

# **The Implementation of the Unified Patent Court: state of play**

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**MEDICINES – INNOVATION- SOCIETY- LAW – ETHICS**

# The Unitary Patent

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- Unitary Patent is a long awaited step in the natural evolution of the European patent system.
- Essential step forward for European companies to get affordable protection over their entire home market.
- Europe's major competitors in US, Japan, China have long had (unitary) protection on their own home markets.
- This is a key competitiveness issue for Europe.



# The Unified Patent Court (UPC)

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- The Court is established through a Multilateral Agreement, which is open only to EU member states.
- It was signed on 19 February 2013 and 26 Member States have joined so far (no: Spain, Poland, Croatia).
- The Court and the option to request unitary effect will become operational once 13 Member States have completed the process of ratifying the Agreement with the three Member States with the highest number of European patents in force in 2012 – Germany, France and the United Kingdom – being necessarily among these 13 Member States.



# The Unified Patent Court

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The UPC will:

- establish an effective forum for enforcing and challenging patents in Europe.
- end the need for litigation in different countries.
- enhance legal certainty through harmonised case law in the area of patent infringement and validity.
- provide simpler, quicker and more efficient judicial procedures.
- harmonise substantive patent law relating to the scope and limitations of the rights conferred as well as the remedies in cases of infringement.



# What is Provisional Application?

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- The UPC Agreement doesn't include a provision enabling the Court to have a pilot phase during which the organisation as such is established but the Court is not yet operational. To remedy this situation the Signatory States agreed the Protocol on provisional application. The protocol means that the State Parties agree to apply the institutional, organisational and financial parts of the UPC Agreement provisionally before it enters into force.
- Once the Protocol enters into force the organisation as such will therefore be created and acquire legal personality.
- The Administrative Committee, the Budget Committee and the Advisory Committee will be established at the start of provisional application and will then take over the responsibility of the preparations from the Preparatory Committee.



# What is Provisional Application?

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- During the provisional application phase the organisation will be able to conclude necessary agreements with third parties and formalise all the preparatory work done by the Preparatory Committee.
- One hugely important area that cannot be conducted before the provisional application phase is the **completion of the recruitment of the judges.**
- The Preparatory Committee has assessed that the provisional application phase needs to be a period of between six to eight months in order to have time to put everything in place and prepare for the Court to be operational.



## Procedural steps for Provisional Application

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- However, for the Protocol to come into effect, 13 signatory states - which have signed the UPC Agreement (and which must include France, UK and Germany) and have ratified the UPCA or informed the depositary that they have received parliamentary approval to ratify the UPCA - must have signed and ratified, accepted or approved the Protocol (in accordance with Article 2(2) of the Protocol) or declared by unilateral declaration or in any other manner that they consider themselves bound by the provisional application of the articles of the UPCA mentioned in Article 1 of the Protocol.
- These Articles cover, inter alia, the establishment of the UPC, the Registry, the Mediation and Arbitration Centre, the training and appointment of judges, and the provisions allowing for the UPC Statute and Rules, legal aid, remuneration of judges, the setting up of local or regional divisions, and the establishment of the pool of judges.



# Protocol on Privileges and Immunities (PPI)

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- The PPI is necessary to give the UPC the privileges and immunities it needs to operate, such as certain immunities from suit for its judges and staff, special tax arrangements and the protection of the court's documents and assets.
- As well as the UK, the PPI must be ratified by France, Germany, Luxembourg (where the three sections of the central division will be located and the Court of Appeal).
- However, the PPI will not enter into force until 30 days after the date on which the last of France, Germany, Luxembourg and the UK have all ratified the PPI.





# Who has ratified the UPC Agreement?

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- ☐ Austria 06/08/2013
- ☐ France 14/03/2014
- ☐ Sweden 05/06/2014
- ☐ Belgium 06/06/2014
- ☐ Denmark 20/06/2014
- ☐ Malta 09/12/2014
- ☐ Luxembourg 22/05/2015
- ☐ Portugal 30/07/2015
- ☐ Finland 08/01/2016
- ☐ Bulgaria 03/06/2016
- ☐ Netherlands 14/9/2016
- ☐ Italy 10/02/2017
- ☐ Estonia (01/08/2017)
- ☐ Lithuania (24/08/2017)
- ☐ Latvia (11/01/2018)



# What is the status in relation to the PPA?

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- ☐ Belgium (declaration to be bound on 29-03-2017, binding)
- ☐ Bulgaria (signature on 11-09-2017, parliamentary ratification in autumn 2017?)
- ☐ Denmark (signature on 01-10-2015, binding)
- ☐ Estonia (declaration to be bound on 03-07-2017, binding)
- ☐ Germany (signature on 01-10-2015, parliamentary approval for ratification on 31-03-2017)
- ☐ Greece (signature on 23-03-2017, not yet binding)
- ☐ Hungary (signature on 07-10-2015, not yet binding)
- ☐ Italy (signature on 20-02-2017, binding)
- ☐ Luxembourg (signature on 01-10-2015,
- ☐ Malta (will issue a unilateral declaration to be bound)
- ☐ The Netherlands (declaration to be bound on 01-10-2015, binding)
- ☐ Romania (signature on 14-09-2016, not yet binding)



# What is the status in relation to the PPA?

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- ☐ Slovenia (signature on 01-10-2015, not yet binding will issue a unilareral declaration to be bound)
- ☐ Sweden (signature on 01-10-2015, binding)
- ☐ United Kingdom (signature on 01-10-2015, declaration to be bound on 07-07-2017, binding)
  
- **Total:** 10 MS have expressed consent to be bound by the PPA (by signature, ratification or declaration): BE, DK, EE, FI, FR, IT, LU, NL, SE, UK.
  
- Other than DE, thus 2 more MS which have ratified the UPCA or received parliamentary approval to ratify UPCA must express consent to be bound by the PPA before the provisional application can start.



## Situation in Germany and the UK

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- UK is progressing with ratification despite Brexit: on 8 February 2018 the UK's Privy Council approved the draft UPC Order 2017, which was the final legislative step in the ratification process. Ratification of the UPC Agreement must be effected by the Foreign and Commonwealth Office on behalf of the UK, and the next step will be for the Intellectual Property Office to request it to do so. This will require a formal letter (signed by Boris Johnson, the Foreign Secretary), stating that the UK agrees to be bound by the UPC Agreement and the UPC's PPI.
- DE: parliamentary approval has been obtained, but some delay caused by a complaint pending at the German Federal Constitutional Court
- The EPO is ready to deliver the Unitary Patent since 2016



# Situation in Greece

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- Greece was one of the original signatories to the Unified Patent Court (UPC) Agreement on 19 February 2013. However, ratification is still missing.
- Two positive developments:
  1. 'successful completion' on 1 March 2017 of a public consultation on draft legislation to ratify the UPC Agreement and amend national law and to ratify the UPC's Protocol on Privileges and Immunities.
  2. on 23 March 2017 Greece signed the UPC Agreement's Protocol on Provisional Application.



# Situation in Greece

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- Greece's signature on 23 March 2017 of the Protocol on Provisional Application (PPA) of the UPC Agreement was a positive development.
- Despite this step, Greece has not yet declared that it will be bound it.
- In addition to action on the PPA, progress on the ratification process of the UPC itself without any further delay is needed (draft ratification bill?).
- This final step will send an important signal to FDIs: Greece is open for business with innovative companies and does not plan to be marginalised in the competitive market for innovation.
- The UPC will also be important for promising Greek SMEs, who will have a springboard to growth (via low patent fees, rebates on court fees and financing and insurance).

# Key messages

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- For the Agreement to enter into force by March 2019, its Protocol on Provisional Operation (PPA) must be in operation by Summer 2018 (nine of the required 10 MSs have already accepted the PPA).
- It will be beneficial for Greece to participate in this first wave of provisional application by consenting to be bound by the Protocol. The Protocol will not result in any new financial or legal obligations.
- At the Competitiveness Council on 28 May 2018, Member States will be asked to outline their progress on the ratification, and to declare without delay their consent to be bound by the Protocol.
- A clear declaration from the Greek government at the 28 May Competitiveness Council could be a good sign to partner Member States that it will be a reliable partner from the start.



# The Unified Patent Court

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## The most crucial aspect of the setting-up of the Court: its judges

- In terms of confidence of the parties in the new system, the Court will only be as good as its judges are or are perceived to be.
- The concept of a Unified Court was right from the start based on the premise that it would be populated with experienced judges. This is still and more than ever the most important condition for the success of the Court and its usefulness for the European economy.
- Let me put it bluntly: while there is no reason to exclude competent and experienced judges from any MS involved, no insufficiently competent or experienced judges should be brought in, except perhaps where solely for training purposes.
- This is why we urge the Member States to start as soon as possible the pre-selection and training programs for the future judges, including as regards language abilities beyond their own national language(s).





BUSINESSEUROPE



**Thank you for your attention!**

**I shall be pleased to answer any questions you  
may wish to raise**