



The European Union's Unified Patent Proposal

For many years the European Union (EU) has been debating the potential for a single EU patent system rather like the unitary trademark system (Community Trade Mark or CTM). The conundrum has always been: if the EU is designed to harmonize, why can it not manage to harmonize its patent system? Progress has been painfully slow but recently we have seen the announcement that 25 of the 27 Member States have taken the next step in achieving the goal of a single EU patent by "enhanced co-operation."

The Council of the European Union (Council), an institution of the legislature representing the Member State governments, approved the proposal on 13 April 2011 by adopting the proposals for the implementing regulations.

Current System – European Patents

Currently European patents are processed centrally in a single procedure with the European Patent Office (EPO). The application must be made in one of the official languages of English, German or French.

However an EPO patent is not a unitary title but a bundle of individual rights that do not take effect in single Member States unless they are validated in each territory via national patent offices. This then results in the patent being subject to national laws and procedures of the individual Member States in which it

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eventually becomes registered. For example, the patent will usually be required to be translated into the local State's language and a different application fee will need to be paid each time, increasing costs still further.

Michel Barnier, the EU Internal Market Commissioner, commenting on the current system stated that "[it] is too expensive; it costs ten times more than in the United States." Indeed it is estimated to cost €32,000 (US\$46,200) in official fees to validate a patent in 27 Member States using the EPO system, in sharp contrast to the €1,850 (US\$2,700) to register in the United States.

New System – EU Patents

The new proposal suggests the creation of a new administratively harmonized block of 25 Member States ("territory") participating in the system by a process known as "enhanced co-operation." Basically, an applicant would be permitted to register a patent through the EPO and have automatic protection throughout the territory. This territory would be open for new members to join in the future.

Patents would be filed in one of the three official languages (with an accompanying translation in the other two) and with a proposed application fee of €680 (US\$980).

The new system has been slow to gain acceptance as a result of language issues. Italy and Spain (currently the only Member States that oppose the scheme) believe the system will have a preferential effect upon English, German and French patents. Other Member States see no reason to include Italian and Spanish amongst the official languages given that, presently, the vast majority of EPO filings are in English, French or German.

In an effort to include as many Member States as possible a number of compromises have been made. These include:

- reimbursement of the costs involved in translating the patent into either English, French or German if the applicant's national language is not one of the official languages;
- the requirement that within 12 months of filing the patent a full length translation of the application should be made into another official language chosen by the applicant; and

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- the condition that third party infringers who are not aware of the patent as a result of it not being in their native language will not pay damages.

The new system will run alongside the existing European patents and national Member State patents.

Enforcement

The Council's plan includes a proposal to set up a new court to deal with disputes arising in the new system. It is thought that this will be divided into a Court of First Instance and a Court of Appeal.

Although 25 Member States are lobbying for the unified patent scheme, the Court of Justice of the European Union (ECJ) has suggested that the proposal may violate EU Law, as such a court would be unitary and autonomous having exclusive jurisdiction over its territorial area. It would therefore be outside of the judicial framework of the EU and would have a distinct legal personality under international law. The ECJ believes that this will deprive national courts of power and the opportunity to refer questions to the ECJ for a ruling.

Concerns have also been expressed that the new system creates a lack of an independent judicial remedy against the proposed new court if it acts improperly and reduces the "fundamental right" of being able to litigate in one's own language.

On 8 March 2011 the current Presidency stated that the proposals were unaffected by this opinion as the ECJ only had concerns about the planned litigation system. It added that work would continue towards a "legally sound, practicable and business friendly solution."

Commentary

The new system would clearly allow applicants to reduce the time, costs and effort by applying for a patent that will be protected in most Member States. However, critics of the proposal point out that:

- Not all applicants desire protection in every EU country and the funds saved need to be considerable if the proposed system is to be more economical in all cases. Those seeking protection in only a few states might be better off with national or EPO filings.
- A unitary system relying on a single examiner for the approval of a patent throughout Europe is

only effective if the quality of that examiner is high. Under the current system controversial decisions at a national level at least are limited to a single country.

- Applicants rarely litigate in multiple jurisdictions for an infringement, so a central court may not often give a practical benefit.

Conclusion

It is clear that the unified patent system has been wanting in the EU for a number of years now. It is equally clear that the majority of Member states recognize its benefits and are committed to its implementation.

The recent proposal represents the most concrete step in the direction of EU harmonization for some months. But there are likely to be still more twists in the road ahead.

For further information about the unified patent proposal, please contact one of our [Intellectual Property & Technology lawyers](#).

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