

Update: Brexit and intellectual property rights in Europe

Following the UK's vote to leave the EU a few months ago, the UK is slowly beginning the long process of a negotiated exit.

Even after the UK leaves the EU there will be no effect on our usual patent prosecution and opposition work, as the EPO is not part of the EU. Our UK, and indeed pan-European, patent litigation practice will also continue unaffected by Brexit.

The UK Government will now have to negotiate its terms of exit from the EU with its European partners. This process is likely to be a long one, so for at least the next two years the UK will remain an EU member. Even so, you may be interested in the limited possible changes for intellectual property rights in Europe when the UK does eventually exit.

In general, there is no reason to make any wholesale changes to your portfolios at this stage. However, now is a good time to review your IP agreements and EU Trade Marks, as in some cases these may benefit from attention before Brexit finally happens. We shall of course provide further updates as the situation develops. In the meantime, if you would like additional information, please get in touch with your usual contact at Carpmiels & Ransford.

European patents

The UK will continue to be a member of the European Patent Organisation (EPO) which is a separate body from the

EU. Thus, patent protection in the UK will continue to be available via the EPO by validating granted European patents in the UK after grant. The European Patent Convention will continue to be part of UK law, and our European patent attorneys will continue to act in the usual way in all matters before the EPO, as recently confirmed both by the UK Government and the EPO. Indeed, many states are members of the EPO but not the EU (e.g. Switzerland and Turkey), so the UK's status at the EPO post-Brexit is already well understood.

Unitary patent ("UP") and unified patent court ("UPC")

We now expect the commencement of the UP and UPC system, previously scheduled for early 2017, to be delayed. While the system may come into force later in 2017, it is also possible that the delay may last at least until the UK has completed its exit negotiations, which will take until 2019 at the earliest.

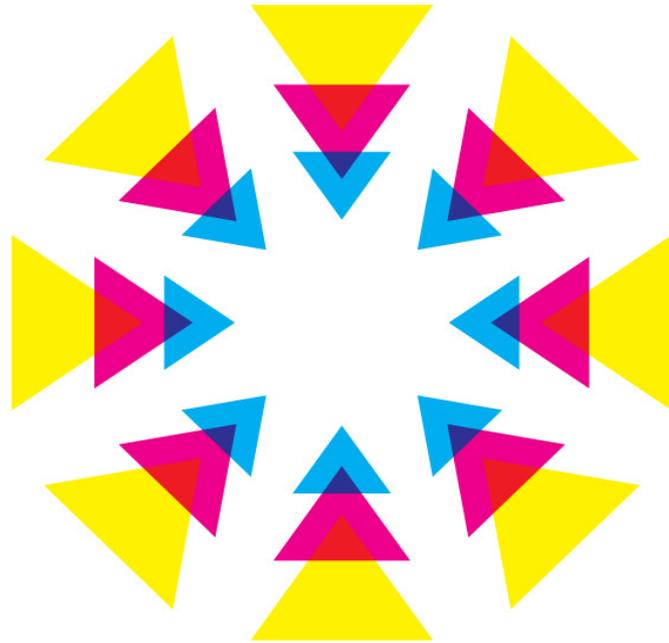
As it stands, the system requires participating Member States to be members of the EU. So currently if the UK leaves the EU, protection afforded by a UP would not extend to the UK and the UPC would not have any jurisdiction within the UK.

If the UK is outside the UP agreement, then UK patent protection from a European patent will continue to be available by nationally validating a European patent in the UK after grant as we do today. If the UPC comes into force without the UK, we will provide an integrated service offering parallel UK and UPC actions run by one team of lawyers and patent attorneys. The team would also handle related EPO opposition proceedings in parallel with any UPC action, as we already do today for parallel EPO and UK actions.

It is possible that amendments might be made to the system to allow the UK to remain in the UP and UPC after it leaves the EU, although this raises a range of political and legal questions that are currently being debated across Europe. While potential users of the system are likely to welcome the possible retention of the UK, the firm will provide a full range of UP and UPC services regardless of whether the UK is ultimately covered by the system.

EU trade marks ("EUTMs" - formerly "CTMs") and registered Community designs ("RCDs")

The legislation governing EUTMs and RCDs is entirely silent on what happens



to those rights when a country leaves the EU. It is likely that the UK will enact national legislation which would deem that EUTMs and RCDs extend to the UK, or the UK and the EU will agree that EUTMs and RCDs can be “converted” such that new UK trade mark and design registrations would be created based on the corresponding EUTMs and RCDs.

We think it is unlikely that post-Brexit RCDs will simply cease to cover the UK. Given this, and that the UK will remain a member of the EU for some time, we do not recommend re-filing all your EUTMs in the UK. However, any EUTMs you routinely enforce in the UK perhaps should be re-filed in the UK now. We recommend filing parallel UK and EUTM applications for new marks, in order to avoid the uncertainty of any conversion process. We shall monitor developments and provide further guidance as the position becomes clearer.

Agreements

It is hard to predict with any certainty what effect the referendum decision and the UK’s ultimate exit from the EU will have on existing agreements. Whilst some agreements may be entirely unaffected, there could be unintended consequences for others. Either way, it would be advisable to review your IP agreements (whether in force, or currently being negotiated) as soon as

possible to identify any potential issues. For example, if the territory covered by an IP licence refers to the “European Union”, does the agreement now need amending so that it continues to include the UK? Could the UK’s exit affect the day-to-day operation of the agreement in any way? Will exit trigger the force majeure provisions or any termination rights? Do any references to specific EU laws need to be changed? Ultimately, the answer is likely to be a matter of construction for each agreement. Where there is any uncertainty, the best way to resolve it is to clarify the position by agreement between the parties. Our transactions team would be happy to assist with any such review or negotiation process.

Regulatory exclusivities, including supplementary protection certificates (SPCs) and regulatory data protection (RDP)

EU legislation currently covers a number of rights which are of importance to the pharma and agrochemical industries. These include SPCs, regulatory exclusivities (i.e. data and market protection), orphan drug exclusivities and exclusivities derived from paediatric studies.

It is too early to say what impact the UK’s exit from the EU will have on these rights, and so at this stage we do not recommend that you take any specific action. We shall monitor developments and provide guidance as the position becomes clearer. We anticipate significant lobbying to keep the current level of protection for pharmaceuticals via these rights, and any new UK legislation may even provide a chance to clarify or strengthen these rights in certain areas.

Need advice?

For more information, please contact email@carpmaels.com.

Carpmaels & Ransford LLP is a leading firm of European patent attorneys based in London. For more information about our firm and our practice, please visit our website at www.carpmaels.com.

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