



Towards a unitary European Union (EU) patent and unified patent court... fait accompli?

This article summarises the current system for obtaining and enforcing patents in Europe and the key features of the proposed unitary European patent and Unified Patent Court. The implications of the proposed changes for patent applicants are also briefly considered.

It has been a long time in coming, but the introduction of a unitary European patent and Patent Court looks increasingly likely to become a reality.

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The Current System

The European Patent Convention provides a centralised procedure for obtaining European patents. Under the current system, a European patent application filed at the European Patent Office (EPO) gives applicants the option to protect an invention in one or more European countries that are members of the European Patent Organisation. Successful completion of a centralised search and examination procedure conducted by the EPO leads to issuance of a “European patent”.

It is then necessary to “validate” any patent granted by the EPO on a country-by-country basis in each of the individual EU countries in which patent protection is required. In practice, this requires registering the granted European patent with national Patent Offices, and in some cases filing translations, and results in a bundle of national patents rather than a single patent that can be renewed and enforced centrally. Following grant of a

European patent, renewal fees (required to keep the patent in-force) are payable to those national Patent Office(s) in which the patent has been registered.

Patent litigation in Europe (for example to contest infringement and/or validity matters) is currently conducted before national courts. National courts may refer questions concerning the interpretation of EU law to the Court of Justice of the European Union (CJEU) in Luxembourg. However, the CJEU does not issue decisions in favour of a particular party to the litigation.

Why change?

The need for post-grant patent validation and renewal fee payment at a national level results in increased costs for applicants than would otherwise arise if a single, EU-wide patent were available.

Moreover, the absence of a unified EU Patent Court means that parallel litigation proceedings concerning the same patent often need to be conducted in more than one European country. This process is complex, costly and often unpredictable in terms of outcome. Although clearly undesirable, it is not uncommon for national patent courts to reach different decisions concerning validity and/or infringement of the same patent based upon their own differing interpretations of EU law.

The Proposed System

Under the proposed system, the filing and examination procedure before the EPO will remain unchanged. However, once a patent has been granted, the proprietor may proceed with one of the following options:

- A European patent with individual territorial protection in the designated Member States (as available under the current system); or
- A unitary European patent with unitary territorial protection in the 25 Member States participating in the unitary patent cooperation scheme (excluding Italy and Spain); or
- A combination of (i) and (ii), by requesting a European patent in a selection of those EU member states not participating in the unitary patent cooperation scheme.

The unitary European patent will therefore be an optional “adjunct” to traditional national and European patents. Once granted by the EPO, a unitary European patent will be automatically valid throughout all participating EU Member States, thereby avoiding the need to validate the patent on a country-by-country basis.

The proposed Unified Patent Court will comprise a Court of First Instance, a Court of Appeal (based in Luxembourg) and a Registry. The Court of First Instance will comprise a Central Division based in Paris with further branches in London and Munich. Each division of the court will have responsibility for different areas of technology as follows: London (chemistry and life sciences, including pharmaceuticals, biotechnology and medical devices); Munich (mechanical engineering); and Paris (remaining technologies). It is intended that the court will have exclusive jurisdiction over any litigation

concerning all European patents granted by the EPO, including unitary patents.

What's next?

Implementation of the unitary European patent and Unified Patent Court will require approval of an implementing Regulation by European Parliament. Whilst a considerable amount of progress has been made over the past year in drafting the Regulation, there remain a number of Articles whose inclusion in the Regulation remains controversial. These Articles govern which actions will be considered acts of infringement of a European unitary patent and the rights conferred by a unitary European patent.

Further debate by the European Parliament concerning the draft Regulation is anticipated in 3Q 2012. If implemented, the new Regulation is set to take effect on 1 April 2014.

Conclusion

It is generally perceived within industry that the introduction of a unitary European patent and Unified EU Patent Court would bring benefits in terms of reduced costs for obtaining and enforcing patents in Europe and should result in improved business certainty where litigation is necessary. To that end, the recent progress made by the European Council is to be welcomed. However, whether there exists sufficient political momentum to overcome the last remaining obstacles to implementation remains to be seen.

Future updates on this matter will be posted on our website at www.aathornton.com.

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