

## Unified Patent Court after Brexit

Devising Patent Strategies Which Adapt to the Variables of the Unknown  
C8's 11<sup>th</sup> Pharma & Biotech Patent Litigation • 26 February 2019

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Member of the Expert Panel group of the Unified Patent Court  
Member of the Drafting Committee of the Rules of Procedure



Unified Patent Court after Brexit

## 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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Unified Patent Court after Brexit

## Signature of the Unified Patent Court Agreement on 19 February 2013



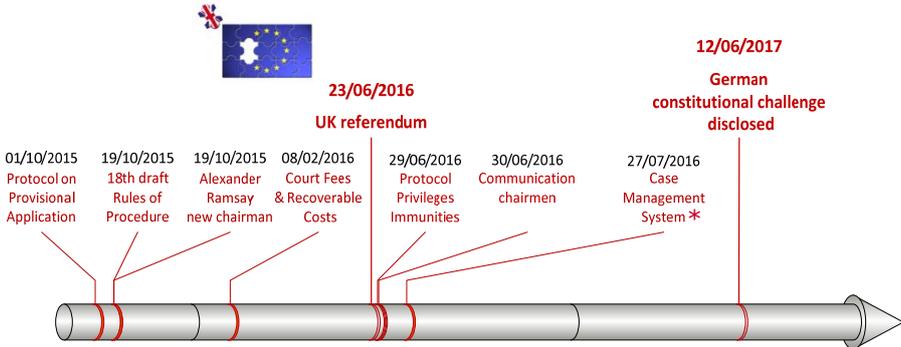
by the representatives of 25 Contracting Member States



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## Everything was ready...



The timeline is represented by a horizontal arrow pointing to the right, with red vertical lines indicating key dates. A small European Union flag is positioned above the arrow.

Date	Event
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
23/06/2016	UK referendum
29/06/2016	Protocol Privileges Immunities
30/06/2016	Communication chairmen
27/07/2016	Case Management System *
12/06/2017	German constitutional challenge disclosed

\* <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
- 16 ratifications so far (chronological order): AT, FR, SE, BE, DK, MT, LU, PT, FI, BG, NL, IT, EE, LT, LV and UK
- 1 ratification still needed : DE

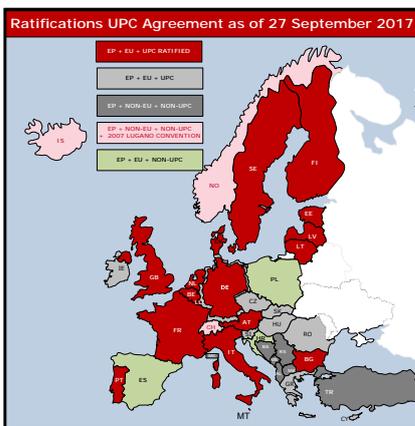


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## Ratifications



Ratifications UPC Agreement as of 27 September 2017

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

One missing:  
 DE

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## The Preparatory Committee



- Composed of all the Contracting Member States of the Unified Patent Court Agreement
- [www.unified-patent-court.org](http://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](http://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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## UK ratification



On 26 April 2018, the United Kingdom ratified the UPC Agreement, thereby accepting Articles 20, 21 and 22 on the primacy of and respect for Union law and on the position of the ECJ:

**ARTICLE 20 Primacy of and respect for Union law**

*The Court shall apply Union law in its entirety and shall respect its primacy.*

**ARTICLE 21 Requests for preliminary rulings**

*... Decisions of the Court of Justice of the European Union shall be binding on the Court.*

**ARTICLE 22 Liability for damage caused by infringements of Union law**

*(1) 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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## German ratification



- The only ratification missing for the UPC Agreement to enter into force is the German one
- In March 2017 the *Bundestag* (Parliament) and the *Bundesrat* (Federal Council) approved the acts required for Germany to ratify
- But the ratification law did not enter into force because of a complaint before the German Constitutional Court, the *Bundesverfassungsgericht* (BVerfG)
- The German ratification will not come before this court's decision



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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



I ♥  
BVerfG



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## 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“



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## The Bundesverfassungsgericht



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



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## 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."*

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## 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>

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## 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."



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## No date set so far for a decision

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

Case listed for a decision already in 2018 and, now, in 2019...



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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."*

<https://www.unified-patent-court.org/news/progress-unified-patent-court-project-21-september-2017><sup>19</sup>



## Can the UK remain in the UPC after the Brexit?

- Dark scenario:  
if the UPC Agreement does not enter into force before Brexit, it cannot enter into force as is

*"Provided we're happy to live on Spam and canned peaches, all will be well."*

John Allan, chairman of Tesco



- Optimistic scenario:  
UPC Agreement enters into force before Brexit: various opinions...

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10 September 2018 Unified Patent Court after Brexit

**Matthias Lamping and Hanns Ullrich,**  
 Research Fellows of the Max Planck Institut,  
 published a 174-page independent study

Matthias Lamping  
 Hanns Ullrich

**The Impact of Brexit  
 on Unitary Patent Protection  
 and its Court**

 "The two studies published here have been undertaken spontaneously and independently to reflect such concerns in the authors' particular field of expertise. The responsibility for the contributions lies with the authors individually."

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3232627](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3232627)

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Lamping's thesis (verbatim) Unified Patent Court after Brexit

**The UK cannot remain  
 in the UPCA after the Brexit**

*"In the following chapters three lines of argument will be explored in order to substantiate the claim that it will not be possible for the UK to remain a contracting state to the UPCA after having left the EU:*

*(1) there is no legal basis in primary Union law for courts situated outside the judicial system of the Member States and, consequently, that of the EU, to cooperate with the CJEU by making references for a preliminary ruling within the scope of Art. 267 TFEU (Ch. II.A).*

*(2) as contracting parties, third countries would have a say in all matters that concern the UPC's polity and policy, including its reception of Union law and policies, and in particular with regard to the transposition of directives into the UPCA (Ch. II.B);*

*(3) the fact that the UPCA's rules may have to be interpreted in the light of different principles and policies depending on the institution by which, and the context within which, they are applied may compromise the uniformity of the law embodied therein (Ch. II.C)."*



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## Lamping's arguments (summary)

After the Brexit, the UK participation in the UPC would create three legal problems:

1. The UPC would no longer be a "*court common to several Member States*"; as a result, **the UPC would be unable to refer cases to the ECJ**
2. **A non-EU country could prevent the UPC to implement Union law and policies**, in particular with regard to the transposition of directives into the UPCA
3. **Uniformity of law would be endangered** because the UPC should apply differently the UPC Agreement when dealing with European Patents granted for the UK and for European Patents granted for EU countries



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## With UK on board after the Brexit, the Unified Patent Court would be unable to refer cases to the ECJ

- The "Preliminary rulings" argument is that, if a non-EU State participates, the UPC will no longer 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*".
- As a result, the UPC would be unable to make references to the European Court of Justice for a preliminary ruling within the scope of Art. 267 TFEU such that the primacy of and the respect for EU law would not be guaranteed



**I DISAGREE**

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**WHY I DISAGREE**

Lamping's Argument #1 (preliminary rulings)

Unified Patent Court after Brexit**With UK on board after the Brexit,  
the Unified Patent Court would be unable  
to refer cases to the ECJ**

- The first reply is that the UPC will still 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"* (UPCA, article 1)
- Indeed, it will not be a court common *exclusively* to EU Member States
- But this has no bearing, as nothing in ECJ's opinion 1/09 (nor in other ECJ's decisions) imply that, if the court is also common to non-EU Member States, it is no longer *"subject to the same obligations under Union law as any national court of the Contracting Member States"*



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**WHY I DISAGREE**

Lamping's Argument #1 (preliminary rulings)

Unified Patent Court after Brexit**With UK on board after the Brexit,  
the Unified Patent Court would be unable  
to refer cases to the ECJ**

- In its opinion 1/09, the ECJ rejected the 2009 draft agreement creating a unified patent litigation system, then named the European and Community Patents Court, because it conferred jurisdiction to hear patent disputes on *"an international court which is outside the institutional and judicial framework of the European Union"* which *"would deprive courts of Member States of their powers in relation to the interpretation and application of European Union law and the Court of its powers to reply, by preliminary ruling, to questions referred by those courts"*
- This would not be the case of the UPC with the UK on board after the Brexit



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**WHY I DISAGREE**

Lamping's Argument #1 (preliminary rulings)

Unified Patent Court after Brexit**With UK on board after the Brexit,  
the Unified Patent Court would be unable  
to refer cases to the ECJ**

- The second reply is that the UPC is clearly and formally listed as "a court common to several Member States" by Article 71a Regulation N° 542/2014 amending Regulation N° 1215/2012 as regards the rules to be applied with respect to the Unified Patent Court and the Benelux Court of Justice



- It would thus be very surprising, that the ECJ refuse to accept a referral from a court listed as "a court common to several Member States"

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**WHY I DISAGREE**

Lamping's Argument #1 (preliminary rulings)

Unified Patent Court after Brexit**With UK on board after the Brexit,  
the Unified Patent Court would be unable  
to refer cases to the ECJ**

Last, but not least, the ECJ has already admitted that courts of third countries may refer questions to it for a preliminary ruling:

*"In the same Opinion, the Court also found that courts or tribunals other than those of Member States could refer questions to it for a preliminary ruling, provided that the answers given by it were binding on the referring courts"*



(Opinion 1/00, paragraph 33 quoting Opinion 1/91, paragraphs 59 and 61 to 65).

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Lamping's Argument #2 (Governance) Unified Patent Court after Brexit

**With UK on board after the Brexit, a non-EU country could prevent the UPC to transpose EU directives into the UPCA**

- The "Governance" argument is that a non-EU country could prevent the UPC from implementing Union law and policies, in particular with regard to the transposition of directives into the UPCA
- In other words, the UK could block the implementation in the UPC Agreement of a future EU directive, thereby hindering the EU fundamental objective of ensuring that the Union retains full control over the attainment of its objectives and policies



**I DISAGREE**

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**WHY I DISAGREE**

Lamping's Argument #2 (Governance) Unified Patent Court after Brexit

**With UK on board after the Brexit, a non-EU country could prevent the UPC to transpose EU directives into the UPCA**

A non-EU country could not prevent the UPC from implementing future EU directives into the UPCA because:

- The direct effect of EU law would not be affected
- The EU Member States would be *"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"* (art. 22 UPCA)
- In addition, because the changes to the UPCA do not require unanimity (but only a 2/3 majority), the UK would have no *"veto right"* against such implementation



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Unified Patent Court after Brexit

Lamping's Argument #3 (Uniformity)  
**With UK on board after the Brexit,  
 uniformity of law would be endangered**

- The "Uniformity" argument is that, because the UPC should apply differently the UPC Agreement when dealing with European Patents granted for the UK and for European Patents granted for EU countries, the uniform application of the UPC Agreement would be endangered
- It would be incompatible with Union law to adopt a "*Janus-faced*" approach to the construction of the UPCA:
  - ▶ as ordinary international law (applicable to European patents granted for non-EU contracting states), on the one hand, and
  - ▶ as international law with a special EU twist (applicable to unitary patents and European patents granted for Contracting Member States), on the other hand.

 **I DISAGREE**

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Unified Patent Court after Brexit

**WHY I DISAGREE**

Lamping's Argument #3 (Uniformity)  
**With UK on board after the Brexit,  
 uniformity of law would be endangered**

- Uniform application of the UPCA is of course highly desirable; it is doubtful however that uniform application can become a matter of EU law
- If the question arises, the ECJ will be empowered to decide over this matter and its decision will be binding on the UK (art. 20-24 UPCA)



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**Read more...**  
by *Atticus Finch* and others



- A. Ohly and R. Streinz, "Can the UK stay in the UPC system after Brexit?", GRUR Intl. 2017, 1;
- R. Gordon and T. Pascoe, "The effect of "Brexit" on the Unitary Patent Regulation and the Unified Patent Court Agreement";
- W. Tilmann, "The future of the UPC after Brexit", GRUR, August 2016;
- M. Leistner and P. Simon, "Auswirkungen des Brexit auf das europäische Patentsystem", GRUR Intl., 2017, 825
- "Reply to the studies on "The Impact of Brexit on Unitary Patent Protection and its Court" by Hans Ullrich and Matthias Lamping", signed "Atticus Finch" 

 <http://eplaw.org/upc-reply-to-max-planck-impact-study-of-brexit-on-the-unitary-patent-protection-and-its-court/>

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**Pierre Véron**

**Thank you**



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