

The Practicalities of the Unified Patent Court What we don't know

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The Unified Patent Court

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Brexit and UK ratification of the UPC Agreement




- Ratification before referendum?
This would allow a timely entry into force of the Agreement, but seems unlikely, notably because a subsequent Brexit would most probably force UK to withdraw from UPCA while there is no provision for departure in UPCA
- Ratification only after a positive outcome of the referendum seems more likely

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In case of Brexit




- Brexit would prevent UK from participating to the UPC (ECJ's Opinion 1/09 requires only EU Member States)
- Brexit would not be the death of the UPCA if the political momentum remains with other Member States
- No UK local division
- London section of the Central division to be relocated (a decision of the Administrative Committee might be enough, no new Agreement needed)
(Art. 87 (2) "The Administrative Committee may amend this Agreement to bring it into line with an international treaty relating to patents or Union law.")

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In case of Brexit

- No UK judges in the UPC
- UK lawyers not permitted to represent clients before the UPC
(Art. 46 (1) "Parties shall be represented by lawyers authorized to practice before a court of a Contracting Member State") (except if UK continues EEA membership as an EFTA member state)
- UK patent attorneys still permitted to represent clients before the UPC
(Art. 46 (2) "Parties may alternatively be represented by European Patent Attorneys who are entitled to act as professional representatives before the European Patent Office pursuant to Article 134 of the EPC and who have appropriate qualifications such as a European Patent Litigation Certificate")

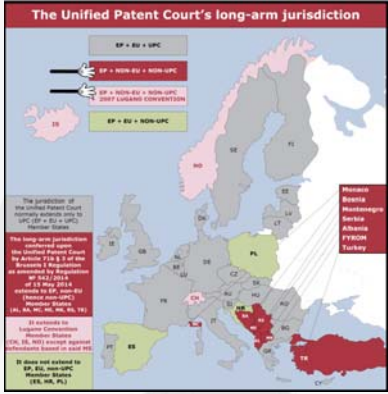
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In case of Brexit, long arm jurisdiction of Regulation No 542/2014 would apply to UK

Long arm jurisdiction for certain acts of infringement of a EP-non EU patent eg Turkey, Switzerland... and UK in case of Brexit



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New Article 71b (3) Regulation N° 542/2014
Jurisdiction for infringement of a European patent committed outside the territory of the Union (EP non-UE)

" 3. Where a common court has jurisdiction over a defendant under point 2 in a dispute relating to an infringement of a European patent giving rise to damage within the Union, that court may also exercise jurisdiction in relation to **damage arising outside the Union** from such an infringement.

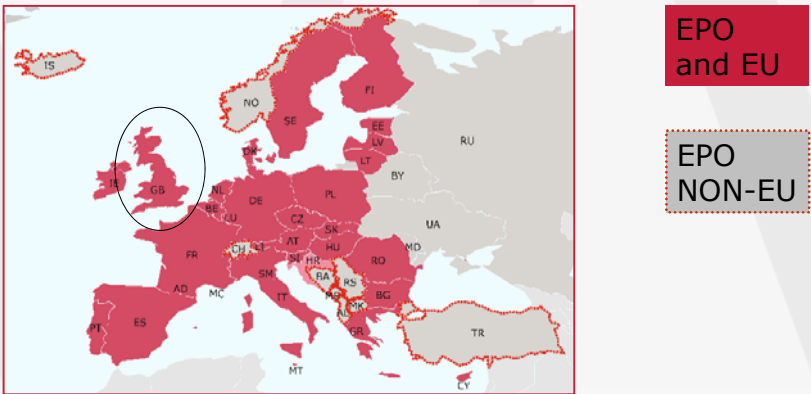
Such jurisdiction may only be established if property belonging to the defendant is located in any Member State party to the instrument establishing the common court and the dispute has a sufficient connection with any such Member State."

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The Unified Patent Court

New Article 71b (3) Regulation N° 542/2014
Jurisdiction for infringement of a European patent committed outside the territory of the Union (EP non-UE)




EPO and EU

EPO NON-EU

(currently Albania, Bosnia, the Former Yugoslav Republic of Macedonia, Iceland, Monaco, Montenegro, Norway, Serbia, Switzerland and Turkey)

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The Unified Patent Court

New article 71b (3) Regulation N° 542/2014
Jurisdiction for infringement of a European patent committed outside the territory of the Union (EP non-UE)

Conditions of the statutory extension of jurisdiction

- The defendant is being sued before the UPC
- He is accused of having committed acts of infringement of a European Patent in a UPC territory
- He is domiciled outside the European Union
- He owns property in any Member State party to the instrument establishing the common court and
- The action has a sufficient connection with this State

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The Unified Patent Court

New Article 71b (3) Regulation N° 542/2014
Jurisdiction for infringement of a European patent committed outside the territory of the Union (EP non-UE)

Scope of the statutory extension of jurisdiction

- The Unified Patent Court « *may also exercise jurisdiction in relation to damage arising outside the Union from such an infringement* »
- This means exercise its jurisdiction to damages arising in States where the European patent in suit has effect, but which are not Member States of the EU, hence not Contracting Parties to the UPC Agreement
 (currently Albania, Bosnia, the Former Yugoslav Republic of Macedonia, Iceland, Monaco, Montenegro, Norway, Serbia, Switzerland and Turkey)

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New Article 71b (3) Regulation N° 542/2014

The 2007 Lugano Convention limits the long-arm jurisdiction



- The 2007 Lugano Convention* applies between the EU Member States and their neighbours, Iceland, Norway and Switzerland, members of the European Free Trade Association (EFTA)
- Article 64 (2) of the 2007 Lugano Convention provides a shield against the long-arm jurisdiction of the Unified Patent Court for the defendants domiciled in Iceland, Norway and Switzerland
- If UK joins the Lugano Convention, UK domiciled defendants would be beyond the reach of the UPC long-arm jurisdiction

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* the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, done at Lugano on 30 October 2007.

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Ratifications

- Entering into force when 13 contracting States including "*the three Member States in which the highest number of European patents had effect in the year preceding the year in which the signature of the Agreement takes place (=2012)*" , currently **DE**, **FR** and **UK** have ratified
- 9 ratifications so far:
AU, **FR**, SE, BE, DK, MT, LU, PT and FI

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In case of Brexit
Who's next?

Art. 89 "This Agreement shall enter into force ... after the deposit of the 13th instrument of ratification or accession in accordance with Article 84, including the three Member States in which the highest number of European patents had effect in the year preceding the year in which the signature of the Agreement takes place"

**And the winner is...
Italy**

Member State	Number of European patents for which an annual fee was paid in 2011	%
DE	414 754	22.31
FR	336 434	18.09
UK	331 528	17.83
IT	[190 000*]	[10.22]
NL	101 157	5.44

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Amendment of national laws


- Purely technical amendments
- Amendments going beyond technicality: e.g. DE proposes to introduce "double patenting" of the same invention (unitary patent and DE patent: the same egg in two baskets)
German draft bills 16 February 2016 for ratification of the Unified Patent Court Agreement and implementation of Unitary patent system into German law
https://www.bmi.vg/SharedDocs/Gesetzgebungsverfahren/Dokumente/Ref_Uebereinkommen_EinheitlichesPatentgericht.pdf?__blob=publicationFile&v=2
https://www.bmi.vg/SharedDocs/Gesetzgebungsverfahren/Dokumente/Ref_Berichtgesetz_EuropaeischePatentreform.pdf?__blob=publicationFile&v=3
- Amendments aiming at alignment of national law on the UPC Agreement as to infringing acts (direct and indirect infringement, exceptions to infringement)

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Divisions

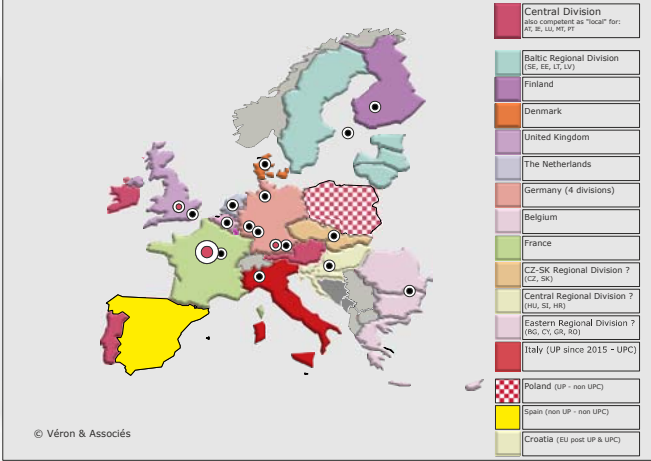


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The Unified Patent Court

7 The Court of first instance: competence of the divisions

(based on the intentions to create divisions as supposed in January 2016)




	Central Division also competent as "local" for: AT, SE, LU, MT, PT
	Baltic Regional Division (SE, EE, LT, LV)
	Finland
	Denmark
	United Kingdom
	The Netherlands
	Germany (4 divisions)
	Belgium
	France
	CZ-SK Regional Division ? (CZ, SK)
	Central Regional Division ? (HU, SI, HR)
	Eastern Regional Division ? (PL, CY, GR, RO)
	Italy (UP since 2015 - UPC)
	Poland (UP - non UPC)
	Spain (non UP - non UPC)
	Croatia (EU post UP & UPC)

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Article 7 and Annex II
**The Court of first instance:
central division's seat and sections**



London **Paris** **Munich**

PRESIDENT'S OFFICE

SECTION A — HUMAN NECESSITIES
SECTION C — CHEMISTRY; METALLURGY

SECTION B — PERFORMING OPERATIONS; TRANSPORTING
SECTION D — TEXTILES; PAPER
SECTION E — FIXED CONSTRUCTIONS
SECTION G — PHYSICS
SECTION H — ELECTRICITY

SECTION F — MECHANICAL ENGINEERING; LIGHTING; HEATING; WEAPONS; BLASTING

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The Unified Patent Court

The Court of appeal (Luxembourg)

Court of Appeal

Appeal (facts & law)




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The Unified Patent Court

Court of appeal

Luxembourg
Hemicycle
Kirchberg



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The Unified Patent Court

Court of First Instance



London
Aldgate Tower (City)



Paris
Palais de Justice



Munich
Bundespatentgericht

<https://www.unified-patent-court.org/locations>

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The Unified Patent Court

Judges

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The Unified Patent Court

Art. 15 UPCA

The judges

"(1) The Court shall comprise both legally qualified judges and technically qualified judges."

*Judges shall ensure the highest standards of competence and shall have **proven experience in the field of patent litigation.***

(2) Legally qualified judges shall possess the qualifications required for appointment to judicial offices in a Contracting Member State.

(3) Technically qualified judges shall have a university degree and proven expertise in a field of technology. They shall also have proven knowledge of civil law and procedure relevant in patent litigation."

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Art. 16 UPCA The judges: appointment

"(1) The **Advisory Committee*** shall establish a list of the most suitable candidates to be appointed as judges of the Court, in accordance with the Statute.

(2) On the basis of this list, the Administrative Committee shall appoint the judges of the Court acting by common accord.

(3) The implementing provisions for the appointment are set out in the Statute."

* 14 (2) The Advisory Committee shall comprise patent judges and practitioners in patent law and patent litigation with the highest recognised competence.

Judges' selection

- Call for expression of interest by the Preparatory Committee fall 2013
- 1300 candidates
- At its 6th meeting (8 July 2014) a list of suitable candidates were approved by the Preparatory Committee
- Legally qualified judges
 - ▶ 170 eligible
 - ▶ 184 eligible with training
- Technically qualified judges
 - ▶ 341 eligible

The Unified Patent Court

Training Center



- Training Centre for the Unified Patent Court (UPC) opened officially on 13 March 2014 in Budapest
- It will function as a coordinating office for the training of judges and candidate judges of the new court system

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The Unified Patent Court

IP Kat Leak

Judicial salaries for full-time Unified Patent Court judges

- For a judge in the Court of First Instance
 - ▶ €11,000 net per month.
 - ▶ €132,000 net per year
- For judges in the Court of Appeal
 - ▶ €12,000 net per month
 - ▶ €144,000 net per year

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Case law and attitude toward EPO

- Local divisions likely to follow their national case law until a UPC case law firmly establishes
- On hot topics (second medical use, equivalence) the Court of appeal will have to set the tune
- Same would probably apply to attitude toward EPO

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