



HOUSE OF LORDS

Select Committee on the European Union

Justice Sub-Committee

Corrected oral evidence: Intellectual Property (IP) and the Unified Patent Court (UPC)

Tuesday 13 November 2018

10.40 am

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Members present: Baroness Ludford (The Chairman); Lord Anderson of Swansea; Lord Cashman; Lord Cromwell; Lord Judd; Earl of Kinnoull; Baroness Neuberger; Lord Wasserman.

Evidence Session No. 3

Heard in Public

Questions 21 - 32

Witnesses

I: Sam Gyimah MP, Minister of State for Universities, Science, Research and Innovation; Mr Adam Williams, Director of International Policy, Intellectual Property Office.

USE OF THE TRANSCRIPT

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

Examination of witnesses

Sam Gyimah MP and Mr Adam Williams.

Q21 The Chairman: Minister, welcome to this session and thank you for agreeing to come and talk to us. I have just explained to you that I am not Baroness Kennedy, who is our Chairman and, unfortunately and very regrettably, is not able to be here today. She sends her strong apologies. I got the job of trying to fill in for her.

As you know, we have had a couple of previous sessions. I expect that you and your officials have been able to look at the evidence.

I will make a few housekeeping points. As you know, the session is open to the public. A webcast of the session goes out live and is subsequently accessible via the parliamentary website. A verbatim transcript of the session and of your evidence will be taken and will be put on the parliamentary website. A few days after the session, you will be sent a copy of the transcript to check for accuracy. We would be grateful if you could advise us of any corrections as soon as possible. After the session, if you wish to clarify or amplify any points that you have made or you have any additional points to make, you are welcome to submit supplementary written evidence to us. I hope that that is all clear.

Is there anything that you wish to say before we launch into the questions?

Sam Gyimah MP: No, thank you. I am happy to go straight into the questions.

Q22 The Chairman: I will kick off by asking you a very broad question. How would you summarise the impact of Brexit on the UK's intellectual property landscape? Are there any specific areas of concern or opportunity that you perceive?

Sam Gyimah MP: Thanks for inviting me to speak to the Committee. The IP landscape is a very dynamic one, Brexit or no Brexit. It is true today in the country that companies are having to adapt all the time, especially with huge amounts of technological change. In the UK, we happen to have one of the best IP regimes in the world. It is harmonised internationally and across the EU.

As we leave the EU, we will have some flexibility here. It matters. The UK is a knowledge-based economy. Potentially, we will be able to respond more to a changing environment. However, the nature of that flexibility and how it is used are subject purely to what deal we end up with, both in the withdrawal agreement and in the future economic partnership and the kind of trade deal that we are able to strike. The way in which I consider it is that, wherever we end up, we must continue to ensure that we are balancing the interests of rights holders and users appropriately and are consulting and involving users, where possible.

It is difficult to specify exactly where the big opportunities are. Inevitably, there will be some—or there may be some—but it will depend on the circumstances. Everyone in this room will be aware that we are at a point of maximum uncertainty as regards what happens next.

Lord Anderson of Swansea: Minister, you have probably seen the evidence that we

have received. I notice that Charlotte May QC said, "... the consistent message that we receive is about the inherent benefit and value of the IP system as it currently is, how engaged users are with the process, how it works very well", and so on. Some would say, "With one bound, we shall be free". What will be able to do in the IP field post Brexit that we are currently unable to do in a system that, apparently, works well for practitioners and users?

Sam Gyimah MP: The system currently works well for practitioners and users, as you have rightly pointed out. We have one of the best regimes in the world. It is also very good for enforcement and works very well for our knowledge-based economy.

Your question implies that somehow there is a scenario under which we return to the status quo ante, before the referendum result. That is not for me to determine. The UK Government's policy is to implement the referendum result. It is for me, as the IP Minister, to work to make sure that we lock in as much as possible the benefits of the current situation, but also look for future opportunities. Given where we are today, I am not sure how constructive it would be for us to rehash the referendum debate as to whether or not it is good for IP.

Lord Anderson of Swansea: It is not about rehearsing the referendum arguments. However, if it is the case that people are broadly content with the current system, what precisely are the benefits that you expect to come post Brexit?

Mr Adam Williams: May I speak on behalf of the Minister? As you rightly said, the UK system works very well. There are what you might call small tweaks to the IP system that, potentially, will increase harmonisation across the globe. The IP system is a well-harmonised system, both in Europe, as you and your witnesses have alluded to, and globally. Those global frameworks provide quite a consistent approach to IP. The areas where we may look to adjust the IP system are quite small. They are what I would term tweaks, rather than wholesale change.

Sam Gyimah MP: It is unusual for a politician to say, "We don't know", but, given the pace of technological change, there is a sense in which no one knows completely how the interests of rights holders and users are going to evolve and, therefore, what opportunities you will be able to exploit. The IP world today is radically different from the IP world a decade ago. We do not know whether being in the EU or out of the EU will position us advantageously. That is a fact.

The Chairman: Minister, we would like to home in a little more on this key question. You have confirmed that the system works well now. The system is not an exclusively UK system. It works because we are part of a European system, both through the European Patent Convention and because we have ratified the Unified Patent Court agreement. We are trying to find out your qualification and quantification of what the legal effects would be if we were not plugged in to that European system and what impact that would have on the intellectual property landscape in the UK, which is in the context of a European system. Can you give us an idea of the damage that there will be if we are not in that European system? You

talk about possible opportunities with innovation, but that is a little abstract for our understanding.

Mr Adam Williams: It is correct to say that, when we exit, there will be legal elements of the European IP system that will no longer work legally. That is quite clear from the technical notices that the Government have published on the various IP rights. The approach has been to make sure that we fix those elements that break and make as little friction and difficulty as possible for businesses to manage those changes.

Exiting the EU will have no broad effect on the patent system, for instance. There are some very minor elements that will change legally, but the proposed legislation that the Government will put forward over the next few months will ameliorate those changes.

There is a more fundamental breakage, if you want to put it in that way, of the legal system for trade marks, but the UK legislation going forward will make sure that that breakage is also fixed.

On the copyright system, many of the copyright elements of IP are harmonised through Europe. There are some special EU rights that exist only within Europe. They were created by the European Union; therefore, they exist only within Europe. In a no-deal scenario, it is impossible to fix some of those, because they require European rules to make them effective. As far as possible, where the UK has authority to make the fixes, we will, but there are a couple of small areas of copyright law where we are unable to do so without that bilateral conversation.

Q23 Lord Cromwell: As you rightly say, there is plenty to fix.

Good morning; it is very nice to see you here. Can we take what you have said to a slightly more granular level, for SME businesses? As the Minister said, things have moved on over the last decade or so. There are businesses in the UK that have their IP protected under EU regulations and EU law. What impact will Brexit have on them? What plans do the Government have to mitigate that impact? As you will appreciate, there are people looking into this session today. That is a really practical concern for small businesses that have their rights protected in that way.

Sam Gyimah MP: I guess that it depends on whether we are talking about a context where there is a deal or one where there is no deal.

Lord Cromwell: Let us do both.

Sam Gyimah MP: In the context of no deal, the Government will ensure that all existing EU trade marks and registered Community designs continue to be protected and enforceable in the UK by providing an equivalent trade mark or design registered in the UK. This will be granted with minimal administrative burden.

Lord Cromwell: I am really sorry to interrupt, but can I clarify something? Thank you for your answer, but how will those rights be enforced in Europe? I am not trying to

trip you up. I am just trying to understand everything.

Mr Adam Williams: Basically, we use the word “cloning”. At the moment, if you are a business operating in the UK and you have a EUIPO European trade mark across the 28 members, your rights in the remaining 27 members will be maintained. You can still be in the UK with a European trade mark operating across the 27 members. You can be an American company with a European trade mark. Your domicile does not affect your ability to have a European trade mark.

The UK section will break away. We use the word “cloning”. We will clone that right in the UK, so you will have a UK right. It will have the same priority dates and the same rights that you already enjoy in the existing European system. There will be no cost for business, which is very important for SMEs, with minimal administrative burden. For existing marks, there will be virtually no change. There will be notifications so that you understand what your new certificate number is and things of that sort.

The only area where you may have to perform some administration is if you have a pending trade mark. If you apply, say, in February next year and we leave in March next year, the chances are that your trade mark will not have been granted in Europe by that point. In that case, you will have to reapply in the UK within nine months of our exit date, whether that be the end of an implementation period or the end of March. However, you will enjoy the priority dates and the same conditions that you had for the first application. In the trade mark space, the friction for businesses will be as minimal as we can possibly make it when those rights break away from the European system.

Lord Cromwell: To summarise it in layman’s terms, you had a Europe-wide right, which will be cloned into a UK right, but your European right will be maintained.

Mr Adam Williams: Yes.

Lord Cromwell: Rather like having a patch applied remotely to the software on your computer, you will barely notice. It will just carry on and function perfectly all right—that is, if we get an agreement.

Mr Adam Williams: No. That will happen in a no-deal scenario as well.

Lord Cromwell: In a no-deal scenario, there will be the same outcome.

Mr Adam Williams: The only addition is that, going forward, you will have to pay a UK renewal fee and a separate EU 27 renewal fee to maintain your European trade mark. Of course, that is also right, in the context that, for business reasons, some businesses may decide no longer to maintain one of those rights. This gives them the ability to do that and not to be forced into a conglomeration that they do not necessarily need or want.

Lord Cromwell: Essentially, your message is that there will be a bit of paperwork, but it is nothing to worry about. Is that a fair summary?

Mr Adam Williams: That is a fair summary.

Sam Gyimah MP: Yes.

The Earl of Kinnoull: Obviously, that is very good news to hear. However, there will have to be some sort of data repository—a register of some sort—to back up such a claim system. It will need to suck out a huge amount of data from the central European registry, and then it will need to be a perfectly usable IT system in the UK. How are you doing with constructing that? It sounds like a big project to me.

Mr Adam Williams: You are absolutely right to talk about an IT project to go alongside the legislative project. When it comes to data extraction, the data that we need is publicly available. The trade mark register is a public document, so we can extract the data from it. We do not need permission per se from the European IP Office to extract that data. We are hoping in future negotiations to have availability of that data, which will give a certain extra element to bits of the data, but we can do what we need to do from the publicly available data.

The Earl of Kinnoull: However, it is quite big. Your access to the publicly available data is read only, so you cannot really get at the stuff to haul it out. In a no-deal situation, will you be ready for 30 March next year?

Mr Adam Williams: Our IT leads are confident that we will have a product that is viable for that date. That is what the IT project is working towards.

The Earl of Kinnoull: I am very grateful.

The Chairman: Can I ask everybody to speak up? I speak as someone who has a tendency to mumble. The acoustics in this room are not brilliant, so could you speak very loudly, if you would not mind?

Q24 **Lord Wasserman:** I want to get away from the very sophisticated new technology that has to be patented, and so on. I want to ask you about geographical indications when it comes to food, which are things I am really interested in. I think that many of those who are watching today are interested in, and know about, geographical indications, which are the property rights for products that are produced or processed in a particular place: Roquefort, Loch Fyne smoked salmon, and so on.

In the March 2018 text of the draft withdrawal agreement, it was confirmed that the provision dealing with geographical indications remained subject to negotiation. It was also an outstanding issue in the June statement. Where are we on geographical indications? I think that they are rather important. Most people do. We certainly do not want them to be ignored after we leave. That would be very unsatisfactory.

Sam Gyimah MP: Absolutely. I hope that I have not suggested in my earlier answers that the focus is solely on new technologies that are yet to be patented.

As you rightly mention, geographical indications are a unique form of intellectual property. The policy responsibility for this relating to agricultural products, in

particular, is covered by Defra, rather than my brief. However, the technical notices, which you have mentioned, make clear that, in a no-deal scenario, the UK will set up its own scheme, which will be consistent with the UK's international obligations, and that protections will be similar to those enjoyed now by UK geographical indication producers. That said, my officials are working very closely with officials in Defra and in the Intellectual Property Office on the design of the new GI scheme and the interrelationship between GI and other IP rights.

Mr Adam Williams: That is absolutely right. I reaffirm that it is a Defra lead, although we recognise that it is allied to intellectual property. Those links are there, but it is not in the Minister's portfolio.

Lord Wasserman: Do I have to go on worrying about this, or will it be all right?

Sam Gyimah MP: I am confident that it will be fine. Non-agricultural GIs are handled by my Department, via the trade mark system. We are looking to continue to make those protected in the UK, in the same manner as we have outlined for other IP rights. I hope that that gives you some reassurance.

Q25 **Baroness Neuberger:** Good morning, Minister. We are delighted to have you here. I apologise for the fact that I will have to leave fairly soon, because the time of my plane has been changed.

We have just heard some reassurance from both of you about what is going to happen under the GI scheme. However, if we have no deal, what happens to stuff that is currently protected under the EU scheme? How can the Government ensure protection here and, indeed, in the EU after we leave?

Mr Adam Williams: At the risk of repeating what the Minister said, the technical notices set out what happens in a no-deal environment. They make clear that a UK scheme will be set up. As far as our Department and the IP Office are concerned, that is as much as we can tell you.

Baroness Neuberger: That is as far as you can go. We need in some way to follow this up with Defra.

Mr Adam Williams: Of course, that is your choice. Defra has responsibility for geographical indications.

The Chairman: I understand that, but the Minister said that you are working closely with Defra. We have been told that 95% of the withdrawal agreement has been agreed. Does that now cover the protection of things like Cornish pasties and Melton Mowbray pork pies—their brand, if you like—in the rest of the EU? That is the key thing. You can set up a UK-only scheme, but will they be protected in the EU? We know that the US does not like GIs and that they will be an issue in a potential US trade deal. Has this been fixed in a deal scenario?

Mr Adam Williams: I understand the Committee's interest in this area. That level of detail is not within our purview, I am afraid. I am afraid that you will have to discuss

that with Defra colleagues, if you feel that it is justified. I understand your interest, but it is simply not our policy area.

The Chairman: We will take your advice and try to extract something from Defra.

Q26 **Lord Cashman:** I refer to my register of interests, as a rights holder. Good morning, Minister, and Mr Williams. Thank you very much for what you have told us so far. I still have some concerns. I have heard that opportunities have not been outlined. We have also heard about concerns on which I do not feel reassured, particularly because of my 15 years in the European Parliament, when I saw rights persistently come under global attack. Our only way of protecting those rights was in conjunction with, then, 14 other member states, and subsequently, 27 other member states, protecting a market of over half a billion people. I therefore remain concerned.

I want to take us to the area of free trade agreements and the long-term consequences of any deal. As you know, because you and, certainly, your officials will have seen the evidence, we have met a range of experts: Daniel Alexander and Charlotte May from 8 New Square, and Mr Trevor Cook from WilmerHale. They have expressed concerns to us. If the Chairman will allow me, I would like to quote a couple of those references.

Trevor Cook warned, "There is now discussion about entering into free trade agreements with various other countries ... One of the free trade agreements ... is what is now the CPTPP". For those people listening in, I need to say that that is the Comprehensive and Progressive Agreement for Trans-Pacific Partnership. Trevor Cook said, "... but there are inconsistencies between its provisions and, in the area of patents ... the provisions of the European Patent Convention". There again, there is a real tension between anything that we agree with the EU and subsequent developments around any new free trade agreements.

Daniel Alexander QC expressed similar concerns. He said, "Could the price of entering the CPTPP be abandoning the European Patent Convention? ... The patent convention is not an EU convention, it is the foundation of European patent law. It is like saying, 'We will withdraw from the European Convention on Human Rights so that we can do a deal with Japan on some trade'".

I am sure that you will agree that those are deep and serious concerns. Do you foresee any problems for the coherence of the UK's intellectual property law regime when and if the UK seeks to join other free trade areas? I hope that I have been clear.

Sam Gyimah MP: That is very clear. The UK will not be leaving the European Patent Convention as part of its withdrawal from the EU. The EPC is an international agreement of which the UK is a founding member. Membership is not limited to EU member states. Any future trade deal negotiated by the UK will therefore seek to get consistency with the UK's membership of the EPC and other intellectual property conventions we are party to. That is our position on it.

The Chairman: You say, "seek to". Will it be a red line in any future global free trade

agreements? Will there be no way that you will compromise British involvement in the EPC or any other European systems?

Sam Gyimah MP: Personally, I think that language such as “red lines” before you enter a negotiation is not always helpful, so I cannot say that.

The Chairman: Oh, I do not know.

Sam Gyimah MP: I think that the consistency and having the harmonisation are important. That is what we would work towards.

Lord Cashman: I would like to follow up on that. Minister, you said that you do not foresee any problems. However, I want to bring you back to something that Mr Trevor Cook of WilmerHale said in relation to free trade agreements and geographical indications. He said, “... one has also to be mindful of the issues down the road in free trade agreements”. That is what I am trying to get to. He continued, “If you look at the most recent free trade agreement between the United States, Mexico and Canada, most of the protocols are concerned with opt-outs of one sort or another in relation to geographical indications”. Immediately, therefore, geographical indications and protections would be at risk.

Mr Adam Williams: Any trade agreement is a negotiation. We have to accept that.

Lord Cashman: Chairman, maybe I am not being clear. If we reach a deal with the EU and then enter into the wonderful hinterland of all these new free trade agreements, but there is a lack of coherence between what we have agreed with the EU and what countries outside the EU are now offering and asking us to agree with, what happens? What happens to our agreement with the rest of the EU and the protections that, quite rightly, the Minister has praised?

Sam Gyimah MP: It is entirely right to point to the risks of the current position we find ourselves in, as you are doing. However, it is also the case that you have to negotiate and find a fix. That is what government is there to do. That is what trade deals are about. Before we have got to that position, it is not clear how we can outline exactly what fix we would have, because you have posed a hypothetical question.

Lord Cashman: Minister, it is not a hypothetical question. If we agree an international treaty, we cannot then enter into negotiations to unpick that treaty, unless we are willing to walk away from the treaty that we have agreed.

Sam Gyimah MP: Of course, I accept the premise of that. We would have to work on a fix, unless you are saying that we should not agree any treaties.

The Chairman: Not everything is ultimately fixable. It is not a diplomatic negotiation. It is not susceptible to a diplomatic fix. If you have agreed law, in an agreement with the EU, you cannot duck and weave around it in order to do an agreement with the TPP or the US. There are certain legal parameters, which are not fixable.

Sam Gyimah MP: We would have to observe those. If you were going to do a deal with the EU, you would have to do it with your eyes open, in that case.

Mr Adam Williams: I understand Lord Cashman's question exactly. The point is that we recognise, of course, that when you have a multitude of trade agreements, which is what you are talking about, there are inevitably tensions between those. I do not think that anybody is denying that that is the case. However, we do not have a future economic partnership agreed with Europe, and we do not have a trade deal agreed with the CPTPP, the US or any others.

That is where the Minister's point about this being a hypothesis comes in. We recognise the tension, and the need and ability to fix some of that tension, but we are not in a position at this point in time to match one schedule up to another, to see where they work or do not work. We recognise the tension, the point of the question and the point of the evidence that has been given, but we are not in a position at this time to give you a reconciliation of that in detail.

The Chairman: Can you not tell us which you would prioritise? If there was that tension, would you prioritise defence of the legal agreements that we had entered into in the European dimension, potentially, or global agreements?

Sam Gyimah MP: We would prioritise the one that maximised the economic opportunity for the UK. That would be one of the serious and important considerations in that context. Obviously, we would also consider the balance between rights holders and users.

Lord Cromwell: Is the implication of what you are saying that we may sign up to an agreement with the EU, but if we are offered a better one by America, for example, we will just dump the EU one?

Sam Gyimah MP: No. There is timing in everything that is part of this. You are trying to draw me into saying whether we will prioritise one type of trade agreement over the other.

The Chairman: Yes. I said that.

Sam Gyimah MP: But we do not have a deal in front of us. Without having a deal in front of me, I find it difficult to say which one I would prioritise.

Lord Cashman: Chairman, according to what I hear on my radio, the Government are operating on the basis that there will be a deal. If we cannot hypothesise on that, what can we do?

Sam Gyimah MP: Saying that you are seeking a future economic partnership with the EU, which I believe is the right thing to do, is not the same as knowing the terms that you will be offered on your IP regime.

The Chairman: This is not an unreasonable question. We are asking you to say whether, if you had that economic partnership, you would prioritise the defence of

its legal terms over any apparent or possible opportunities on the international scene with the TPP or the US. Surely, Minister, that is not an unanswerable question.

Sam Gyimah MP: If you are talking about trade deals, you want to prioritise the best deal.

Lord Cashman: Chairman, I could go on, but I suggest that we leave it there.

The Chairman: We will move on. Lord Anderson wants to chip in before we do so.

Lord Anderson of Swansea: You have said in terms that, come what may, we will adhere to the EPC. Do you believe that, when Mr Fox comes to negotiate a great range of other regional co-operation agreements, the commitment that you have made will prove a constraint?

Mr Adam Williams: No. At the risk of repeating the previous conversation, we are very clear that we are not leaving the EPC because of exit. We will maintain our commitment to the international harmonisation and the international treaties that the IP fora provide, including the EPC. We will look at the negotiations, discussions, options and fixes, and decide what is best for the UK IP system.

I want to reiterate the point that the Minister made about this at the very start. The UK is consistently in the top tier—1, 2 or 3—of IP regimes in the world, including the whole gamut of our processes. The Government have no desire to change that. We recognise the comments and questions of the Committee, but that is the fundamental basis of any negotiations. Individual clauses may change slightly or may need to be looked at, but that fundamental point is well worth repeating at this stage.

The Chairman: I am going to allow myself one last question on this point. Do you or do you not agree with Mr Trevor Cook, who gave evidence to us, that there are inconsistencies between the provisions of the CPTPP and the European Patent Convention? Do you agree factually with that assertion, or not?

Mr Adam Williams: Factually, as of today, there are different clauses and different requirements in both. However, I go back to the Minister's point. That does not mean that there cannot be fixes or negotiations around those points, if we decide that we want to sign up to the CPTPP in its current form.

Lord Anderson of Swansea: We can hardly expect them to alter their provisions to suit us.

Mr Adam Williams: I cannot comment on other people's negotiating positions.

The Chairman: We have probably gone as far as we can.

Q27 The Earl of Kinnoull: In the Chequers White Paper of 12 July, you said that you would be "exploring options on intellectual property, including participation in the Unified Patent Court and unitary patent system". We are after an update on what

you have been doing there and what progress you have made. There are two sub-questions here. First, can we continue to be part of the unitary patent? Secondly, can we continue to participate in the Unified Patent Court agreement or UPCA?

Sam Gyimah MP: As you rightly point out, the UK has set out its proposals for the future relationship, including exploring participating in the UPC and the unitary patent. Again, the starting point for my answer is that the future of the UPC and the unitary patent will be a matter for negotiation. I think that there is scope to negotiate our continued participation. There may be some legal disagreement about what can or cannot be negotiated, but I do not think that it is as cut and dried as some of the critics suggest.

The Chairman: You will be aware that there are differing legal opinions, including a very long article from the Max Planck Institute. I am testing my colleagues on their knowledge of that. Can you give us an indication of the legal stance that the Government have taken on the possibility of a third country—a non-EU country—participating in the court agreement?

Sam Gyimah MP: The Unified Patent Court is established by international agreement, as the Committee is aware. Twenty-five EU member states are involved, but not the EU. The UK ratified the agreement quite recently. Our legal view is that it should be possible for the UK to remain in the system after leaving the EU.

The Chairman: Could you amplify that a little? Why do you disagree with those who say that a third country cannot be in the system?

Sam Gyimah MP: It is not an EU institution.

The Chairman: Maybe I am not going to make any further progress, but we have been supplied with an opinion by two barristers, which is now two years old. There is a differing opinion on the legal position from the German institute. We have had various opinions by the court on various issues, such as EU accession to the European Court of Human Rights. There is also the opinion on the EEA, which is now nearly 30 years old, and the opinion on the first draft of the UPC. All are prayed in aid in one way or another. Could you give us a bit more detail on what stance you take between those various opinions?

Mr Adam Williams: I am not in a position to give you a legal analysis, but the legal summary that we have commissioned has respectable and reasonable arguments that suggest that, subject to negotiation—we clearly recognise that we need to discuss this with the members of the UPC agreement—it is possible for us to negotiate to continue in that agreement. We recognise that there are several opinions, that there is not a clear-cut legal case and that it is part of a negotiation and discussion.

We also recognise the incredible value that the UK brings to the UPC agreement. Within a proportion of the current signatories, certainly, the benefit that the UK's participation and value adds is recognised. London is the home of one of the court

systems. We think that there is a good basis for a sensible discussion about future participation.

The Earl of Kinnoull: We have become quite familiar with the legal soup on this issue and the Grundgesetz of the German system. I thought that a Daniel Alexander quote was extremely interesting on the soup point. I will read it out to you. He said to us, "It would be unfair to suggest that the legal issues will be completely plain sailing as regards the UK's continued membership. But many people say, 'Where there's a will, there's a way'".

I wonder whether the will exists. You have repeated the Chequers White Paper to us, but is there a will to continue this? It is greatly in the interests of ordinary citizens on both sides of the channel. It is not really a political thing. Intellectual property rather rises above that. Can you give us some comfort that there is a will to try to make this work?

Sam Gyimah MP: There is a will, and work is under way. It is not cut and dried legally, but I do not think that anything is cut and dried as far as our exit from the EU and carrying on in some of these institutions is concerned. There is a will, and we are determined to make sure that it works.

Lord Judd: When you say, "There is a will", is that a will among those involved in the detail—the officials, the legal people and the rest—or is it a will of the Government?

Sam Gyimah MP: It is the will of the Government.

Mr Adam Williams: Exactly. The White Paper could not be a clearer statement of the Government's intention. There is a whole paragraph there on the willingness to try to make the UPC work, within the boundaries within which we have to work. The White Paper is a very clear statement.

Lord Judd: Do you feel that there is real political commitment?

The Chairman: What about from the EU 27? That is the point.

Sam Gyimah MP: I cannot speak for the EU 27.

The Chairman: The Government may have the will, but it takes two to tango. Have you said all that you feel that you want to say on that subject?

Sam Gyimah MP: There are different views. We recognise that. It is for us to state our position, which is quite clear in the White Paper, to persuade the other side and to do the work that is needed to deliver it.

Q28 Lord Anderson of Swansea: In relevant cases, the UPC will have to apply Union law. In those cases, that means referring that law to the Court of Justice of the European Union and abiding by the decisions of that court. Are the Government reconciled to that view, in spite of the way in which some regard the CJEU as a boo institution?

Sam Gyimah MP: I agree that the UPC is bound to follow EU law, where it is relevant, and can refer questions to the CJEU on the interpretation of EU law, as you rightly point out. However, the CJEU is not an appeal court of the UPC, which has its own court of appeal. I think that, when ruling on domestic cases, UK courts will not be bound to follow decisions of the CJEU or the UPC.

The Chairman: Really? This is a challenging subject for all of us. How does that work if the system has to respect the role of the CJEU as the final arbiter of EU law? Of course, EU law includes the Charter of Fundamental Rights, which the Government are not very keen on. How would our domestic courts be able to escape applying rulings of the CJEU if we were part of the UPC system? Forgive me if I am being thick.

Mr Adam Williams: It is a fair and understandable question. The point is that the CJEU is not the final arbiter. That is the clear issue for Government. Patent law and trade mark law are being operated across the world and across Europe as we speak. That will continue when we leave. Inevitably, British courts will follow case law that is being made across Europe. The UPC will follow that case law when it is making decisions. The issue is that the final arbiter—the final decision in any case, as it is elevated through the various appeals—will be its own appeals board, not the CJEU.

The Chairman: That is the case at the moment, is it not? We had a rather good article on the issue at one point. It is rather a misnomer to talk about direct jurisdiction of the court, because it is indirect. At the moment, the whole system of references from national courts is that you get an opinion from Luxembourg, and it is then up to the national court to implement that. The system at the moment is actually a kind of indirect jurisdiction, because the national court has to apply to the facts of the case the ruling that it has had from Luxembourg. That is the system at the moment. It is the system that would continue if we were part of the UPC system. Is it not dancing on a pinhead to say that our national courts would not be subject to the jurisdiction of the CJEU? They would, in a broader sense.

Mr Adam Williams: We believe that the distinction is important enough to satisfy the Government's desires with regard to the CJEU.

The Chairman: I am tempted to use the phrase "window dressing" for this.

Lord Anderson of Swansea: It is no longer a thick line.

The Chairman: It is not only pink; it is practically invisible.

Sam Gyimah MP: I suspect that Adam has had some inspiration, which he may refer to in a second. I am sure that our national courts have one eye towards what the CJEU says, which is not the same as being under its direct jurisdiction. What inspiration have you had, Adam?

Mr Adam Williams: Quite rightly, my colleague has just reminded me that, of course, the UPC is not a UK court. One division may be sited in London, but it is actually an international court. That is also an important point here. It is not a UK

court following case law, but an international court, based in London, that is following case law.

The Chairman: But businesses and public and private organisations in the UK will have to follow what the UPC decides, if they want to be part of the system. The UPC is governed by EU law and is subject to rulings by the CJEU. To say that it is not a national court because the UPC is an international court, which is true, slightly dodges the issue, does it not?

Mr Adam Williams: I think that that is a matter of opinion.

Lord Cashman: It is worth referencing page 134 and paragraph 30 of the Max Planck Institute's article.

Sam Gyimah MP: I am afraid that I have not memorised it.

The Chairman: You can see how he spent his Sunday.

Lord Cashman: It would open up the discussion further. It is really interesting. In this discussion, we are talking about our relations with the European Union and then, subsequently, with the wider world. The article says, "First, the UPC's nature and its status within the EU judicial system is governed by EU law alone. Art. 267" of the Treaty on the Functioning of the European Union "is subject to autonomous interpretation by the CJEU according to the general scheme, requirements and objectives of the Union". Whether we like it or not, if we wish to deal with the UPC and its members, we will have to accept the judgments of the Court of Justice of the European Union. That is perhaps something for another debate, probably over several glasses of wine.

The Chairman: But not at 11.30 in the morning. Was that more a comment than a question?

Lord Cashman: It was more a comment than a question.

The Chairman: In that case, we will move on, unless you want to respond to a comment, Minister.

Sam Gyimah MP: I will wait until after a glass of wine.

The Chairman: We will hold Lord Cashman to that.

Q29 **Lord Judd:** My question continues some of the matters that we have been discussing. Quite apart from the issue of participating, what will happen to our hosting of a division of the UPC in the UK?

Mr Adam Williams: We would have to see what the negotiation gave us. In theory, if we left the unitary patent and the agreement, or did not become part of it, because we did not join, my understanding is that we would no longer be able to host the court.

Lord Judd: Can I take you back to something that you said much earlier, which I

found positive? You recognised very fulsomely the value for everybody concerned of international, global agreements in this area of law and emphasised that, if we were no longer members of the European Union, there would be a good opportunity for us to continue playing our part in strengthening global law in this respect. I am interested not just in the theory but in the dynamics of that.

At the moment, the European system—the UPC—is part of the practical process of building more global approaches to these matters. What will happen to the UPC if we are no longer a member? Do we think about that? There are mentions of it, but do you take it fully into account in the evaluation of government policy? What are we actually doing to the cause?

Mr Adam Williams: I can reiterate the points that were made earlier. We recognise the value that the UK brings to that. As I said, it is one of the three divisions in the current agreement. The UK Government's approach is to try to maintain part of that. I am not sure that I can add any more to that statement. We are subject to a negotiation with the other members. Yes, of course, the Government have considered and recognise the value of this, and have stated their desire in the White Paper, but it is subject to agreement. This is not a unilateral thing that we can create in domestic law. We recognise the importance of it and will do what we can to maintain our membership. I am not sure that I can answer the question any more fully, I am afraid.

Lord Judd: If there were no deal, we would be putting ourselves in a position of theoretical commitment and potential influence in global institutions, but we would be forgoing real muscle in this context.

Mr Adam Williams: Again, that is a theoretical or hypothetical question. In a no-deal scenario, of course we would leave—

Lord Judd: Forgive me, but I would like to challenge you on that. Why is it a theoretical consideration? If the Prime Minister has just said again that no deal is a possibility—quite a real possibility—surely considerations such as this are central to that decision. They are not vague, theoretical positions.

Mr Adam Williams: My point about theory was that we do not know the exact terms yet, but of course we have considered the issues. We have considered the effect and what exit means. As I said at the very start of this Committee meeting, we have looked at the areas where law may need fixing.

We are also looking at how we can maintain that influence. As I said, the UK has always had a very strong IP system. We want to see how we can continue to have conversations to maintain that strength and be a global influencer, whether that be with a future economic partnership and by working with the EU, not necessarily in legal terms, but in co-operative terms, by working with other members of the World Intellectual Property Organization, where we will still be a full member in our own right, or by working with bilateral partners that also have strong IP systems. The UK

has a huge wealth of experience and a good story to tell in this area. Brexit will not change that.

Lord Judd: But we shall have forgone real muscle. Is that fair?

Sam Gyimah MP: I will answer your question frankly. In leaving the EU, we will forgo some of the muscle—to use your term—that we have in some of these institutions. That is entailed in the decision to leave. While we look to make sure that rights holders and users continue to benefit from the protection that they need, the UK's role in some of these institutions will not be what it was before. That was entailed in the decision to leave.

Q30 The Chairman: Thank you for that frank answer, Minister. We are also interested in what will happen to the Unified Patent Court if the UK does not and cannot participate. As far as we know, there is a case in the German constitutional court in Karlsruhe about German ratification. The agreement needs the ratification of 13 states, including the three biggest patent users: the UK, France and Germany. If we do not participate, what will be the effect on the survival and thriving of the court? What would be the effect of the UK having ratified, but not being able to continue to participate? I guess that you have thought all of this through. As Mr Williams said, the evidence that we have had previously is on the big British contribution to intellectual property. If we are not able to continue to participate in the court, what will be its fate?

Sam Gyimah MP: My focus has been on our participation, given that that is what is in our interest and what we are seeking to achieve. I hope that we will achieve what we have set out to achieve. If we are stymied somehow, the effect on the court will be not because we did not try, but because we were stopped. We will not be in a position to advance the court's interests if we are stymied from participating.

Mr Adam Williams: If the UK, for whatever reason, is no longer a member of the UPC, it will not be through political will, but because we cannot make an agreement work. It is entirely within the gift of the existing members of the UPC agreement to decide to change the agreement not to require the UK to be one of the three members. There is no point in my speculating on how they might do that, but it is fair to say that it is not inconceivable that a UPC could carry on without the UK. Again, I am careful not to speak on behalf of European member states, but it is not inconceivable that they could organise that themselves. I repeat that, obviously, that is not our intention. That is not just a UK view. Many of the member states see the value of having the UK as part of the court and are willing to help that discussion to happen so that it can include the UK.

Lord Anderson of Swansea: The same argument could be made about the European Medicines Agency. Everyone said that our pharmaceutical industry is very important. Nevertheless, because we will not be a member of the European Union, we lost that agency to the Netherlands. Equally, surely, if we are not a contracting party to the UPC after March, it will be virtually impossible for us to be a part of that.

Sam Gyimah MP: It is a legitimate point to make.

Lord Cromwell: In another context, but also to do with Brexit, it was put to me rather chillingly by one of the witnesses that the difference is that the UK will move from being a member to being a lobbyist, effectively, in a whole range of areas. This may be one of them. Do you recognise that as our change in status? We are no longer inside and able to influence matters. We, as British lawyers, have been fundamental, but, effectively, we are going to be lobbyists, on the outside.

Sam Gyimah: I see this across the board in my brief of science, research and innovation. As a leading member of the EU, there are a number of areas where we can influence direction, not just as a member state but as a very active participant. A lot of that changes when we leave the EU, and, especially in the immediate aftermath of leaving the EU, in some cases it looks as if our position is significantly worse. That is in the immediate aftermath; nobody knows what will happen further down the line. The UK is one of the strongest economies in Europe. What it means to be in will change over time as well as what it means to be out.

To answer your question, in the immediate aftermath, we find ourselves in a position where we are lobbying, when four years ago we would have been setting the agenda. That is entailed in the decision that was made. Nobody knows what will happen further down the track, because the UK still has a lot to offer, and the dynamic of the negotiations now is to make it very clear, certainly from the EU side, that being out is very different from being in. I do not know how long we will be able to hold that position. There are elections next year; there will be a new Commission and a new Parliament. The world will change. We will see.

Lord Cromwell: So we will be a lobbyist, but we are a very good one and we will be listened to.

Sam Gyimah: We still have a lot of significant cards.

Lord Cromwell: There are two things on which I would like your reaction. One is around the no-deal preparation. Daniel Alexander has been quoted quite a number of times today, and I hope he is enjoying that. I take your point earlier about not refighting the Brexit debate. That is always the temptation here, which I hope we can all avoid.

Sam Gyimah: It is not just this Committee. I am sure there are many other fora in which that is happening.

Q31 **Lord Cromwell:** If we can bask just a little longer in the joys of the current system, Mr Alexander said that, when there is a change in law, the UK IPO engages in a very full consultation, and his comment was “all of that has gone out of the window” as Brexit approaches. I would be interested in your response on that.

Sam Gyimah: What has gone out of the window? I missed that.

Lord Cromwell: The extensive consultation around a change in the law. This was his

comment in evidence to us. I will park that as the first point. The second one is around the technical notices. Trevor Cook's evidence showed that there was, in his view, a lack of detail and that the uncertainty persists around many of these areas. One witness referred to the technical notices as "anodyne" and not reflecting the major impact on businesses. How do you respond to that also? Those are the two points that I wanted not to couple together, perhaps, but to put before you. Either of you can answer.

Mr Adam Williams: It is good to hear of the high regard in which the IPO is held, and we have striven to maintain that with our stakeholders.

This is an unusual situation. We are in a deeply complex, multifarious negotiation. We have been constrained perhaps a little more than in the past in discussing the elements of IP. Often, IP, in my opinion, is not hugely political in many ways, with a small "p". In this case, it has been wrapped up in a much larger political wrapper, as have all Brexit negotiations. We have perhaps been a little more constrained in discussing absolute detail with our stakeholders, but, as soon as we have been able to, we have engaged with them as closely as possible.

We have talked very frequently, and more frequently as time has gone on, with the professional organisations—for example, the patent and trade mark attorneys—and the creative industries. The Minister met with all the IP industries earlier this year, and we have had very close discussions with them whenever we have been able to. As I say, I recognise his comment, but I think we have done a very good job in making that engagement.

With regard to the technical notices, they were not written for patent attorneys but for businesses. They aim to give a layman's example or exposition of the issues that we face in a no-deal scenario. We have to remind ourselves that they are for a no-deal scenario. When the statutory instruments are laid, they will go into a legal exposition of the issues, and I think that will satisfy many of the more legally-minded interlocutors to whom you may have spoken. As the Minister and I said, once those statutory instruments are laid, we will also be looking to do some more business notices, which will particularly enable SMEs and those without teams of IP attorneys to understand what they need to do and give some practical advice. My personal opinion is that we have engaged as much as we possibly could, and we have tried to provide as much information for businesses as we possibly could.

Sam Gyimah: I do sympathise with the position of businesses in particular. They want clarity and certainty, and they want it as early as possible. The nature of the negotiations has been that we have to move in step with the entire negotiations. What we did in IP, what I am looking at in Horizon Europe and all these things have to be looked at together across government. You then get cross-government agreement, and the Government communicate all these positions at the same time.

As a general point, I can sympathise with businesses who say, "Why can't you just give us what we need on IP?" However, it is quite a complex situation, and it is why we are focusing a lot on constant engagement and providing assurances as soon as

we have cross-government clearance and are able to do so. Sometimes, in doing that, we might not give the complete information that businesses want. That might be because we have clearance and we have agreed one part of the question, but some other parts of the question are still under discussion. I can understand the frustration, but it is where we are, I am afraid.

Lord Cromwell: That is very helpful, and I do understand and sympathise with both sides of that equation. I guess that one area of uncertainty for businesses is that these technical notices are all very well and you can fight your battles at the policy level, but is the detail really being taken care of? All you can do is assure me that it is, because you cannot reveal it, but that is going to be an ongoing uncertainty until it is all finally published, which will possibly be too late to influence events.

Sam Gyimah: I can give you a strong assurance that the detail is being taken care of.

Lord Cromwell: That is comforting; thank you.

Q32 The Chairman: Minister, perhaps I could move on to what is our final question, subject to any last remarks you want to make, about the EUIPO—the EU Intellectual Property Office. We had a range of opinions from our previous witnesses, but we were intrigued by the fact that the EUIPO is not one of the EU agencies in which the Government are seeking to participate, or it has not been named, when and if the UK leaves the EU. On balance, our legal witnesses and practitioners felt that it would be useful, because it provides a unitary trade mark system.

As a subset of that, Stephen Jones said he thought it was very important for British businesses to be able to continue to use UK practitioners before the EUIPO. Could you explain why it has not been one of the named agencies in which the Government wish to continue participation?

Mr Adam Williams: We recognise the interest and views of stakeholders. They have indeed written to the Minister and us with those views. But this is a negotiation, and any decision to be made on membership of the EUIPO is part of that negotiation and the future agreement with the EU. As such, that is where we stand, and we cannot give any more details on that negotiation, because it is a negotiation and we will hope to have that discussion in due course.

The Chairman: Yes, but the Government have named other agencies such as Europol, the EMA and EASA. They are able to name some agencies they want to stay in, even though that is also subject to negotiation, but not the EUIPO. We are trying to double down into the reason why that has not been name-checked.

Mr Adam Williams: I cannot comment. My supposition is that the named agencies have clearly been able to make more progress with Europe to enable them to be named. That is not the case with the EUIPO.

The Chairman: The fact that it is not on the list does not indicate a lesser degree of interest necessarily.

Lord Anderson of Swansea: Or priority.

The Chairman: Or priority.

Sam Gyimah: If the question is less degree of interest and priority, no.

The Chairman: It does not indicate any less than the—

Sam Gyimah: I do not think you should be reading too much into the fact that it has not been named.

The Chairman: Can I turn that round and say: how important is it to you, as the Minister for IP, that the UK stays part of the EUIPO and that UK practitioners have rights of representation before it?

Sam Gyimah: It is a point of principle. My approach is to lock in as many of the benefits that we currently have as we can. In terms of rights of representation and how that plays out, we would be looking at a more complex situation.

The Chairman: If I can remember, we understood that apparently there is some quirk that, because UK patent attorneys are also EU patent attorneys, they will have rights before the UPC, I suppose. Apparently, the situation is different on trade marks because there is not an EU trade mark attorney. I may have mangled that, but there is some dimension to EU patent attorneys.

Mr Adam Williams: They are different organisations. The European Patent Office is European by name but not EU. It is a completely different system. The European IP Office is an EU institution and therefore has EU residency rules, but the Minister's point about the EUIPO stands.

Lord Anderson of Swansea: Even though the EUIPO will be governed by the Court of Justice of the European Union. Does that trouble you?

Mr Adam Williams: It causes issues. There are parts of the negotiations that we need to think about, because, yes, there is a more direct effect in the EUIPO of the CJEU than certainly in the UPC.

The Chairman: Would I be able to tempt you to express a view on the priority that the Government put on the issue about the CJEU compared with the practical benefits for our businesses and industries in remaining part of these European and EU systems, with the influence of EU law? If you were weighing up the legal bogeyman, if I can put it like that, compared with the practical benefits for British industries and firms in being part of the system, Minister, how would you weigh up the respective weights?

Sam Gyimah: The answer is that it is a very challenging question. I will just be up front. I voted remain. This is not where I would have chosen for us to be, but this is where we are, and our job is to make sure that it works. It is one of the challenging questions.

The Chairman: Is there anything that we have not given you an opportunity to say that you wish you had said?

Sam Gyimah: I think the most important thing for the sector is the assurance that there is a lot of detailed work going on and that we are determined, in the event of no deal or we get a deal, that rights holders and their users are protected. That work is at a very advanced stage and we are very confident.

The Chairman: It just remains to thank you very much, Minister, and Mr Williams, for giving us so much of your time today. We are very grateful.