



# Key Patent INNOVATIONS

## The Irish Referendum on the Unified Patent Court (UPC)

In June, Irish citizens will vote in a [referendum](#) on whether Ireland should ratify the Unified Patent Court (UPC) Agreement. This referendum relates to how European patent disputes concerning Ireland can be handled in future and how that might differ from how Irish patent disputes are currently handled. Many voters will be unfamiliar with patent disputes and how they are currently handled and may find it difficult to understand the issue they are being asked to vote on.

The aim of this article is to provide context for the referendum and explain the question we, as voters, are being asked to answer.

### What is a Patent?

Patents originated as a means to promote the furtherance of science and technology.

A patent is essentially an agreement between the state (or relevant jurisdiction) whereby inventors who publicly share details of how a new, non-obvious invention works are awarded the sole right to use the invention for a number of years in return. Essentially, this means that only the patent owner, or a third party given permission by the patent owner, can use the invention for this period of time.

It is possible to obtain an Irish patent via the Irish patent office, or through the European Patent Office (EPO). An important point to note about patents is that patents are [territorial](#). This means that an Irish patent, whether issued by the Irish Patent Office or the EPO, covers only Ireland – so a patent owner's right to prevent others from using their invention is only applicable in Ireland. Accordingly, anyone can use an invention protected by an Irish patent provided they do not do so in Ireland.

### How are Patents Enforced in Courts?

As with any legal rights, disputes relating to patents may arise and patent owners and third parties may need to turn to the courts to find a resolution.

Generally, such disputes may fall into one of two categories

- (1) a patent owner may file an infringement action against someone using their invention without their permission;
- (2) a third party may apply to have a patent revoked – essentially asking the court to rule that the patent should never have been issued and that, accordingly, the patent owner does not have the right to prevent others from using the invention described in the patent.

Due to the territorial nature of patents, discussed above, patent disputes can only be heard by courts in the state or jurisdiction in which the patent was issued. In practical terms this means

that you must go to an Irish court to enforce or revoke an Irish patent, and to a German court to do the same with a corresponding German patent. The need to use both courts exists even if the German patent is essentially identical to the Irish patent.

In the above example of a European patent, prior to the UPC, disputes relating to the patent must be resolved by a national court in each individual country. Therefore, a European patent dispute often requires separate similar lawsuits in multiple languages across multiple states. For this reason, even though there are various mechanisms that aim to ensure consistency and minimize duplication of court work, European patent disputes generally take an enormous amount of money and time.

An exemplary scenario is as follows. An Irish company invents a new smartphone and patents the invention. With the phone's success comes knock-offs, which flood the European market and diminish the Irish company's sales. Under the current system, the Irish company would have to sue the infringer individually in every European country where the product is sold, making the process extremely expensive, time-consuming and inefficient.

## What is the Unified Patent Court (UPC)?

The [UPC](#) is an international court, sitting in locations distributed across participating European states. The court can only handle cases relating to patent disputes, such as patent infringement or patent revocation lawsuits.

Participating states must be in the European Union (EU), but it is important to note that the UPC's operation is not based on EU law. Instead, it is a new court system based with a new legal basis – the Agreement on a Unified Patent Court (UPCA), making it essentially independent of the EU. This is why an Irish referendum is required to ratify the UPCA. The UPC has already been operating since 1<sup>st</sup> June 2023 in 17 European states: Austria, Belgium, Bulgaria, Denmark, Estonia, Finland, France, Italy, Germany, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Portugal, Slovenia, and Sweden.

The UPC enables a single court to rule on patent disputes across all participating states. This means that, contrary to how things currently work, if Ireland participate in the UPC, an Irish patent owner could take a single action (in English) to resolve disputes across all of Austria, Belgium, Bulgaria, Denmark, Estonia, Finland, France, Italy, Germany, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Portugal, Slovenia, and Sweden.

In this way, the UPC will improve legal certainty, access to justice, and reduce the cost of resolving patent disputes.

## Is joining the UPC giving up Irish sovereign rights?

Put simply, no.

Currently, most patent disputes concerning Irish companies have their substantive matters first considered in Germany and/or the UK. The courts of these two large states are well-respected and are relatively quick to issue judgements. In the future, regardless of whether Ireland joins the UPC, Irish courts (like every other European court) are also likely to find the reasoning coming from the UPC persuasive. Hence, the UPC is likely to be extremely influential on Irish courts, even if Ireland does not join it – however the burden of filing and/or defending actions in foreign courts will remain for Irish companies and Irish patent holders.

At present, Irish courts have relatively few opportunities to develop patent law themselves. This is no criticism of the Irish judiciary – who do a great job with the patent lawsuits that are handled

in Ireland (normally rare pharmaceutical or EU-law based patent lawsuits) – it is simply because Ireland is not a popular venue for handling most types of European patent disputes.

Joining the UPC will let Ireland establish a division of the court based here in Ireland, likely significantly increasing the number of patent disputes concerning Ireland that will be considered in Ireland. In effect, this will allow Irish courts to play a much more pivotal role in deciding and shaping patent law.

## Could Irish patent courts be developed into attractive venues independently (i.e., if Ireland does not join the UPC)?

Irish courts are not a preferred venue for most European patent disputes mainly due to Ireland's small size/marketplace, lack of speed/experience in processing most types of patent lawsuits, and alternative dispute venues being more established and thus considered safer options.

Given these restraints, outside the framework of the UPC, it is extremely difficult to see how Irish courts could feasibly be developed to strongly compete with the currently favoured venues of larger states: e.g., German patent courts.

## Why is a Division of the UPC an attractive venue?

The UPC has been decades in the making and has been designed, from first principles to be the best, and most efficient, venue for European patent disputes. The UPC has been designed to be self-funding across the participating member states and will therefore not face the funding competition and other pressures faced by national courts.

Additionally, the UPC has a huge advantage of scale both in terms of numbers of patent cases and in the marketplace (all UPC states) across which UPC judgements apply. It is this scale that allows the UPC to be self-financing whilst also aiming to be cheaper and faster than any other European patent court.

Therefore, if the UPC referendum passes, Ireland will be able to host an internationally competitive court for patent disputes without incurring the expense, delays, and risks associated with national patent court reform. This will be a golden opportunity for Ireland, Irish citizens, and Irish companies.

## Why does anyone care where patent disputes are handled?

In truth, it would be a dry legal concern that few people would care about were it not for the fact that courts handling patent disputes bring jobs and money to their locations.

For the case of new UPC divisions, there are new positions for those working for the UPC and supporting the UPC's operation: judges, builders, IT workers, security staff, clerks, etc. Further, as UPC divisions handle highly technical patent lawsuits, there will also be additional positions for lawyers, office staff, accountants, engineers, patent attorneys, technology-consultants, etc.

Beyond the direct employment and opportunities created by the court, the establishment of a speedy, cost-efficient patent court will be of particular benefit to Irish SMEs enabling them to take action locally and through English, to protect their technology across some of the largest economies in Europe.

Indeed, Ireland hosting a UPC division will improve Ireland's competitiveness and attractiveness for business, in particular research and development on a global scale. For any state, good local knowledge of, and support for, patent rights and other intellectual property rights tends to

reassure innovators and encourage investment. Taking this effect into account, Ireland's largest lobby and business representative group estimates the [UPC could be worth over €1.6 billion per year to Ireland!](#)

Therefore, where patent lawsuits are handled has huge real-world implications. This is why states such as Germany and the UK have invested so much time and effort into improving their patent courts over the years. Joining the UPC offers Ireland a unique opportunity to play catch-up without having to invest the same time and money.

## Will there be any Irish character to an Irish UPC division?

Whilst the UPC aims to harmonize operation across its members, it was designed with flexibility to allow local divisions their own character.

Ireland specifically also has a further significant, Brexit-related, bonus: during the decades-long negotiations on how the UPC should operate, European common-law states, including Ireland and the UK at the time, pushed hard for the new court system to include common-law practices. As all other large European states are associated with a different legal system, namely civil law, achieving these concessions took considerable effort and was largely reflective of the pivotal role played by the UK in the development of the UPC.

However, following Brexit, as UPC participating states must be in the EU, the UK was forced to withdraw from the UPC. Happily, the hard-fought UPC common-law provisions remain and, if Ireland joins the UPC, an Irish UPC division could operate with common-law associated practices. Indeed, if Ireland ratifies the UPCA, it would be the only common-law member of the UPC, an Irish division could become very attractive for companies from other common-law countries notably the US, the UK, and Australia. Unfortunately, the longer Ireland delays joining the UPC, the less opportunity there will be for Ireland to promote and influence the adaptation of common-law practices and benefit from this unique opportunity.

## Is there any risk of saying "yes"?

The UPC is not perfect and is still finding its feet. Many have well-founded criticism of aspects of current UPC operation. For example, many would like to see the UPC operate in a more transparent manner and are driving for changes in this direction.

However, the UPC is operating in 17 European states and will remain so regardless of the Irish referendum outcome. The Irish referendum is only on whether Ireland can join the UPC.

Practically, the Irish referendum boils down to simply asking Ireland to choose between whether Ireland joins in the benefits of this new court system or stays outside it. Of course, if Ireland does join the court, we will have a seat at the table in deciding how the UPC evolves over time and how any faults can be improved.

Of course, the UPC may fail. There are no indications of this at the present, and the vested interests of the big UPC states make this unlikely in the foreseeable future, but nothing is infallible. That said, even if the UPC started to fail, Ireland would simply return to its current mode of operation and would have lost little in the process of trying the UPC. Indeed, by demonstrably trying to work the UPC, it would have secured political good-will from the other UPC states.

There is therefore no obvious risk in saying "yes".

## Is there any risk of saying “no”?

As the *status quo* would be maintained in the event of a “no” outcome, you might think there is no risk in rejecting the UPC - this is incorrect.

The UPC is a golden opportunity, to bring investment to Ireland and competitiveness to an underdeveloped part of the Irish economy. Ireland is late to the party and, as always, this has cost dearly. However, Ireland can still grasp the remaining opportunity and minimize further losses but only if it acts quickly. Letting this golden opportunity pass is therefore a significant risk itself.

An arguably bigger risk comes from the fact that this golden opportunity for Ireland is appreciated world-wide. A “no” vote would thus send an awful signal: that Ireland is not keen to support knowledge-based business, and that innovators and manufacturers might be better basing their operations or investments in more appreciative European states.

The opportunity cost and reputational damage of a “no” vote would therefore be immense.

## Are you supporting the UPC because you want a pro-patentee court?

No. The UPC will be available for any entity to use regardless of how the Irish referendum goes. The outcome will only really affect whether there is an option to file at a UPC division in Ireland.

## Why promote a “yes” vote?

Simply because we are based in Ireland.

We believe that, for the reasons detailed above, Ireland has a unique opportunity to benefit its citizens, companies and economy without the need for substantial investments of time and money. For this reason, we believe that it is incumbent on any of us familiar with patent matters and the workings of the UPC to ensure that this opportunity is not squandered.

The opportunity for growth of the Irish knowledge-based economy making Ireland a more attractive venue for research or manufacturing, creating Irish jobs, and adding money to the Irish economy is too good to be missed.

This is why we promote a “yes” vote.

[Anthony Kavanagh](#) welcomes any questions you might have with respect to the above.