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CONSEQUENCES OF A BREXIT ON THE UPC AGREEMENT AND ON THE UNITARY PATENT PROTECTION

1. The present situation

We are now faced with the result of the British referendum which decided that UK should leave the European Union.

In order to achieve this result, UK has to trigger Article 50 of TFEU.

According to the last news it seems that the UK government intends to trigger this Article in March 2017. However the possibility for the government instead of the parliament, to take this decision is presently challenged before the London High Court.

In any case, if Article 50 is triggered, this will open a time period of two years maximum which should be used by the UK and the European Union to negotiate the practical and legal implications of such a leave.

This time period should end preferably before the next elections to the EU Parliament which are scheduled for June 2019.

2. What are the consequences for the UPC Agreement?

Since the UPC Agreement cannot enter into force as long as UK has not ratified, the Agreement is presently on standby.

The great majority of representatives of the European industry is in favor of an entry into force of the UPCA, preferably including UK.

Several possibilities to arrive at this result have been recently proposed.

- According to a first possibility, UK could ratify the UPC Agreement already now, leading to a quick entry into force of the UPC

The local division in London as well as the London section of the Central Division could be opened as soon as the UPCA enters into force. British judges could be nominated to act in the various divisions of the First Instance Court as well as in the Court of Appeal.

If this possibility is used, the question is then to decide whether UK could remain a Contracting Member State of the UPC Agreement even after having left the European Union or if UK would have to leave the UPC as soon as it leaves the European Union.

If it would appear impossible for UK to remain within the frame of the UPC Agreement after leave, it seems impossible that the London local division could be maintained. The same is probably also true for the London section of the Central Division and for the activities of the British judges.

- According to a second possibility, and if UK refrains from any ratification of the UPC Agreement, the present UPC Agreement would be amended as soon as possible so as to organize the UPC without UK .

The goal should be that the Agreement could enter into force before the effective Brexit i.e. before June, 2019.

3. What are the changes which would be necessary to the UPCA to allow UK to participate?

If UK does not ratify the UPC Agreement before leaving the European Union, the necessary changes for admitting UK after leave, appear politically difficult to accept.

There are presently proposals made for politically more acceptable changes, on the basis that UK would ratify the UPC Agreement as soon as possible and in any case before leaving the European Union.

The obstacles to a participation of a country which is not a Member State of the European Union are the following:

- Article 84 UPC clearly mentions that the UPC Agreement is open for signature to “Member States” which according to the definitions of Article 2 UPC, means Member States of the European Union. This Article should therefore be amended if UK is to participate to the UPC after leave.
- Opinion 1/09 of the CJEU considered that the draft Agreement on a European and Community Patents Court established in March 2009 was not compatible with the EU treaties.

This opinion led to an amendment of the draft which is now the present Agreement.

The CJEU was particularly concerned with the fact the future jurisdiction would be competent for the future Community patent.

Since the UPC Agreement relates to a jurisdiction having competence not only for European patents but also for Unitary patents (European patents having a Unitary effect within the Contracting Member States of the European Union), the Court insisted, in its opinion, on the fact that it is essential to guarantee a direct cooperation between the ECJ and the national jurisdictions in view of a uniform interpretation of the Union law. The functions of the national jurisdiction are therefore essential for the preservation of Union law. Since the new jurisdiction replaces the national jurisdictions, this direct cooperation between the UPC and the ECJ must be guaranteed. In addition, the liability of a Member State of the European Union should always remain in case of a violation of Union law by a national jurisdiction and therefore also by the UPC.

In its opinion, the CJEU also noted that the Benelux court is in a different situation since it is a jurisdiction which is common to several Member States and therefore remains within the jurisdictional system of the European Union.

All those remarks of the CJEU have been introduced in Article 21 UPC concerning the request for preliminary rulings before the CJEU.

- If UK is to participate to the UPC Agreement even after having left the European Union, it will therefore be necessary to amend Article 84 UPC so that the Agreement would not be limited to EU Member States.

In addition to this amendment, the UK should positively recognize the possibility of preliminary rulings by the CJEU and the full application of Union law.

One way of stating such an acceptance could be to draft a corresponding provision in an exit agreement to be signed by the UK and the European Union.

4. What are the consequences for the Unitary patent?

The Unitary Patent Protection has been defined by two EU Regulations. It does not seem possible for a non Member State of the European Union to participate to such a Unitary Patent Protection.

Some voices however emitted the idea that the Member States of the European Patent Convention (EPC) could agree to a special agreement according to Article 142(1) EPC. A group of EPC Contracting States, including UK, could then agree that a European patent may only be granted jointly in respect of all those states. A kind of “further Unitary patent” would then be created, which would cover UK.

It is however questionable whether such a solution would be politically acceptable.

5. Conclusion

It can be concluded that there are three ways of reaching an entry into force of the UPC Agreement.

- A quick way which is however uncertain consists in having the UK ratifying already now the Agreement before leaving the European Union with the hope that legal solutions will be found and confirmed in an exit agreement and by suitable amendments of the present UPC Agreement.

It must be noted that amendments of the present UPCA could be made by the Administrative Committee which may amend the Agreement to bring it into line with Union law according to Article 87(2) UPC. If the changes can be made in that way, no new ratification process would be necessary in the various Contracting Member States.

This leads to a certain risk since a Member State of the European Union could at any time ask for an opinion of the CJEU, which could be negative.

- A slow but safer way would be to first amend the present UPC Agreement to make possible for UK to remain a Contracting Member State after leaving the EU and to obtain confirmation by the CJEU that this amended Agreement would be compatible with the European Union Treaties.
- Finally, a third way could be for the signatory States to decide already now that the UPC Agreement should enter into force without UK. It would then be necessary to define a new location for the London section of the Central Division (if the rather complicated solution of three locations for a “Central Division” is maintained).

This third way could lead to entry into force of the Agreement only slightly amended as far as the Central Division is concerned. The future decisions of the UPC would then not anymore cover the territory of the United Kingdom.

- If the UPCA enters into force and UK remains a Contracting Member State of the UPC, the Unitary patent may or may not extend its protection to the UK territory. The only strange consequence if the Unitary patent does not extend to UK is that the London local division and the London section of the Central Division will be competent for deciding infringement and validity of Unitary patents not extending to the UK territory.

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