

## Unified Patent Court after Brexit

Comments on the Lamping-Ullrich paper  
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Pierre Véron

Honorary President EPLAW (European Patent Lawyers Association)  
Member of the Expert Panel group of the Unified Patent Court  
Member of the Drafting Committee of the Rules of Procedure

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Unified Patent Court after Brexit

**Matthias Lamping and Hanns Ullrich,**  
Research Fellows of the Max Planck Institut,  
published a 174-page independent study

Matthias Lamping  
Hanns Ullrich

**The Impact of Brexit  
on Unitary Patent Protection  
and its Court**



*"The two studies published here have been undertaken spontaneously and independently to reflect such concerns in the authors' particular field of expertise. The responsibility for the contributions lies with the authors individually."*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3232627](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3232627)

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Lamping's thesis (verbatim) p124 § 25

## The UK cannot remain in the UPCA after the Brexit

"In the following chapters three lines of argument will be explored in order to substantiate the claim that **it will not be possible for the UK to remain a contracting state to the UPCA after having left the EU**:

(1) there is no legal basis in primary Union law for courts situated outside the judicial system of the Member States and, consequently, that of the EU, to cooperate with the CJEU by making references for a **preliminary ruling** within the scope of Art. 267 TFEU (Ch. II.A).

(2) as contracting parties, third countries would have a say in all matters that concern the UPC's polity and policy, including its reception of Union law and policies, and in particular with regard to the transposition of directives into the UPCA (Ch. II.B) ("**governance**");

(3) the fact that the UPCA's rules may have to be interpreted in the light of different principles and policies depending on the institution by which, and the context within which, they are applied may compromise the **uniformity** of the law embodied therein (Ch. II.C)."



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## Lamping's arguments (summary)

After the Brexit, the UK participation in the UPC would create three legal problems:

1. The UPC would no longer be a "*court common to several Member States*"; as a result, **the UPC would be unable to refer cases to the ECJ for preliminary rulings**
2. **A non-EU country could prevent the UPC to implement Union law** and policies, in particular with regard to the transposition of directives into the UPCA
3. **Uniformity of law would be endangered** because the UPC should apply differently the UPC Agreement when dealing with European Patents granted for the UK and for European Patents granted for EU countries



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Lamping's Argument #1 (preliminary rulings) Unified Patent Court after Brexit

**With UK on board after the Brexit, the Unified Patent Court would be unable to refer cases to the ECJ**

- The "Preliminary rulings" argument is that, if a non-EU State participates, the UPC will no longer be "*a court common to the Contracting Member States and thus subject to the same obligations under Union law as any national court of the Contracting Member States*".
- As a result, the UPC would be unable to make references to the European Court of Justice for a preliminary ruling within the scope of Art. 267 TFEU such that the primacy of and the respect for EU law would not be guaranteed



**I DISAGREE**

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**WHY I DISAGREE**

Lamping's Argument #1 (preliminary rulings) Unified Patent Court after Brexit

**With UK on board after the Brexit, the Unified Patent Court would be unable to refer cases to the ECJ**

- The first reply is that the UPC will still be "*a court common to the Contracting Member States and thus subject to the same obligations under Union law as any national court of the Contracting Member States*" (UPCA, article 1)
- Admittedly, it will not be a court common *exclusively* to EU Member States
- But this has no bearing, as nothing in ECJ's opinion 1/09 (nor in other ECJ's decisions) imply that, if the court is also common to non-EU Member States, it is no longer "*subject to the same obligations under Union law as any national court of the Contracting Member States*"



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**WHY I DISAGREE**

Lamping's Argument #1 (preliminary rulings)

Unified Patent Court after Brexit**With UK on board after the Brexit,  
the Unified Patent Court would be unable  
to refer cases to the ECJ**

- In its opinion 1/09, the ECJ rejected the 2009 draft agreement creating a unified patent litigation system, then named the European and Community Patents Court, because it conferred jurisdiction to hear patent disputes on "*an international court which is outside the institutional and judicial framework of the European Union*" which "*would deprive courts of Member States of their powers in relation to the interpretation and application of European Union law and the Court of its powers to reply, by preliminary ruling, to questions referred by those courts*"
- This would not be the case of the UPC with the UK on board after the Brexit



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**WHY I DISAGREE**

Lamping's Argument #1 (preliminary rulings)

Unified Patent Court after Brexit**With UK on board after the Brexit,  
the Unified Patent Court would be unable  
to refer cases to the ECJ**

- The second reply is that the UPC is clearly and formally listed as "*a court common to several Member States*" by Article 71a Regulation N° 542/2014 amending Regulation N° 1215/2012 as regards the rules to be applied with respect to the Unified Patent Court and the Benelux Court of Justice
- It would thus be very surprising, that the ECJ refuse to accept a referral from a court listed as "*a court common to several Member States*"



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**WHY I DISAGREE**

Lamping's Argument #1 (preliminary rulings)

Unified Patent Court after Brexit**With UK on board after the Brexit,  
the Unified Patent Court would be unable  
to refer cases to the ECJ**

Last, but not least, the ECJ has already admitted that courts of third countries may refer questions to it for a preliminary ruling:

*"In the same Opinion, the Court also found that courts or tribunals other than those of Member States could refer questions to it for a preliminary ruling, provided that the answers given by it were binding on the referring courts"*



(Opinion 1/00 European Common Aviation Area, § 33 quoting Opinions 1/91 European Economic Area, §§ 59 and 61 to 65; see also 1/92 §33).

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**WHY I DISAGREE**

Lamping's Argument #1 (preliminary rulings)

Unified Patent Court after Brexit**With UK on board after the Brexit,  
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to refer cases to the ECJ**

Last, but not least, the ECJ has already admitted that courts of third countries may refer questions to it for a preliminary ruling:

*"As regards the provisions of the agreement under which EFTA States may authorize their courts to request the Court of Justice to decide on the interpretation of a provision of the agreement, it is to be noted that the wording of Article 107 ensures that the answers which the Court of Justice may be called upon to give will be binding. Consequently, that mechanism satisfies the requirements set out in the Opinion of 14 December 1991 and is therefore compatible with Community law."*



(Opinion 1/00 European Common Aviation Area, § 33 quoting Opinions 1/91 European Economic Area, §§ 59

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Unified Patent Court after Brexit

**Lamping's Argument #2 (Governance)**

**With UK on board after the Brexit, a non-EU country could prevent the UPC to transpose EU directives into the UPCA**

- The "Governance" argument is that a non-EU country could prevent the UPC from implementing Union law and policies, in particular with regard to the transposition of directives into the UPCA
- In other words, the UK could block the implementation in the UPC Agreement of a future EU directive, thereby hindering the EU fundamental objective of ensuring that the Union retains full control over the attainment of its objectives and policies

 **I DISAGREE**

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Unified Patent Court after Brexit

**Lamping's Argument #2 (Governance)**

**With UK on board after the Brexit, a non-EU country could prevent the UPC to transpose EU directives into the UPCA**

A non-EU country could not prevent the UPC from implementing future EU directives into the UPCA because:

- The direct effect of EU law would not be affected
- The EU Member States would be "*jointly and severally liable for damage resulting from an infringement of Union law by the Court of Appeal, in accordance with Union law concerning non-contractual liability of Member States for damage caused by their national courts breaching Union law*" (art. 22 UPCA)
- In addition, because the changes to the UPCA do not require unanimity (but only a 2/3 majority), the UK would have no "*veto right*" against such implementation

 **WHY I DISAGREE**

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Unified Patent Court after Brexit

Lamping's Argument #3 (Uniformity)  
**With UK on board after the Brexit,  
 uniformity of law would be endangered**

- The "Uniformity" argument is that, because the UPC should apply differently the UPC Agreement when dealing with European Patents granted for the UK and for European Patents granted for EU countries, the uniform application of the UPC Agreement would be endangered
- It would be incompatible with Union law to adopt a "*Janus-faced*" approach to the construction of the UPCA:
  - ▶ as ordinary international law (applicable to European patents granted for non-EU contracting states), on the one hand, and
  - ▶ as international law with a special EU twist (applicable to unitary patents and European patents granted for Contracting Member States), on the other hand.

 **I DISAGREE**

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Unified Patent Court after Brexit

**WHY I DISAGREE**

Lamping's Argument #3 (Uniformity)  
**With UK on board after the Brexit,  
 uniformity of law would be endangered**

- Uniform application of the UPCA is of course highly desirable; it is doubtful however that uniform application can become a matter of EU law
- If the question arises, the ECJ will be empowered to decide over this matter and its decision will be binding on the UK (art. 20-24 UPCA)



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**Read more...**  
by **Atticus Finch** and others



- A. Ohly and R. Streinz, "Can the UK stay in the UPC system after Brexit?", GRUR Intl. 2017, 1;
- R. Gordon and T. Pascoe, "The effect of "Brexit" on the Unitary Patent Regulation and the Unified Patent Court Agreement";
- W. Tilmann, "The future of the UPC after Brexit", GRUR, August 2016; "The Impact of Brexit on Unitary Patent Protection and its Court", GRUR Intl., Nov. 2018, 1094
- M. Leistner and P. Simon, "Auswirkungen des Brexit auf das europäische Patentsystem", GRUR Intl., 2017, 825
- "Reply to the studies on "The Impact of Brexit on Unitary Patent Protection and its Court" by Hans Ullrich and Matthias Lamping", signed "Atticus Finch"



<http://eplaw.org/upc-reply-to-max-planck-impact-study-of-brexit-on-the-unitary-patent-protection-and-its-court/> 15

**Pierre Véron**

**Thank you**



[pierre.veron@veron.com](mailto:pierre.veron@veron.com)

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