HOUSE OF LORDS

Select Committee on the European Union

Justice Sub-Committee

Corrected oral evidence: Brexit, the UK and the Unified Patent Court

Tuesday 10 March 2020

10.45 am

Watch the meeting

Members present: Lord Morris of Aberavon (The Chair); Lord Anderson of Ipswich; Lord Anderson of Swansea; Baroness Deech; Lord Dholakia; Lord Gold; Baroness Goudie; Baroness Hamwee; Lord Rowlands.

Evidence Session No. 1 Heard in Public Questions 1 – 8

Witnesses

I: Mr Daniel Alexander QC, 8 New Square; Ms Julia Florence, Chartered Institute of Patent Attorneys.

USE OF THE TRANSCRIPT

1. This is a corrected transcript of evidence taken in public and webcast on www.parliamentlive.tv.

Examination of witnesses

Mr Daniel Alexander QC and Ms Julia Florence.

Q1 **The Chair:** Thank you very much for attending. Mr Alexander and Ms Florence, may I welcome you to the Committee and thank you very much for your time in giving evidence at a particularly important moment in the progress on this very issue? Mr Alexander, I have many friends at the patent Bar and I very much welcome your generosity in giving us your time.

Members of the public are here. A transcript will be taken and made public, and our witnesses will have a chance to review it before it is published. The session will be webcast live and subsequently made available to view via the parliamentary website. Any Member here should declare an interest.

I will ask the first question to set the ball rolling. It would be very helpful for the record to have the relationship between the European Patent Convention, European law and the Unified Patent Court explained. I would be very grateful if you would do so.

We have the background. The only document we have as regards the view taken by HMG is a piece in the *Law Society Gazette*, which we will explore further. It apparently deals a death blow to the UK's role in the Unified Patent Court. It is particularly important that we explore this issue.

Could I ask all of you to speak up, because the acoustics in this room are particularly bad? If I ask you to speak up it is not a criticism; it is merely because I want to hear better what you have to say.

Ms Julia Florence: Thank you for the opportunity for us to speak to you today. I am happy to take the first part of the first question.

My background is that I am a UK and European-qualified patent attorney and have practised for about 40 years. I started practising at about the time the European Patent Convention came into force.

So let us start with the European Patent Convention. The first thing I want to stress is that this is not EU law—it is an international agreement; and the EPO—the European Patent Office—which administers the European Patent Convention, is not an EU body. They are quite separate, and that is a very important point to note.

The European Patent Convention—EPC—is an international agreement that dates from 1973 but came into force in 1978. It has grown over the years and now encompasses some 38 European countries, including all the EU Member States but also a significant number—now 11, including the UK—of non-EU states. Therefore, it is pan-European, not EU.

The UK was one of the original members of this convention. It has been a very important and influential member and continues to be. The European Patent Convention is a fantastic model of European

co-operation in the IP area. It has been so successful that there are now a number of countries, although they are not full members of the Convention, that are called extension states. Some of those are outside Europe—for example, Cambodia. They have agreed to accept a patent granted by the European Patent Office in their own countries. So it is a really successful model.

What does the European Patent Convention do? It enables an applicant—a company or a person—to file a single patent application, which is then processed centrally by the European Patent Office. It is examined and processed up until grant. It is a single application for all these countries; so it is quite cost effective and very time effective, rather than having to file at all the individual national patent offices. I remember doing that when I first started training.

When the patent is granted it does not remain as a single right; it splits into a bundle of national patents. If you have filed an application, you can designate up to 38 countries. You will then have the potential to have the patent in each of those 38 countries. At that point you have the choice whether to proceed in every country. You have to pay fees to each national patent office, and in some cases you have to get translations. Depending on the importance of your invention, you may decide to carry on in all 38 countries, which is quite costly, or carry on in just a subset of those countries, perhaps the ones that are most relevant to your technical area.

Crucially, because those patents are now national rights, you have to enforce them separately in the national courts of each country. Is that clear?

The Chair: Thank you very much.

Ms Julia Florence: The UK has been a very influential member of the European Patent Convention. Most patent attorneys in the UK are qualified to act both before the UK Patent Office and the European Patent Office. UK patent attorneys carry out a substantial amount of work at the European Patent Office. It is by far the most attractive route. We have a wonderful patent office in the UK—the UK IPO—which does a great job, but most applicants prefer to go via the centralised route.

UK patent attorneys not only represent clients from within the UK before the European Patent Office, but we bring in work from around the world—for example, the US and the Far East. We are very highly regarded as European patent attorneys, so it is a very important part of our work. I have seen a statistic that shows that, although UK patent attorneys represent one-fifth of all qualified European patent attorneys around Europe, we actually do one-third of the work, so we definitely punch above our weight in working at the European Patent Office.

The Chair: Thank you very much. Mr Alexander?

Mr Daniel Alexander: Thank you very much for inviting us to this Committee, Lord Chairman and Members. It is a pleasure to be here again. I am a practising barrister and deputy judge. I am also the chairman of the Intellectual Property Bar Association.

Perhaps I could add just a few words by way of segue to the next question about the relationship between the European Patent Convention, EU law and the proposed Unified Patent Court. I will say a few words of history just for those who are not very familiar with the patent system.

The original idea of the patent system was that individual nation states would grant individual national patents that gave monopolies within those national territories. In this area, as in many others, there has been a gradual process of internationalisation of rights. In part that has followed the internationalisation of science, technology and creativity, and in part it has been a response to the internationalisation of trade.

The European Patent Convention, which, as has been said, is not an EU convention, is an initial part of that process, in that it says there will be a single grant process for a patent for the countries that are part of the Convention, so you do not have to apply to individual national patent offices for a patent to cover those countries. You apply once and it is examined once by very highly technically qualified people in the EPO. There is a relatively short time period of opposition. If the patent is essentially clearly invalid, the idea is that one can get rid of it rapidly, almost as an administrative or quasi-administrative procedure, but then each of the patents take effect as national patents.

The problem with that, and one of the original impetuses for the UPC, was that you then had to enforce the national patents in each individual country. If you wanted to enforce your patent in France, you would have to go to the French courts, if you wanted to do it in the UK, you would go to the British courts, and so forth. The idea of the Unified Patent Court was to take this bundle of European rights and create a court that will enable you to enforce them in a single venue, basically. It is somewhat more complicated than that, because the way the Court is proposed to be set up provides for multiple places where that can take place. It is a little bit like the United States federal system where you can enforce federal rights in district courts and they are effective throughout the territory of the United States.

In addition, the EU wanted to make good on something that has been a kind of dream of the EU for quite a long time, which was to create effectively a Community patent, a unitary patent, that would be effective as a single right, a unitary right, throughout the EU.

There is already a model for that in EU rights: namely, EU trademarks. You can apply centrally for an EU trademark and enforce that in the High Court sitting as a Community Trade Mark Court—or you could before 31 January—and you could have rights effective throughout the Community.

One of the ideas was to try to do that for patents, hence a court that would take both the bundle of rights and the new unitary patent, and enable someone to enforce or, just as importantly, knock out an invalid patent for the whole of the territory in question. I emphasise knocking out patents, because it is quite easy to think of intellectual property rights as things that are necessarily valid and so forth. As much work is done to get rid of what might be called legal litter—namely, the invalid rights that people have improperly obtained because they are not novel, obvious or infringe some other provision of the relevant law—as to deal with cases in relation to the enforcement of rights. So the idea of the Unified Patent Court was and still is to provide for both of those opportunities.

Perhaps to pre-empt question two, the reason it was necessary to pass the EU legislation referred to in that question was in order to create the unitary patent, which was one of the two sets of rights that was to be enforced in the Unified Patent Court.

The final point is that, within the EU, EU law takes precedence. We will come on to discuss the extent to which it is important at all in the context of patents, because one of the issues that has bedevilled this debate is a sense that the formal supremacy of EU law and its importance in decision-making are not reflected in this area, which is why red lines in relation to this are questionable. We can come on to debate that, but, formally speaking, EU law governs all the legal relations at that level, but it is equally important to understand that for patent law, save for a few areas that we can come on to, EU law really has nothing to say. The laws of obviousness, novelty and infringement are the fundamental things in patent law. Those are not creatures of EU law; those are harmonised by the EPC, and the Court of Justice and EU law really would have nothing to do with those fundamental areas. I do not know whether that is helpful.

The Chair: It is very helpful.

Ms Julia Florence: I may not have made clear when I was talking about the European Patent Convention and the European Patent Office that no cases brought before the European Patent Office can be referred to the CJEU. There is no nexus and no mechanism; it is totally independent, so there is no means of referring cases from the European Patent Office to the CJEU.

Q2 **Baroness Hamwee:** I think Mr Alexander has covered the question about why the agreement was pursued outside the EU but the EU legislation was necessary.

Mr Daniel Alexander: A related question, which is relevant to what we may come on to, is why the UPC agreement makes EU law the supreme law; so it is the other way round. That has some historical reasons that are relevant to the Committee's deliberation. Originally, the professions and industry wanted something that would cover not just EU Member States, but all EPC member states, so that everyone could participate, including the Swiss and other important territories. For all sorts of

political reasons, that was not possible, but the EU then said, "If you want to do it yourselves, you have to make EU law supreme".

The Chair: Baroness Goudie, turning to question three, we have covered some of the ground already, but perhaps we can explore it further.

Q3 **Baroness Goudie:** How do we now see the formal relationship between the Unified Patent Court and the Court of Justice of the EU?

Ms Julia Florence: The Unified Patent Court, although it is a court under an international agreement, as Daniel said, will nevertheless apply EU law, but only to very small aspects of the patent cases before it. The UPC is obliged, as the national courts are now, to refer any question of EU law that arises during a patent case to the CJEU. However, questions of EU law very rarely arise in patent cases. Very little EU law is applicable. One area where it does arise is in relation to supplementary protection certificates, which are a form of patent term extension. If you wish, we can say a little bit more about that, but, in the great scheme of things, European patent attorneys, for example, who practise day in, day out in the area of European patent law very rarely have any cause to refer to EU law or the CJEU.

Lord Anderson of Ipswich: Thank you very much for that answer. I should declare an interest as a colleague and friend of Mr Alexander, but my question is to Ms Florence. In view of what you have just said, do you anticipate that it is also going to be the case in the future that questions coming before the UPC will not involve questions of EU law, or is this a field where EU jurisdiction is likely to encroach in the future? We already have the unitary patent. Is this an area where EU law is going to take over, or is it going to remain very much distinct from that?

Ms Julia Florence: I think substantive patent law will always remain distinct from EU law. Substantive patent law has been around for a long time; it is very largely harmonised not only within Europe but around the world. Patent law could intersect with EU law in relation to what types of invention are patentable. Who knows what will arise in the future? At one time there were some questions about biotechnology inventions related to stem cells that fell within the EU biotech Directive. There was a bit of an intersection there, but, by and large, normal run-of-the-mill inventions, even normal pharmaceutical inventions that do not involve some of the biological aspects, would fall under everyday patent law and I cannot really see how EU law would encroach upon that.

Mr Daniel Alexander: Broadly speaking, there are four areas where EU law has an impact in this domain, but they are very limited areas and EU law has a limited impact. One that has been mentioned is supplementary protection certificates. The reason EU law has an impact is that supplementary protection certificates are themselves a creation of EU law, for complex legal reasons we need not go into now. The Court of Justice has the right to say that these conditions are fulfilled, essentially for an extension of term of protection, for certain pharmaceutical

products. That is a not unimportant category of inventions for the pharmaceutical industry, but it is a very narrow one.

The second area is remedies under the enforcement Directive. Here again, the European Court of Justice has not had a great deal to say so far. The thing about the enforcement Directive is that, if anything, what it did was to say to the rest of Europe that it ought to be doing the same things that the UK does in any event.

The third area is some exclusions from patentability, which are again harmonised at European level. So far, the only impact has been very small in a specific area of stem cells, or processes for stem cell research, derived from human embryos because of the restrictions on patenting "life" that were agreed in Europe.

The final one is general areas of law—competition law and so forth—in so far as they may affect patent cases, but for what might be called the common or garden patent case, such as those involving mechanical inventions and probably most small and medium-sized enterprises in this country, EU law and the Court of Justice would have no material impact.

Ms Julia Florence: Of course, it is only those aspects of EU law that can be referred, not the whole patent case as such.

The Chair: We move to the key question, question four. I have already expressed to colleagues my surprise that news of the Government's attitude has been made known only in a piece in the *Law Society Gazette*. We will explore that further. Perhaps Lord Gold can ask the question.

Q4 **Lord Gold:** What is your assessment of the decision by the Government not to seek involvement in the Unified Patent Court in future? The reason seems to be, as reported in the *Law Society Gazette*, because a "court that applies EU law and bound by the CJEU is inconsistent with our objective of becoming an independent self-governing nation". When answering, I am curious to have your views as to what will happen next.

Ms Julia Florence: Obviously, the announcement was extremely disappointing to the whole of our profession and businesses. Since the referendum, we have had many meetings with Government to consider what the impact of Brexit on intellectual property in the UK might be, and the UPC played a very large part in that.

We understood that there were clear red lines in relation to the CJEU. That had been said many times by the Government. However, the Unified Patent Court is an international court. We understood that there were concerns about the CJEU having an influence over UK courts, but we thought there is a distinction here because the UPC is an international court and people can choose to use it. If people do not so choose, there are alternatives. People can still file patent applications nationally in the UK and deal only with the national courts, so that option remains. We felt there was a distinction. We had hoped, and there had been noises, that the Government might make some exceptions to the red lines in relation to technical areas such as this and some other areas.

Certainly, the UK IPO and successive IP Ministers have all been very supportive of our views on continuing to be a member of the UPC. We have had some very constructive meetings with recent IP Ministers, so it was really a blow when those hopes were not able to come to fruition.

The Chair: It is a death blow.

Ms Julia Florence: I like to say, "Never say never". We certainly hope that, even if the UK cannot be a member of the UPC for now, the door is left open for the possibility that non-EU Member States, not just the UK but others, could at some point in the future be part of that system.

Mr Daniel Alexander: I share those views. I think it is a regrettable decision. I am afraid to say I think the reason given for it is an unjustified one, and it is particularly unjustified in this area.

First, the Court of Justice, as we have indicated, plays a very limited role in this area. Secondly, the role that it plays is an indirect one, in that it does not directly influence the UK position. It has a role in stating what the principles are in certain limited areas in relation to a common court. Thirdly, one has to remember that the Court of Justice is not some kind of directive, imperial body telling the UK what to do, and particularly not in this area. There are references made to the Court of Justice to set out general principles of law. It is then left to the courts of the Member States to implement those decisions. In a sense, it is one of the most respectful of lower courts appeal processes. Even to regard it as an appeal process is not quite correct. You have a combination of indirect, light-touch judicial regulation in limited areas. I have to say I just do not get the argument that that is incompatible with the United Kingdom becoming an independent self-governing nation. It is the rejection of a practical means of co-operation.

Patent lawyers and people who deal with patents tend to have an engineering mindset; they are quite techie and practical. Part of the reason for getting together is to say, "If we can do all of this in one court, let us have a one-stop solution; let us make this a little bit simpler and more practical". They are not very interested in what might be called jurisprudential ideology—to have a kind of ideological objection to some tiny involvement in specified areas that are advantageous to the UK.

Let me give you an example from the most recent case on supplementary protection certificates in the High Court. I should declare an interest to the extent that I appeared in it. The High Court said, "This is the answer, but we're not completely sure. Let's refer it to the Court of Justice". The Court of Justice said, "Perhaps we would put your reasoning in slightly different ways, but basically you are right; that's the answer". It came back to the High Court, which said, "Okay; that's the answer". The Court of Appeal said, "That's the answer".

The effect of the reference to the Court of Justice was not the Court of Justice dominating the UK; it was the opposite. It was the UK suggesting to the Court of Justice, "This is the way you should answer the question".

The Court of Justice was answering the question for the whole of Europe. In one strange way, you could say that the High Court was using the Court of Justice as an instrument to impose UK approaches on the rest of Europe rather than the opposite. Therefore, the idea that you have this court that is dominating and that is a reason for not having practical co-operation seems to me fundamentally misconceived.

The Chair: Thank you very much. I have four colleagues who want to come in on this very important issue that goes to the heart of the matter.

Lord Anderson of Swansea: To an outsider, it appears that that last helpful answer from Mr Alexander suggests that the mantra of sovereignty dominates and that, whatever damage may or may not be done to our interests, ideology rules. My question is rather the manner in which this was done. Our Lord Chairman mentioned this earlier. We have been given this quotation from the Law Society *Gazette*. You are the relevant practitioners. Have you had any direct refusal by the Government, or has it been done in this somewhat odd way? Have other legal journals had the same experience of similar avoidance of direct contact?

Mr Daniel Alexander: I cannot comment on the way the Government announce what they want to do. I can speak personally. I was called by someone from the United Kingdom Intellectual Property Office to say this was the approach. I should say I think the UK IPO has been fantastic in all of this; it is trying to work in this system under quite difficult conditions, not just in this area but in other areas of IP. It is superb. I expressed some views on that call as to whether it was right to do it in this way rather than have a formal announcement and explanation, but that is not really for me to say.

My concern is not even so much ideology or non-ideology on this. It is that, if one wants to be a self-governing nation and a powerful one, it is wrong to reject institutions that help you to be an independent, powerful and self-governing nation rather than hinder it. That is my fundamental question about the rationale here. I even get people who say they do not want interference. I am quite an enthusiastic European, but I certainly get the argument the other way. What I find much harder to understand are people who reject the mechanisms at their disposal to increase their power overall. That is something being done in this context and I regret it.

Baroness Hamwee: Mr Alexander, I have to say I think you would be entirely justified in commenting on consultation, or the lack of it, and methods of announcement, but that is a matter for you.

I want to ask about the practical implications for both practitioners and would-be patent holders and those who are challenging them—in other words, the commercial aspects of it. You have said that the UK has punched above its weight in its involvement so far, so what are the implications for the future in those practical ways?

Ms Julia Florence: The Unified Patent Court is not yet up and running, so to that extent at least we are not having to disentangle ourselves from a system that is already working. The UK has played a great part in shaping how the system will work. We looked forward to continuing that as the Court came into existence. I know that other countries that are going to be members of the Court welcomed the UK legal expertise because this was going to be a court that drew on both continental civil law procedures and UK common law procedures, so we were going to have a blend of the best of both.

What will happen going forward is obviously a matter of some speculation. At the moment the introduction of the Court has been held up by a challenge before the German Constitutional Court. That has been going on for some years. We have consistently heard rumours that it will be decided shortly. Those rumours seem to be gaining traction, and there is a hope that there will be a decision by the middle of this year.

Assuming that the challenge raised is dismissed and Germany agrees to go ahead as a member of the UPC —I hear there is a great will for the other members to go ahead—if the Court comes into existence, it will continue without the UK, without any UK judges and without the UK being able to influence the jurisprudence going forward. Although we will not be a member, UK businesses will still be able to use the Court because they may have patents covering other European countries that can be litigated in that court, but essentially it will be a foreign court to us. It will be a court in which we do not have a stake. We will not have judges; we will not have any parts of the Court in the UK; so it will be a different beast from what it would have been with the UK playing a very central role.

The Chair: In view of the time, Lord Anderson, could you link question five, which has already been partly discussed, with your supplementary?

Lord Anderson of Ipswich: I ask a quick supplementary to Baroness Hamwee's question. Ms Florence, you were at pains to emphasise in your first answer that the European Patent Convention and the European Patent Office are nothing to do with the EU, and that our fine patent attorneys—barristers, solicitors and so on—make a big contribution to our export earnings by the work they do before the EPO.

Ms Julia Florence: Indeed.

Q5 **Lord Anderson of Ipswich:** Do you anticipate that our dominance before the EPO will be affected in any way by non-participation in the Unified Patent Court, or can we keep those two entirely separate? As the Chair asks me to do, I move on to the next question to either of you. It is a hopeful question. Could any aspect of the agreement creating the Unified Patent Court be changed in order to accommodate the UK's red lines as transmitted to us all last week?

Ms Julia Florence: I do not see any reason why our not participating in the Unified Patent Court should impact negatively on our participation in

the EPC, because that is a granting process and it will be the same granting process for what we have now—what we call classical European patent applications—and what will become unitary patent applications, because the unitary effect will take place only at grant. The whole process up to grant will be the same; the only difference is in the enforcement. I do not see any reason why the UPC should have an effect on our practising before the European Patent Office.

As the rules of the Unified Patent Court are presently written, any European patent attorney with the relevant litigation certificate can represent clients before the Unified Patent Court. Clearly, there are European patent attorneys in countries outside the EU, and our understanding is that all of those will have rights of representation before the UPC, including European patent attorneys in the UK. We hope that that will continue. We do not know what will happen in the future and whether rules or procedures will be rewritten, but I cannot see that an entire swathe of European patent attorneys could be cut out just like that just because the UK has left the Court. Hopefully, we will continue to have rights of representation.

I would also like to note that, recently, the Government in their negotiating objectives for the US FTA have said very clearly that they recognise the importance of the UK being a member of the European Patent Convention, so we very much hope that that will continue.

Lord Gold: As an observation, we have had the big issue of the Government being so concerned about the CJEU's continued involvement in things. Ironically, the UPC provides a model as an alternative for problems to be resolved. It is a model that we should be looking at in other ways, yet we are turning our backs on something that will be there to do exactly what we might want in resolving issues in how we look at European law decisions.

Mr Daniel Alexander: My Lord makes a very good point. You might say that for those who do not like things being done through the EU and prefer things to be done internationally by convention this agreement provides a model for that kind of co-operation, as indeed does the EPC.

Lord Gold: Exactly.

Mr Daniel Alexander: If one says, "We are not having anything to do with EU law in circumstances where our trading partners are obliged to do so", you rule that out completely as a model going forward. That was why I was rather critical of the reasons for rejecting this approach in this context. I have to say I think this applies more broadly than just the UPC; it is about the approach the Government take to their relations and their ability to make agreements with other countries. That is not for now.

Following up very briefly on the questions, one of the points made was that other European countries were very much hoping that the United Kingdom would remain involved, partly because of the strength of the

United Kingdom judiciary. In this area it is absolutely phenomenal; it is regarded as one of the finest in the world, not just technically able but also very broad thinking, because patent lawyers do not just do patent cases; they do a range of other cases. They have brought a huge amount to this project. Quite a lot of the rules of procedure are, in a sense, based on the rules developed by the UK for its court designed for small and medium-sized enterprises: the Intellectual Property Enterprise Court. We have been absolutely at the heart of creating this system, and that is one of the reasons why there is so much regret in the IP community that it will not be possible to participate.

The Chair: I think I am getting the message, but do you want to add to the comments regarding question five, Mr Alexander, which has already been put?

Mr Daniel Alexander: Very briefly, Article 20 of the UPC agreement says, "The court shall apply Union law in its entirety and shall respect its primacy". If you have a red line that says that no agreement can have that kind of thing in it, it is quite difficult to see how you move forward, for the reason that the legality of an agreement of this kind also falls to be determined by reference in part to EU law.

Historically, there was a challenge to an earlier version. If an agreement says, "We're going to have absolutely nothing to do with EU law", to accommodate one of the Government's red lines, it is possible that EU law may say, "If you are making that kind of agreement, if you, the court in France, is agreeing with the United Kingdom that you won't apply EU law—wait a moment—how is that compatible with the French courts' approach to being a member of the EU?"

The question has a bipartite answer. One is whether the red line remains; the other is whether, if it does to that extent, what is left in terms of the negotiating space is doable as a matter of EU law. That is itself a complex question of EU law.

Q6 **Baroness Deech:** Mr Alexander, you have almost persuaded me that we are cutting off our noses to spite our face. I just wonder how far it goes. It crossed my mind that we or the Government might be doing it as a matter of leverage to try to get something in return from Europe. How extensive is this? I understand that the UPC is not yet up and running because it has not been ratified, inter alia, by Germany, so it does not yet exist.

I am also wondering how we cope now and in the future with the countries that I am guessing are most likely to be difficult over patents: China, Japan and the USA. If this is covering only a small number, should we calm down and say there is a bigger problem out there? Are there any advantages at all to us not participating? So, in its extent, looking at the overall picture, just how damaging is it? I am also interested in stem cells, which are not covered by European law because they have a different ideology.

Mr Daniel Alexander: That is a very good question. Bearing in mind the increasing power, for example, of Chinese intellectual property administration, including very effective patent offices, courts and so forth that have ramped up in the past few years, it may be said it is even more important for Europe to have the most efficient, streamlined and easiest ways of dealing with these issues. We are not just squabbling among ourselves. There are much bigger issues at play in this, and we ought to be putting our battles to bed and looking much more broadly. That is a much bigger political debate.

On stem cells, that is a very isolated issue. It may be that, if there is interest in that, following this up in writing would be useful because there are two key cases on this. The question there is the extent to which the approach to restricting patentability in that context has had an impact on R&D in this country and Europe in general, and whether it is specifically patent issues that have that. I do not feel equipped to answer that question; it is a question of industrial economics as much as patent law. It is certainly not clear that the decisions that have been reached by the Court of Justice in this area have had a major impact in the long term, partly because of where technology is in stem cells at the moment.

Lord Rowlands: Has China not been breaking patent laws? Is that right?

Ms Julia Florence: China has improved its intellectual property regimes as it is becoming more developed. As a general trend, as countries become more economically successful and have their own home-grown industries, they tend to rely more on intellectual property for their own industries and become more respectful and have stronger IP laws. It is improving in China. There are still quite a lot of problems, particularly on the trademark side, but I think we are seeing an improvement in the Chinese patent courts.

Baroness Deech: Do Japan and the US respect European patents?

Mr Daniel Alexander: They have their own systems. US patents and Japanese patents are granted in similar ways. The US has a federal system, so it is a patent granted for the whole of the United States and is administered by the USPTO, which is a little bit like the EPO, and then enforced in federal courts. In a way, the UPC system would be like the US system in terms of federal enforcement for the whole of the European territory.

On your point about looking more broadly and particularly east, in a way one might think of China as following a very traditional model. What you want to be as a developing country is sucking in technology as much as you can and being a kind of copyist. That was what the US and Switzerland did. As soon as you get to a position where you have your own R&D industry, you want to be a proprietor. What is the biggest company filing patents in the electronics and telecoms space at the moment? Now it is Huawei because China has moved from the historical position of wanting to take things in to being someone who says, "Now

we want to protect our territory". That is why in looking at some of these issues you need a much broader geopolitical perspective.

On the point about cutting off one's nose to spite one's face, I think of it slightly differently. It is about letting small things get in the way of a much broader picture that is important for this country's strength and independence.

Q7 **Lord Rowlands:** You began answering the question I was going to put. What is really behind the legal challenge in the German Constitutional Court? What is the argument about?

Ms Julia Florence: I think I am right in saying that the details of the challenge, as I understand it, have not been made public, although there has been quite a lot of speculation.

Mr Daniel Alexander: There is some material on it.

Ms Julia Florence: Yes. We believe the case has been brought by an individual German lawyer and may be concerned with the number of levels of appeal that are available in the UPC. The UPC will have a court of first instance and then there will be an appeal to a central court based in Luxembourg. That is just one level of appeal, if you like. I think in the German courts they have two levels of appeal. There was some concern that the rights you are getting to appeal in the Unified Patent Court would not be the same; you do not get as many chances as you would have in the German national courts. That is just an understanding based on what has been in blogs and some reports. We have not seen the details of the challenge.

Mr Daniel Alexander: If I can fill in on this and perhaps follow it up in writing, if that is convenient to the Committee, as I understand it, there are, broadly speaking, four grounds. One of them is that the procedure for transferring the powers to the common court has not followed the constitutional requirements under the Grundgesetz in Germany. Another is that there is, in broad terms, a defect in the democratic requirements with respect to the legislative powers of the organs of the UPC. A third relates to the legitimacy and independence of the judges in the UPC. Finally, it is said that there is an incompatibility with EU law.

As to how all those relate to the specifics of German constitutional law, as you will know, German constitutional law takes a slightly different view of the relationship of its law to EU law and institutions. It is a somewhat more protective jurisdiction and is not something on which I am specialised. I can try to find information for you afterwards, but probably now is not the moment to take up time on it.

Lord Rowlands: Do the German Government and industry support strongly the agreement?

Mr Daniel Alexander: They do.

Lord Rowlands: It has been one of the leading lights.

Mr Daniel Alexander: Yes.

Ms Julia Florence: German industry is very supportive.

Lord Rowlands: Is there any hope that the court will overthrow the challenge?

Ms Julia Florence: That is very much the hope.

Lord Rowlands: Or expectation.

Lord Anderson of Swansea: Effectively, it is a lone German lawyer against the unified voice of German industry.

Mr Daniel Alexander: You could say that. You could say that it might be a group of judges in Karlsruhe sitting in a constitutional court—

Lord Anderson of Swansea: In the Bundesverfassungsgericht.

Mr Daniel Alexander: —in the Bundesverfassungsgericht, against the German judges sitting in the Bundesgerichtshof dealing with patent matters, who are also very supportive of the Unified Patent Court. In Germany the balance of constitutional powers is somewhat different, so quite where it comes out I would hesitate to predict. The dominant view at the moment is that it is likely the challenge will be rejected by the constitutional court, but I do not have expert knowledge on that.

Lord Anderson of Swansea: Building on Baroness Deech's question, if we fail to participate, how damaging in your judgment would that be to our inventors and creative industry?

Mr Daniel Alexander: That is quite a difficult question to answer and again merits proper economic analysis. Let me illustrate a few areas where it may be damaging.

First, the court is intended to improve enforcement for SMEs particularly. They are the people one wants to worry about. In some respects, the big pharmaceutical companies, in a way, can look after themselves. If you have an $8 billion drug, costs of enforcement and so on pale into insignificance. If you are an SME, that is a different question. You are affected by inefficiencies in the legal system more than some of the big people are. Therefore, having a unified court to enforce your rights is a good idea. Equally though, if you are an SME and are affected by someone else claiming unjustified rights in a territory, you are affected. You can think of a patent as being one of the dominant non-tariff barriers to trade; it is an absolute prohibition, so what you want is a really quick and efficient way of ensuring that either your product does not fall within the scope of the claims, the patent is invalid or whatever. Again, the Unified Patent Court is intended to provide that.

If one is the United Kingdom, for both reasons one really wants to have influence on a court that is doing that in adjacent territory with which one wants to trade, not just for the SMEs but for those servicing SMEs. You

do not want a position where an SME says, "I now have to use a French lawyer rather than a UK lawyer to defend myself", when the whole idea is to make life simpler for the SMEs rather than more complicated.

One of the fears may be that, as with systems of this kind, things are kind of fine for multinationals because they sort of always are, but they are actually less fine for the people one really wants to encourage—the people where the legal costs and what might be called the legal friction is a dominant factor in their success. That is one of the things we as lawyers are concerned about in making the administration of justice easier and fairer for people.

Ms Julia Florence: Speaking as a patent attorney from industry who has been involved in multijurisdictional litigation in Europe, even for a large company it is time-consuming—it is all-consuming—and quite logistically difficult to carry out parallel cases in Germany, France, the Netherlands and Spain, as Daniel has said, with different sets of lawyers under different procedures, evidential requirements and different timetabling. It is very difficult even for a large company, so for an SME I imagine it is a complete nightmare. So, having this single court and one-stop shop covering all of those European jurisdictions aims to make litigation much more effective. What we hear from inventors time after time is, "It's cost me enough to get my patent, but I certainly can't afford to enforce it all around the world or around Europe". Having a court that made that more likely was going to be a really good thing. Of course, people can still use the court, but without having the British flavour that would have been so useful for our industries.

Lord Gold: I feel incredibly privileged to be part of and listening to this seminar you have been giving this morning. Do you think the Government actually understand what this is all about?

Baroness Goudie: That is really important. I think the answer to that is no.

Ms Julia Florence: I would not like to comment on the Government's understanding.

Lord Gold: Please do.

Ms Julia Florence: But understanding of intellectual property issues is generally not high. We have had some very informed questions from the Committee today, which is great, but people just do not engage very much with intellectual property. People still talk about a world patent, which does not exist. Probably people in Government do not understand all the issues to the extent that your questions demonstrate that you do.

The Chair: If I may be allowed, I endorse what Lord Gold has said.

Q8 **Lord Anderson of Swansea:** Basically, for me patent law is a closed book and so I have benefited from this seminar, but I am puzzled by the fact that the enforcement improvement is so obviously desirable that it has taken so long. What have been the major road blocks on the way?

Looking forward, where do we go from here if we do not participate? What are the next desirable steps?

Ms Julia Florence: I think the creation of a Unified Patent Court has been a long-felt want, but it has had a chequered history. As Daniel said at the beginning, initially it was envisaged that such a court would cover all the countries of the European Patent Convention, so it would cover EU and non-EU countries. My understanding is that that was one of the stumbling blocks with regard to the Commission. I am not entirely sure about all the legal arguments that went on—some of this happened before I became involved in UPC matters—but getting agreement between a large number of countries always takes time. Since 2012, when the new concept of the Court was being discussed, things have progressed quite quickly. Daniel, you probably know more than I do.

Mr Daniel Alexander: One has to look at IP harmonisation against a background of nation states being quite protective of their own patch in some ways and everyone thinking, "We've got the best system. How are we going to create a better one?" Doing the rules of procedure for the Court alone, I think they went through 18 iterations and many sub-committees and so on to try to blend the national traditions.

Before we get too gloomy and down about this, we have to realise what the UPC actually is. It is probably the most ambitious international court that has ever been created. We are trying to create an international court that is multilingual and multilocational. We are trying to blend legal traditions from different areas and involving a combination of specialist judges, which is quite hard in a specialist area, with public legitimacy. Patents are not just a narrow techie area; they require public legitimacy in order for the system to operate. It is a challenging thing to do and takes time for everyone to be happy about it.

One of the things that the very process of trying to create the Court has led to is what I call harmonisation by lunch, by which I mean that the judges have had to get together to say, "We need to forge a common European thinking on this. We need to work out the rules of infringement, validity and so on". They have these regular conferences, meetings and so on. That has created an element of common thinking in this area that has existed in parallel to creating the institutional requirements.

With regard to next steps, we do not know what is going to happen to the German challenge. That is the next issue. We do not know whether, if the challenge is rejected, everyone will be happy to go ahead with the system as it exists currently. There will need to be a renegotiation of the UPCA to reconstitute it in that form. That is not necessarily straightforward. Obviously, there is momentum for that at the moment and people have indicated that they want to do that. Who knows where matters will end up?

To answer Baroness Hamwee's question, in a year's time we will come back to look at what the actual impacts are. It is a little bit too early to say.

Could I endorse the fact that for us it is a privilege to be here with you and that you should take an interest in this? As enthusiasts and practitioners of IP, we find that when people start to look at it they say, "It seems quite an interesting area. It seems rather techie, dry and narrow, but this is about control of technology and the power of the courts; it is about the future, fundamentally, so it is an interesting area."

Are the Government paying enough attention? Do they understand it? I am convinced that they can be made to understand it. There is an element of shallowness of thinking that says, "When we look at this, it says the EU is involved. Right; we strike this out", but I think that a discussion of this kind with reasonable people can make genuine progress.

Lord Anderson of Swansea: Are you prepared to give a seminar to the Government?

Mr Daniel Alexander: I am prepared to talk to anyone who will listen to this and try not to allow silly things to be obstacles. I am very happy for genuine ideological debates to be obstacles; that is sensible; that is politics. But to have pointless things stand in the way at this stage in the country's history is not where we should be.

Lord Anderson of Ipswich: May I take advantage of your presence to move away from a narrow focus on the UPC to look at intellectual property law more generally? You may or may not be aware that, in the European Union (Withdrawal Agreement) Act 2020, our parent Committee, the House of Lords Select Committee on the European Union, was directed to examine proposals coming out of Brussels over the course of this year that engaged the vital national interest. I am sure our legal advisers will be trying to identify what proposals might meet those criteria, whatever they are. Is either of you aware of anything in gestation in Brussels that might break the surface this year that you think could arguably engage a vital national interest that, therefore, our parent Committee, or successor Sub-Committee, might want to look at? You are allowed to say no.

Ms Julia Florence: That might be something that we need to think about and get back to you on.

Mr Daniel Alexander: I would also like to get back to you on this. There is some discussion at the moment about SPCs. That is a very important area for patents. I know that it is a sub-nerdy area in a way in patents, but it is a very important one. That is under discussion at the moment. One of the things about intellectual property law in Europe is that there has been a very extensive programme of harmonisation already over the past 20 or 30 years. A great deal of that has involved essentially, with some changes, other countries adopting quite a lot of what we want to do ourselves, so it has not been a difficult process of harmonisation in many areas. There are specific areas, for example in the copyright Directive, where there are reasonable differences, but overall it has been quite a

successful process. On that, we probably ought to revert to you on general matters of intellectual property that are under examination.

Intellectual property law does not exist in isolation; it exists in co-operation with regulatory law and in some areas in competition law and so forth. There are other areas of EU law that touch on this subject where the interrelationship between those areas of law can be as important as the substance of any proposed changes to the specific domain of intellectual property. If the Chair would permit us to think about this and, if appropriate, write to the Committee, we would be happy to do that.

The Chair: Is there any other issue you would like to raise that we have not explored? We have gone over the ground quite a few times. This has been highly educational. It has been a seminar, as Lord Gold described it, dealing with practical issues that have been put into the front of our minds, as against ideological decisions. Is there anything you want to add?

Ms Julia Florence: Perhaps I may revert to a couple of points that Daniel made earlier. One of the questions related to the way the announcement was made. Daniel mentioned that he had had a call. Indeed, the head of the UK IPO, Tim Moss, did call all the heads of the key IP organisations in the UK, so we did get personal contact and had the news personally from the head of the UK IPO. That was helpful, but I agree that the fact there was no general announcement did seem rather strange to us.

The other aspect I want to revert to is related to question five and whether any aspect of the agreement could be changed in order to accommodate the UK's departure from the EU. There are two points here. There is a distinction between what could be done in the face of departure from the EU and what could be done in the face of the red lines. If there were no red lines, it would have been so much easier to accommodate the UK still remaining a part of the Unified Patent Court. It is important we recognise that because it is very much hoped that, in future, that Court could be expanded to include other European countries that are not members of the EU. It is important to recognise that it is not simply the fact of us leaving but the fact of the red lines. Those are the two additional points I want to make.

The Chair: Do my colleagues have any comments? I thank both of you very much for this most valuable session at a most opportune moment, given the announcement.

Ms Julia Florence: Thank you for your questions.

Mr Daniel Alexander: Thank you very much for your questions and attention to this issue. I hope you will keep an eye on this area generally. It is technical but repays study.

The Chair: Thank you very much.