Open hostility?

Bristows' **Alan Johnson** and **Gregory Bacon** are puzzled by the negativity shown in a report from the Max Planck Institute, which examined the viability of the UK remaining in the Unified Patent Court

The Max Planck Institute for Innovation and Competition has published a research paper (by Lampig and Ullrich) titled *The Impact of Brexit on Unitary Patent Protection and its Court*. It makes a major contribution to the debate on this topic. Further, no one could disagree with its conclusion, "Unless the outstanding issues are sorted out in advance, uncertainty will hang over the system … It should therefore be in the interests of all contracting parties and potential users of the system to be sure of the UPCA's compatibility with EU law and of the consequences that the UK's upcoming withdrawal from the EU may have in that regard."

However, the paper spends virtually all of its 182 pages explaining why the UK cannot be a part of the unitary patent and Unified Patent Court (UPC) system post-Brexit. It suggests no solutions, and moreover one senses that the authors have no desire to find any. As such they are out of line with the views of industry (European and not just UK-based) which wants to find a way for the UPC to start as soon as possible, and with the UK in it. The hostility toward the UK in the light of Brexit evident in some sections[1] is also surprising in a legal treatise and devalues the work by creating an impression of a lack of partiality.

The authors also appear to have what one might call a 'purist' view of the EU. They appear to have a fundamental, possibly politically motivated, view of the EU and its institutions as something which should not be tarnished by having anything to do with a non-EU state. In that regard they claim that, "the UPC needs to be preserved as a judiciary that, being common only to EU Member States, is bound to their obligations of loyal cooperation and by their relationship of mutual trust in integration by an autonomous legal order." This comment is explained by the relationship of the UPC with the Court of Justice of the European Union (CJEU), effectively saying that for the CJEU to receive references from the UPC, it must have, as its members, only EU states. However, by contrast, relevant CJEU case law[2] suggests that what the CJEU itself is concerned with is that its rulings are honoured, and that the primacy of EU law is safeguarded. It may be of concern to those among Brexit supporters who consider that the CJEU should have no influence at all on legal decisions affecting the UK, but for better or for worse, the UK (post the Brexit vote) has ratified the UPC Agreement complete with its acceptance of the primacy of Union law in the areas relevant to the law of patents. One might then ask two questions rhetorically: first, what else is the UK supposed to do to signal its acceptance of the CJEU jurisdiction; and secondly, why would the CJEU have a problem with that? The answer to the second question must surely be reminiscent of the apocryphal story of the economist who accepted an idea would work in practice, but questioned how it would work in theory.

Whether or not there is an issue at all is debatable, but by comparison with the Max Planck authors, Richard Gordon QC of Brick Court Chambers assisted by Tom Pascoe in their opinion on the future participation of the UK in the UPC[3] concluded that any such issue can be solved by an EU-UK agreement specifically stating that the CJEU can accept references from the UPC. This is not only entirely logical, but also a far more constructive contribution to the debate, and unless we have missed something buried in the Max Planck paper, we do not believe this aspect of the Gordon Pascoe view has been addressed by the authors. Neither have they addressed the provisions of Article 71a of the amended recast Brussels Regulation (1215/2012 as amended by 542/2014) which deems the UPC a common court of member states, and which arguably[4] obviates the need for any agreement in any event. These omissions are, in the context of a lengthy paper, surprising.

There are other issues too where the authors see problems, which may well have a sound theoretical basis, but which can be refuted.[5] The long-term participation of the UK in the unitary patent part of the project, for example, is certainly not without its difficulties. But on this and all other issues, the authors have a demonstrably negative approach rather than one which appears open-minded.

One of the mantras in relation to the UPC of Margot Fröhlinger, formerly of the European Commission and currently of the European Patent Office, is "where there's a will, there's a way". For now at least, despite Brexit, there is a considerable will for the UK to be a part of the UPC. It is to be hoped that the negativity of this paper does not discourage those who seek to find the solutions that are wanted by so many.

Footnotes

1. For example on p 102: "… the UK generally and insistently repudiates [the] principles of the law of the EU … that distinguish the EU as a particular model of cooperation and integration of states…"
2. For example Opinions 1/92 and 1/00.
3. *Legal Opinion on the UK's participation in the UPC after Brexit*
4. Although it is arguable that since this is not a Treaty provision this is insufficient.
5. See in particular the Reply by "Atticus Finch" at: http://eplaw.org/upc-reply-to-max-planck-impact-study-of-brexit-on-the-unitary-patent-protection-and-its-court/

Authors

Alan Johnson (left) has advised on intellectual property rights throughout his career, particularly in patent matters, and has a keen interest in the UPC. He sits on the UK IPO's European Focus Group which advises on government policy concerning the unitary patent and UPC, as well as being a regular speaker and commentator on the UPC. In 2014 he was appointed chair of AIPPI's unitary patent/UPC committee.

Gregory Bacon (right) is a partner in the IP litigation department at Bristows with a particular focus on patent litigation in the life sciences sector. He has extensive experience of acting before the national courts, as well as on strategic multinational litigation in multiple jurisdictions, hence his interest in the UPC.