

# Kluwer Patent Blog

## A new European patent landscape (1): the bumpy road to the Unitary Patent system

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**In June 2023 the European patent landscape will see one of the most dramatic changes in decades with the introduction of the Unitary Patent (UP) and the opening of Unified Patent Court (UPC). In a short series this blog will go through the main characteristics of the system and decisions that need to be made to get ready and to protect inventions, both new and existing. Part one: the bumpy road of the creation of the Unitary Patent system.**

For decades the creation of a truly harmonized European patent system has been on the agenda. Since 1978 the European Patent Office (EPO) has been examining European applications and granting patents for its (currently) 39 member states. This was just a first step. Traditional European patents have to be validated in every single member state; they are essentially a bundle of patents enforceable before national courts according to different national legislations and procedures. The Unitary Patent is something else, once granted it will be valid in every UP member state and has to be maintained by yearly payments of renewal fees to the EPO. The new Unified Patent Court is the only competent court in case of conflicts.

Negotiations about the Unitary Patent system came off the ground after the Court of Justice of the EU (CJEU), as requested by the European Council, had concluded in 2011 that setting up a court with exclusive jurisdiction for both European patents granted by the EPO and EU patents with unitary effect was incompatible with EU law, as it “would deprive courts of [EU, ed.] Member States of their powers in relation to the interpretation and application of European Union law. The agreement would also affect the powers of the Court to reply, by preliminary ruling, to questions referred by those national courts.” ([Opinion 1/09](#))

After this ruling it was decided to set up the Unified Patent Court Agreement (UPCA) outside the EU framework, but open to EU members only. It was signed in 2013 by 25 states. In the meantime, the EU regulations 1257/2012 and 1260/2012 about [enhanced cooperation for a unitary patent](#) had entered into force in January 2013.

Although Poland was involved in the process up to 2013, in the end it didn't join the Unitary Patent project out of concern it would harm its economy. Spain stayed out as well. It objected and objects to the language regime for the Unitary Patent, which doesn't include Spanish as official language. Italy only fully joined after the CJEU had rejected two challenges (in 2013 and 2015) of the new system.

Constitutional complaints filed in Germany severely delayed the start of the UP system

Just when it seemed all hurdles were out of the way, the UK – paramount in the creation of the UP system – voted to leave the European Union on 26 June 2016. After initial declarations of the government of prime minister Theresa May that the Brexit would not change its position regarding the Unitary Patent system, it was Boris Johnson who pulled the plug in 2020. He declared the UK would withdraw from the UP and UPC, leaving its members in uncertainty about what should happen to the pharma division of the Court, which had been designated to London.

Another blow was a constitutional complaint against the UPCA, filed in March 2017 by German patent lawyer Ingve Stjerna. The three years that it took the German Federal Constitutional Court (FCC) to decide the case were years of stagnation. The FCC upheld parts of the complaint, due to procedural flaws: the German Act of Approval of the UPCA should have been ratified by a two-thirds majority in both chambers of the Bundestag, and this hadn't been the case.

Late 2020, the procedure was repeated in the proper way and although two new constitutional complaints were filed immediately, these failed to delay the process for another long period. In June 2021 the FCC rejected two applications for an interim injunction against German UPCA ratification, and made clear the main proceedings had no chance whatsoever to be successful. From that moment preparations relaunched with full vigour. The thirteenth – Austrian – [ratification of the UPC's Protocol for Provisional Application \(PPA\)](#) on 18 January 2022 marked the birth of the Unified Patent Court as an international organisation and the start of an official period of preparations.

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[Judges were appointed in October 2022](#). Klaus Grabinski from Germany was appointed president of the Court of Appeal and the French judge Florence Butin president of the Court of First Instance. The recruitment of a few more judges is underway. Alexander Ramsay, long-time chairman of the UPC's Preparatory Committee, was recently [appointed as the court's first Registrar](#). A first training for judges took place in Hungary in January.

Currently, IT systems are being prepared for registering unitary effect and handling cases of the UPC, among others. An initial roadmap foresaw 1 January 2023 as the beginning of the Sunrise Period – a period of three months preceding the UPC's opening, during which European patents can already be opted out from the jurisdiction of the court – with an entry into force of the UPCA on 1 April 2023. But both dates were [postponed two months](#) because of problems with accessing the UPC's content management system. 'The additional time is intended to allow future users to prepare themselves for the strong authentication which will be required to access the Case Management System (CMS).'

Since 1 January of this year, it is already possible to request [transitional measures](#) for traditional European patents with a view to the entry into force of the Unitary Patent system. [Forms have been made available](#) relating to requests for unitary effect, as well as to requests for delay in issuing the

decision to grant a European patent, so as to benefit from unitary effect in due course.

As [Article 89 of the UPCA](#) says, the Unitary Patent system and the UPC will fully start functioning on the first day of the fourth month after Germany deposits its instrument of ratification with the European Council. As things stand now, Germany will do this in February, in close contact with the EPO and UPC management, which means the court will open its doors on the first of June 2023.

*Download our [White Paper: Preparing for the Unitary Patent](#) now.*

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