

The Unified Patent Court & Brexit

Pharma and Biotech Patent Litigation
Amsterdam • 25 April 2017

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The Unified Patent Court

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Legal sources

-  17 December 2012
Regulation 1257/2012 enhanced cooperation in the creation of unitary patent protection
-  17 December 2012
Regulation 1260/2012 (translation arrangements)
-  19 February 2013
Agreement on a Unified Patent Court and draft Statute
-  19 October 2015 (15 March 2017)
Draft **Rules of Procedure** Unified Patent Court (V18)




https://www.unified-patent-court.org/sites/default/files/upc_rules_of_procedure_18th_draft_15_march_2017_final_clear.pdf
http://www.upc.documents.eu.com/PDFs/2015-10-19_Agreement_UPC_DE-EN_FR_and_Rules_Procedure_UPC_DE-EN_FR_Draft_18.pdf

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The Unified Patent Court

Signature of the Unitary Patent Regulations on 17 December 2012



by the Presidents of the Council and of the European Parliament

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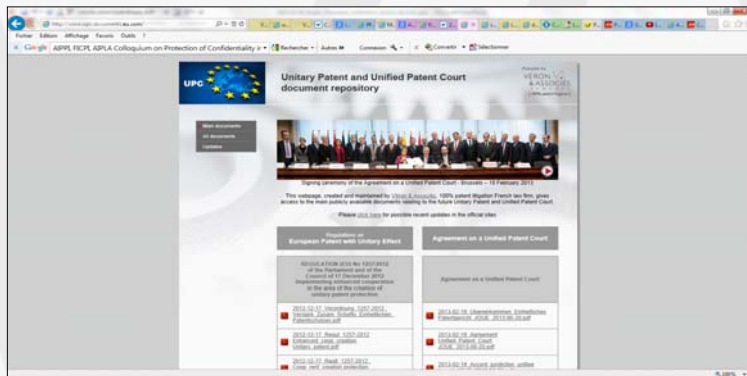
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Signature of the Unified Patent Court Agreement on 19 February 2013



by the representatives of 25 Contracting Member States

The main publicly available documents can be found on
www.upc.documents.eu.com



The Unified Patent Court

UPC's FAQ

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

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The Unified Patent Court

The last months

* <https://secure.unified-patent-court.org/login>


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The Unified Patent Court



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)”, i.e. **DE, FR** and **UK** have ratified
- 12 ratifications so far (chronological order):
AT, **FR**, SE, BE, DK, MT, LU, PT, FI, BG, NL and IT
- 2 ratifications still needed : **DE** and **UK**


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Ratifications


Ratifications UPC Agreement as of 1 April 2017

- EP + EU + UPC RATIFIED
- EP + EU + UPC
- EP + NON-EU + NON-UPC
- EP + NON-EU + NON-UPC + 2007 LUGANO CONVENTION
- EP + EU + NON-UPC

12 ratifications so far (chronological order):
AT, FR, SE, BE, DK, MT, LU, PT, FI, BG, NL and IT


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The Unified Patent Court



The Preparatory Committee

- Composed of all the Contracting Member States of the Unified Patent Court Agreement
- www.unified-patent-court.org
- 5 major work streams
 - Legal framework
 - Facilities
 - Financial aspects
 - Human resources & Training
 - IT

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1 October 2015

Protocol for the provisional application of the UPCA

The protocol for the provisional application of the Unified Patent Court Agreement allows for the **provisional application of the institutional, organisational and financial provisions of the UPCA and Statute during a period of approximately six months** before the UPCA enters into force.

This will allow all legal texts and all decisions and appointments to be adopted in accordance with the relevant procedures.

www.upc.documents.eu.com/PDFs/2015-10-01_Protocol_provisional_application_Agreement_Unified_Patent_Court.pdf

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The Unified Patent Court

The Court of appeal (Luxembourg)

Court of Appeal

↑
Appeal
(facts & law)

Luxembourg
Hemicycle
Kirchberg




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The Unified Patent Court


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



London

SECTION A — HUMAN NECESSITIES

SECTION C — CHEMISTRY; METALLURGY



Paris

PRESIDENT'S OFFICE


SECTION B — PERFORMING OPERATIONS; TRANSPORTING

SECTION D — TEXTILES; PAPER

SECTION E — FIXED CONSTRUCTIONS

SECTION G — PHYSICS

SECTION H — ELECTRICITY



Munich

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

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Court of First Instance



London
Aldgate Tower (City)



Paris
Palais de Justice



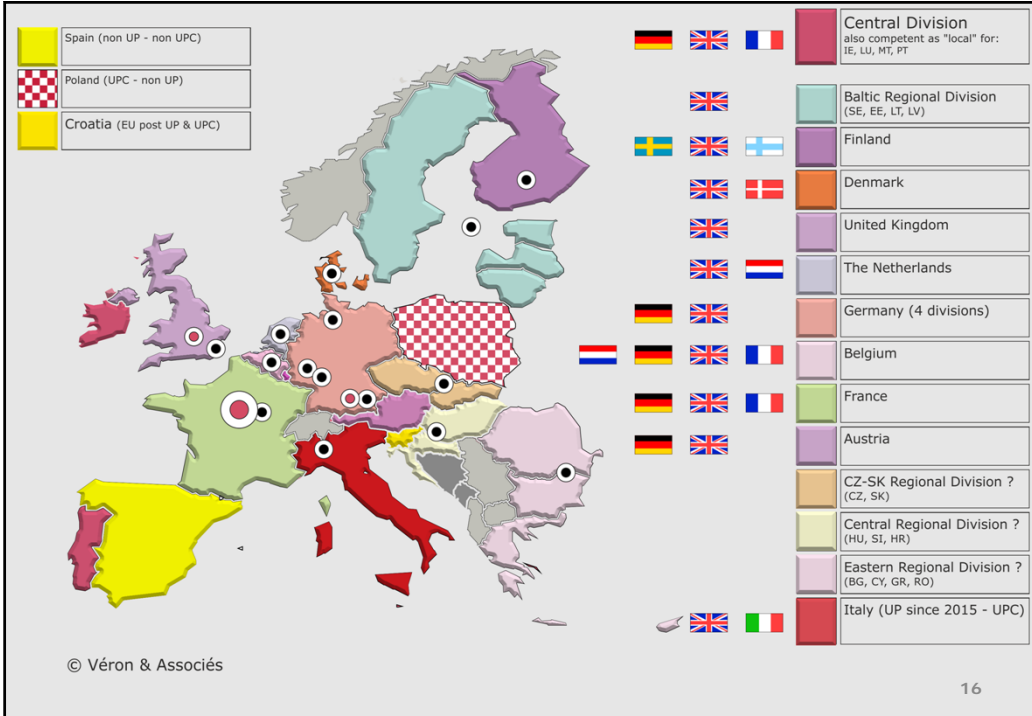
Munich
Bundespatentgericht














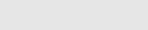

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<https://www.unified-patent-court.org/locations>

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

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IT System

- Unified Patent Court Case Management System is ready and can be tested
<https://secure.unified-patent-court.org/login>
- Case Management System mailing list
<http://unified-patent-court.us9.list-manage.com/subscribe?u=ce522772fa2293932d95a6e0f&id=a1f94756ea>

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The next 12 months (tentative)

15/03/2017 End Preparatory Work

01/08/2017 Beginning Provisional Application Phase (PAP)

01/12/2017 Court starts operations

15/03/2017 - 31/07/2017 Ratifications needed


01/08/2017 - 30/11/2017 Provisional application phase

01/09/2017 - 30/11/2017 Sunrise Period

<https://www.unified-patent-court.org/news/final-preparatory-committee-signals-state-readiness-15-march-2017>

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The aftermath of the UK referendum of 23 June 2016 (contents)

- The UK is still a EU Member State for several months or years
- UK may ratify the UPC Agreement notwithstanding the outcome of the Brexit referendum
- Legal questions and political uncertainties

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EU law background

The UK is still a EU Member State for several months or years

- The 23 June 2016 referendum on Brexit had no legal effect in itself
- Only the formal notification in accordance with Art. 50 Lisbon Treaty on 29 March 2017 triggered the process by which the UK will withdraw from the EU
- the UK remains in the Union until *“the date of entry into force of the withdrawal agreement or, failing that, two years after the notification”*

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Referendum and UPC Agreement

- On 28 November 2016, the UK government announced its intention to ratify the UPC notwithstanding the referendum result to leave the EU
- This announcement is a major step towards the entry into operation of the UPC
- Some people, however, voice concern that the UK position (inside the UPC, but outside the EU) may raise legal questions

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Influence of a possible Brexit on the UPC Agreement

- UPC Agreement refers only to “*EU Member States*” (Art. 2, Art. 84): a non-EU Member State could not **accede** the Agreement
- UPC Agreement does not envisage the withdrawal from the EU of a EU Member State thereby becoming a non-EU Member State
- UPC Agreement does not envisage either the withdrawal of a Member State (nothing like Art. 50 Lisbon Treaty in the UPC Agreement)

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Legal questions

- Assuming the UPC Agreement enters into force **and** assuming UK withdrawal from the EU become effective, would such withdrawal make the UPC incompatible with EU law?
- In other words: is it possible that a State which was a EU Member State when the UPC Agreement entered into force remain in the UPC system after its withdrawal from the EU?

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The CJEU's legal opinion 1-09 of 3 March 2011

- The CJEU did **not** say that only EU Member States could participate in the UPC system
- It only answered the specific question: *'Is the envisaged agreement creating a Unified Patent Litigation System (currently named European and Community Patents Court) compatible with the provisions of the Treaty establishing the European Community?'*

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The CJEU's legal opinion 1-09 of 3 March 2011

- The question submitted to the CJEU related to a system
 - ▶ in which non EU Member States (like Switzerland) could participate; and
 - ▶ which would have created a "*European and Community Patents Court ('the PC')*" which was an independent court, **not** "*a court common to a number of Member States, situated, consequently, within the judicial system of the European Union*"
- The CJEU's opinion is only based on the second point: it does not directly address the first one

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The CJEU's legal opinion 1-09 of 3 March 2011

The CJEU's opinion is also based on the following remark: "*if a decision of the Patents Court were to be in breach of European Union law, that decision could not be the subject of infringement proceedings* nor could it give rise to any financial liability on the part of one or more Member States*"

* In this context "*infringement proceedings*" refer to EU law proceedings whereby a party would argue that a Member State or another legal body has infringed EU law (nothing to do with "*patent infringement proceedings*")

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The CJEU's legal opinion 1-09 of 3 March 2011

This failure noted by the CJEU's opinion has been overcome in the UPC Agreement:

- Art. 1 *"The Unified Patent Court shall be a court common to the Contracting Member States and thus subject to the same obligations under Union law as any national court of the Contracting Member States"*
- Art. 22 "1) *The Contracting Member States are jointly and severally liable for damage resulting from an infringement of Union law by the Court of Appeal, in accordance with Union law concerning non-contractual liability of Member States for damage caused by their national courts breaching Union law"*

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Optimistic interpretation of the CJEU's legal opinion 1-09 of 3 March 2011

- The CJEU's legal opinion does not exclude the participation of non-EU Member States
- *"A court common to a number of Member States, situated, consequently, within the judicial system of the European Union"* may also be a court common to EU and non-EU Member States without violating EU law as long as the UPC Agreement provides that the Contracting Member States are jointly and severally liable for damage resulting from an infringement of Union law by the Court of Appeal

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Prepare for entry into force

- Before entry into force
- Transitional period
- After entry into force

Prepare before entry into force

- National patent? Classical EP “bundle” patent?
Unitary patent? Both (national + EP)?
Language of filing?
Order of applicants in the patent application?
- Review collaboration or joint research agreements
- Review co-ownership and licence agreements

Prepare for transitional period

- To opt out or to stay in?
- If no opt-out, concurrent jurisdiction of UPC and national courts (claimant's choice)
- Applicable law may be different before the UPC and before national courts?
- Time matters: UPC has only jurisdiction for infringement facts subsequent to the entry into force of the Agreement

Prepare for entry into force

- Superfast proceedings
- Fully electronic proceedings
- All statements and documents immediately available to the public unless specific request

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Thank you

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