UPC benchmarking study

Opt in / Opt out: where do you stand?

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“Companies are about to see the biggest ever shake-up of European patent legislation.”
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For years, companies have demanded an easier and cheaper way to protect and enforce their patents in Europe rather than litigating separately in every country, each with its own language and legal peculiarities. Now that the long-delayed and much-debated European unitary patent and Unified Patent Court (UPC) are nearing reality, many executives seem to have forgotten that they are about to see the biggest ever shake-up of European patent legislation. That means big changes to the way they maintain exclusivity for their technology and products in Europe.

The UPC is expected to come into effect in 2016 and companies cannot prepare for it overnight. If they don’t engage strategically with the changes now, they could find their competitors dragging them into UPC or national patent litigation on their terms.

The new system has received a faltering reception from companies across the globe, but its impact is likely to be significant. The UPC will offer patentees the ability to obtain broader remedies than those currently on offer in the U.S., with a larger customer base impacted and injunctions that are easier, cheaper and quicker to obtain. Costs are estimated to be at least five times lower than in the U.S.

These advantages alone mean there is likely to be a shift towards Europe’s UPC as a forum of choice to rival the U.S. for major patent disputes. Indeed, it seems that the corporate consensus, once dominated by a desire to keep the status quo and opt out of unitary protection and the UPC for important patents, has shifted towards their use. Our survey suggests that the majority of patent owners will file unitary patents under the new system.

Applications will be quicker and cheaper under the UPC because a firm need only apply for a single patent, not multiple ones, and enforcement will become more efficient and consistent because of the possibility of gaining a pan-European decision rather than having to litigate country by country. Of course, such efficiency brings with it greater risk: companies which lose unitary patent protection or a patent litigation case in the UPC could be left with no exclusivity for their products – or, worse still, have their business or products locked out of the entire continent.

The stakes are high, and companies must start thinking seriously about how they will protect and enforce their patents in Europe.

The task can be huge for companies sitting on hundreds, even thousands, of patents. They first need to develop a thorough understanding of the UPC’s strategic implications. Companies will have a seven-year transition period in which they can choose, patent by patent, whether they will be enforcing in the UPC or whether they will formally opt out of it and continue to litigate in national jurisdictions.

That means they need to audit their patent portfolio to identify their most important patents – their crown jewels – and then decide how best to protect them across Europe. They will also need a strategy for their secondary patents and for their product pipeline. Here, the lower costs of the new framework and the geographic ‘one-stop’ coverage

“There is likely to be a shift towards Europe’s UPC as a forum of choice to rival the U.S. for major patent disputes.”

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might give them new opportunities to gain, in effect, a monopoly position for their products in the many EU countries where that has not been realistic to date.

While such an audit sounds technical, the dangers of not engaging with the UPC at a senior, strategic, level are stark. The UPC will make it easier for competitors to challenge patents across the whole of Europe and to clear a pan-European path for their products. Companies that fail to prepare in time might find themselves forced to react when a rival product achieves pan-European protection or a competitor threatens a pan-European injunction.

So the urgency is genuine and, equally, the reasons to delay are easing. The haze is clearing over how the UPC will work, and whether it will be safe and cost-effective to rely upon. A recent report commissioned by the European Patent Office cites academic research suggesting that total savings to business will be between EUR148 million and EUR289m annually under the new system. Rather than raise costs, therefore, this is one regulatory change that could help businesses in Europe to improve margins, while at the same time boosting their ability to operate across markets.

It should also improve companies’ access to finance. Patents are often used as security against loans and being able to provide a patent with European-wide protection, rather than for just one or two markets, should prove more attractive to lenders.

Elsewhere, concerns about the quality of judgements by the new court are beginning to ease as the system nears launch.

Many hesitated to commit to using the new system because experienced national judges might be replaced by inexperienced practitioners on the UPC, trained through a new school in Budapest. But commentators have been encouraged by the number of highly regarded national judges coming forward for the new patent court. There have been 1,100 applicants, of whom 130 are very experienced patent judges who would need little training. That suggests the UPC will, in time, be an effective forum.

Ultimately, however, companies cannot afford to wait until they have an absolute and final answer to every question. There is now evidence enough for them to decide whether or not to use the new system. Time is running out before the UPC becomes active. Companies can’t afford to hesitate over one of the bigger strategic decisions their organisations will face for many years.
THE SURVEY RESULTS

Two important findings emerge from our survey.

The first is that most firms support the concept of the unitary patent and the UPC and expect to use them: some three-quarters of respondents say that being able to take out a single pan-European patent will help their firm, and more than half expect unitary (rather than national) patents to dominate future filings.

The second finding is that, while many companies are still undecided and uncertain about how the process will work, they anticipate using the UPC for ‘crown jewel’ patents, where they foresee the need for enforcement. The UPC is seen as offering greater legal certainty and more efficient pan-European portfolio management. Companies tend to be less decided over secondary patents less likely to be challenged. For these, they want more clarity on the cost of using the UPC, and on the way it will function, before making a definite decision on whether or not to use it.
Almost three-quarters (74%) of respondents expect that the UPC will be positive for their firm — and only 15% expect it to have negative consequences for them. But there is a degree of uncertainty. More than half of those expecting benefits for their company qualified their answer with ‘probably’. On the other hand, while 31% were certain that the UPC would benefit them, only 1% felt that it would definitely not.

EU-headquartered businesses closely matched the overall mood (73% seeing some benefit), but interestingly, non-EU-headquartered businesses were marginally more positive, with 80% saying ‘yes’ or ‘probably’.

Telecoms, media and technology (TMT) companies were strongly positive, with 91% expecting to see benefits; industrials were less so, but two-thirds were still broadly in favour. Most strikingly, the survey indicates that companies with large patent portfolios seem to be the least positive. Just 41% of firms holding more than 500 patents thought the UPC would help them, compared to 84% of firms with fewer than 50.
Preparations for the UPC are mixed, but overall, 37% say that they have not got beyond the early stages of preparation. Only 42% have reached a decision over whether to file new unitary patents or continue to use the classic European patent or national systems. Less than 40% have identified the patents they will opt into or out of the new regime, or the national law(s) they would prefer for the enforcement of future patents. Just 37% have audited their portfolios to identify their crown jewels.

The level of preparation broadly echoes the level of benefits firms expect to receive from the UPC. Over half of industrial and manufacturing firms, who perceive the least benefit from the change, say they are still not beyond the early stages, compared to less than a third of companies in more bullish sectors such as TMT and pharma. The majority (55%) of firms holding 500-plus patents are also yet to get beyond the early stages of their preparation, which is high compared to those with mid-sized patent portfolios. However, responses to other questions on the survey show that those with large portfolios are aware of the size of the task ahead of them. Non-EU businesses appear to be better prepared, with over half (59%) saying they have identified which patents to opt in and which to opt out and (52%) have determined whether they should file unitary patents. By comparison, only 34% and 40% of EU respondents have got this far.
Are senior management clear about the implications?

Not very, but with large variations by country and sector.

There is some awareness but they have not fully grasped the implications this change could have for our business.

This is not a strategic priority for our management as it will have little impact on our business.

There is insufficient awareness and understanding of the implications for our business.

Senior management are fully engaged on this issue and appreciate the potential implications.

Don't know.

Other.

Question asked: Which one of the following best reflects whether there is a sufficient level of awareness at a senior level in your business about the UPC, and in particular the implications of opting-in and opting-out for your business?

Senior management are not yet treating the UPC as a priority. Only 13% of respondents say that senior management is ‘fully engaged’ and appreciate the UPC’s implications. Another 39% say that there is some awareness, but admit that the implications for the business have not yet been ‘fully grasped’. Close to a third (29%) say that it is not ‘a strategic priority’ for them.

Nearly a third (31%) of EU businesses do not see this as a strategic priority, compared to 21% of non-EU businesses. However, over twice as many EU companies as non-EU ones (15% as opposed to 7%) believe senior management are fully engaged. By sector, management in TMT are more focused on the shift than others, with 20% ‘fully engaged’.

This compares to only 8% in industrial/manufacturing companies. Firms with mid-sized patent portfolios are the most likely to see the strategic relevance of the UPC and have some level of engagement from senior management.
Question asked: Roughly what per cent of your patent portfolio are you opting in, opting out, or remain undecided about?

68% of portfolio

7%
Only 7% of respondents have decided what to do with their entire portfolio

24% of portfolio

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Will you opt in or opt out?

Most are undecided, but the trend is towards opting in.

Most respondents remain undecided about whether to opt in or opt out of the UPC for a large number of their patents. Indeed, only 7% of respondents have already made decisions on all their patents. On average, no decision has been made on over two-thirds (68%) of the patent portfolio. Where a decision has been made, however, the average proportion of the portfolio being opted in is more than double that being opted out.

That indicates that companies may engage with the UPC more than previously anticipated, even though they currently remain undecided on the bulk of their portfolio. Close to half (49%) of those surveyed said that they would definitely opt in at least some of their patents, while only 15% said they would definitely opt out some of them.

EU and non-EU companies have so far made decisions on roughly the same proportion of their portfolio, with less than 1% difference between them across all three options. Companies with large patent portfolios are relatively advanced compared to others and have made decisions on just over half of their portfolio, deciding to opt out slightly more patents than they have opted in. Among the sectors, respondents from TMT companies are most enthusiastic about opting in patents, although they, too, have made decisions on just over a third of their portfolio.

“The economics of a single enforcement action outweighs the risk of Europe-wide invalidation.”

Dutch head of IP strategy.

9%

of portfolio
Which patents are you opting in?

The crown jewels are being opted in to provide more legal certainty and lower costs.

**Question asked:** For those patents you intend to opt in, are they:

- **13%** A mix of patents of varying value
- **6%** Among our least valuable patents (secondary)
- **82%** Among our most valuable patents (crown jewels)

**Question asked:** For those patents you intend to opt in, was it because:

- **8%** We are unsure whether we may need to enforce these patents
- **7%** We do not anticipate a need to enforce these patents
- **85%** We anticipate the need to enforce these patents
Why?

It will provide greater legal certainty for our patents on a pan-European basis. 77%

The process of managing our patent portfolio across Europe will be far more efficient. 68%

We believe we will be able to achieve a higher level of damages under the UPC. 53%

It will be cheaper to enforce patents on a pan-European basis. 48%

We want to opt in a small number of patents in order to test the system and gain a working understanding of it before committing to it fully. 40%

We believe we may be able to obtain injunctions (potentially pan-European) more easily. 39%

We perceive the risk of not opting in to be too high for us as a business. 31%

Question asked: What are the main reasons that your business intends to opt in some or all of its patents?

While companies still have many decisions to make overall, respondents overwhelmingly say they will use the UPC to protect their most important patents. The vast majority (82%) of patents that companies say they will opt in count among their crown jewels. The reason is also clear: 85% of respondents expect that they will need to enforce those patents. While the smaller sample size for non-EU companies responding to this question makes it harder to draw clear conclusions, all of those we spoke to headquartered outside the EU and who say they are opting in, are opting in their crown jewels, and they all anticipate the need to enforce them. This would seem to support our argument that Europe could become the forum of choice for global IP disputes.

When asked why opting in makes more sense to them, respondents point to two key factors, indicating a level of confidence in the effectiveness and efficiency of the UPC once it becomes reality. Firstly, more than three-quarters (77%) say that the UPC gives them more legal certainty across the whole continent. And secondly, over two-thirds (68%) believe it will make portfolio management across Europe more efficient. Just over half of the opt-in respondents (53%) also expect to be able to win greater damages under the UPC.

The majority of non-EU responses indicate their primary driver is also legal certainty, but indications are that cost may also be a major factor, with far more non-EU than EU-headquartered companies saying it will be cheaper to enforce patents on a pan-European basis.
What makes it hard to decide?
Handling secondary patents is the big issue.

Question asked: For those patents you are still undecided on, are they:

- **11%**
  - A mix of patents of varying value

- **87%**
  - Among our least valuable patents (secondary)

- **1%**
  - Among our most valuable patents (crown jewels)

Question asked: For those patents you are still undecided on, is that because:

- **40%**
  - We are unsure whether we may need to enforce these patents

- **57%**
  - We do not anticipate a need to enforce these patents

- **2%**
  - We anticipate the need to enforce these patents
Why?

We are not yet clear on the costs for us. 67%

Lack of clarity on how the UPC will work in practice – ie we are still waiting for detail in a number of areas. 62%

It’s still a long way off. 52%

We are still in the process of conducting our portfolio audit. 45%

Lack of resource internally. 34%

We have not been able to get senior management to engage sufficiently on the subject to make a decision. 34%

Question asked: What are the main reasons that your business is still undecided as to whether it will opt in or opt out some or all of its patents?

With companies concentrating on protecting their crown jewels, the secondary patents make up the bulk of the undecided category (87%). The majority (57%) of firms say they are undecided because they do not expect to have to enforce these patents, while 40% say they are unsure whether they will need to enforce or not. This highlights the pressing need for a decision on the outstanding issue of costs. Only when this is clarified will firms be able to undertake a proper cost-benefit analysis on their less valuable patents.

The barrier that lack of clarity on costs and process is creating to businesses’ decision-making is borne out by the research. Two-thirds (67%) of respondents say the main reason they remain undecided is due to not yet being clear on the costs for their business and 62% say they are waiting for more detail on how the UPC will work in practice. Just over a half (52%) of respondents say they have not yet reached a decision on secondary patents because the UPC remains a long way off, with a similar number saying they are still in the process of auditing their portfolio. A third of respondents say that they lack the resources internally, or that senior management are insufficiently engaged.
Which patents are you opting out?

The few respondents deciding to opt out are worried about the UPC’s effectiveness.

**Question asked:** For those patents you intend to opt out, are they:

- **0** Among our least valuable patents (secondary)
- **11** A mix of patents of varying value
- **6** Among our most valuable patents (crown jewels)

**Question asked:** For those patents you intend to opt out, is it because:

- **13** We are unsure whether we may need to enforce these patents
- **6** We anticipate the need to enforce these patents
- **4** We do not anticipate a need to enforce these patents

Note: Frequencies are shown rather than % due to low sample size.
Why?

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<td>Concerns over the quality of judgements from the new courts in the UPC.</td>
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<td>Uncertainty over how the system will work in practice.</td>
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<td>We want to retain the possibility to design enforcement strategies jurisdiction by jurisdiction and don’t want to put all our eggs in one basket.</td>
<td>13</td>
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<tr>
<td>Concerns over the ability of litigants to game the system.</td>
<td>12</td>
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<td>Concerns over bifurcation.</td>
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<td>We have confidence in the current national patent enforcement systems.</td>
<td>11</td>
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<tr>
<td>Potential increased cost for litigating under the new system.</td>
<td>10</td>
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<td>It is sufficient for us to enforce a patent in one key jurisdiction in order to resolve an infringement issue.</td>
<td>8</td>
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<tr>
<td>We do not validate patents in enough jurisdictions to warrant opting in.</td>
<td>7</td>
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<tr>
<td>Not enough jurisdictions have signed up.</td>
<td>4</td>
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<td>Other.</td>
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Note: Frequencies are shown rather than % due to low sample size.

**Question asked:** What are the main reasons that your business intends to opt out some or all of your patents from the UPC?

Only 15% of our respondents – 23 companies – have definitely decided to opt out at least some of their patents. As a result, it’s hard to draw clear conclusions on the reasons for opting out. The responses we have suggest that those who have decided to opt out so far have focused not on their lowest-value secondary patents, but either on crown jewels or a mixture of high-and-low value ones. In most cases, respondents are unsure whether these patents may need to be enforced. The main reason people offer as to why they are not opting into the UPC reflects concerns over its effectiveness, not over the cost and time it would take to protect minor holdings. The biggest concern is over the quality of the UPC’s judgments. More than half are also uncertain how the new system will work, and are motivated by their desire to spread risks over different national jurisdictions.
How clear is the opting-in/out process?

Not bad, but could be improved.

Given the importance of the decisions companies must make and their potential impact, clarity is paramount. Only 10% of respondents feel the process is ‘Very clear’. With 90% of respondents’ views ranging from ‘Not clear at all’ (21%) to ‘Somewhat clear’ (58%), there is obviously room for improvement, but this may not come until the Court of Appeal for the UPC provides clarity.

A more optimistic view of the findings could be that 68% of respondents feel the process is either ‘Very clear’ or ‘Somewhat clear’. By this measure, 64% of EU-headquartered companies say the process is broadly clear, while 82% of those headquartered outside the EU believe this to be the case – non-EU companies are more hesitant with 79% saying it is ‘Somewhat clear’.

Among sectors, only the life sciences/pharmaceutical sector feels confident about the clarity of the processes – well over a quarter of those in the industrial/manufacturing and TMT sectors say they have no clarity. Almost a third of companies with the largest portfolio size say they are still analysing the rules – by far the largest share.
Can you opt into the UPC if an adversary files an action?

Who knows, is the worrying answer.

If an adversary files an action against a patent that you have opted out, you are still able to opt back into the UPC once the action been resolved.

If an adversary files an action at a national court against a patent that you have opted out, it prevents opting back into the UPC.

Don’t know.

50%

31%

19%

Question asked: There appears to be variance of opinion among IP practitioners as to the relationship between opting out and adversaries taking action against those patents opted out. To help ascertain whether there is, in fact, a lack of clarity around this point, we would like to know which of the following you understand to be true.

To test the level of clarity among those responsible for their companies’ European patent portfolios, we asked respondents whether they believed they could decide to opt back in, if an adversary filed an action in a national court. Respondents have mixed interpretations. Half say it is possible to opt back into the UPC once such an action has been resolved, but a third say that the adversary filing prevents opting back in, while the rest simply don’t know.

Firms in the EU are less likely to know – over a fifth of EU-headquartered respondents say they don’t know whether they could, compared to just 10% of non-EU companies. There are some big differences of opinion between business sectors. Nearly three-quarters of TMT firms believe they can opt a patent back in once a dispute has been resolved, for example, compared to less than a third of industrial/manufacturing companies. Similarly, big companies completely disagree with small firms’ interpretation of the rules here, with a majority of the large firms (52%) believing resolution of a dispute prevents them from opting back in – this compares to just 26% and 27% for small and medium companies, respectively.
How will you handle future filings?

The majority expect to file mostly unitary patents.

**Question asked:** We expect unitary patents to make up:

- None of our future filings: 4%
- The minority of our future filings: 31%
- The majority of our future filings: 53%
- All of our future filings: 3%
- Don't know: 10%

**Question asked:** We expect classic European patents with national designations to make up:

- None of our future filings: 9%
- The minority of our future filings: 57%
- The majority of our future filings: 25%
- All of our future filings: 9%

**Question asked:** We expect national filings to make up:

- None of our future filings: 24%
- The minority of our future filings: 62%
- The majority of our future filings: 7%
- All of our future filings: 7%

More than half (56%) of respondents expect unitary patents to make up all or most of their future filings, with just 4% saying they will not use them at all. However, most respondents do expect to continue using classic European patents and national filings, even if to a more limited extent, suggesting that they have some role to play in the new order. Almost a quarter (24%) of respondents say they will stop filing national patents, and just 9% say they will no longer use classic European ones.

As with existing patents, the expected take-up rate for new filings largely hinges on whether firms expect to benefit from the UPC. Companies with larger portfolios and in the industrial/manufacturing sector are much less likely to see a major role for unitary patents. Companies headquartered outside the EU are more bullish about the unitary patent, with 72% suggesting it will make up all or most of their future filings.
## What makes it difficult to prepare?

Many different reasons, often depending on company culture.

Getting clear answers to questions we have regarding how the system will work in practice and its various implications for our business, to help inform our decision-making. **71%**

Getting enough resource internally to properly audit and review our patent portfolio. **68%**

Ensuring we have the right level of expertise and understanding of the new system within the team to undertake the analysis required to inform our decision-making. **59%**

Keeping up with and monitoring developments and their implications for our decision-making. **57%**

Getting management sufficiently engaged with this issue and realising its importance for our business. **42%**

**Question asked:** What are your biggest challenges in preparing for the UPC?

Respondents identified multiple challenges in preparing for the UPC. More than two-thirds say it is difficult to get clear answers on the mechanics and potential implications and cite internal challenges such as lack of resourcing to audit the patent portfolio. Non-EU-headquartered companies (72%) say ensuring the right level of expertise within the team to undertake the analysis required for decision-making is a big challenge, along with lack of resources (76%).
Opt-in orphans: the dangers of abusive conduct

Interpretations differ about patents that are not formally opted out

Much of the worry and confusion surrounding the introduction of the UPC is starting to lift as IP practitioners get their heads around the new system. But there are still important areas where interpretations of the rules differ, leaving companies with dangerous gaps in their understanding of the strategic implications of their decisions during the seven-year shift to litigating in the UPC.

One remaining area of confusion, where clarification is urgently needed, surrounds the treatment of patents that have not been formally opted out of the UPC. When a patent holder decides formally to opt out of the UPC system, the situation is clear: the UPC has no jurisdiction over the rights concerned, even when the initial seven-year transitional period ends, but the patentee can opt back into the UPC system as long as no national court proceedings have been launched.

Yet our survey finds a deep confusion about this among patent owners. Asked whether action through a national court would bar them from opting back into the UPC, half of the respondents said that it would not (once the action was resolved). However, a substantial minority (31%) believed that it would, and a fifth said they simply did not know. It is an issue that needs clarifying urgently because the practical consequences of either option would be severe.

Where there is no formal opt-out, the situation is far murkier. These patents are “opt-in orphans”. The patent can be litigated during the transitional period in either the national courts or the UPC, but what happens to the patent’s status once litigation is commenced? Is any party then bound to litigate the patent in that court until it expires? Or can the patent still be enforced or challenged in different courts, both the UPC and at national level? It is not clear which court should take care of these orphans.

If national court proceedings arise first, then potentially the patent cannot be litigated in the UPC and the patent has effectively been opted out of the system without going through the formal opt-out process. This right could be abused, for example by initiating actions against a subsidiary which would then be withdrawn.

Outside companies could also force an undecided patent holder out of the UPC system by bringing lawsuits before national courts. An extreme example would be a generic company launching a revocation action against, for example, the Latvian part of a blockbuster patent. The company could then withdraw the action, having effectively forced the patentee out of the UPC system. This goes entirely contrary to the original intention to leave as many patents as possible in the system.

Forcing patent cases into national jurisdictions could also cause problems over transparency. Since not all national court cases are published, companies wanting to challenge a patent could find it hard to know whether it has already been subject to litigation in a state, and therefore falls outside of the UPC system.

The second possibility, where the UPC acts concurrently with alternative national courts, would create serious problems too. If a patent is being challenged in different courts, for example, there would be complex related case issues; there could also be contradictory decisions if, for example, a national court upholds a patent and the UPC revokes it. This is the very type of clash that the UPC is designed to avoid. Greater clarity is urgently required for these opt-in orphans.
Methodology

This survey consists of 152 interviews completed with individuals who have responsibility for, or oversight of, their company’s European patent portfolio and decisions regarding the Unified Patent Court. Interviews were completed by YouGov online and by telephone between 1 April 2014 and 16 May 2014. Respondents are all drawn from the European headquarters of large and medium-sized, patent-owning enterprises (predominantly in the UK, Germany, France and the Netherlands), of which 81% have their global headquarters in Europe, while 19% are headquartered outside Europe. 88% of respondents are drawn from the life sciences/pharmaceutical, telecoms, media and technology, and industrial/manufacturing sectors.
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