensus predicted that the Agreement would be ratified by all required parties by spring of 2017.

Unknown Effects of British Referendum

On June 23, 2016, the United Kingdom (UK) held a referendum to leave the EU (the “Brexit”). As of that day, the UK had yet to ratify the Agreement, leaving the future of the UPC and the proposed unitary patent uncertain.

As the formal legal process of separating the UK from the EU proceeds, it is likely (but not certain) that the UK will continue to be considered a member state of the EU under the Agreement. As a result, the UK should retain the

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ability to ratify the Agreement, despite the eventuality of full separation from the EU. Whether the UK will exercise this ability remains to be seen.

If the UK does not prioritize ratification of the Agreement, implementation of the UPC in its proposed form may be delayed until after the UK has fully separated from the EU. That process is predicted to take at least two years.

It is also possible one or more member countries would propose renegotiating the Agreement.

The president of the EPO, Benoît Battistelli, is hopeful that the UK will ratify the Agreement so that the implementation of the UPC may not be delayed. Specifically, President Battistelli remarked on June 24, 2016, that the EPO expects “participating member states will find a solution as soon as possible which will allow a full implementation of these so-long awaited achievements.”³ The president did not opine on possible solutions.

Patent Filings in Europe and the United Kingdom

Despite the unclear future of the UPC and the unitary patent, it is clear that the Brexit vote does not presently impact the relationship between the UK and EPO. The ability of patent applicants to file European patent applications and seek validation in the UK is unaffected by the UK’s status as a member state of the EU, at least for the foreseeable future.

This document is intended to provide you with general information regarding the impact of the "Brexit" vote on the European Unified Patent Court and European Unitary Patent. The contents of this document are not intended to provide specific legal advice. If you have any questions about the contents of this document or if you need legal advice as to an issue, please contact the attorney(s) listed or your regular Brownstein Hyatt Farber Schreck, LLP attorney. This communication may be considered advertising in some jurisdictions.

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1 Unified Patent Court Agreement, Arts. 1–2

2 Unified Patent Court Agreement, Art. 89

3 <https://www.epo.org/news-issues/news/2016/20160624.html>