



THE UPC OPEN FOR BUSINESS IN 2017? ANNOUNCEMENT THAT UK WILL RATIFY UPC AGREEMENT

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Legal Briefings

At the meeting of the Competitiveness Council, Minister of State for Intellectual Property Baroness Neville-Rolfe announced that the UK would proceed to ratify the Unified Patent Court Agreement, so allowing the Agreement to come into force (once Germany has also ratified).

This was followed by a Government announcement [here](#). The Unified Patent Court and unitary patent now look to become realities as early as 2017.

ALL SYSTEMS GO?

The UPC Agreement requires Germany, France and the UK to ratify along with at least 10 other participating EU Member States before it can come into force, and the establishment of the Unified Patent (UP) is also dependent on the UPC being established. The ratification tally currently stands at 11, including France, so Germany and the UK are the only participating states now needed to ratify for the whole UPC and unitary patent system to come into force.

Since only EU member states can be party to the UPC Agreement, it was thought that the UK's decision to leave the EU made its participation in the UPC unlikely at best. This was expected to delay the establishment of the UPC. However, following the UK's announcement that it will ratify, the UPC now looks like it will be established in the relative short term, coming into effect within the timeframes predicted before the Brexit referendum, ie: in 2017.

If the UK had not decided to ratify the agreement, the other participating states would have had to wait for the UK to leave the EU before the UK's ratification requirement could be replaced by the next qualifying state (Italy). This would have delayed the introduction of the new system significantly.

WHAT WILL HAPPEN BEYOND BREXIT?

Discussions are taking place as to whether the UK can remain in the UPC/UP system in future even if no longer an EU member state. A Counsel's Opinion sought by Herbert Smith Freehills and representative UK IP bodies has been published (see our e-bulletin on this [here](#)) - and notes that if the UK ratified the UPCA, without amendment, and subsequently left the EU, any divisions of the UPC in the UK would have to cease operating. The transitional consequences of this are matters of detail to be negotiated as part of the UK's exit negotiations.

If the UK cannot continue to take part in the UPC beyond Brexit, it will become one of the European jurisdictions where separate patent protection will need to continue to be sought following the introduction of the new UPC/UP system, as will be the case in Spain, Croatia and Poland - where there will be no means of enforcement of UPs. The seat of the central division of the UPC dealing in particular with pharmaceuticals is due to be established in London. Should the UK no longer be allowed to continue as part of the UPC system post-Brexit, it is thought likely this would move to Milan.

HOW WILL ALL THESE DEVELOPMENTS AFFECT YOUR PATENT LITIGATION STRATEGY?

Strategic patent litigation will still be a priority across Europe even once the UPC is in place since the transitional period allows a certain amount of dual jurisdiction between national courts and the UPC, and enforcement in non-UPC states will also need to be done locally. Judgments obtained in the UK courts will continue to be respected and influential following Brexit. If the UK is unable to continue within the UPC, we expect UK judgments to be of equivalent value before the UPC as they are currently before the separate patent courts of European countries. This is due to the UK courts' expertise in patent litigation - particularly in pharmaceuticals and life sciences, strong links with judges in European jurisdictions, and contribution to the development of the court and training of UPC judges.

This development is one which will require a mindset change, pushing the UPC back up the agenda for innovative companies. The June referendum raised questions regarding whether the UPC would go ahead, and when. These questions are now answered, and discussion moves on to what happens next - companies should continue to factor in the UPC and Unified Patent in formulating filing and enforcement strategies.

This is an unexpected but welcome development, as the UK's decision has not delayed the establishment of the UPC as was feared. For the UK, this might generate goodwill which will help in subsequent negotiations. There remains significant uncertainty as to what will happen once UK leaves the EU - in particular, if the London division is up and running, and any transitional mechanisms for litigation which might be in progress in the UPC when Brexit happens.

[< SEE MORE ON OUR UPC AND UP HUB](#)

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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