



A Single Patent in Europe (At Last?)

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A Single Patent in Europe (At Last?)

European Patent Convention (EPC)

Signed: 1973 In Force: 1977

Community Patent Convention (CPC)

Signed: 1975, not entered into force

Agreement relating to Community Patents

Signed: 1989, not entered into force



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A Single Patent in Europe (At Last?)

Community Patent Regulation (CPR)

Drafts: 2000-2004, not entered into force

European Patent Litigation Agreement

Draft: 2003, not entered into force

Community Patent Court Agreement

Draft: 2003, not entered into force



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A Single Patent in Europe (At Last?)

European and Community Patents Court

Draft Agreement: 2009, rejected by CJEU

Enhanced Cooperation (EU-Regulation)

Drafts: 2010-2011

Unified Patent Court Agreement

Draft: 2011



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A Single Patent in Europe (At Last?)

Enhanced Cooperation (EU-Regulation) („European Patent with unitary effect“)

Scheduled: 22 December 2011

Unified Patent Court Agreement

Scheduled: 22 December 2011



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A Single Patent in Europe (At Last?)

European and Community Patents Court

Draft Agreement: 2009, rejected by CJEU

Enhanced Cooperation (EU-Regulation)

Drafts: 2010-2011, not entered into force

Unified Patent Court Agreement

Draft: 2011, not entered into force



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A Single Patent in Europe (At Last?)

Unified Patent Court Agreement

EU-Regulation for European Patent with Unitary Effect



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Unified Patent Court Agreement

- Accession only possible for EU Member States (MS)
- Divisions of first instance (local (LD), regional (RD), central (CD)) may, the Court of Appeal has to refer questions to the CJEU to safeguard “correct application and uniform interpretation of Union law”
- MS are liable for damages caused by infringement of Union law





Unified Patent Court Agreement

➤ Competence

- Settlement of litigation related to EPs and UPs
- Agreement shall apply to any UP, SPC issued for EP or UP, EP (not lapsed when Agreement enters into force), EP or UP application (pending when Agreement enters into force)





Unified Patent Court Agreement

➤ Exclusive Competence

- (a) actions for actual or threatened infringements “and related defences”
- (a1) actions for declarations of non-infringement
- (b) actions for provisional and protective measures and injunctions
- (c) actions for revocation of patents
- (c1) counterclaims for revocation of patents
- (d) actions for damages or compensation derived from the provisional protection
- (e) actions relating to prior user rights
- (f) actions on compensation for licences of right (→ UP-Regulation)
- (g) actions concerning decisions of the EPO concerning UPs





Unified Patent Court Agreement

- Competence
 - LD or RD
 - Defendant domiciled (based)
 - Infringement (occurred or may occur)
 - Counterclaim for Revocation
 - LD or RD where infringement suit was initiated
 - LD or LD may refer the counterclaim to CD
 - Parties may agree to refer the case to CD





Unified Patent Court Agreement

➤ Competence

➤ Actions for revocation or declaration of non-infringement

➤ Only before CD

➤ Actions concerning decisions of the EPO concerning UPs

➤ Only before CD



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Unified Patent Court Agreement

➤ Language

➤ LD, RD

➤ Official language of MS; MS may designate E, F or G

➤ Parties may agree on language of patent (E, F or G)

➤ CD

➤ Language of the patent (E, F or G)

➤ Court of Appeal

➤ Language of 1st instance

➤ Parties may agree on language of patent (E, F or G)

➤ Exceptional cases: other language





Unified Patent Court Agreement

- 1st instance Panels (all must be multinational)
 - LD (“experienced”): 2 legally qualified national judges + 1 legally qualified judge from CD “Pool of Judges” (on a long term basis)
 - LD (“inexperienced”): 1 legally qualified national judge + 2 legally qualified judges from CD “Pool of Judges”
 - RD: 2 legally qualified regional judges + 1 legally qualified judge from CD “Pool of Judges”
 - CD (EPO actions): 3 legally qualified judges from CD “Pool of Judges”
 - CD (other actions): 2 legally qualified judges + 1 technically qualified judge, all from CD “Pool of Judges”
 - Parties may agree on case being heard by 1 legally qualified judge





Unified Patent Court Agreement

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- 2nd instance Panel (“Court of Appeal”; multinational)
 - 3 legally qualified judges + 2 technically qualified judges





Unified Patent Court Agreement

➤ Representation

- Lawyers authorized to practise before a court of a Contracting MS
- European Patent Attorneys and who have appropriate qualifications such as a European Patent Litigation Certificate
- Representatives may be assisted by patent attorneys who shall be allowed to speak at hearings of the Court
- Representatives of the parties shall enjoy the rights and immunities necessary to the independent exercise of their duties





Unified Patent Court Agreement

- Entry into force:
 - Ratification by 9 Contracting Member States
 - Including the three MS with the highest number of EPs
- Amendments to the Agreement
 - “Revisions”: 6 years or after 2000 cases: consultation → amendment of the composition of the panels and the competences of the Court
 - Bringing Agreement into line with an international treaty (unanimity required)
 - No other stipulations for amendments!





EP with Unitary Effect

- Draft EU Regulation “implementing enhanced cooperation in the area of the creation of unitary patent protection” (“UP Regulation”)
- Draft EU Regulation “implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation agreements” (“UP Translation Regulation”)





EP with Unitary Effect

- Effects of the European patent with unitary effect (Art. 6-8 UP Regulation)
 - Right to prevent the direct use of the invention
 - Right to prevent the indirect use of the invention
 - Limitation of the effects of the European patent with unitary effect





EP with Unitary Effect

- UP Translation Regulation
 - EP granted in E, F or G with claims in E, F and G.
 - No further translations required
 - “Once available”: machine translations made available online and free of charge on publication of application and patent





EP with Unitary Effect

- UP Translation Regulation
- In case of a dispute
 - Full translation to alleged infringer or competent court upon request
 - Language of MS where infringement took place or alleged infringer is domiciled
 - Such translations shall not be carried out by automatic means
 - At cost of patent proprietor





EP with Unitary Effect

- UP Translation Regulation
- In case of a dispute
 - “concerning a claim for damages, in particular if the alleged infringer is a small or medium-sized enterprise, the court hearing the dispute shall take into consideration that the alleged infringer may have acted without knowing or having reasonable grounds to know that he was infringing the patent before having been provided with the translation referred to in paragraph 1.”





FICPI Positions (historical)

- Position paper on Community Patent (CP) Regulation draft (EXCO/IT04/CET/1402)
- Position Paper on legal effect and timing of translations (EXCO/IT04/CET/1401)
- Resolution “CP Translations” (EXCO/SG04/CET/2005)
- Memorandum: CP: Alternative Strategies (EXCO/IT04/CET/1403)
- Position “On the patent system in Europe” (EXCO/FR06/CET/1403)





FICPI Positions (historical)

- Position “On the patent system in Europe” EU consultation (EXCO/FR06/CET/1403)
- Invitation for public hearing 12 July 2006 in Brussels (out of 2515 replies to consultation)
- Official report of the EU Commission mentioned FICPI as only organisation (EXCO/CL06/CET/1403)
- Right of representation (EXCO/AU08/CET/1401), (EXCO/US09/CET/1404)





FICPI Positions (historical)

- Discussion Paper EU Patent and EP Patent Litigation System (EXCO/AR10/CET/1408; EXCO/DE10/CET/1404, EXCO/ZA11/CET/1404)
- FICPI Position Paper on the Unitary Patent and the Unified Patent Court (EXCO/AU12/CET/1401)





FICPI Position Paper

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- “FICPI believes that the present projects have been prepared with excessive haste and suffer from a number of severe legal and practical deficiencies, partly because there has been inadequate consultation with the stakeholders of the patent system, which is essential to robust and effective law making.”





FICPI Position Paper

- “FICPI therefore considers that it would be a mistake to sign and enforce the planned legislation documents in their current form.”
- “FICPI therefore strongly urges the authorities in charge of enforcing this project to pause and organize a proper user-consultation process that would allow the major roadblocks identified by FICPI (and detailed below) and other organizations to be addressed. FICPI would be very willing to participate in such consultation process.”





FICPI Position – Major Issues

- Although generally supporting a patent system with unitary effect in Europe, FICPI notes the renunciation to a EU-wide agreement on such projects, but still believes that an approach which would receive the acceptance of all EU countries is possible and desirable.
- An appropriate user-consultation process, much like the one engaged by the EU Commission when contemplating amendments to the Trademark system in Europe, should be provided before considering the signature of any legally enforceable instrument in this field.
- The mechanism for providing of patent translations according to the UPTR, as well as the legal effect of such translations e.g. according to Art. 70 (4) EPC, should be defined.





FICPI Position – Major Issues

- The mechanism for providing of patent translations according to the UPTR, as well as the legal effect of such translations e.g. according to Art. 70 (4) EPC, should be defined.
- Should the UPR principles be retained, this Regulation should provide for the possibility for a patentee to file voluntary translations to a competent authority which shall officially publish these translations, to overcome the weakening of the untranslated patent right as explicitly stipulated in the draft.
- The details of the Rules of Procedure should be made available and publicly debated together with the provisions of the UPC Agreement before any enforceable instrument is signed.





FICPI Position – Major Issues

- The linguistic system of the central division as provided by the UPC should be brought in line with the fundamental principles of Union law, as requested by the CJEU Advocates General.
- The UPC Agreement should include a suitable scheme for the ease of its revision whenever it becomes necessary, e.g. by a qualified majority decision process for many of its provisions, unanimity being required only for central provisions of the Agreement.
- The UP system should provide that the request for unitary effect is filed in sufficient time before grant of the European Patent, so that the existence of the unitary effect is notified to the public already in the publication of the granted patent.





FICPI Position – Major Issues

- The unitary effect of the patents should be safeguarded, including e.g. for any post-grant limitations to the patent right. In this regard, the UPR draft procedures should be amended to acknowledge possible amendments to the Unitary Patent after grant.
- An appropriate definition of the term “dispute” in Art. 4(1) and (2) of the current UPTR draft should be provided.





FICPI Position – Major Issues

- For effectiveness of the system, the UPC Agreement should provide whenever possible that a technically qualified judge is present in any first instance panel, whether in a local or a regional division.
- The competence of the UPC to hear questions of ownership in inventions or patents should clearly be provided.
- The deficiencies of the proposed system with respect to its connection with the administrative proceedings of the EPO, as underlined by the Advocates General of the CJEU, should be addressed





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