

# The unitary patent

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The unitary patent creates an additional option to obtain patent protection in Europe. At the same time a new patent Court will be introduced: the Unified Patent Court. It is still difficult to predict when the unitary patent system will start.

The unitary patent system is created by the European Union. Unitary patents are granted by the European Patent Office, following the same, established procedure for the grant of European patents. Strictly speaking, a unitary patent is a "European patent with unitary effect". That is, a single patent that is valid across the member states of the unitary patent system. A traditional European patent is in fact a bundle of national patents, which can be kept in force in those states for which the European patent is validated and for which the proprietor pays the annual renewal fees.

## Participating states

Almost all EU member states participate in the unitary patent system. For the non-participating EU member states (Spain, Croatia, Poland) and for non-EU states (such as Norway and Switzerland) which are party to the European Patent Convention nothing changes, because the traditional European patent remains in existence and may be validated in such states.

For a majority of the EU member states two separate, but mutually exclusive, options of patent protection based on a single European patent application apply: a (national part of a) European patent, and a unitary patent.

## Entry into force

The unitary patent system is not effective yet. Currently 16 member states (2) have completed all required legislative actions, more in particular the ratification of the UPC-Agreement. In any case, Germany must still ratify this Agreement.

The result of the EU-referendum in the UK of 23 June 2016 has created uncertainty as to the participation of the UK in the unitary patent system, in particular after the 'Brexit' - date, i.e. after that the United Kingdom leaves the EU. In Germany the situation is unclear as well. In the spring of 2017 a complaint has been filed with the German Constitutional Court.

This constitutional complaint has affected, or better, has suspended, the German ratification of the UPC Agreement. A decision on admissibility of the complaint – which is only a first step – is still not issued. If considered inadmissible, Germany should be able to ratify shortly after that. If admissible a considerable delay is to be expected.

## Effect of the unitary patent

A unitary patent provides uniform protection and has equal effect in all the participating member states. It is an alternative to the current European bundle patent and to national patents. A unitary patent can only be limited, transferred or revoked in respect of all the participating member states. A unitary patent can be licensed in respect of the whole or part of the territories of the member states. Like the current European patents, unitary patents are subject to an opposition period of nine months from grant thereof.

## The unitary patent

### The Unified Patent Court

The Agreement on a Unified Patent Court (UPC) creates a common patent court for unitary patents. The UPC has exclusive jurisdiction for unitary patent and traditional European patent litigation (1). It provides for central enforcement and revocation and abolishes the need for national (parallel) litigation. The UPC will have a Central Division with seats in Paris, London and Munich. Participating member states may create Local or Regional Divisions. A Court of Appeal will be seated in Luxembourg. For questions of EU law, referrals may be made to the Court of Justice of the EU.

### Geographical scope

After the unitary patent system has come into force, unitary patents are only effective in those member states that have completed ratification of the Agreement on the UPC. This means that the first unitary patents might be effective in 17 member states only. For other states, the European patent needs to be validated. In the event that additional states ratify the Agreement after its entry into force, the geographical scope of unitary patents already granted at that time does not change. These granted unitary patents will thus have a smaller geographical scope compared to unitary patents that are granted later on.

### How to obtain a unitary patent

Unitary effect – so as to obtain a unitary patent – can be requested for any European patent within one month from its grant. Unitary effect can only be requested for European patents having the same set of claims for all the member states. There is no official fee involved with filing the request. Thus, a unitary patent can be obtained by registration only, without the need for any national actions in the participating member states.

Other than translations required in the case of an infringement dispute, no further post-grant translations are required in the end. However, during a transitional period of at least six years, the unitary patent should be available at least in English and in one other official EU language. Thus, when the unitary patent is granted in English, a translation of the complete patent specification needs to be provided in any other EU language. For unitary patents, a single renewal fee has to be paid to the European Patent Office each year. The amount is roughly four times (3) the amount of a national renewal fee for a current European patent.

### Strategical considerations

The unitary patent system sets many new aspects which need careful consideration in view of the specific demands of your client. However, there are some basic issues you have to observe in advising your clients.

If the additional geographical scope of a unitary patent against – in general – less costs outweighs the exposure to a central attack on validity, you may validly apply for a unitary patent. The unitary patent, however, may influence the renewal policy of your client since no designations can be dropped over the years so as to reduce costs.

Although the unitary patent system is not effective yet, it is now time to start considering the options you will soon have. The unitary patent comes with the Unified Patent Court. This new Court, for litigation relating to unitary patents, will also affect litigation in your present European patents. This leaflet contains a brief overview of key features of the unitary patent. For key features of the UPC we refer to our leaflet “The Unified Patent Court”.

Do not hesitate to consult your AOMB patent attorney to discuss the optimal strategy for your client.

(1) Transitional provisions apply. In particular the competence of the UPC for European patents may be withdrawn during a transitional period of 7 years |after the start of the unitary patent system. For more information we refer to our leaflet “The Unified Patent Court”

(2) Already ratified: Austria, Belgium, Bulgaria, Denmark, Finland, France, Italy, Luxembourg, Malta, Netherlands, Portugal, Sweden, United Kingdom, Estonia, Lithuania and Latvia.

(3) The renewal fee for a unitary patent is equal to the sum of the current renewal fees for Germany, United Kingdom, France, and The Netherlands.