

LAW SOCIETY SUBMISSION



RESPONSE TO A REQUEST FOR A SUBMISSION ON THE UNIFIED PATENT COURT

JOINT COMMITTEE ON ENTERPRISE, TRADE AND EMPLOYMENT

AUGUST 2022

ABOUT THE LAW SOCIETY OF IRELAND

The Law Society of Ireland is the educational, representative and regulatory body of the solicitors' profession in Ireland.

The Law Society exercises statutory functions under the Solicitors Acts 1954 to 2011 in relation to the education, admission, enrolment, discipline and regulation of the solicitors' profession. It is the professional body for its solicitor members, to whom it also provides services and support.

The headquarters of the organisation are in Blackhall Place, Dublin 7.

1. Introduction

- 1.1 The Law Society of Ireland ('the **Society**') appreciates the opportunity to respond to an invitation from the Joint Committee on Enterprise, Trade and Employment ('the **Committee**') to make a written submission on the Unified Patent Court (**UPC**). The UPC is an enhanced co-operation mechanism between 25 participating European jurisdictions.
- 1.2 The Society is the educational, representative, and co-regulatory body for the solicitors' profession in Ireland. Our members provide legal advice on matters related to intellectual property (**IP**) law.

2. Ireland's commitment to the UPC

- 2.1 As a member of the UPC system, Ireland will participate in the unitary patent system, which will facilitate Irish people and Irish businesses in securing a single patent which will have legal effect and offer protection across the European countries which are part of the unitary patent treaty network, including Ireland. Before the unitary patent was introduced, patents had to be obtained in each country secure patent protection across the participating jurisdictions. The unitary patents will be enforced by the UPC.
- 2.2 This unitary patent will not replace the existing routes to patent protection in Europe. Instead, it will be an additional, alternative option to the patents currently available to Irish business.
- 2.3 The new UPC system will allow a unitary patent holder to obtain a judgment covering the participating EU countries in respect of that unitary patent. It is also intended that the UPC will eventually have exclusive competence in respect of other types of European patents, as well as the unitary patents. Initially, for a transitional period of at least 7 years, owners of these other European patents will have the ability to opt-out of the UPC.
- 2.4 Ireland has been a signatory to the Agreement on a Unified Patent Court ('the **Agreement**') since 2013, however Ireland has yet to ratify it. While heads of the *Amendment of the Constitution (Unified Patent Court) Bill* were approved by Government in July 2014, we understand that a referendum is considered by the Government to be necessary in order to for Ireland to:
 - a. ratify the Agreement; and
 - b. proceed to participate in the UPC.
- 2.5 Further, it is the Government's stated position that Ireland will establish a local division of the UPC so that businesses can seek protection and recourse in respect of relevant rights in Ireland, where appropriate. This will minimise the need for Irish-based businesses to enforce/defend rights outside Ireland and will play an important part in maintaining Ireland's attractiveness for foreign direct investment. Government formed this view in 2015, when it decided that Ireland should have a local division of the UPC.

3. Establishment of a Local Division

- 3.1 The Society welcomes the Government's commitment to facilitating the establishment of the UPC and a local division of the UPC in Ireland, action on such establishment is time-sensitive. A local division of the UPC means a court sitting in Ireland, dealing with certain UPC issues arising in Ireland.
- 3.2 The Committee will be aware that expected launch of the UPC is imminent, with recent assessments suggesting Q1 of 2023 as a likely timeframe. In the absence of the appropriate legal structures in Ireland for a local division, Ireland businesses will be disadvantaged if unitary patent holders cannot enforce their rights in Ireland.
- 3.3 The practical implications of delay in the establishment of a local division of the UPC is that Irish entities will not be in a position to bring/defend proceedings locally, but will have to travel to litigate in another division of the UPC (likely to be France, the Netherlands or Italy). Further, if Ireland is to participate in the UPC and to host a local division, there are benefits to doing so from the establishment of the UPC system.
- 3.4 When a local division of the UPC is established in Ireland it will have the following benefits:

1. Benefit to the Economy

Permitting effective enforcement and protection of UPC rights in Ireland will incentivise those seeking UPC rights in Ireland and may assist in fostering innovation and commercialisation as well as securing foreign direct investment.

Having a legal system that efficiently protects and enforces IP rights is essential to the growth and development of the economy in Ireland and to Irish businesses competing successfully in international markets. Having a robust IP system in Ireland also supports the case for multinational companies choosing Ireland as a jurisdiction from which to do business. Most patent litigation in Ireland involves the life sciences sector, one where Ireland has been extremely successful, to date, in attracting investment.

2. Litigation Costs

Until a local division of the UPC is established in Ireland, Irish SMEs and other businesses based in Ireland will be obliged to leave the jurisdiction to litigate/defend certain UPC related disputes, thereby increasing the costs and management time involved.

3. Continuing growth of IP capability in the legal profession

Since the creation of the Commercial Court in 2004, the ability and sophistication of Ireland's IP legal community has increased substantially and the availability of domestic legal experts in the area is an important factor for business success, both for SMEs and for multinationals.

Failure to establish a local division of the UPC or to meaningfully participate in the UPC system will detract from the future development of specialised IP legal services in Ireland to date.

4. Recommendations for Action

- 4.1 As above, ratification of the Agreement is to be dealt with by way of referendum. The Rules of Procedure for the UPC come into force on 1 September 2022 and, given that current indications are that the UPC may start to hear cases in the next 6 to 9 months. It is only when the Agreement is ratified that a participating state can fully activate the benefits of the UPC system.

Recommendation 1 - Referendum

The Society supports the Government's policy to schedule the UPC referendum at the earliest opportunity that the Government considers it appropriate to do so.

- 4.2 Draft legislation necessary for the UPC (e.g. the *Amendment of the Constitution (Unified Patent Court) Bill* and any further legislation which will be necessary to establish a local division of the UPC in the State) could be prepared in advance of any referendum. This would facilitate swift action after the referendum but would also help public debate and discourse during the referendum campaign in relation to what is a technical area.

Recommendation 2 - Legislation

Relevant legislation should be progressed to facilitate the efficient and expeditious ratification of the UPC and the establishment of a local division of the UPC in the event of a positive referendum result.

- 4.3 Further ancillary actions will be required to implement the UPC system in Ireland. A local division of the UPC will not form part of the Irish existing courts system so physical and IT court infrastructure will be required. It will be important to involve all relevant stakeholders in discussions around these important issues in preparation for the UPC. These preparatory steps would facilitate swift action after the referendum but would also help public debate and discourse during the referendum campaigns, which are likely to raise questions about the cost of the UPC and how it would operate in practice.

Recommendation 3 – Ancillary Actions

Ancillary preparatory plans could be made before the referendum to establish a local division of the UPC in Ireland. These plans could then be implemented after the referendum.

5. Central Division

We are aware that there has been some discussion around whether Ireland might also consider seeking to replace the UK in respect of the operation of a Central Division of the UPC. This is policy matter for Government to determine. It is a topic that should not be confused with, nor should it delay, establishment of a local division of the UPC in Ireland.

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