

# Unified Patent System for Europe

## Better Protection for Innovations through a more Uniform and Cost-effective Patent System

After almost 50 years of development, the Unitary Patent and the Unified Patent Court will be launched in the European Union in 2022. Innovation protection of inventions will thus be possible in future in a more uniform and cost-effective manner. However, the new regulations are associated with risks for companies also.



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The new system is expected to be launched in the second half of 2022. The road ahead was long and hard: The German Federal Constitutional Court finally paved the way for ratification of the law only in June 2021 rejecting two emergency appeals against the Unified Patent Court. The journey to a unitary patent system began in 1975 with the so-called Community Patent Convention that did not enter into force for lack of ratification. The second attempt in 1989 to establish a Community patent also failed.

In 2000, the EU Commission proposed a regulation on the Community Patent having significantly reduced translation costs by focusing on the three official languages German, English and French. This attempt also failed due to Spain and Italy opposing the language regulation.

The EU Treaty of Lisbon in 2009 has introduced the instrument of "enhanced cooperation" between the participating Member States with the result that the unanimity of member states was no longer required. In 2012, the EU Parliament adopted two regulations establishing a unitary patent system and the Unified Patent Court (UPC) that entered into force by the thirteenth ratification document having been deposited and will be applicable when the UPC Agreement enters into force, after Germany has also deposited its ratification document.

During the national ratification processes, the tension strongly increased once again, because the ratification process in Germany was halted by a successful first constitutional complaint against the Bundestag's decision of Mar. 10, 2017. Brexit, which had been discussed since 2013 and occurred in 2020, also hindered the process. Finally, the way was cleared now by withdrawal of the UK from the patent system as a third country. On Sep. 27, 2021, Germany signed the Protocol on provisional application of the Unified Patent Court.

### Unitary Patent for EU States Reduces Costs

The current system at the European Patent Office (EPO) is based on a central examination system. If a European patent (bundle patent) is granted after completing the examination system, it must be validated in the contracting states mandatorily in order to be able to develop its protection nationally as a bundle patent. For this purpose, parts or the entire patent have to be translated into the national language or into English in various countries at considerable cost. In addition, there are national representative fees and, in some cases, official fees.

In contrast, the Unitary Patent has to be entirely translated into English within the first six years if the text version is available in French or German. If it is written in English, it must be translated into another official language of the European Union.

The new system now allows, with effect for all participating EU member states, to file a "unitary effect" request with the EPO within a time limit following the patent grant of the established central examination



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procedure. The "unitary effect" of the new Unitary Patent avoids the previous fragmented protection in European Union countries, as all EU member states except Spain and Croatia want to implement the system. In addition, the administrative and cost burden for all parties involved will be significantly reduced.

The overall administration of the Unitary Patent will be consolidated at the EPO and the renewal fees will be equal to the sum of the four countries where the most patents were validated in 2015. We remember that the UK as one of these four countries has left the EU. However, up to now, about 50% of the granted patents have been validated in Germany, France and the UK, for which no translation had to be filed. When considering the renewal fees in isolation, the cost advantage of the Unitary Patent for the above example has thus melted away as a result of Brexit.

However, the great advantage of the Unitary Patent is the uniform territorial extension of protection of the granted patent to up to 24 participating EU member states. Until ratification in all member states, there will be different generations of Unitary Patents having an extension of protection in the member states that deposited the ratification document. Currently, about 16 member states, including France, Italy, the Netherlands, Germany and Denmark, have initiated or completed the ratification process. A further eight EU member states are expected to follow. The granted European patent can still be nationally validated in the remaining contracting states of the European Patent Convention. Alternatively, a patent applicant may take the purely national route by applying for a national patent and thus also wanting to ensure a purely national place of jurisdiction.

### Unified Patent Court Ensures Uniform Jurisdiction for all Proceedings

The Unified Patent Court (UPC) will have jurisdiction over actions for infringement of unitary patents, granted European patents, and European patents and unitary patents as well as supplementary protection certificates (SPCs) granted in future. This ensures uniform jurisdiction even for coexisting nationally validated European patents (bundle patent) and the unitary patent.

However, parallel jurisdiction of the national courts for nationally validated European patents continues for a transitional period of seven years. This must be communicated by time limit to the registry of the Unified Patent Court by means of an "opt-out" declaration before the end of the transitional period and before an action is brought before the Unified Patent Court.

Innovation protection of inventions in future will thus be possible in a more uniform and cost-effective manner and can be enforced at the Unified Patent Court in a single procedure.

### Central Cancellation of Patents Possible

Likewise, however, a nullity action can centrally cancel the unitary patent and nationally validated European patents in future, provided that no "opt-out" has been declared for the nationally validated patents. Also, nullity actions can be filed without having to file an opposition with the EPO first. Particularly critical is the possibility of a nullity action before the Unified Patent Court despite parallel opposition proceedings.

Therefore, a strategy, for which patents the "opt-out" possibility before the Unified Patent Court is to be used, must be prepared for each patent portfolio very carefully. With regard to the costs, it is to be expected that the German infringement proceedings will be significantly more favourable to conduct than proceedings before a Unified Patent Court.

With the new patent system, the participating EU member states have developed a modern patent system for SMEs and industry that is fit for the challenges of the coming innovation decade.