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EXTREME CHANGES ARE COMING TO EUROPE The Unitary Patent and Unified Patent Court

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The Unitary Patent and Unified Patent Court - A Revolution in European IP

From 2015 or 2016 on, the patent landscape in Europe will undergo a significant change which by many has been called a revolution. By that time, the Unitary Patent and Unified Patent Court will have been introduced, providing IP owners with new ways to protect and litigate their patents in Europe.

Under current practice, European patent applications are filed and prosecuted with the European Patent Office, and once allowed, there is a validation process with each European country where protection is required. This process involves the filing of an appropriate translation for that country as well as submission of country-specific paperwork and compliance with country-specific patent laws. Additionally, annuities are then paid to each country of validation, making the process rather complex, cumbersome, and costly. Also, enforcement of patent rights is done within the court system in each country of validation. If this validation process is not completed along with a translation within 3 months (6 months for Ireland) from the date of grant by the European Patent Office, the patent shall be considered void *ab initio* in that country.

The upcoming changes to practices in the European Patent Office will change this process drastically. The exact date of introduction is not currently established with certainty, as the new Unified Patent Court is based on an international treaty which needs ratification (more details to follow).

Part 1: The Unitary Patent

The new Unitary Patent will be a single patent for (at least) 13 member states of the European Union, i.e. those who have ratified the Agreement on the Unified Patent Court (see below). However, there will be no new patent office in Europe. Rather, the present day European Patent Office (EPO) will grant these new Unitary Patents.

As described above, after the grant of a European patent, Applicants must validate their patent rights into national patents on a country-by-country basis. The new Unitary Patent will replace this multi-country validation process with a single registration. With the advent of the Unitary Patent, it is expected that Applicants will still have the choice to stay with the validation system as it is today.

If the Unitary Patent agreement is ratified in 2016, then it is very likely that it will initially be valid for the following countries:



Austria, Belgium, Bulgaria, Denmark, France, Germany, Ireland, Malta, Netherlands, Portugal, Romania, Sweden and the United Kingdom.

With this new system, after the grant of a patent by the European Patent Office (EPO), owners can then decide if they want to validate for all of the above mentioned countries via a Unitary Patent, or if they want validation only in specific countries, such as France, Germany, and the UK, by performing validations in only those desired countries. Of course, costs for the upcoming Unitary Patent will certainly influence desirability of such a unitary validation, but so far no costs for filing or ongoing annuities have been published.

If patentees are interested in protection in any country outside those that will be encompassed by the Unitary Patent, e.g., Switzerland or Italy, they will need to do a validation there, as done in the present day system.

Part 2: The Unified Patent Court

The Unified Patent Court is much more important insofar as there will be no other option for patentees. It will entirely replace the current litigation regime in Europe.

Today, although the European Patent Office centrally grants patents for Europe, these patents then need to be validated country-by-country and also litigated country-by-country if there is infringement in more than one European country. Usually a first litigation is started in a first country, typically in Germany, and after the decision of the German courts, plaintiff and defendant will then settle. In 2011 (the

newest year for which data is available), 1,250 litigation suits were started in Germany, compared with 280, 260, 53, and 50 for France, Italy, UK and the Netherlands, respectively.¹

This litigation regime will be replaced by the Unified Patent Court, a newly installed court with its own rules and jurisdiction. This Unified Patent Court is based on an international treaty which needs ratification by at least thirteen countries; amongst them are the essentially mandatory “big three,” France, Germany, and the UK. So far, five countries² have ratified the treaty: Austria, Belgium, Denmark, France, and Sweden. Germany and the UK are currently preparing ratification, which is expected by this year or early 2015. Once the new court is installed, unitary patents will be available as well.

The Court will be competent to hear cases not only for all Unitary Patents, but also for all future and existing conventional European Patents. However, for conventional European Patents, there is a possibility to “opt-out” within the first seven years that the court exists. By filing a declaration with the court, the applicant can request that for a specific patent the national courts remain competent, which means that litigation and nullity actions still would need to be filed on a country-by-country basis.

The court will provide a two-instance procedure, whereby there are several courts of first instance but only one central appeal court in Luxemburg. The courts of first instance will divide up into local chambers, regional chambers, and one central chamber, which all have the same competence.

Local Chambers are courts which are placed in one country. Each country may have at least one Local Chamber; however, countries with a large number of pending litigation cases before the court comes into place may appeal for a second and up to four Local Chambers. From the data available, the only three countries which are eligible for more than one Local Chamber are France, Italy, and Germany, the latter being eligible for four Local Chambers. Nevertheless, France and Italy have announced that they will only have one Local Chamber each (mainly due to cost reasons). Only Germany will install four Local Chambers in Düsseldorf, Mannheim, Hamburg and Munich.

Regional Chambers are courts which serve more than one country. Regional Chambers are attractive for countries which have had only a few litigation cases in the past. So far, there is an announcement that Sweden and the Baltic States will form a Regional Chamber together, which will be seated in Stockholm.

The *Central Chamber* will be in Paris with two subsidiaries in Munich and London. The only difference between the Central Chamber and the other Chambers is that the Central Chamber has the only competence for nullity actions.

Although the new court procedures are completely new, there is a high degree of similarity with the German and Dutch court procedures. This provides for:

- a highly front-loaded procedure which will be mainly in writing with oral hearings given a maximum of one day.

- a quick procedure with very limited possibility for each side to file pleadings and arguments.
- a “loser-pays” regime where the losing party has to bear the costs of the court and the attorneys of the other side according to a fixed scheme based on a value of dispute (as is Germany’s practice today).

The main difference between the new procedure and the German procedure is within the new Unified Patent Court, there will be the possibility of filing a counterclaim for revocation, something which is unavailable in Germany where there is strict bifurcation. Where a Local or Regional Chamber is hearing the cases, that Chamber may then either decide both cases or give the counterclaim procedure to the Central Chamber. In the latter instance, the infringement procedures may be stayed or permitted to proceed.

Although some details of the new court are not yet clear and there is, of course, no jurisprudence whatsoever, patent users have already expressed their views that the new court will surely be one of the most important venues worldwide for patent enforcement. According to a survey by the law firm Allen & Overy³, amongst the heads of IP departments worldwide, 74% said that the new court would benefit their company. Some even stated that there is likely to be a shift towards Europe’s UPC as a forum of choice to possibly rival the U.S. for major patent disputes.

¹ Source: Kühnen/Claessen, GRUR, 2013, 592 ff.

² Status as of 1 August 2014. There are reports that also Malta has already ratified the Agreement but not yet informed the EU about the ratification.

³ cf. <http://www.allenoverly.com/SiteCollectionDocuments/Research%20reveals%20growing%20business%20support%20for%20UPC.pdf>

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