



# All systems “GO”? - Countdown to the commencement of the Unified Patent Court and the Unitary Patent

By Claus Elmeros, HØIBERG A/S

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The two agreements on the Unified Patent Court (UPC) and the Unitary Patent (UP) can commonly be referred to as the Unified Patent Package (UPP). This article is an update on the status of this package. It is nearly three years ago that the agreements of the package were signed by the relevant ministers in Brussels and close to two years ago that the referendum on the UPC was held in Denmark.

Since then all the practical preparations have been taken and preparations are still ongoing to ensure that the system (UPC and UP) are ready to go live when the ratification processes in the individual member states are completed. The system will go live four months after ten states plus the three largest states (i.e. Germany, France and the United Kingdom) have ratified. Optimists say 1<sup>st</sup> of January 2017, but others say mid-2017 or even primo 2018.

## Status of ratification

After the signing of the agreements, each state must ratify the package in their national parliaments. This activity is currently under way in most of the states. Some states have completed the ratification, and so far 9 states have ratified the package.

Initially only 25 states signed the agreements, which was all of the EU member states, except Italy and Spain. Poland though only signed the agreement for the Unified Patent Court, but not the one on the Unified Patent. Italy has later signed both agreements.

Until today (early February 2016) Austria, Belgium, Denmark, France, Luxembourg, Malta, Portugal, Sweden and Finland have ratified, so eight states plus France which is one of the three big states needed. So we still

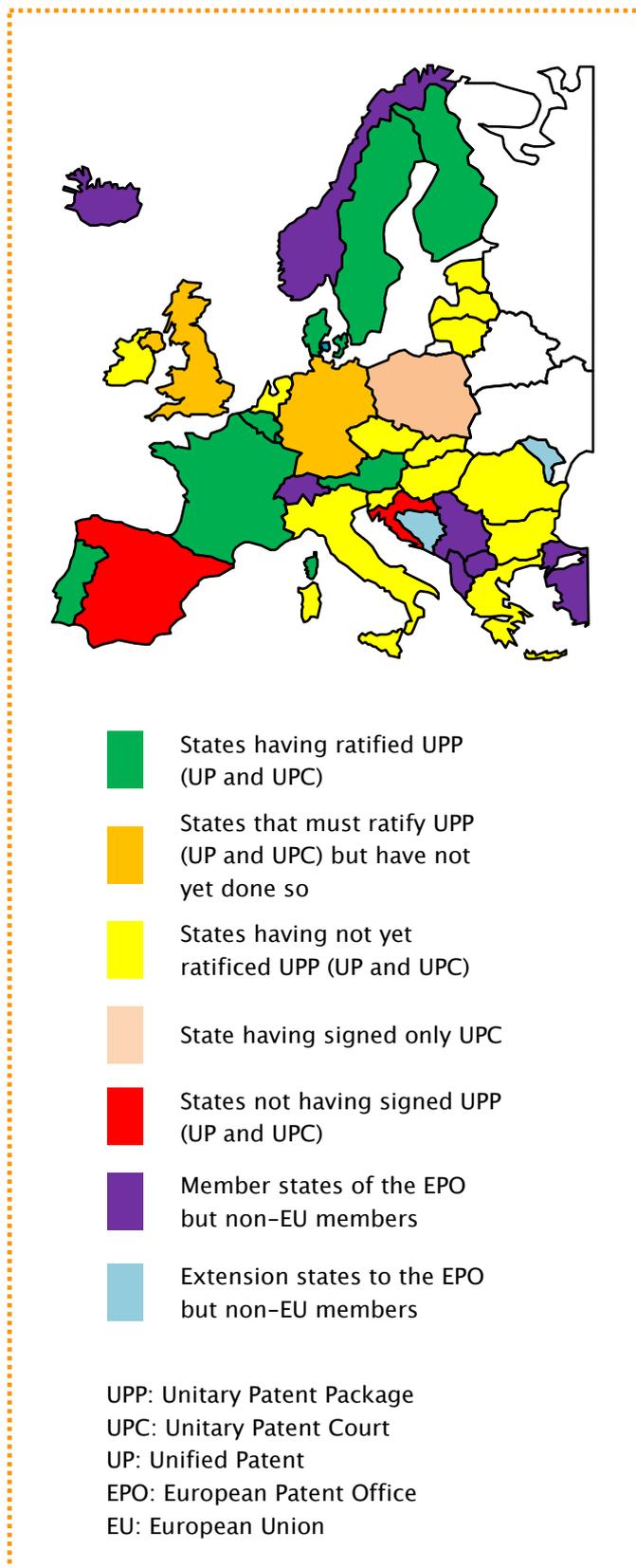
need at least two more plus Germany and the United Kingdom before the UP enters into force.

It is rumoured that the German ratification of the Unified Patent Court Agreement most likely will be postponed until September 2016 and thereby the 13 ratifications needed for the new European patent system to start functioning. Hereby, the law makers can also ensure that the organisational set up of both the Unified Patent and the Unified Patent Court is ready to go, such as IT systems, staff training, etc.

## The Unitary Patent – and the costs hereof

All European patent applications not yet granted when the system goes live can be validated as a Unified Patent. The European Patent Office will be in charge of administrating this. In December 2015 the EPO announced that the Unified Patent is ready to go. Agreements are in place on the fee levels, such as validation fees and annuity fees. The annuity fees will be similar to the top four European countries, i.e. the costs of maintaining a Unified Patent rather than validating a European patent nationally will be equal to the current costs of validating in Germany, France, the United Kingdom and the Netherlands, besides most importantly the translation costs, which will be significantly reduced.

After the Unified Patent comes into existence, there will still be a need for validating the European patent nationally, since there are states that are members of the European Patent Organisation (EP-member states) but not EU member states or EU member states that have not ratified the UPP at the time the European patent is granted. In the accompanying figure, a graphic representation of the (admittedly) still somewhat complex unified patent system in Europe as it looks today is shown.



- States having ratified UPP (UP and UPC)
- States that must ratify UPP (UP and UPC) but have not yet done so
- States having not yet ratified UPP (UP and UPC)
- State having signed only UPC
- States not having signed UPP (UP and UPC)
- Member states of the EPO but non-EU members
- Extension states to the EPO but non-EU members

**The Unified Patent Court**

The preparations for setting up the Unified Patent Court are also under way. Training of judges – both legal and technically qualified judges – is well underway. The Court will have its central seat in Paris with branches in Munich and London.

Finding suitable buildings for housing the Court is not finalised, the court fees have not yet been agreed and the staffing is also not yet in place.

Several local divisions of the UPC will be set up around Europe. These will be funded by the state or states (in case of a regional division). This makes the preparation somewhat easier as they will typically be set up in connection with an existing national Court organisation.

**While we wait – Opt out options**

All proprietors of a European patent application or a European patent already granted and validated should start to consider how to prepare. The Unified Patent Court (UPC) will have jurisdiction over both Unified Patents (UP) and existing European patents (EP). This means that also existing nationalised/validated European patents can be enforced or invalidated centrally. By way of example, this means that a proprietor may be sued for invalidity at the UPC by a potential infringer, i.e. centrally, unless he or she “opts out” his or her European patent. This opt-out possibility is available for a transitional period of 7 years and can potentially be extended for another 7 years.

If a European patent is opted out, neither the proprietor nor any competitor can sue on this opted-out patent centrally, but can only do so nationally, as we know the system today.

The “opt-out” must be registered at the Court and there will be an opening for registration of opt-outs for a period of some months in advance of the UPC going live. There is also a possibility to “opt-in” again. The “opt-out” (as well as the “opt-in”) will be subject to a fee.

If you are the proprietor of a European patent it is advisable to contact us to discuss how to prepare for this new regime. Similarly, there may also be issues with patent license agreements – both if you are a licensee or a licensor – since the existence of this new Unified Patent Court was probably not taken into account when such agreements were drafted.



**Claus Elmeros**

Senior Partner, European Patent & Design Attorney

Contact information:  
 T: +45 3332 0337  
 cel@hoiberg.com

**Learn more about Claus Elmeros here.**