

Europe's patent landscape post-Brexit

The decision by UK voters to leave the European Union has thrown plans for the Unified Patent Court into chaos. Specialists from three top European law firms discuss what is likely to happen now, as well as other key issues

By Joff Wild

Finally, after years of discussion and disagreement over Europe's proposed Unified Patent Court (UPC) regime, it looked as if we were reaching the endgame. The United Kingdom was due to ratify the agreement creating the UPC and the EU unitary patent some time over Summer 2016, with Germany to follow by the end of the year – it was estimated that everything would be up and running by mid-April 2017. Then in June 2016 came the UK's Brexit bombshell. Now, nobody knows what will happen next.

To try to shed more light on where things stand and what the future might hold, *IAM* brought together a group of leading lawyers – Sofia Willquist and Julia Mannesson of Awapatent in Sweden; Alan Johnson and Dominic Adair of Bristows in the United Kingdom; and Gottfried Schüll and Christoph Walke of Cohausz & Florack in Germany – to look at the possibilities. However, they did not confine themselves to the UPC – there is plenty more going on in Europe as well.

Q: How would you characterise the European patent landscape following the UK vote to leave the European Union?

Sofia Willquist (SW): At the moment, the patent landscape itself has not changed and the United Kingdom has not indicated that it will leave the European Patent Convention (EPC). I believe that rights holders will continue to validate their patents in the United Kingdom even after a possible Brexit situation. The uncertainty regarding what will happen with the UPC and the apparent delay in implementing the new regime are disappointing for many applicants, some of which had already begun preparing for a start in 2017.

Alan Johnson (AJ): The mantra from UK industry is “no loss of rights”. In relation to patents, there are concerns around supplementary protection certificates (SPCs), which are especially valuable and which will require positive steps to be preserved given that they are based on EU regulations. Not only is there doubt about how the United Kingdom will preserve these rights; there are also concerns that it will have no seat at the negotiating table for future discussions on the SPC regime. This links in with the pharma regulatory regime, where the United Kingdom will once again be on the outside.

While SPCs are a sector-specific issue, the subject on

everyone's lips is the fate of the unitary patent and UPC system. This was widely expected to start in May 2017, but that is no longer realistic.

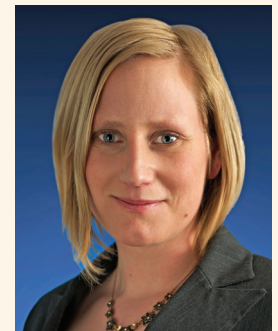
Julia Mannesson (JM): As many people were anticipating that the UPC would launch in early 2017, IP firms and companies with large patent portfolios had not only started preparations, but progressed these to quite an advanced level. Since the referendum result has postponed the entry into force of the UPC – probably by at least two years – many patent attorneys are quite discouraged. There have been calls for the United Kingdom to ratify the UPC regardless of the referendum result. I think that this is highly unlikely, since it would contradict the voice of the people and the UK government has other far more pressing issues to deal with.

Gottfried Schüll (GS): Bearing in mind the United Kingdom's position in the European Union with regard to gross domestic product, number of patent applications and cultural influence, it is fair to say that the European patent landscape will be seriously affected in the mid and long term by the vote to leave.

When it comes to the formally unaffected EPC, we expect to see the United Kingdom lose considerable influence. This is not only because there will naturally be consequences for all European institutions if one of its members decides to leave the most important one (ie, the European Union), but also because of likely restrictions on UK experts being admitted to work for the European Patent Office, if there is less freedom of movement for workers between the United Kingdom and the European Union.

Q: What is now a realistic timeframe for the UPC regime to come into force in Europe?

AJ: It could be anything from one year to never. The first question is whether the United Kingdom will ratify soon, thus enabling the system to come in more or less on time. This seems politically impossible: could the government really be seen to be giving new powers to the European Court of Justice (ECJ) in the present climate with no support from industry? It seems clear that a guarantee is needed that the United Kingdom would be able to continue to participate in the UPC post-Brexit before it would call for early ratification.



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The real question, therefore, is whether other EU member states will work with the United Kingdom to try to find a modified form of UPC which can include the United Kingdom, or whether they will go ahead without the United Kingdom. I was in Milan recently, chairing a Q&A session on the UPC and Brexit, and I detected relatively little enthusiasm for a UPC system without the United Kingdom. However, despite this, there are fears that momentum will be lost if there is any real delay. My own guess is that some attempt will be made to encourage other countries to go ahead without the United Kingdom, but that this will fail. If so, it may be at least three years before a new UPC becomes a reality.

GS: I do not expect the UPC regime to come into force without the United Kingdom. From a user perspective, the UPC was already unclear with the United Kingdom – it became less and less attractive the more visible and predictable its structure became, especially with regard to the cost of proceedings and annual fees. There was the impression that industries which depend on parallel patent enforcement in many EU member states would become less engaged the longer the implementation process lasted.

Various technical questions need to be resolved (eg, where a third venue for life sciences and chemistry should be located instead of London – Milan is one suggestion). When it comes to issues such as appointing judges and complex discussions about how to distribute annual fees, the feeling is that the parties involved – especially users – are not sufficiently motivated for the cumbersome undertaking of setting up a UPC without the United Kingdom.

JM: For a long time, I hoped that the United Kingdom would manage to remain in the European Union – perhaps by saying that it has influenced the European Union in a desired way so that it is now a good idea to remain. Unfortunately, this seems unlikely.

If the United Kingdom triggers Article 50, which seems quite likely, and the UPC is not rewritten so that it can start earlier without the United Kingdom, the earliest date would be at least two years from when the United Kingdom initiates its exit from the European Union. On the other hand, the UPC might be rewritten so that it could start without the United Kingdom, while it is still a member of the European Union. However, this new agreement would also have to be ratified. I imagine that this process would probably also take at least two years.

SW: The signals from the UPC preparatory committee appeared to suggest that it was carrying on more or less as if the UPC would enter into force in 2017, until recently when the recruitment of judges was paused. I do believe that the UPC could be reality even without the United Kingdom participating – the timeframe will ultimately come down to what the United Kingdom decides to do and how quickly it intends to do it. It seems as if it will trigger Article 50 during the beginning of 2017. The UPC Agreement will have to be renegotiated to get the UPC going before the United Kingdom actually leaves the European Union; otherwise, the delay could be as much as three years, which is unacceptable. The second option (ie, the United Kingdom moving on to a quick ratification) is also unrealistic at this point. A realistic, but perhaps

somewhat optimistic timeframe is somewhere during 2018 if all remaining countries really push forward.

Q: How likely is it that the UPC regime, once – or if – it is established, will include the United Kingdom? Will it be as attractive without the United Kingdom?

GS: I am no politician, but it is difficult for me to imagine a way in which the UK government would be able to explain that, despite the vote to leave, it wishes to enhance European integration and hand over UK jurisdiction in patent matters to an EU institution (ie, the UPC). Imagine a case in which a German court issued an injunction claim enforceable in the United Kingdom via the UPC against a UK company producing baked beans! It might be a different matter if it were sauerkraut...

As previously discussed, a UPC without the United Kingdom is not appealing enough for users. Consequently, from my perspective, if there is no UPC with the United Kingdom, there basically is no UPC. Even though our firm contributed to the implementation of the UPC, it has to be said that the sad news now is that the UPC is most probably dead.

SW: It is not realistic to believe that the United Kingdom will be a part of the UPC if it decides to leave the European Union, since the UPC involves enhanced cooperation within the European Union. Countries outside the European Union, such as Norway and Switzerland, cannot take part in the agreement as it currently stands. The UPC will probably be less attractive without the United Kingdom and one of the greatest downsides will be the loss of competent judges from a common law country. Despite this, patent holders will have protection in many countries for a lot less money than under the current system. The territory for enforcement will cover 24 EU member states – including France, Germany, Italy and the Netherlands, which are among the countries where most patent holders today validate their European patents. This will still be highly attractive to many patent holders.

AJ: The position of those pushing for early UK ratification is that it is legally possible for the United Kingdom to continue, post-Brexit, to participate in the UPC as presently drafted, with only minor modifications. The same people say that the ECJ will agree with them when the inevitable challenges are brought. I am not so sure. The case law is far from clear. A way needs to be found to avoid asking the United Kingdom (and indeed the other participants) to take such a gamble. This issue must be clarified before a new agreement is reached, which in effect means a modified agreement with the European Union as a party so that a new opinion can be obtained from the ECJ. This has its own challenges. For example, could Spain veto this? Would the acceptance of EU law supremacy and the jurisdiction of the ECJ be politically any more acceptable to the United Kingdom post-Brexit than it is now? And what would the ECJ decision actually be? The net result is that if other states do wait for the United Kingdom, the UPC is still extremely uncertain. However, it is clear that there is a great willingness to work towards such a solution and that the majority favours this over the option of going ahead without the United Kingdom.



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JM: There are voices saying that the UPC will be significantly less attractive without the United Kingdom – although many of these appear to come from within the United Kingdom. For companies that are not involved in litigation or licensing, there will be almost no difference whether the United Kingdom joins or not, since it costs relatively little to validate a European patent in the United Kingdom. Another aspect to consider is that few companies choose to litigate in United Kingdom due to the high cost and difficulty in predicting outcomes. If choosing between EPC states, one is more likely to litigate in Germany.

I think that the UPC will enter into force in some way since the project has come too far to stop and interest in it is widespread both geographically and across different industries. The longer the United Kingdom waits to take a stand on the European Union, the smaller the chances that it will be part of the UPC. It will be difficult to negotiate a deal where the United Kingdom is part of the UPC, but not the European Union, as this would set a precedent for other non-EU countries joining (eg, Norway and Switzerland).

Q: In terms of procurement and portfolio management, what is your advice to patent owners which were gearing up for the UPC, but are now facing up to the potential for several more years of delay?

JM: This is like the extra week that you wanted so much when studying for an exam. At last there is time to do all the things that you wanted to do, but did not have time to. There is time to prepare and adapt your systems; there is also, for example, an opportunity to influence the UPC case management system. In addition, there is plenty of time to prepare strategies for the patent portfolio – in many cases strategies will be unaffected by whether the United Kingdom is part of the UPC.

It is also important to keep up interest and follow what happens. Once the UK issue is decided, things will move quickly.

Christoph Walke (CW): Patent owners wishing to use the organisational (single validation) and monetary benefit (reduced validation/maintenance costs) of the unitary patent should delay any European patent applications, since the decision between a unitary patent and a European patent need be made upon grant only. Delays can be caused by exploiting due dates or extensions and filing divisional applications. For as yet unfiled applications, the Patent Cooperation Treaty (PCT) route can be used to defer the start of the actual European patent examination. From a litigation perspective, the dwell-time until the UPC enters into force should be used to decide which granted European patents should be opted in or out of the UPC and which should finally become European patents or unitary patents. Applicants should consider extending the life time of their unitary patents or European patents as much as possible by filing non-European patent/non-PCT priority applications first and only then reverting to European patent/PCT applications. For important inventions which are intended to be protected by unitary patents, parallel national patent applications should already have been filed in European countries which are patent-owner

friendly and provide economic impact (eg, Germany). In this way, the consequences of losing the unitary patent in a central attack can be mitigated and at least some degree of forum-shopping opportunities preserved.

SW: My initial advice to patent owners is to carry on as usual. Delaying prosecution to get into the UPC regime will be difficult to achieve for most applicants. Keeping applications pending (eg, by filing divisional applications) will likely become a more important strategy for applicants that want to keep the option of unitary patent protection open. Keeping up to date with the latest progress will also be important, as if the United Kingdom decides not to leave the European Union or to ratify the agreement, the UPC could enter into force quite soon. Patent owners must be prepared to analyse their portfolios with regard to the opt-out issue and to have a team ready for action if proceedings before the UPC are initiated.

AJ: My advice is simple: you cannot rule out the UPC coming along in a few years' time. So keep abreast of developments and work on the basis that it will happen eventually. At a practical level, this means building provisions into licences and joint venture agreements to cater for the present UPC and unitary patent provisions. So, for example, provide clarity over who decides on whether to seek unitary patent protection and, in relation to classic European patents, who decides on opting out.

Q: Looking at your own jurisdiction, how friendly to patent owners would you say that it is? Let us start with Germany...

CW: Germany is generally seen as a particularly patent-friendly jurisdiction, not least due to its bifurcated system: an infringement court will stay infringement proceedings only if there is sufficient probability that a nullity action filed against the patent in suit at the Federal Patent Court will succeed. This usually requires the presentation of novelty-destroying prior art by the defendant. Alternatively, a negative qualified opinion issued by the court against the patent in suit, prior to a hearing in infringement proceedings, may cause the infringement court to stay – although this is rarely the case, since infringement proceedings progress much faster than nullity proceedings. German infringement proceedings are quick (between eight and 14 months from filing the complaint until the hearing), predictable and less expensive than US or UK proceedings, and include no disclosure process. A plaintiff may choose between several highly experienced infringement courts depending on criteria such as duration of proceedings, extent of claim limitation allowed by the infringement court without stay and broadness of claim interpretation. First-instance decisions yield claims for injunctive relief that are enforceable upon provision of a security bond, generally leading to settlement of the case.

Q: And turning to the United Kingdom ...

Dominic Adair (DA): The United Kingdom is good for patent owners that own decent patents. These are enforceable quickly and efficiently, while the system of



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product and process descriptions enables process patents to be enforced more easily than in other countries – you can actually find out what the infringer is doing. The litigation procedure also involves the disclosure (discovery) of documents and cross-examination of witnesses – these are important tools which keep parties honest. There has been criticism of the cost, but there is a cheaper option in the IP Enterprise Court, which runs a more streamlined procedure and caps recoverable costs and damages. Further, the High Court is trialling schemes to reduce the time and cost of getting to trial. Appeals are also quick and injunctions are rarely stayed pending appeal.

Q: What is the situation in Sweden?

SW: Sweden has historically been quite friendly to patent owners, as is apparent from decisions issued by the Patent and Trademark Office (PTO) and the patent courts. However, a recent change in the system for handling patent-related cases could alter the way in which actions such as oppositions, infringement and invalidity cases are handled. Both plaintiffs and defendants should be prepared for less room to manoeuvre in cases before the new courts. Sweden has also traditionally been a country with a great many technical advances and innovations, and the Swedish PTO is well known for carrying out thorough searches and issuing high-quality patents.

JM: One could say that Sweden is patent-owner friendly, since the patent system is a functioning one. There are laws, regulations, case law and a well-functioning PTO; it is possible to appeal decisions and to resort to litigation. On the other hand, it is not as friendly to patent owners as, say, the United States.

Q: Has the United Kingdom seen an increase in interest from non-practising entities (NPEs)?

DA: There have been a few cases, but not a torrent. We fully expected the UPC to be used by NPEs, and many may have been saving their cases for that system to come into force. Now that it is unlikely to launch any time soon, there will doubtless be a strategic rethink. No country in Europe has the relatively NPE-friendly regime of the United States in terms of large damages awards decided by juries, no fee shifting of consequence and contingency fee lawyers. So it is more expensive for NPEs to enforce in Europe than in the United States and the rewards are not so significant. The one European plus point for NPEs is the lack of any *eBay* principles – at least as yet.

Q: How has the NPE landscape developed in Germany?

CW: For a long time, IPCom (Germany) was the only NPE actively conducting infringement suits in Germany. Its litigation campaign started in 2008 and is still ongoing. However, other NPEs commenced activities in 2012, with complaints from Vringo

(United States) and Smartphone Technologies (United States); these intensified in late 2013 to 2015, with litigation campaigns by France Brevets (France), Unwired Planet (United States), Sisvel (Luxembourg), Saint Lawrence Communications (United States), Marathon/TLI (United States) and Intellectual Ventures (United States). One driving factor for this development is surely the NPEs' insight that litigation in Germany is attractive and works well. This is particularly true for the telecommunications market, where usually an injunction in one European country already severely affects the defendant's business. For US-based NPEs, another driver is the increasingly tough climate for NPEs in the United States as a result of the America Invents Act in 2012 and the Supreme Court's recent *Alice* and *Mayo* decisions concerning patent eligibility, which have created uncertainty regarding the validity of business and software-related patents in general. Finally, for the owners of standard-essential patents (SEPs), the ECJ's July 2015 ruling in *Huawei v ZTE* now provides guidance on how to properly approach a defendant in German pre-trial negotiations so as not to jeopardise claims for injunctive relief.

Q: Is it a similar story in Sweden?

JM: No – I have seen no increase in NPE activity here. Sweden is not interesting for them, since the damages available are relatively low. Also, the losing party bears the costs, so the incentives to settle are not that high. However, what I have seen is NPEs contacting Swedish firms which are active in the United States.

SW: I have only limited experience of NPEs and I have not seen any indications that they are becoming more interested in Sweden, which is a very small jurisdiction – although I think that the fact that it has a growing culture of high-tech start-ups could make it attractive to NPEs in the future. Further, since Swedish courts are also extremely strict about recoverable costs for attorneys' fees for the losing party (ie, if you claim damages and lose, you have to pay attorneys' fees), that probably makes it unattractive for an NPE to start an action in a Swedish court.

Q: In the United States, a string of Supreme Court decisions has raised significant concerns for patent owners in areas such as software and biotechnology. How would you characterise the situation for them with regard to eligibility and enforceability in your jurisdiction?

SW: Sweden largely follows the European Patent Office (EPO) and EU regulations when it comes to the eligibility and enforcement of software and biotech inventions. Decisions of the US Supreme Court thus have limited impact and there is no indication that the EPO or the European Union is considering further restrictions or changes to the current praxis at this time. The situation thus remains unchanged in our jurisdiction, even though applicants will have to revise their strategy in the United States.

JM: The Swedish PTO is not obliged to follow US case law. Rather, it is supposed to follow European case law. However, our clients file in the United States and therefore patent applications need to be written in the light of US Supreme Court decisions. Before these latest cases, it was easier to get a software patent in the United States than in Sweden. Now it is the other way around.

Q: How would you characterise the enforceability of software and biotech-related patents in the United Kingdom?

DA: The United Kingdom has not experienced the same upheaval as the United States, where the Supreme Court's decisions in *Alice* and *Myriad* have considerably reduced the scope of patent-eligible subject matter in the fields of software and biotech, respectively. In the United Kingdom, the patentability of computer-implemented inventions has always been limited and, in fact, the situation in the United States has now moved closer to the UK position. The patent-ineligible invention in *Alice* was an abstract idea which was not made patent eligible merely because it was implemented on a computer. UK jurisprudence and the case law of the EPO Boards of Appeal agree that to be patentable, there must be an improvement in a technical process, such as the functioning of the computer itself; mere implementation on a general purpose computer is insufficient. In the biotech field, *Myriad* has resulted in a significant reduction in patentability in the United States and an approach that, in fact, is stricter than that in the United Kingdom and at the EPO. In the United States, the effort and technical skill required to identify, isolate and extract a natural product are no longer enough to confer patent eligibility. Not so in the United Kingdom, where patents can still be granted for such inventions.

Q: And in Germany?

CW: The major uncertainty on the validity of software and biotech patents in the United States arises from the fact that the historically generous treatment of patent eligibility was severely changed, in particular by the decisions in *Mayo* (2012), *Myriad* (2013) and *Alice* (2014). For German and European patents, assessment of eligibility by the patent offices and courts has been somewhat more restrictive in the past, in particular with regard to software and business patents. However, it has undergone only gradual changes and patentees can rest assured that their granted European or German patents, even if directed at software and business methods, are still valid. Further, concerning biotech patents, the Federal Supreme Court clarified in its January 2016 *Rezeptortyrosinkinase* decision (X ZR 141/13) that the principles of the US *Mayo* decision do not apply in Germany, and that a technical teaching which teaches use of a discovery to achieve a specific goal is patent eligible irrespective of whether there is an inventive surplus over the mere use of the discovered natural law.

Q: Another big issue is the availability of injunctions for SEPs – how do the courts in Germany deal with that?

GS: Injunctions for SEPs are granted on a regular basis in Germany. The injunction claim is granted by law in cases of patent infringement. The application of the guidelines set by the ECJ have – subject to the appropriate choice of venue – not led to a significant number of cases in which the plaintiff and owner of an SEP did not obtain the injunction claim.

In recent decisions, the German courts have clarified details for the application of the ECJ's fair, reasonable and non-discriminatory (FRAND) guidelines and it is not an issue for any well-prepared patent owner to comply with these. These guidelines apply only if use of the relevant standard is a precondition for market access for the defendant.

Q: What is the view on injunctions for SEP owners in the United Kingdom?

DA: There is very little case law. The trend now seems to be towards not seeking an injunction, at least at first instance. This is probably for a combination of reasons. First, it is more in line with the ECJ's decision in *Huawei v ZTE* (and the need to avoid acting in breach of EU competition law), and also to avoid any decision of an *eBay*-type argument. Generally, case law outside the SEP field has held that there must be strong reasons for an injunction not to be granted – essentially, that it would be grossly disproportionate to the right being protected. For SEPs, the injunction question came before the UK Patents Court's decision in *Nokia v ICom* in 2012; in that case the court refused to grant an injunction, largely because ICom was an NPE and each party was willing to enter into a licence, albeit that they could not agree on terms. In 2014 the European Commission accepted as legally binding certain commitments by Samsung not to seek injunctions on its SEPs against licensees which signed up to a specified licensing framework.

Q: Is it a similar story in Sweden?

JM: SEPs are not dealt with in Sweden. Such matters are handled in Germany or the United Kingdom.

SW: There is, to date, no case law by EU courts dealing with the legality under Article 102 of the Treaty on the Functioning of the European Union of SEP-based injunctions and national courts have so far reached divergent conclusions on this question. Most cases relating to SEPs are handled by international trade commissions. However, it is widely expected that the Swedish Patent Court would largely follow the decisions of the European Commission (eg, 2014/ C 344/06 and 2014/C 350/08). Even though seeking and enforcing an injunction is generally a legitimate course of action for a patent holder to pursue, the context is different with regard to injunctions on the basis of SEPs. The commitment to license under FRAND licensing terms and conditions should therefore be respected by patent holders.



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Q: What are the key considerations for parties – plaintiffs and defendants – which find themselves engaged in multi-jurisdictional patent litigation in Europe?

DA: The location of the infringement (if it is in Europe) is obviously one factor. To generalise, the usual choice for litigants is Germany, the United Kingdom or both. This is a question not just of the importance of those individual markets, but also the legal systems in these countries. Both have advantages. In Germany, the bifurcated system is seen as an advantage to patentees, especially those with weaker patents. The existence of pending EPO opposition proceedings also complicates things in Germany, effectively ruling out revocation counterclaims. In the United Kingdom, the availability of a quick decision and disclosure when needed are both important factors. Often one sees the first decision anywhere leading to settlement and certainly the first case which results in an injunction – pointing to the lack of any real need for a UPC! Few disputes involve actions in more than one country – it is just that those which do tend to be very valuable or to have a high profile.

SW: The main advice would be to set up a dedicated team of people internally who can coordinate the litigation processes. It is also important – as both a plaintiff and defendant – to understand how processes are carried out in the different countries and that judicial systems differ. Choosing a forum that best suits your purposes is crucial and should be thoroughly considered before starting an action. As a plaintiff, the main advice is to take as much time as possible to prepare the case and set out all your evidence and arguments from the beginning. As a defendant, be prepared for the fact that you might not have the same outcome in different jurisdictions. Finding good local counsel is also key for both plaintiffs and defendants.

CW: A plaintiff's first key consideration is how to gather proof of infringement, if this is not obtainable without the defendant's cooperation. Options include discovery (United Kingdom), *saisie contrefaçon* (France) and pre-trial inspection (Germany). Second, the plaintiff must consider whether communication shall take place with the defendant before filing the complaint – with the aim of a quick settlement – and, in the case of SEPs, on the fulfilment of FRAND-related obligations, or whether the element of surprise is used to avoid torpedo tactics and limit the defendant's time to prepare countermeasures. Third, the plaintiff should consider officially limiting patents at the respective patent offices to increase resilience to invalidity attacks. The plaintiff's fourth consideration is the choice of venue itself. Factors such as the size and relevance of the market, the average speed of proceedings, joint or bifurcated infringement or validity proceedings, and the broadness of claim construction applied by the respective court should be weighed up carefully. The plaintiff must also decide whether litigation shall proceed sequentially, with a positive verdict being 'exported' to other jurisdictions, or at least partially in parallel. The defendant, when anticipating that it may be sued, might consider torpedo tactics. After receiving a complaint, the defendant must decide how and where to challenge the patent's validity.

Q: Using your crystal ball, what would you expect the European patent landscape to look like in five years' time?

SW: We will have the unitary patent and the UPC. Case law from the UPC will have started to change the way that we draft and prosecute patent applications before the EPO – for instance, I think the issue of inventive step will become increasingly more difficult to prove. I think that more applicants will choose to enter Europe – both European domestic applicants and non-European applicants. As case law emerges and applicants better understand where the UPC stands and that it is issuing high-quality decisions, more and more patent owners will either choose the unitary patent and thus the UPC or choose to opt into the system.

AJ: My crystal ball has been looking distinctly foggy since June 23 and is not showing much sign of clearing. However, to speculate, I do not think that five years is necessarily enough to see a new incarnation of the UPC up and running. While it may very well take longer, if it does happen, then I would hope that it would include not only the United Kingdom, but also Spain, Switzerland and others currently excluded (by choice or by rule of law). In truth, I see the most likely position being little different from today. We will see increasing communication between European patents judges and consequently greater harmonisation at a practical level, but not necessarily through formal means, such as the UPC. One other possibility we have not discussed so far is that as patent budgets are ever more squeezed, we may see more of a switch to national filing strategies, at least outside the pharma sector – particularly if the EPO does not improve its productivity and reduce its delays. If all a patentee really needs is protection in the United Kingdom and Germany, then why not seek national patents in those states only?

JM: I think that the UPC will have entered into force and that the first implications of it will have been seen. However, there will not yet be much case law or patents because of delays due to the UK referendum. The reason for this is that, according to what we heard from industry voices during preparations for the UPC, most companies were planning to opt out of everything and keep only a few patents and applications in the new system. However, I think that after five years, more and more will go for the new system.

GS: Under the assumption that Brexit is implemented and results in a clear separation of the United Kingdom from the European Union, I do not see the implementation of the UPC taking place. Further, the Boards of Appeal will become separated from the EPO and patent owners might experience an increasingly patent-friendly environment within the European Union. It is no secret that the UK interpretation of European patent law is and has been less patent owner friendly, and the United Kingdom's influence with respect to this interpretation will decrease.

Finally, I hope very much that the translation burden will become significantly reduced by additional ratifications of the relevant London Agreement. This is an opportunity for EU countries to increase the benefit from the positive aspects of patent protection for the economy by lowering the constraints to obtaining it. However, this may take quite a while. *iam*