# Brexit and Japanese companies

Reassuring and supporting Japanese companies on the potential impact of Brexit. By **Dr Frederick Ch'en** (Hogan Lovells, Tokyo)

As Japan is eight hours ahead of British Summer Time, those of us waking up in Tokyo on Friday, 24 June 2016 experienced first-hand and in real time the referendum voting results as they were declared, culminating in the announcement around 3:30pm local time that the UK electorate had decided to "Leave the European Union". The spike in urgent telephone calls and the rapidly falling sterling against the yen throughout that morning gave some indication of the likely outcome by lunchtime, but it was nevertheless an unexpected result to many in Japan.

In the weeks and months after the result, we in Hogan Lovells' Tokyo office have continued to support and advise our Japanese client companies and contacts on the likely issues and potential impact of Brexit, particularly on their UK and European operations. We have been fortunate to have a "Constitutional Taskforce" based in our London office, with which one of our Tokyo corporate partners, Jacky Scanlan-Dyas, is heavily involved. She has taken the lead for the Asia-Pacific region within Hogan Lovells, and has interacted with the British Embassy, British Chamber of Commerce in Japan, NHK (the national broadcaster, equivalent to the BBC) and other media to help Japanese companies prepare for the possible changes ahead.

We have also taken a sector-based and practice-based approach to informing Japanese companies of potential issues. Two of the strengths of Hogan Lovells globally are its international intellectual property (IP) practice and the multi-disciplinary life sciences team. From this perspective, this article summarises some of the interactions we have had with Japanese companies, the topics that we have covered and some observations on how such companies appear to perceive Brexit.

## Approach to Japanese companies

With the help of our central "Constitutional Taskforce", and like many international law firms, we had started to prepare material several months in advance in the event of a "Leave" result. Those initial newsflashes were subsequently supplemented by on-going client seminars, in-house seminars and industry-sector newsletters that were tailored for Japanese companies.

The remainder of this article focuses on the seminars that we gave in 2016 to Japanese companies interested in the potential impact on intellectual property, and also briefly on our sector approach to Japanese life sciences companies. As might be expected, we have seen increasing engagement as Brexit has become a more likely reality; indeed, many Japanese companies have been subscribing to our general and sector-specific webinars following Prime Minister May's letter to the European Council on 29 March 2017 notifying it of the UK's intention to leave the European Union.

## Potential impact of Brexit on Japanese companies' IP and related life sciences issues

### Brexit seminars generally

In the majority of our Brexit seminars, we started by clarifying the difference between the 28 member states of the European Union (EU), the European Economic Area (EEA), and the European Free Trade Association (EFTA). We then explained the background to the UK referendum and that, from a legal perspective, it was advisory and has no legal force. We sought to emphasise that no laws have changed and that there is no certainty that any laws will change (at least at the time we gave the seminars). Given our audience, we also described in a little detail some of the key individuals in the UK and in Europe, along with their evolving political roles and responsibilities.

We have also been keen to highlight some of the practical implications and actions that could be taken. For this reason, we covered likely next steps in the process, and discussed potential implications for Japanese companies, not only generally, but also divided into what might be expected in the short-term (e.g. market impact), between two and three years (e.g. change to UK laws and barriers to goods and services), and after three years (e.g. divergent regulation). In addition,

we explained possible Brexit models, from "full divorce", free trade, "pick & mix", associate EU membership and adjusted EU membership. These commentaries appeared to be well-received and generated interesting discussion among our audiences.

Consistent with the message from the British Embassy in Tokyo, and others, we explained that the possibility of real change has, naturally, increased and that the probability and shape of any real change (to the UK/EU relationship and, possibly within the EU) would become clearer during the course of 2016. One of our key themes was that there is still likely to be at least two years to prepare (because of the Article 50 mechanism) and, importantly, that Brexit is not all a threat to business: there will also be some opportunities and it would be a mistake for businesses to make fundamental changes at this stage. Our overriding recommendation was that Japanese companies' current business priority should be to analyse, prepare and influence.

## IP-focused seminars

In the IP seminars to our Japanese audiences, we focused on three areas: patents, trade marks and IP transactions. We began by emphasising the current uncertainty (especially prior to the Article 50 notification), and that the position will change depending on the UK's negotiations with the EU, whether the UK stays within the single market, and what transitional arrangements are agreed and implemented.

### Patents

In relation to patents, we reiterated the differences among the member states of the EU, the EEA and EFTA, and, in addition, the European Patent Convention (EPC). As the EPC is not a creation of EU law, we emphasised that the UK would remain a member of the EPC. This has been an important point, not least because Japanese companies are prolific filers of European patent applications.

A natural topic of interest has been the forthcoming Unitary Patent (UP) and Unified Patent Court (UPC), not just for Japanese life sciences companies, given London's planned role within the Central Division of the UPC, but also for Japanese technology companies. Thus, in our seminars, we recapped the requirement for ratification of the new UP/UPC system by 13 member states, including France, Germany and the UK. During the summer of 2016, we explained that the UPC may likely need restructuring if Brexit were to proceed, and that because the UP/UPC only applies to EU members

states, a UP granted after Brexit would not cover the UK: a Japanese company seeking to bring an action against UK infringers would be need to litigate before the UK courts.

We also explained that a start date for the UP/UPC in 2017 looked improbable, and then discussed potential legal theories of how the UP/UPC could happen, with and without the UK's involvement. Our audiences seemed interested in our account of the role of politics, and also what would happen to the UP/UPC without the UK. For instance, we considered whether the system might have a different feel, e.g. without common law input (although as Japanese has a civil law system, the absence of discovery and cross-examination would be more familiar to Japanese companies). We also considered whether the UP/UPC would remain attractive for its potential main users (the technology sector), and discussed the likelihood that the UK would continue to be a desirable venue for litigation given its speed, predictability and exportability, as well as the availability of discovery and cross-examination. Depending on the specific Japanese audience, we also touched on supplementary protection certificates (SPCs). As SPCs are created by EU regulation, we speculated on how they would be handled after Brexit, including whether the UK would take note of existing or future decisions of the Court of Justice of the EU (CJEU).

The statement by Baroness Neville-Rolfe, the then UK Minister for IP, on 28 November 2016 that the UK would be ratifying the Agreement on the UPC appears to have been an unexpected but welcome development, especially after months of uncertainty following the Brexit vote on 23 June 2016. Our sense is that Japanese companies have been preparing for variations of the forthcoming system for at least the past five to ten years, with varying degrees of engagement, enthusiasm and bemusement; only now, with potentially only nine months before a possible start to the UP/UPC, have we started to see meaningful re-engagement.

### Trade marks

In relation to trade marks, we explained that as EU trade marks (EUTM) are created by EU law, action will need to be taken as a result of Brexit. We said that one likely approach would be the creation of a UK national mark based on the EUTM. In terms of changes to UK trade mark legislation, we have advised that these will depend on the UK's relationship with the EU; thus, for instance, if the UK is in the EEA, the UK would need to conform with existing harmonisation, while if there is a "hard Brexit", relevant elements of EU law would need to be transposed into UK legislation. Our audiences seemed interested in some practical issues, such as the status of CJEU decisions, and whether the risk of having trade marks revoked for non-use in the EU (where proof of use is only in the UK) would lead to more national marks. There was also interest in our discussion of filing trends before the UK IPO, especially the comparative data and statistics. We noted in particular that there had been a 33% increase in trade mark filings in August 2016 (normally, with December, the quietest month) and that the proportion of non-UK applicants had increased to 11.22% (September 2016; 9.46% in 2015). Our audiences took note that, as of September 2016, there were: 1,276 filings from the US (1,212 for whole of 2015); 776 filings from China (681 for whole of 2015); and 149 filings from Germany (132 for whole of 2015).

### IP transactions

In relation to IP transactions, we emphasised that the nature of the UK's relationship with the EU after Brexit will be important, and that the potential impact of Brexit is currently very uncertain. We cautioned that, depending on the model that is finally adopted and the terms of any international agreements that are negotiated, Japanese companies' contractual arrangements will likely need to be reviewed and updated, especially if they cover the EU as a defined territory, or relate to

## A four-staged approach to Brexit

- Analyse – we suggest that companies conduct a detailed review of the application of EU rules to their business, to assess which ones really matter and to consider the impact of potential Brexit models. We also suggest they identify priority areas, the actions their business might take once the likely Brexit model is clearer, and any areas of new opportunity, such as to influence UK rules.
- Communicate – we suggest that companies develop an external and internal communication strategy.
- Plan – we suggest that companies prepare action plans for the scenarios of most significant change, and to retain options and flexibility in decisions over the next few months.
- Influence – we suggest that companies consider engaging with the process in London, Brussels and relevant EU Member States, and encouraging policymakers to focus on companies' priorities while taking account of political realities.

EU-wide IP rights. We highlighted in particular specific issues, such as governing law and jurisdiction clauses, definitions of "Territory" and "IP" (especially considering transitional or successor national rights), the export of personal data outside the EU, and compliance with regulations.

In some of our seminars, we also considered "Brexit clauses", namely possible contractual provisions that trigger some change in rights or obligations as a result of a defined Brexit-related event (in essence, a variation on a Material Adverse Change clause). We discussed potential Brexit triggers that could be incorporated into a contract (e.g. a specific divergence between the rules applicable in the UK and those applicable in the EU), along with possible consequences (e.g. allocation of responsibility for addressing a particular consequence).

### Practical considerations

Our overall message to Japanese companies, at least in 2016, was that the UK is unlikely to depart quickly from existing EU law: there would be a transitional period of at least two years, allowing Japanese rights holders to optimise their brand protection and enforcement strategies well in advance. Nevertheless, we cautioned that it is not unlikely that Parliament may bring in successor rights, and that there would be an impact on IP enforcement and litigation. Moreover, because the UK courts would no longer be required to interpret UK IP law in the light of EU rules, or comply with other EU legislation, e.g. the IP Enforcement Directive, we expected a period of uncertainty and increased litigation risk for Japanese companies.

In some of our more specialised seminars, we also touched briefly on other related issues that appeared to be of interest to Japanese companies, such as the impact of Brexit on parallel trade and exhaustion of rights, trade secrets and potential implications in the light of the EU Trade Secrets Directive 2016/943, regulatory data protection and the Bolar-type exemption.

### Life sciences seminars

For Japanese life sciences companies, we typically covered the topics in our IP-focused seminars before moving on to cover the potential impact of Brexit on three key issues, as follows.

First, we considered marketing authorisations (MA) and, in particular, whether an EU marketing authorisation held by a Japanese company's UK subsidiary would continue to be valid in the light of the MA holder no longer being established in the EU. We provided some practical advice on what steps need to be taken to ensure on-going validity, as well as on related pharmacovigilance obligations.

Second, we considered European clinical trials, including the validity of UK clinical trial data and the consequences of Brexit for on-going, completed, and future clinical trials. This was in the context of the requirement that data from clinical trials conducted in a non-EU country, which are submitted in support of EU MA applications, must comply with EU requirements on the protection and safety of trial subjects.

Third, we addressed European data privacy for life sciences companies and, in particular, the validity of informed consent provided by study subjects as well as the transfer of personal data outside the EU.

## Reaction of Japanese companies

Generally, the reaction of Japanese companies to Brexit and to the forthcoming UP/UPC has been to seek as much information, data and, ultimately, certainty, as possible. As with many other companies around the world, it appears that the key difficulty is not knowing – once issues have been identified and assessed, companies can manage their risk and develop appropriate strategies.

In this context, we have been advising our clients and contacts, not just in Japan but also globally, to adopt a four-staged approach to Brexit [see panel]. We hope that this will provide some helpful guidance (more resources and up-to-date information can be found at: *www.hoganlovells.com/brexit*).

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