

The Unified Patent Court Update

*IP World Summit
Amsterdam • 26 September 2017*

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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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Signature of the Unitary Patent Regulations on 17 December 2012



by the Presidents of the Council and of the European Parliament

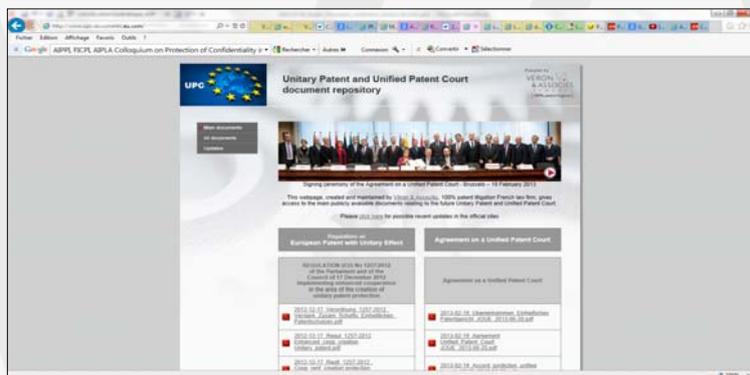

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Signature of the Unified Patent Court Agreement on 19 February 2013



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 last months

23/06/2016
UK referendum

12/06/2017
German constitutional challenge disclosed

01/10/2015 Protocol on Provisional Application
 19/10/2015 18th draft Rules of Procedure
 19/10/2015 Alexander Ramsay new chairman
 08/02/2016 Court Fees & Recoverable Costs
 29/06/2016 Protocol Privileges Immunities
 30/06/2016 Communication chairmen
 27/07/2016 Case Management System*

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

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Ratifications

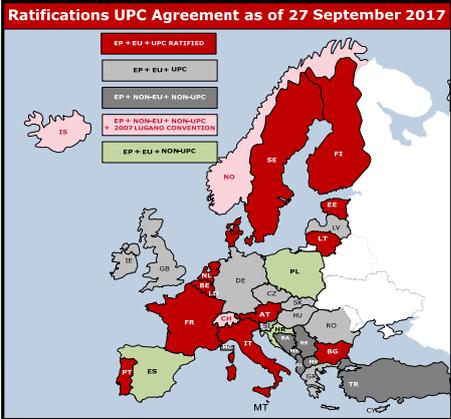
- Entering into force when 13 Contracting States including *“the three Member States in which the highest number of European patents had effect in the year preceding the year in which the signature of the Agreement takes place (= 2012)”*, i.e. **DE, FR** and **UK** have ratified
- 14 ratifications so far (chronological order):
AT, **FR**, SE, BE, DK, MT, LU, PT, FI, BG, NL, IT, EE and LT
- 2 ratifications still needed : **DE** and **UK**


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Ratifications

Ratifications UPC Agreement as of 27 September 2017



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


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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
 - Financial aspects
 - IT
 - Facilities
 - Human resources & Training

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The Unified Patent Court

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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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 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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The German ratification process



- The *Bundestag* (Germany's parliament) and the *Bundesrat* (Federal Council) approved in March 2017 the acts required for Germany to ratify the Unified Patent Court (UPC) Agreement
- The remaining steps required for the acts to be promulgated were:
 - ▶ countersignature by the Federal government
 - ▶ **certification by the Federal President**
 - ▶ publication in the Federal Law Gazette (*Bundesgesetzblatt*)

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12 June 2017

The FAZ bomb

Frankfurter Allgemeine
ZEITUNG FÜR DEUTSCHLAND

- On 12 June 2017 a journalist of the *Frankfurter Allgemeine Zeitung* disclosed that the *Bundesverfassungsgericht* (BVerfG: German Constitutional Court) suggested to President of the Republic to suspend the certification of the Parliament Act of ratification in Germany due to a constitutional complaint by a private person
- No other information was available at this time

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August-September 2017

Drip drip details

- Proceedings before the *Bundesverfassungsgericht* (BVerfG) are not open to the public during the preparation of the case
- Details were not available about the claimant's identity and the legal grounds of the complaint before August September 2017

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The complainant

On 6 September 2017, the German legal journal *Juve* disclosed that the complaint was filed late March 2017 by a Düsseldorf attorney, IP specialist, Dr. Ingve Stjerna



The German Constitution



- „Das Grundgesetz (GG) ist die Verfassung für die Bundesrepublik Deutschland.“
- „The Basic Law is the constitution of the Federal Republic of Germany“

The Bundesverfassungsgericht



The Federal Constitutional Court's duty is to ensure that the Constitution of the Federal Republic of Germany is obeyed.

The *Bundesverfassungsgericht*



"Since its founding in 1951, the Court has helped to secure respect for and effectiveness of Germany's free and democratic basic order. This applies particularly to enforcement of the fundamental rights."

Legal grounds of the constitutional complaint

"In terms of substance, plaintiff is essentially asserting a breach of the limits to surrendering sovereignty that are derived from the right to democracy (Art. 38 (1), clause 1, Basic Law)..."

Source:

<http://patentblog.kluweriplaw.com/2017/08/16/upc-finally-some-news-from-the-german-federal-constitutional-court>

Legal grounds of the constitutional complaint

"... Primarily the following violations are asserted:

- *breach of the requirement for a qualified majority (2/3)*
- *democratic deficits and deficits in rule of law with regard to the regulatory powers of the organs of the UPC;*
- *the judges of the UPC are not independent nor do they have democratic legitimacy*
- *breach of the principle of openness towards European law owing to alleged irreconcilability of the UPC with Union law."*

No date set so far for a decision

"... The proceedings are pending; a specific date for the decision is presently not foreseeable."



Application for provisional measures

It has been reported that the challenge includes an application for "provisional measures" (a formal injunction to the Federal President of Germany not to promulgate the challenged acts)

21 September 2017

Unified Patent Court News

"A case is currently pending in the German Federal Constitutional Court (FCC) concerning the law passed by the German Parliament on the implementation of the Agreement on the Unified Patent Court (UPCA). This will cause delay to the German ratification of the UPCA and the Protocol on Provisional Application.

We have, otherwise, been making good progress regarding the ratification of the UPCA where we now have 14 full ratifications and more in the pipeline, making it reasonable to expect that we will begin operations with closer to 20 contracting states. We are also very close to the 13 required ratifications of the Protocol on Provisional Application.

***It is now difficult to predict any timeline.** We are following the situation and will publish a further update when additional information is available."*

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

The Unified Patent Court

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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