



Opinions Divided on EU Unitary Patent

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From 1 June, there is a new way of protecting inventions in the EU. The unitary patent is intended to support inventors and improve protection of their inventions. For now, the unitary patent is in force on the basis of enhanced cooperation between 17 EU states, but it is already causing controversy among them, as well as with business. Reservations about the cost-effectiveness of the solution means that applicants for protection still often choose national patents.

The Pre-Existing Protection. Patents may be granted at the request of an inventor at the national level, internationally, including through the World Intellectual Property Organisation, or in the form of a so-called European patent. The latter is issued by the European Patent Office (EPO), but must then be separately validated (confirmed) in each of the states in which the applicant seeks protection (any or all of the 39 participants, including EU members). This entails additional fees and costs for the administration, translation, and legal assistance necessary to secure the patents. Nevertheless, almost 193,500 applications were submitted to the EPO in 2022, 2.5% more than in 2021. The total number of applications from EU countries has remained around 43% in recent years, but the largest number of them comes from the U.S., Germany, Japan, China, and France, respectively. Since 2017, China's Huawei, Korea's LG, and the U.S.-based Qualcomm have submitted the most applications per year.

The Unitary Patent. The intent behind the Union's idea for a new patent is to deepen integration of the single market and attract foreign innovation and investment. It is also a way to strengthen the position of small and medium-sized enterprises (SMEs). The automatic grant of protection for an invention in all participating states on the basis of a single application and without additional validation is the main difference between the unitary patent and the European patent. A Unified Patent Court (UPC) has been created to settle disputes, including infringement or invalidity of a patent, with its headquarters in Paris, branches in Munich and Milan, and an appeal instance in Luxembourg. The UPC

also will have local and regional branches (e.g., common in Sweden and the Baltic States) in other participating countries.

Under the system, a patent with unitary effect is granted by the EPO. Previously filed European patents or applications for European patents may be granted the same protection unless their owners opt out of the UPC's jurisdiction within the initial deadline of seven years. After this period, the choice of national, unitary, or European patents will still be possible, but disputes will be resolved by the UPC in each case. At the owner's request, a unitary patent will be validated in nonparticipating countries analogous to the European one.

Divergent Opinions of Member States. In 2012, 25 EU countries launched enhanced cooperation to create a unitary patent protection and related translation system. So far, 17 of them have joined the new system, which required, among other things, ratification of the agreement creating the UPC. Cyprus, Czechia, Hungary, Ireland, Greece, Romania, and Slovakia have only signed it, while Poland, Spain, and Croatia have not taken any of these steps. Some countries, including Poland, express the fear that the transfer of jurisdiction to the UPC will be unconstitutional, as it is a new court not provided for in their legal systems. A similar conclusion was reached by the Hungarian Constitutional Court in 2018. In Germany, after a series of complaints were heard, ratification proved possible. In Ireland, it is a constitutional requirement to hold a referendum on the issue—scheduled for [2024 in conjunction with the European Parliament elections](#). A vote

was already held in Denmark in 2014 and 62.5% of voters were in favour of uniform protection.

Another problem is the official languages of the EPO and UPC—English, French, and German. According to Spain, Hungary, and Poland, this restriction makes the situation worse for their native entrepreneurs who had used their own languages in patent proceedings before the offices operating in their countries. They argue this puts them at a disadvantage in disputes with entities whose native language is one of the official ones and generates translation costs. Hungary additionally points out that the European patent is mainly used by non-European companies; domestic inventors apply for national protection first (they account for about 0.1% of European patent applicants), and the new solution will only exacerbate these trends. In contrast, the solution is favoured by Sweden, which expects to attract foreign innovation to the EU, and by Portugal, which points to revenues from patent-licensing agreements. Ireland expects the introduction of a unitary patent to encourage its companies to increase exports. It also intends to become a link between the EU market and inventors from other common law countries (e.g., Australia, U.S.), who will be more likely to register patents through it rather than countries with a less familiar legal system.

Divergent Opinions of Business. The views of big businesses on the new solution are also divided. It is supported by, among others, representatives of the Italian car industry, who convinced previously sceptical authorities (who, along with the Spanish, were the only ones to directly oppose cooperation and challenged it, unsuccessfully, at the EU Court of Justice). The unitary patent is also of interest to telecom companies hoping to make more profit from selling licences for innovative solutions than from protecting their know-how. Nevertheless, opt-outs were filed against more than 417,000 patents during the transition period from 1 March to 31 May this year. A significant group of them came from [pharmaceutical companies](#), which benefit from the current fragmentation of protection. The impact of a challenge to their patent is limited to the state in which the decision was issued, and initiating proceedings in further ones often represents an excessive cost for their smaller competitors. The revocation of a unitary patent, on the other hand, will automatically have effects in all participating states.

SMEs are also not convinced by the new solution. Many of them benefited from the fact that foreign competitors were not interested in validating patents in their local market

(e.g., out of the 133,000 patents granted by the EPO in 2020, about 5% were validated in Finland) and, if validated, gained access to technical information in their native language. The extension of unitary protection will increase the number of foreign inventions protected in participating countries and thus the risk of patent infringement by local businesses. They will therefore have to follow patent decisions more closely, which will be particularly burdensome for SMEs, which often do not have the resources to do so. Costs are also a widely debated issue. While protection and its renewal will generally be cheaper than for a European patent, proceedings before the UPC will remain expensive; for example, the average cost of filing a complaint is €11,000. SMEs will benefit from significant concessions and reimbursements (e.g., for translations), but the amount of even reduced fees, the geographical remoteness of the court, or the foreign language of the proceedings may still discourage them from taking advantage of unitary protection.

Conclusions. The new solution is unlikely to strengthen the competitiveness of EU inventors vis-à-vis their foreign competitors as the unitary patent is not reserved for EU companies. However, it has a good chance of attracting new technologies and investors to the EU and they are likely to be its biggest beneficiaries. As they already have experience in acting before European offices and courts, including in a foreign language, the most important change for them will be the simplification of procedures and, consequently, a reduction in the cost of having their inventions protected in Europe. For EU companies, on the other hand, unitary protection may have as many advantages as drawbacks, and their eventual balance will largely depend on their individual situation as inventors and their business decisions.

Unitary patent protection is unlikely to be extended to the entire EU anytime soon. The new solution was introduced in spite of previously known objections, including constitutional and linguistic, and therefore an impasse in extending its territorial scope can be expected. From the perspective of the Polish patent office, the unitary patent effect will not bring major changes because its beneficiaries will still be required to use the existing validation procedure in Poland. This may turn out to be beneficial for domestic inventors, as potential cases against them will be brought to courts in Poland and not before the UPC, and they will, at their discretion, be able to benefit from the unitary patent abroad on an equal footing with their EU and third-country competitors.