

AA THORNTON

INTELLECTUAL PROPERTY LAW

An introduction to the Unitary Patent and the Unified Patent Court



It's our people
that make
the difference

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Preface

In this guide, we provide a brief introduction to the UP and UPC, focusing on the options available and decisions that will need to be made in the very near future. This guide does not provide any information regarding making use of the UPC for litigation.

Since we cannot cover every detail of the system or its consequences in this guide, please contact us to discuss particular concerns and requirements. Suitable contact details can be found at the end of this guide.

Introducing the Unitary Patent and the Unified Patent Court

The **Unitary Patent (UP)** will be a new option for European patent protection and is expected to be available in 2022. The UP will enable uniform patent protection to be obtained in at least 17 European states via a single granted patent. It is expected that, eventually, UPs will provide protection in at least 24 European states.

The existing European patent application procedure results in a **European Patent (EP)**, which is effectively not a single patent but a bundle of national patents in various European countries. These can each be separately renewed and separately enforced in the national courts. They are referred to as **EP national validations**. The **UP (more accurately, “the EP with unitary effect”)** will provide an additional option to these in some countries.

This means that patent protection in Europe will in future be available via 3 routes: through EPs and UPs (via application to the European Patent Office), and also through **national patents** (via application to the respective national patent offices).

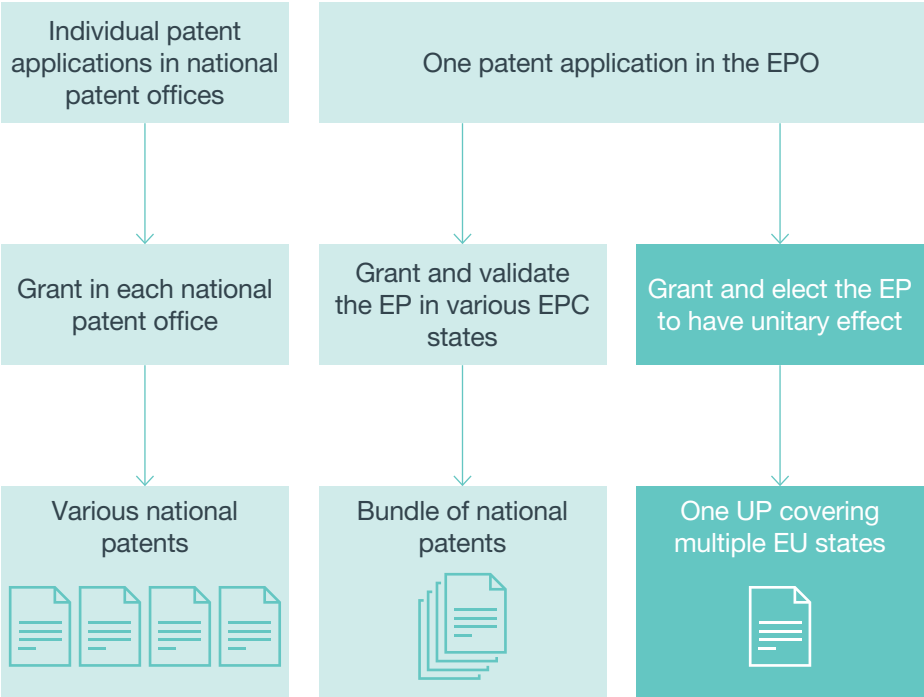
Future options for protection, enforcement & revocation

One of the main differences between the EP and the UP is that the UP will not have to be validated in each country, thereby avoiding some costs. Furthermore, legal decisions concerning a UP will have effect throughout the *whole* territory covered by the UP, avoiding potentially conflicting national court decisions. To make decisions on UPs, there will be a **Unified Patent Court (UPC)**, which will exclusively be able to determine infringement and validity of the UPs. Importantly, the UPC will also have an impact on enforcement of and attacks on EPs (see below).

We can guide you through the patenting maze in Europe

Once the UPC system is up and running, there will be a number of new decisions to be made before, during and after filing patent applications in Europe. Therefore, patentees and those involved in licensing EPs should review their portfolio as soon as possible, and ensure their patent strategy is ready for the start of the UPC system.

Post UPC/EIF routes to patent protection in Europe



- = current routes
- = additional route once the UP system enters into force (UPC/EIF)

Note: most national or the European patent applications can optionally be accessed via the Patent Cooperation Treaty (PCT) system, which is not dealt with in this guide.

Member states of the European Patent Convention (EPC)

(as at February 2022)

Opposite is a map of the countries which can be covered in an EP ‘bundle’ of patents via national validations. The UP will eventually be able to cover many of these, as shown on the map on pages 10 and 11.

■ EPC Member States (38)

Albania	France	Luxembourg	Serbia
Austria	Germany	Malta	Slovakia
Belgium	Greece	Monaco	Slovenia
Bulgaria	Hungary	Netherlands	Spain
Croatia	Iceland	North Macedonia	Sweden
Cyprus	Ireland	Norway	Switzerland
Czechia	Italy	Poland	Turkey
Denmark	Latvia	Portugal	United Kingdom
Estonia	Liechtenstein	Romania	
Finland	Lithuania	San Marino	

■ Extension States (2)

Bosnia-Herzegovina
Montenegro

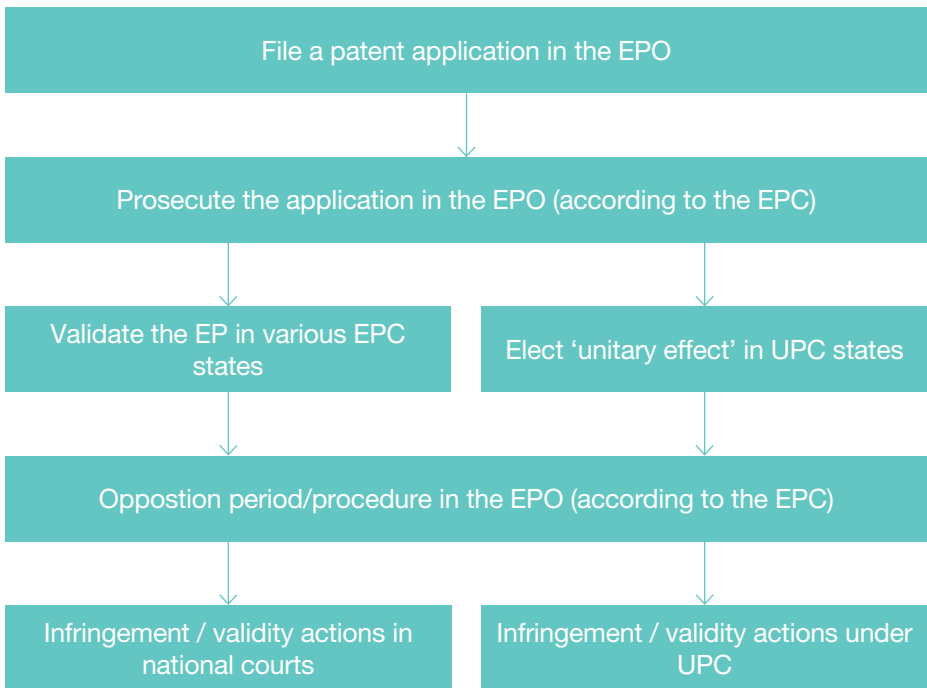
■ Validation States (4)

Morocco
Republic of Moldova
Tunisia
Cambodia (not shown)



How to obtain a Unitary Patent (UP)

UPs will be applied for in exactly the same way as EPs, via the European Patent Office (EPO). Also, after grant, UPs will be subject to an opposition period, exactly as for current EPs.



Future options at grant stage of application through EPO

At the grant stage in the EPO, for countries *not* in the UP, the current national validation system must be followed in each country where patent protection is desired, resulting in a bundle of EP national patents (or 'validations'). However, when the UP system comes into force, it will be possible to obtain a UP covering at least 17 countries (the number of countries is likely to increase over time). The applicant will need to decide, for the UP

countries, whether it wants: (i) the EP to have “unitary effect” and become a single UP; or (ii) to pursue the current system of validating the EP in each chosen state. If the decision is for option (i), then the applicant must tell the EPO of that decision within one month of publication of the date of grant of the EP in the EPO bulletin.

There are consequences of this decision, which are explored further below:

- it will, to some extent, determine where patent protection is achieved;
- it will impact renewal fees and other costs; and,
- importantly, it will determine how the patent can be enforced and attacked (potentially invalidated) through the courts.

Can existing EP applications become UPs?

An EP application must be pending (not yet granted) when the UP system enters into force (‘UPC/EIF’) in order to be able to obtain a UP. Therefore, current applicants who want UP protection in UP states (instead of a bundle of EP national validations) should consider **delaying grant** of the European patent application until after UPC/EIF. For example, this option should be considered by applicants who receive the EPO’s notice of intention to grant in the months just before UPC/EIF.

If a UP is wanted but it is not possible for the current application even by delaying grant, then it may be possible for some subject-matter to be divided out of the application into a new EPO-filed patent application that claims the same original dates as the ‘parent’ application. This new **‘divisional’ patent application** would proceed to grant later than the parent application. Assuming that grant of the ‘divisional’ application would be after entry into force of the UP system, the proprietor would then have the option to obtain a UP on that divided-out subject-matter.

However, for **existing EPs that are already granted**, there is *no* possibility of obtaining a UP.

Equally, for **countries of the EPC which are not part of the UP**, the *only* possibility for protection via an EP will be the current national validation system resulting in multiple EP national validations. For example, in future, the EPO procedure could result in: (i) a UP covering up to 24 EU states; and (ii) a number of national validations in non-UP countries.

Member states of the UPC Agreement (UPCA)

(as at February 2022)

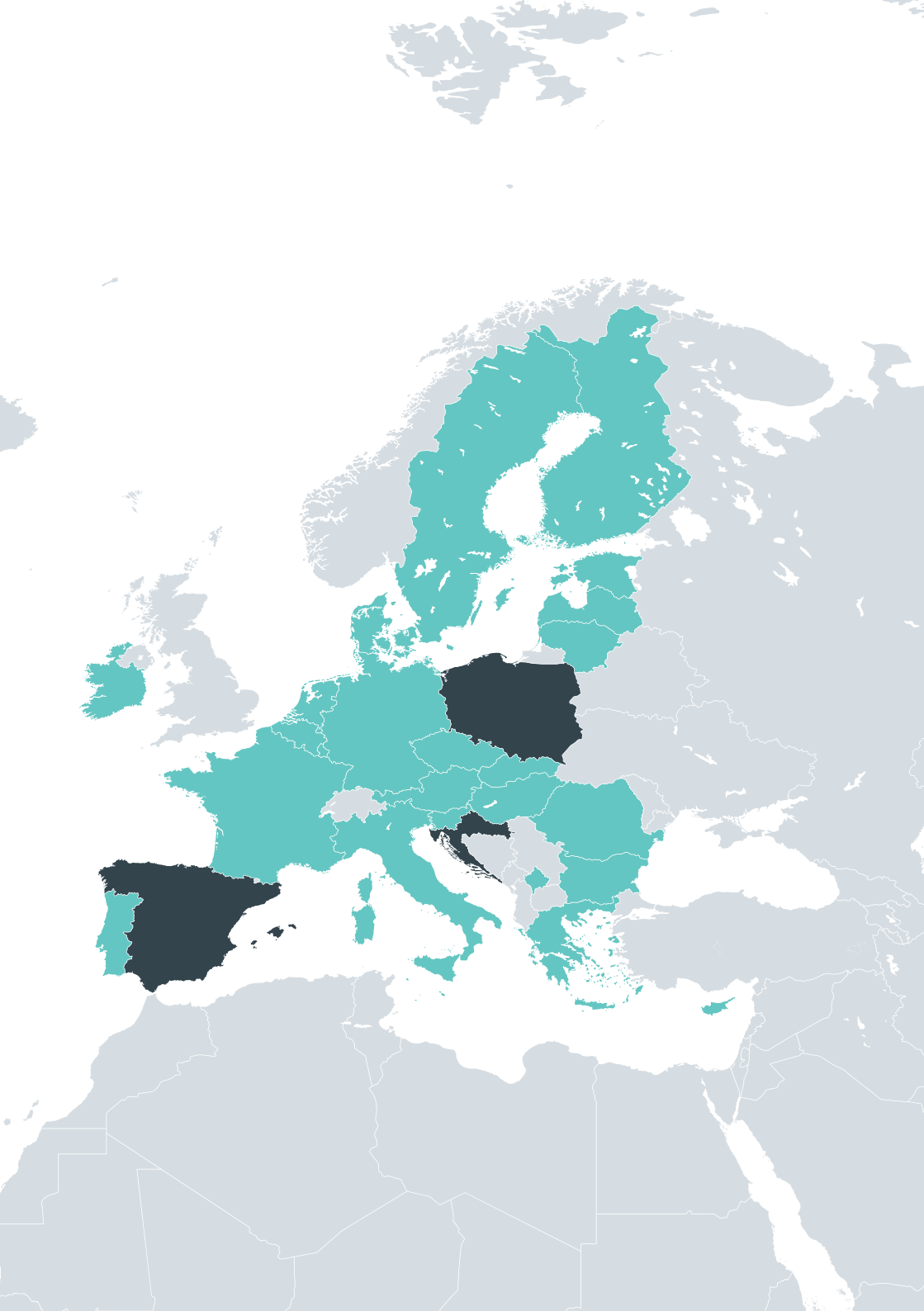
Currently, all the UPCA participating states are also member states of the EPC. All are also EU member states, but not all EU countries have so far signed up. Furthermore, at the start, not all participants will have ratified the UPCA, which is initially expected to enter into force in at least 17 states; this number is expected to rise in future. Please contact our patent attorneys (details at the back of this guide) for an updated list.

■ UPCA Participating States (24)

Austria	Germany	Netherlands
Belgium	Greece	Portugal
Bulgaria	Hungary	Romania
Cyprus	Ireland	Slovakia
Czechia	Italy	Slovenia
Denmark	Latvia	Sweden
Estonia	Lithuania	
Finland	Luxembourg	
France	Malta	

■ Non-participating states of the EU (3)

Croatia
Poland
Spain



Choosing between a UP and EP national validations

For countries participating in the UP, there will be a choice to be made: national validation or an EP with unitary effect (UP).

Any invention covered by the claims of a UP will automatically be protected across the whole of the UP territory – it is likely that this will eventually be all the EU member states, except for Croatia, Spain and Poland (i.e. at least 24 EU states in total). There will be no national validation procedure for UPs, thereby avoiding some costs that apply to EP national validations; these include some renewals and translations costs.

UP benefits: renewal fees

A UP will be subject to a **single annual renewal fee** covering the *entire* UP territory. This could represent a significant saving in post-grant fees for patentees who normally validate in more than four states. For example, renewing an EP in *all* UP territories for 10 years could amount to official fees in excess of €30,000, whereas via the UP system it would cost in the region of €5,000. There should also be a saving in associated service fees charged by renewals agencies.

UP benefits: translation requirements

Eventually, **no translations** will be required to obtain a UP at the grant stage of an EP once machine translations of sufficiently high quality have been developed. In the meantime, current translation requirements will be reduced for UPs: there must be an English text, so either the proceedings must have been in English or – if they were in German or French – a translation into English must be provided at the grant stage. If the application procedure was in English, then a translation is required into any other *EU* language (e.g. Spanish). Those wishing to view documents in any other language than those provided can use the EPO's Patent Translate software, available in at least 32 languages.

If the UP enters court proceedings, a human translation into the relevant language will be required (if this is not already available from the application/grant proceedings). There are provisions for smaller entities, non-profit organisations and like proprietors to be reimbursed these costs.

Why not *always* obtain a UP, when possible?

Given the potential cost benefits and apparent simplicity of the UP system, especially when wishing to cover several EU territories, it begs the question: “Why not *always* choose a UP, and obtain protection in any other desired EPC countries via either an EP national validation or a national patent application?”

There are two main reasons for *not* choosing a UP:

1. UPs are less flexible than EPs when making **renewal** decisions and when considering **selling/assigning** them. This is because a UP is a *single* patent, which must be sold or renewed as *one* entity (unlike EPs, which are a bundle of national patents that can be dealt with individually).

Therefore, UP owners cannot reduce their renewal costs country-by-country – they must either renew for the whole UP territory or else the patent will lapse for the whole UP territory.

2. Significantly, **UPs must be enforced and invalidated by the Unified Patent Court (UPC)**, rather than on a country-by-country basis in the respective national courts. Whereas EP national validations have been individually subject to the relevant national courts, the national courts will have *no* jurisdiction over UPs.

Therefore, choosing the UP option is a decision to simultaneously put all the patent eggs in one jurisdictional basket: if a UP is invalidated, then protection is lost throughout the whole UP territory. Also, questions of infringement will be assessed for and applicable to all UP states. In the case of a UP, it will no longer be possible to pick and choose jurisdictions in order to take advantage of national differences in post-grant law and practice.

Disadvantages of a UP versus a bundle of national patents

- When the patentee is interested in protection in only four states or fewer, then the costs (renewals, service, translations charges) of obtaining protection via a UP are likely to be significantly higher than via national validations of the EP.
- Other factors, similar to those listed on page 19 in favour of opting out existing EPs from the UPC system, would favour national validations of the EP in UP countries, rather than obtaining a UP.

Aspects of Patent Procedure:		EP	UP
Apply through the EPO (as for EPs now)		✓	✓
Obtain allowance through the EPO		✓	✓
Grant procedure		Validate in national territories of choice – becomes 'bundle' of national patents	Within 1 month of publication of grant of EP, choose UP option at the EPO
EPO opposition procedure		✓	✓
Jurisdiction for enforcement / (non-opposition) validity attack:			
– until UPC/EIF		National	N/A
– after UPC/EIF and during 7 year (or more) transition period		*Opted out (all owners agreed) National	*Left in / no action UPC
– after UPC/EIF and after expiry of transition period		UPC	UPC
All EU member states covered? (as at February 2022)		✓ (27 states)	✗ (24 states – Croatia, Poland and Spain are not in UPCA)
Renewal Fees (post-grant)?		Per national patent	One fee
Translations required for validation?		Multiple, depends on country	One only
Applicability of enforcement / validity decision		*Opted out Local – applies to national only	*Left in / no action Central – applies across UP territory

**Patent owners have one and only one opportunity to 'swap boxes'/change their minds post-UPC/EIF, provided that litigation has not yet begun*

Impact of the UPC on EPs/SPCs, and 'opting out'

In a major change, the Unified Patent Court (UPC) will *eventually* have jurisdiction over not only UPs but also *all* EP national validations in a UP state, including over supplementary protection certificates (SPCs) based on such EPs.

SPCs are effectively an extension of the patent term (in relation to specific products such as certain marketable pharmaceuticals) to compensate for regulatory delays to marketing.

EPs can avoid UPC jurisdiction for a transitional period

There will be a transitional period of at least 7 years (extendable up to 14 years) during which it will be possible to use the traditional means of enforcing and invalidating EPs (and relevant SPCs) through the national courts, *provided that the patent owner takes action to opt out* the EP from the UPC system. **If no action is taken, all EP national validations in a UP state will automatically fall under UPC jurisdiction** – this is the default position from the start of the UPC system. This means that, if a patent owner wants to use the current, national route for enforcement and validity of EPs (and relevant SPCs), the patent owner must take action to 'opt out' the EP from the UPC system.

How to opt out EPs from the UPC system

Once the UP system starts, it will be possible to opt out both pending European patent applications and already-granted EPs.

Opt out must be effected centrally by opting out each EP concerned – it is not necessary or possible to act on a country-by-country basis. Furthermore, for patent owners having a large portfolio of patents who, for example, may wish to opt out all of their granted EPs, it is expected to be possible to do so in a batch process, avoiding a lengthy one-by-one procedure.

There is no official fee (at the EPO or UPC) for opting out, although representatives advising and/or acting on behalf of patent owners are likely to charge for this service.

The ‘sunrise provisions’ for opting out

So that proprietors can opt out their granted EPs in readiness for the UPC system, there will be a **‘sunrise period’ of 3 months** before the system commences. This means that proprietors will have 3 months in which to ensure that any EPs (covering UPC states) that they want to keep out of the jurisdiction of the UPC are not automatically subjected to it. On opt out, jurisdiction is lost by the UPC and remains, as now, with the national courts.

Despite the ‘sunrise period’, an opt out only takes effect from the date on which it is *registered by the UPC*, which may not occur immediately the opt out application is made. Hence, desired opt outs should be applied for as soon as possible after the start of the ‘sunrise period’.

In the case of SPCs, unless the base EP is opted out, the corresponding SPCs will automatically be subject to the jurisdiction of the UPC. Some of these are likely to be based on EPs which will have expired before the sunrise period. So, all base EPs (even those that have expired) where the SPC proprietor does not want the SPC to be subject to the UPC system will have to be taken into consideration so that any desired opt out is actioned within the sunrise period.

It is important to note that, **where there is more than one patent owner** for a particular EP, *all co-owners must be in agreement* with the decision to opt out. Moreover, care must be taken, as ownership may change over time and the EPO register may not have been updated to reflect this. Furthermore, if the patent application is subject to licences or other agreements, their terms need to be considered (see page 20).

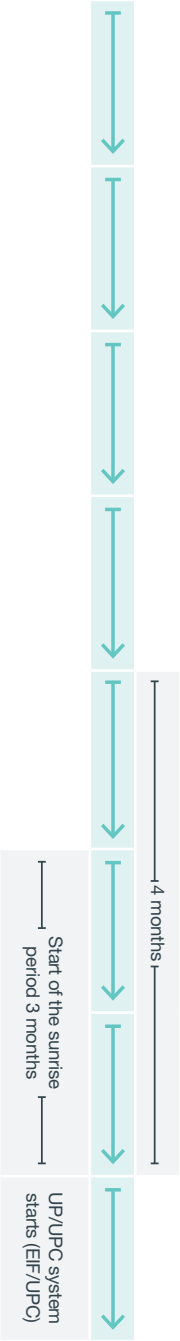
Decision-making on opt out should begin soon

Because of the potential complexities of co-ownership and other considerations around the opt out (or leave in) decision, and the need to allow time for the UPC to register any opt out decision, the decision-making process should start as soon as possible. We recommend that consideration of the pros and cons of opting out should begin at least six months ahead of the start of the UPC system, as indicated in the following timeline. The earliest that the UPC system could enter into force (the ‘UPC/EIF’ date) is around October 2022.

UPC/EIF Minus 6 months	UPC/EIF Minus 5 months	UPC/EIF Minus 4 months	UPC/EIF Minus 3 months	UPC/EIF Minus 1 month	Entry into force of UPC (UPC/EIF)
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Beware any holiday periods: build in additional time to allow for staff, EPO, agency and other absences

Ratification of
UPCA by Germany



List EPs having opt out potential, including expired EPs acting as basis for SPCs	Determine ownership status for each EP Review any relevant licences	If opt out required, obtain (written) agreement of all co-owners May require co-operation of licensees	Ensure your authorised representative: a) has your opt out (or leave in) instructions for each EP; and b) has your express mandate per EP for any opt outs	Ensure your authorised representative has opted-out any existing qualifying EPs which you do not wish to be under jurisdiction of UPC. (Allow time for EPO/UPC to register the request for opt out)
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Discuss pros/cons/concerns/strategies with our Patent Attorneys

Ongoing for pending EP applications from now

If you would prefer a single UP to a 'bundle' of EP national validations, **consider delaying response to notice of intention to grant for EP applications** in order to obtain option to proceed via UP route after UPC/EIF

Consider filing a divisional EP application (pre-grant) on cases where: either (1) UP is or may be wanted and grant of parent EP cannot and/or should not be delayed until UPC/EIF or (2) you may want an additional UP in due course

For new applications involving multiple owners, consider the order in which applicants are listed. This could affect the law applicable to any eventual UP as an article of property

Changing your mind about opting out or leaving in

The following only applies during the transition period of seven years (plus a possible further seven years) from the start of the UPC system:

Where an EP is opted-out of the UPC system, if it appears later to a patent owner that there are advantages of the UPC system for that EP, then there is the possibility of withdrawing the opt out so that the EP falls under UPC jurisdiction. This ‘opting-back-in’ possibility is subject to two main constraints:

1. the EP can only be opted back in if there has not yet been any action in the national courts (e.g. for revocation or infringement) in relation to that EP. Therefore, if (for example) things are going badly in a national court procedure, it is not then possible to escape or delay the consequences by transferring into the UPC system; and
2. proprietors have *one and only one* opportunity to change their minds, so if an EP has already been opted out, it can be opted back into the UPC system, but then it must stay in – there is no mechanism for opting out again at a later date.

Alternatively, if it were decided to leave an EP in the UPC system (or if no consideration was given to the options, and the EP by default became subject to the UPC system), then it is possible to opt out at a later stage, provided that no proceedings in the UPC have already begun. Any such later opt out can also be subsequently withdrawn.

Factors to consider when deciding whether to leave in or opt out from the UPC

Each decision must be considered in the light of its specific facts and the particular set of circumstances of the EP and its owner. It is not possible to cover everything in this introductory guide. However, we note below some of the factors that need to be taken into account when making these important decisions. We strongly recommend that you discuss these and other aspects with our Patent Attorneys, prior to making a final decision. Contact details are at the back of this guide.

Remember: taking no action on an EP amounts to a decision to leave the EP under UPC jurisdiction once the UPC enters into force. We shall not apply for any opt out without specific, written instructions and authorisation from the current owner(s) to do so.

Opting out from UPC jurisdiction: factors in favour

- Removes risk of a successful central validity attack on the EP, which could result in losing all EP national validations in UPC countries, i.e. eventually in up to 24 EPC states, simultaneously
- Relatively highly important patent, e.g. for a pharmaceutical drug or new product/system
- Desire to maintain the status quo
- Fear of the unknown – want to see how UPC system pans out first
- Prefer national jurisdictions for countries of most commercial interest
- Licensor/licensee considerations, e.g. exclusive licensee wants opt out [only the patent owner can effect the opt out]
- Litigation may arise that can only be dealt with nationally anyway (e.g. stand-alone entitlement proceedings)
- Prefer dealing with country-specific litigation teams and procedures
- Relatively front-loaded court costs of the UPC system

Leaving in UPC jurisdiction: factors in favour

- Opportunity for cross-border enforcement, e.g. single injunction applicable across all UPC territorial coverage
- Difficult or impossible to get co-owners to agree opt out (agreement is obligatory)
- Uncertain ownership/licensee status – discussions or investigations ongoing
- Patent covers a relatively small/low cost/replaceable aspect of a larger product/process (defensive protection)
- Patent is to support a quantitative rather than qualitative IP strategy
- Strong patent – perhaps already validity ‘tested’ in other jurisdictions
- Court fees may be lower – fixed portion + portion based on value of action
- Relatively quick court procedure expected, compared to some jurisdictions
- Prefer dealing with a single litigation team, single procedure, etc

Third party considerations

Assignments and Technology Transfer Agreements involving EPs

If an EP owner is selling or someone is buying an EP or a share of an EP, it will be important to consider the opt out position of the EP. This matter should be covered in the due diligence stage ahead of the assignment, and there may be a need for the assignor to effect an opt out/withdrawal of opt out ahead of the assignment so that the assignee achieves their desired jurisdiction for the EP once it has ownership.

It is also important to consider the territory concerned: for EPs, assignment of national validations can be treated separately whereas, for UPs, it will only be possible to assign the whole of the UP.

Licensing

EP licence negotiations should also take account of the jurisdictional status of the EP, and the preferred jurisdictional status for each of the parties. It is possible that conflicting interests could arise on this point, which could impact on other fundamental aspects, such as royalty rate, exclusivity, etc. It is likely to be optimal for the ultimately agreed jurisdictional choice for the EP to be put in place (e.g. via opting it out or withdrawing an existing opt out) prior to the licence coming into effect.

In the case of licensing a UP, it will remain possible to grant licences for individual countries or geographical areas.

Existing Licences

The UPC will impact *all* existing EP licences. For these, it is important to consider, from both licensor and licensee perspectives, what is likely to be the best decision regarding jurisdiction. In many cases the interests of licensor/licensee will conflict.

Once a preference has been identified, the strategy relating to communication of that preference to the licensor/licensee can be considered with the aim of reaching a desired agreement.

For an exclusive licence covering the whole of Europe:

- Licensors may prefer an opt out to remove the possibility of central revocation via the UPC wiping out royalties.
- Licensee may prefer opt-in, as the EP could then be enforced across Europe in one action.

For a non-exclusive or sole licence for the whole of Europe:

- Licensors may prefer to leave the EP under UPC jurisdiction for convenience of enforcement, particularly if licensor has its own product.
- Licensee may prefer opt-in if licensee has the contractual ability to control enforcement and validity issues in its specific territory.

For a series of licences to different licensees in different territories:

- Licensors may prefer to opt out, so that some royalty remains even if the EP is revoked in some countries. Set against this are the costs of multiple infringement actions.
- Licensee in Germany (a common patent jurisdiction) may prefer to opt out, as they may have more faith in/be able to predict better the outcome of this court system.
- Licensee in an atypical patent jurisdiction may prefer to be under UPC jurisdiction, due to concerns about litigation in that jurisdiction; it could also be easier to persuade Licensors to sue for infringement in the UPC.
- Licensee in numerous jurisdictions may prefer to opt in to benefit from a finding of infringement and pan-European injunction.

In the case of UPs, it is worth noting that certain default provisions apply unless the licence specifies otherwise, such as:

- exclusive licensees can enforce UPs without the UP owner's consent.
- non-exclusive licensees need the UP owner's consent to enforce UPs.

Considering your competitors

So far, we have been concerned with the effect of the new system from the patentee's point of view, but there are also strategic questions regarding competitors and other commercially relevant parties.

For example, have your competitors or holders of dominant patents that could pose a threat to your business opted out their EPs? If not, you may have the opportunity to mount a central validity attack in the UPC *immediately* it comes into effect. This would prevent future opt out of the competitor's EP and provide an opportunity for the patent to be revoked in *all* UPC countries in one action.

Whether or not any EP has been opted out will be determinable from the UPC website, subject to administrative delay while they process opt out requests. The EPO register should also be updated in line with this. Alternatively, please ask our Patent Attorneys to provide a status report; contact details are at the back of this guide.



Next steps: Checklist

- ☐ Decide on a strategy for UPC opt outs as EP patentee in consultation with:
 - ☐ Any co-owner(s) of the EP
 - ☐ Any licensing / agreement partners or potential assignees
- ☐ Review agreements concerning EPs
- ☐ Consider delaying grant of pending EP applications for potential UP benefits
- ☐ Consider filing an EP divisional application per EP family for potential UP benefits
- ☐ Monitor competitors' opt out strategies
- ☐ Consider future filing strategy
 - ☐ National patents via national patent offices
 - ☐ EP via EPO (becomes bundle of national patents)
 - ☐ UP via EPO (single patent in UP states with unitary effect)
 - ☐ Combinations of any of the above
- ☐ Consider which and in which order multiple EP applicants should be named

Glossary

Assignor = the person who transfers ownership to another (the assignee)

Assignee = the person to whom ownership is transferred by the assignor

Divisional (patent application) = an application split out from a pending application (the 'parent' application), awarded the same significant dates as the parent

EIF = entry into force

Enforce = assert (a patent) against a third party in infringement proceedings

Entitlement proceedings = proceedings to determine the correct legal owner (of a patent)

EP = European Patent (granted under the EPC by the EPO)

EPC = European Patent Convention (law relating to grant of EPs)

EP national validation = a national patent that was granted as an EP by the EPO and was validated in the country concerned

EPO = European Patent Office (the patent office that administers the EP application procedure under the EPC and in future the UP)

EPO Bulletin = the dated journal in which, the grant of EP patents is announced

Exclusive licence = only the licensee is permitted (to work the patent)

Invalidate = cause (a patent) to be declared invalid and unenforceable

Licensee = the recipient of a licence/permission from a licensor (to work a patent)

Licensor = the person allowing another (the licensee) (to work a patent)

National patent = a patent applied for in a national patent office (not the EPO) which is under the jurisdiction of national law

Opposition = post-grant proceedings in the EPO to challenge the validity of EPs

Prosecute (a patent) = go through the (patent) application procedure, including examination

Protection = the scope of the claims of a patent; the area in which third parties cannot work without infringing the rights of the patent owner, unless licensed

Renewal = a fee (often annually) paid to keep a patent in force

Sole licence = only the licensor and a single licensee are permitted (to work the patent)

Subject-matter (of a patent) = that which is disclosed in the patent specification as filed

Sunrise = a period before the start of a new law/rule/system during which action can be taken to request or avoid some aspect(s) of the new regime

Third party = someone who is not the patent owner or co-owner

Unitary effect = treated as a single patent having effect in a region consisting of all UP states

UP = Unitary Patent or 'EP with unitary effect'

UPC = Unified Patent Court

UPC/EIF = the date on which the UPC system enters into force (EIF)

Validate (an EP in a country) = undertake post-grant requirements (e.g. pay fees, make translations available) to enable the EP to take effect in the country

Validity = the strength of a patent; how vulnerable it is to revocation

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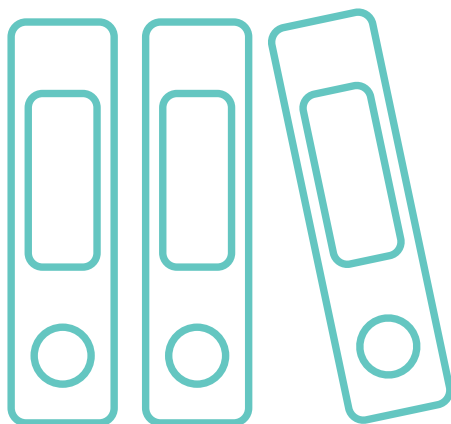


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February 2022