



## News about the Unitary Patent system

### Expected start

The General Secretariat of the Council of the European Union has declared that the Protocol on Provisional Application of the UPC Agreement has entered into force 19 January 2022 after Austria deposited its instrument of ratification of the Protocol. The start of the UPC system is now currently expected to take place towards the end of 2022. The Unitary Patent system is inextricably linked to the creation of an international specialised patent court, the Unified Patent Court, which will decide on the infringement and validity of Unitary Patents and "classic" European patents.

### States

Of the 25 states participating in the cooperation to bring about the Unitary Patent system currently the following 17 states have already ratified the UPC Agreements and will participate in the Unitary Patent when it starts: Austria, Belgium, Bulgaria, Denmark, Estonia, Finland, France, Germany, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Portugal, Slovenia, and Sweden. The UK is no longer member of EU and cannot participate. National protection in UK can still take place via the "classic" European patent system.

So currently Cyprus, Czech Republic, Greece, Hungary, Ireland, Poland, Romania, and Slovakia have not ratified the UPC Agreements, however on the first day of the fourth month following the deposit of the 13<sup>th</sup> instrument of ratification or accession and because Germany, France and Italy are included the Unitary Patent system can proceed to take effect. Patentees will need to use national routes or the EP patent system to obtain patent protection in the remaining EU member states until these states access the UPC, and in non-EU member states of the "classic" European patent system, including in Iceland, Norway, Switzerland, Turkey and UK.

### Transitional provisions

A Unitary Patent may be requested for any European patent granted on or after the date of entry into force of the UPC Agreement, thus the Unitary Patent make take effect on already pending EP applications. Applicants who consider using the Unitary Patent system may try to delay the grant process.

Furthermore, the EPO will introduce two transitional measures applicable to European patent applications having reached the final phase of the grant procedure.

The first transitional measure will enable applicants to file early requests for unitary effect already before the start of the Unitary Patent system. This will allow the EPO to register unitary effect immediately at the start of the system, provided all corresponding requirements are met. It is expected that EPO soon will open for early requests for unitary effect, however early requests for unitary effect may only be filed for European patent applications in respect of which a communication under Rule 71(3) EPC has been despatched.

The second transitional measure will provide the possibility for the applicant to request a delay in issuing the decision to grant a European patent after despatch of a communication under Rule 71(3) EPC by the Office and before approving the text intended for grant. This will make a European patent eligible for Unitary Patent protection that would otherwise have been granted before the start of the new system, and will avoid that applicants miss opportunities to obtain a Unitary Patent in the transitional phase. The EPO will allow requests for a delay in issuing the grant as of the date Germany deposits its instrument of ratification of the UPC Agreement.

In the first seven years of the new Unitary patent system owners of EP patents can opt out of the new system. Opting out removes jurisdiction from the UPC and maintains litigation in national courts. There will be a sunrise period of three-month period between the final ratification needed to bring the system into force and the actual coming into force of the new system to make an opt out decision.

If the owner does not opt out the UPC will acquire joint jurisdiction over the EP patent, together with the national courts. So it will be possible to choose whether to enforce a patent in the UPC or in one or more national courts. Third parties have the same possibilities in for example revocation actions and declarations of non-infringement. It should be noted that Unitary Patents cannot be opted-out. Existing European patents, validations and EP applications can be opted out, but Unitary Patents cannot be opted-out. The opt out is for the lifetime of the patent. The opt out can be withdrawn but cannot be restored after withdrawal.

Further information and updates can be found at <https://www.unified-patent-court.org/>, <https://www.epo.org/law-practice/unitary/unitary-patent.html>, and <https://www.epo.org/law-practice/unitary/upc.html>

Please do not hesitate to contact us in case you have any questions.

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