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# **The Legal 500 Country Comparative Guides Hot Topic | Patent Litigation**

## **The Upc And Hungary - Facts, Prospects, Strategies**

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# THE UPC AND HUNGARY - FACTS, PROSPECTS, STRATEGIES



## 1. Hungary outside the UPC

The patent litigation landscape in Europe has undergone significant transformations, culminating in the inauguration of the Unified Patent Court (UPC) in June 2023. As it stands, 17 EU member states have embraced the system, but Hungary remains an outlier<sup>1</sup>. While Hungary initially signed the UPC Agreement in 2013 and even hosted the training center for upcoming UPC judges in Budapest, this trajectory shifted in 2018. That year the Hungarian Constitutional Court, in its assessment requested by the Hungarian Government, found the UPC Agreement as an international agreement, which transfers decision-making powers on certain private disputes, that is patent litigation, to an international body not established by the foundational treaties of the European Union, violates Hungary's Fundamental Law. Specifically, this transfer would bypass Hungarian judicial sovereignty, as defined by specific sections of the Fundamental Law. This decision<sup>2</sup> of the Hungarian Constitutional Court has blocked the ratification of the UPCA in Hungary since it is not legally possible without amending the Fundamental Law.

Five years have elapsed without significant legislative action, signaling a decline in Hungary's political fervor for the UPC. This diminishing enthusiasm can likely be traced back to concerns highlighted in a 2014 impact assessment, commissioned by the Hungarian Intellectual Property Office and executed by Price Waterhouse Cooper. The study underscored potential adverse effects of the unitary patent and the UPC on Hungarian SMEs. Central to these concerns were the dramatic increase in patents obstructing domestic industries and innovation in Hungary, the unavailability of patent documents in the Hungarian language, and the logistical and financial challenges of litigating in a different EU country, particularly in unfamiliar languages. Given the inclination of Hungarian SMEs to occupy the defendant's role, these issues become even more pressing. In the absence of any sign of the continuation of Budapest's role in hosting subsequent UPC judge training sessions, Hungary's distance from the UP/UPC framework appears likely to persist. This is the general expectation the more because the Fundamental Law may only be amended by two third majority of the MPs. While the present government holds this majority in the Parliament, considering views widely held about current political dynamics in Hungary, any motion is highly unlikely from the government that would result in an amendment of the Fundamental Law which would allow more sovereignty transfer. And, furthermore, given widely shared perspectives on the current political landscape in Hungary, there's a prevailing belief that that it is highly unlikely that the opposition would be able to secure a two-thirds majority in upcoming elections in 2026. Consequently, it's hardly anticipated that Hungary will ratify the UPC agreement in the near future.

## 2. Patent system in Hungary

As Hungary remains uninvolved in the UPC, it's pertinent to understand its domestic patent and in particular patent litigation system.

Having joined the EPC in 2003, both national and validated European Patents have become integral to

the patent landscape. On the prosecution front, the Hungarian Intellectual Property Office (HIPO) is emerging as a preferred “Office of First Filing”. This is not only due to its ability to offer a wide array of search and patentability evaluation services at the outset of an application in English but also because of its involvement in numerous PPH collaborations.

As for patent litigation, historically, the system was strictly bifurcated: revocation actions commenced at the Hungarian Intellectual Property Office, entirely separate from infringement claims litigated at the Metropolitan Court, Budapest, with exclusive competence for such matters. As customary practice, infringement proceedings were inevitably stayed until the final and binding conclusion of revocation cases at the Hungarian IP Office or opposition actions at the EPO. However, preliminary injunction requests moved ahead without a stay and were – still are – typically decided within about a month, at first instance. With judicial practice developing over frequent pharmaceutical patent litigations presided over by panels comprising legal and technical judges, has grown into a rich case law (of course relative to the size of the country), especially in handling preliminary injunctions. Eventually, patent litigation, characterized by bifurcation, gained a reputation for its patentee-centric inclination. However, a legislative change has affected the scenery when an amendment to the Patent Act<sup>3</sup> softened bifurcation. This reform introduced greater leeway for defendants, permitting them to lodge revocation actions directly as counterclaims in infringement suits and broadened the range of validity discussions during preliminary injunctions. The ramifications of these adjustments on patent litigation practice are still unfolding.

### **3. Will the UPC change the characteristics of patent litigation in Hungary?**

Patent litigations in Hungary in parallel with other European jurisdictions is a fairly common occurrence, especially in the pharmaceutical field. In the Hungarian proceeding, parties frequently reference decisions from renowned foreign courts, especially German and UK institutions, viewing that these foreign judgements serve as a repository of legal reasoning and precedent that might influence the case at hand.

Yet, the Hungarian IP Office and the Metropolitan Court and Appeal Court deciding on the case have historically shown reluctance to derive guidance from these foreign verdicts. The Metropolitan Court, when delivering judgements on preliminary injunctions, consistently emphasizes its autonomy from foreign court decisions. It’s a firm stance that showcases its confidence in the Hungarian legal framework and its interpretative skill.

In a similar vein, while the Hungarian IP Office, when relevant, tends to stay its proceedings in anticipation of judgements from the European Patent Office (EPO) or the Court of Justice of the European Union (even without legal obligation) on interconnected matters, it is rare (if not unprecedented) for it to directly reference or integrate perspectives from foreign civil court decisions in their final conclusions.

Such a pronounced sense of judicial independence sends a strong signal and suggests that the Metropolitan Court might maintain its distinctiveness even in the face of UPC decisions.

### **4. How Will the UPC Affect Companies Operating in Hungary?**

Merely being outside the UPC doesn’t immunize Hungarian entities from its influence. It goes without saying that European Patents held by Hungarian entities or individuals, which haven’t been opted out of

the UPC, come under its competence and could be targets for central revocation attacks as well. Furthermore, due to the provisions of the Brussels Recast Regulation on special jurisdiction, Hungarian entities operating in UPC states might face potential infringement actions at the UPC divisions. However, more intriguing issues arise for potential defendants.

Firstly, Hungarian entities even if operating domestically but being potentially exposed to infringement actions with respect to a validated EP must diligently monitor the UPC's evolving practices, particularly its interpretation and application of Article 71 (b) and related provisions of the Brussels Recast Regulation. Awareness of early UPC decisions, in particular those of the Appeal Court in this aspect, will help them to assess risks of being joined as co-defendants in UPC proceedings based on Article 8 (1) of the Brussels Recast Regulation or facing preliminary injunctions based on Article 71b (2). Reportedly, the question of UPC's long arm jurisdiction was already brought up in a preliminary injunction case heard by the Baltic Regional Division in Helsinki in September 2023. Undoubtedly, jurisdiction will be a hot topic during the UPC's early and maybe not so early days, with pioneering entities testing various strategies. Observing these unfolding disputes will be crucial for Hungarian entities.

Another point of challenge – or opportunity – is connected to the enforcement of UPC decisions in Hungary. Consider a scenario where a UPC decision targets a firm that is not operating in Hungary directly, rather through a legally independent subsidiary or affiliate. Under Hungarian enforcement laws, the affiliate might not be seen as the direct recipient of the UPC's order, hindering its enforcement. Historically, Hungarian courts have refrained from imposing obligations on uninvolved parties and the same approach may be expected when it comes to enforcement questions. Another potential hurdle is the specificity of injunctions. Unlike many UPC countries that might issue broad injunctions, the Hungarian courts' injunctions are very specific, identifying by at least the name of the product of the defendant in question. Given that Hungarian courts and authorities are unaccustomed to broader injunctions, this could also lead to practical challenges in enforcement.

Furthermore, as the Unitary Patent itself in its current form does not grant patent holders exclusive rights for the entire area of the single market, it is clear that a Unitary Patent that does not have a validated European Patent counterpart in Hungary will not be able to serve as basis for any claim or procedure in Hungary.

The above issues might prompt patent holders to consider independent patent infringement proceedings in Hungary and validate their European patents. However, it remains uncertain whether the Hungarian infringement court would mirror the UPC's decisions. With diverse interpretations of what constitutes an infringement in Europe, there may be diverging outcomes in Hungary. For example, importing and storing a product that may fall under a patent is considered an act of infringement in Hungary – on the basis of Art. 19 (2) of the Patent Act, traditionally interpreted restrictively by the acting courts – only if done with the intent of distribution or sale. Furthermore, exporting is not listed in the mentioned article and has not been deemed infringing activity so far. These differences, along with the expectation for plaintiffs to provide comprehensive evidence, may present hurdles for patent holders.

It's still unclear how Hungarian practices will align with the UPC's evolving case law. Will they enhance the court's efficiency through streamlined enforcement, or will their strict enforcement criteria and unique infringement interpretations turn Hungary into a haven for entities facing UPC litigation?

## 5. Takeaways and Strategies for Patentees and Potential Defendants

Navigating the patent landscape in Hungary, especially in the shadow of the UPC, is a delicate endeavor for both patent holders and potential defendants. For patentees, the distinct nature of Hungary's judicial decisions will continue to necessitate keen awareness of local nuances.

Potential defendants, on the other hand – while have to remain vigilant about the UPC's evolving case law on jurisdiction – may perceive Hungary's judicial autonomy as an opportunity. The independent nature of Hungarian courts could, in some cases, lead to more favorable outcomes than in jurisdictions strictly adhering to the UPC's viewpoints.

Furthermore, the complexities of enforcing UPC decisions within Hungary offer potential defendants a window for strategic considerations, which might provide a buffer against certain litigation pressures.

Initiating parallel proceedings – both within Hungary and at the UPC – could offer a comprehensive protective framework for patentees, albeit with potential cost implications. The weight of evidence in Hungary, resting predominantly on the plaintiff's shoulders, underscores the need for a solid evidential foundation.

Finally, both sides must remain updated on legislative shifts, such as Hungary's 2022 reforms allowing the merger revocation and infringement actions, and how this will affect Hungarian patent litigation practice, as we know it.

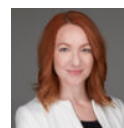
In addition, the intricacies of enforcing UPC judgments in Hungary, especially in a scenario involving independent legal entities operating in Hungary, highlight the importance of a proactive strategy. It's essential to anticipate potential enforcement hurdles, fine-tune legal tactics accordingly, and be prepared for the evolving interplay between the UPC and Hungary's patent landscape.

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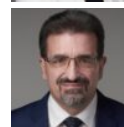
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