

# **BREXIT**

## **How it effects IP in Europe**

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On June 23, the British held a referendum and voted to leave the European Union. No one knows how this (Br)exit is going to work and even more so, no one knows how this decision will affect IP rights. Therefore, please understand the following paragraphs as the authors's personal opinion.

### **Britains vote to leave.**

When the majority of Britains voted leave, the Prime Minister David Cameron – who initiated the referendum in the first place – announced that he would resign in October as he did not think that he was the right person to implement the Brexit. His successor will be Theresa May, who already announced that she will not try to overturn the referendum (which is not binding for Parliament) and that there will be no second referendum. These statements ended all speculations about how Britain could try to stay in EU regardless of the referendum. Therefore, I think it is safe to assume that Brexit will happen.

### **Leaving the EU.**

Please note, however, that for the time being - and for a few more years to come – Britain is and will be a member of the EU. The Treaty of the European Union provides for an exit procedure. According to Art. 50, a member wishing to leave the EU has to formally notify the desire to leave. Then the EU and the member will have to negotiate the terms of a “leave agreement.” Regardless of the outcome of the negotiations, membership will automatically end two years after the notification, even if there is no agreement<sup>1</sup>. This deadline can be extended by unanimous decision of all Member States. The EU already announced that there will be no formal or informal negotiations before Britain's notification. According to that, we can expect the notification by the end of the year. Since, it will be impossible to renegotiate the relationship between the EU and Britain within just two years, we can expect that Britain will be a member of the EU for several more years. I don't think that anyone will risk a Brexit before all terms have been negotiated.

### **So nothing changes for IP? Effect of Brexit on the EP patents.**

Brexit or the current situation will not have any effect on the current European Patent system, which is a mere application system. When an application is filed with the European Patent Office, the applicant gets a bundle of national patents upon grant. Since the European Patent Organisation (EPO) is not an EU institution, the system does not have to change and Britain can still be a member after Brexit.

### **What about European Trademarks and designs?**

Unlike the EPO the European Union Intellectual Property Office (EUIPO, formerly known as Office for the Harmonization in the Internal Market) is an EU agency. If Britain leaves, they are no longer part of the system, which means that existing EU trade marks and designs lose their effect in Britain. A few days ago

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<sup>1</sup> When Greenland left the EU in the 80's, negotiations took about 3 years.

I read a soothing article written by a British partner of an international law firm, who stated that this situation is no reason to worry as there will be laws in Britain, which ensure that existing EU IP rights will be transformed into corresponding national rights, in particular keeping their priority. His suggestion was to sit back and relax.

While I admit that this is what one should expect, there is no guarantee that the British resources allow for new laws in all fields affected by Brexit – in time. Government and Parliament will need a lot of manpower to negotiate leave terms with the EU and pass all national laws in due course. This should not be a problem. But, if it is, trademarks and designs might be lost. Therefore, in view of priority, it can be advisable to register national trade marks for the most important brands of a company in Britain right now, just in case the laws required are not in place in time.

### **What happens to the European Patent with Unitary Effect?**

According to the current timeframe, the system of the European Patent with Unitary Effect is due to start in early 2017. The hiring process for the judges of the Unitary Patent Court (UPC) has already started, court rooms are currently prepared. However, the underlying legal basis is not effective, yet. To enter into force, the UPC agreement needs to be ratified inter alia by Germany, France and Great Britain. According to my opinion, Britain will not ratify the agreement now that the people voted to leave.

Reason is that Britain would not just have to organize the court infrastructure (one chamber is supposed to be in London), but will also have to accept the competence of the European Court of Justice in UPC matters. However, if Britain is no longer a member of the EU, its courts can't refer matters to the European Court of Justice and the court has no competence to hear British cases.

One other option would be to reinterpret the agreements or to make some smaller amendments so that Italy, as the member with the highest number of European Patent Applications after Germany, France and Great Britain, can replace Britain. This is very unlikely to happen while Britain is still a member of the EU. Even if this option were discussed, it can be expected that Italy will claim a chamber of the UPC in Milan. It could even happen that Italy demands that Italian becomes an official language of the Unitary Patent System. In any event, negotiations will last a while.

It has to be concluded that the Unitary Patent System in its present form will most likely not be ratified by Britain due to the leave vote. This in turn has the effect that the system can't enter into force as planned. In any event, the legal basis of the entire system would have to be amended, which will probably not happen before Brexit becomes effective. Further, negotiations might re-open discussions about issues previously resolved (in particular the language regime and the seat of institutions). In view of the fact that the original negotiations lasted more than 40 years, one does not have to be a pessimist to see a high likelihood that the entry into force of the Unitary Patent System will be delayed for years – or may fail.