

## January 19, 2022 The Unified Patent Court enters partially into force

**The Protocol on provisional application of the Agreement on the Unified Patent Court (UPC) entered into force on January 19, 2022 following ratification by Austria, the last country expected to do so.**

The immediate consequence is the entry into force of a significant part of the UPC Agreement: almost one third of the Agreement and three quarters of the UPC Statute are now applicable.

In order to take account of the Brexit, however, it is expected that the Contracting Member States will make clear in a joint declaration that ratification by the United Kingdom was not necessary for the entry into force of the protocol, contrary to what was initially planned.

### ➤ **What is in force:**

All that is necessary (besides the establishment of a mediation and arbitration center) to enable legal actions relating to European patents, SPCs and Unitary patents (European patents with unitary effect) to be brought before the new Court on the same day as the Agreement enters completely into force.

This includes establishment of the Administrative, Budgetary and Advisory Committees, definition of the role of the Presidents of the First Instance and the Court of Appeal, creation of the different divisions of the First Instance and the Registry, appointment of the judges and definitive adoption of the Rules of Procedure.

- The Administrative Committee (Article 12 of the Agreement):

It is composed of one representative per Contracting Member State, with the European Commission having observer status. This committee adopts the Rules of Procedure of the Court; it appoints, by consensus, the members of the Advisory Committee based on proposals made to it by the Contracting Member States and, above all, it appoints the judges. Moreover, it is the Administrative Committee that creates the local and regional divisions upon request of the Contracting Member States (Article 18 of the Statute).

- The Advisory Committee (Article 14 of the Agreement):

Its members are proposed by each Contracting Member State and appointed by the Administrative Committee. It is composed of patent judges and practitioners specialized in patent law.

Its composition should ensure a broad range of expertise. This is even more important as the Advisory Committee plays a crucial role, not only for the appointment of judges, by assisting the Administrative Committee in this task, but also for the representation of parties by European Patent Attorneys, by giving opinions on the qualification requirements of these Attorneys.

- Appointment of judges:

The Advisory Committee shall draw up a list of the candidates it considers most qualified, which list shall include at least twice as many candidates as there are vacancies to be filled (Article 3 of the Statute). The number of candidates is more than one thousand. However, the number of positions to be filled is about 90. Indeed, the total number of local, regional and central divisions can be estimated at about twenty, with each chamber comprising three judges. As for the Court of Appeal, its two chambers each have five judges. Finally, all fields of technology must be covered by technically qualified judges, which requires a certain number of additional judges.

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From the list of candidates drawn up by the Advisory Committee, the Administrative Committee shall appoint the necessary number of judges, whether full-time or part-time, so that at least one chamber can be constituted in each of the local, regional and central divisions of the First Instance and two chambers in the Court of Appeal.

As the composition of the Court should be geographically balanced, some legally qualified judges may be required to undergo training in patent law. This training, which was to be provided by a center in Budapest, will probably be provided by the European Patent Academy in Munich, as Hungary has not ratified the Agreement.

- The Presidents and the "Presidium":

As soon as the judges are appointed, the President of the Court of First Instance and the President of the Court of Appeal will be elected, respectively, by all the full-time judges of the Court of First Instance and by all the judges of the Court of Appeal, taking into account the fact that the first President of the First Instance must be French, as the central division has its seat in France.

The President of the First Instance shall have an important role and shall direct the judicial activities and the administration of all divisions of the Court of First Instance (Article 14-3 of the Statute). He shall supervise the sub-registries established at the various divisions (Article 25 of the Statute). It will also intervene in the proceedings, at the request of a party, to decide on the language of the proceedings (Article 49(5) of the Agreement) or at the request of a panel, to assign an additional technically qualified judge (Article 33-3 of the Agreement).

A "Presidium" is defined in the Statute (Article 15) and consists of the Presidents of the Court of Appeal and of the First Instance, two elected judges of the Court of Appeal, three elected full-time judges of the First Instance, and the Registrar.

The Presidium appoints the Registrar (Article 22 of the Statute) and a Deputy-Registrar (Article 25 of the Statute), adopts the framework for the training of judges (Article 11 of the Statute) and may decide on the removal of a judge (Article 10 of the Statute).

The Presidium shall be responsible for the management of the Court and may, also propose amendments to the Rules of Procedure (Article 15 of the Statute).

### ➤ **What is not yet in force:**

The other provisions of the Agreement are not currently in force.

They mainly concern the primacy of Union law, the sources of law and substantive patent law, the rules of jurisdiction as well as certain general procedural provisions which will complement the Rules of Procedure. More information in our section on "The Unified Court" [under this link](#).

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### ➤ **Conclusion:**

The entry into force of the Protocol on provisional application marks the final implementation of the Unified Patent Court and the Unitary patent.

A three-month sunrise period will be opened before autumn of 2022 to allow for the registration of opt-outs for European patents that their owners would like to see outside the jurisdiction of the new Unified Court and be dealt with by national courts.

More information in our article "The transitional provisions and the opt-out" [under this link](#).

At the end of the current preparation phase, which should last about eight months, the first actions before the Unified Court will be possible and the first Unitary patents will be granted, and this, at the end of 2022 or beginning of 2023. More information on the Unitary patent [under this link](#).

We will keep you inform of the main developments of these important changes in patent matters in Europe.



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