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## The UK Ratifies the UPC Agreement

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*The Unified Patent Court (UPC) is one step away, with ratification by Germany required....However, there remains uncertainty as to German ratification, and whether the UK will be able to continue in the UPC system after Brexit.*

On Thursday, April 26, the UK Government announced that it had ratified the UPC Agreement. For the UPC and the EU unitary patent to commence, at least thirteen countries, including the UK, France and Germany, must have ratified the UPC Agreement. Sixteen countries have now ratified the Agreement, leaving Germany as the only country that is required to ratify but has yet to do so.

The prospect of Brexit had delayed the UK's ratification and, at one stage, there had been doubts as to whether the UK would ratify at all. There is still uncertainty as to whether the UK will be permitted to remain in the UPC system after Brexit. However, it is clear that there are no significant political objections to that in the UK, and it is thought that other European countries are generally keen for the UK to remain involved. There is a question as to whether the CJEU will decide that it is lawful for the UK to remain in the system once it is outside the EU. In its Opinion 1/09, the CJEU ruled that an earlier proposal for a pan-European patent court, which involved non-EU Member States, was unlawful. However, the UPC Agreement acknowledges the primacy of EU law, which may overcome the previous objection.

The remaining hurdle preventing the commencement of the UPC and the unitary patent is ratification by Germany. A claim challenging the UPC ratification has been brought in the German Constitutional Court on various grounds, including an allegation of a breach of the requirement for a qualified majority in the Bundestag and Bundesrat, criticisms of the administration of the UPC and the extent of the independence of the judges, and an allegation of incompatibility with EU law. As a preliminary measure, the Constitutional Court asked the German President not to approve the German legislation providing for ratification (which had been passed by the legislature). The constitutional complaint will initially be considered this year. If the case is dismissed at that stage, the UPC can be expected to commence in 2019 (with the opt-out period possibly starting this year). However, it remains possible that the German Constitutional Court will decide that full consideration of the complaint is required, or that a reference to the CJEU is necessary, either of which would

involve significant further delay of at least a couple of years (and, in turn, complicate the UK's inclusion, as the court would then start after Brexit).

Ratification of the Protocol on Provisional Application that permits certain acts to take place before the court opens, for example, judge recruitment and opting out, is also required, and is proceeding. Ten countries have ratified the Protocol, including France and the UK, and it only remains for Germany and two other countries to ratify the Protocol. Ratification of the Protocol by a number of countries is expected shortly so, as a practical matter, the outstanding step is ratification by Germany, which would take place together with its ratification of the UPC Agreement.

*The Unified Patent Court will be a single court having jurisdiction in all EU Member States that ratify the UPC Agreement. As things stand, that will eventually amount to all current EU Member States apart from at least initially, Spain, Poland and Croatia. The court will hear proceedings involving the new EU unitary patent, classic European patents (that have not been opted out of the system), and Supplementary Protection Certificates (a form of patent extension for medicinal and plant protection products) associated with those patents. It will deal with infringement proceedings (and so will grant pan-European injunctions having effect in all states in which the patent is in force that have ratified the UPC Agreement), declaration of non-infringement proceedings (and so will grant pan-European declarations) and revocation proceedings (and so will be able to revoke a unitary patent and all designations of a European patent within its jurisdiction). It will, therefore, be a court with unprecedented powers that will ultimately have jurisdiction in states with a combined population of at least 350 million people.*

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