

# The Unitary EU Patent and the Unified EU Patent Court

## An alternative view

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# **Unitary EU Patent – Unified EU Patent Court**

**Let's assume**

**The Unitary EU25 Patent (UP) is REALITY**

**The Unified EU25 Patent Court (UPC) is REALITY**

**WITHOUT significant changes to the present drafts  
(as presented by Daniel Alge)**

# **Unitary EU Patent – Unified EU Patent Court**

**My topic should have been:**

**Practical aspects of litigating in the UPC**

**This would be premature given the status of the UP/UPC**

**I'll give you an alternative view to the scepticism**

**It's neither completely my personal nor the German view**

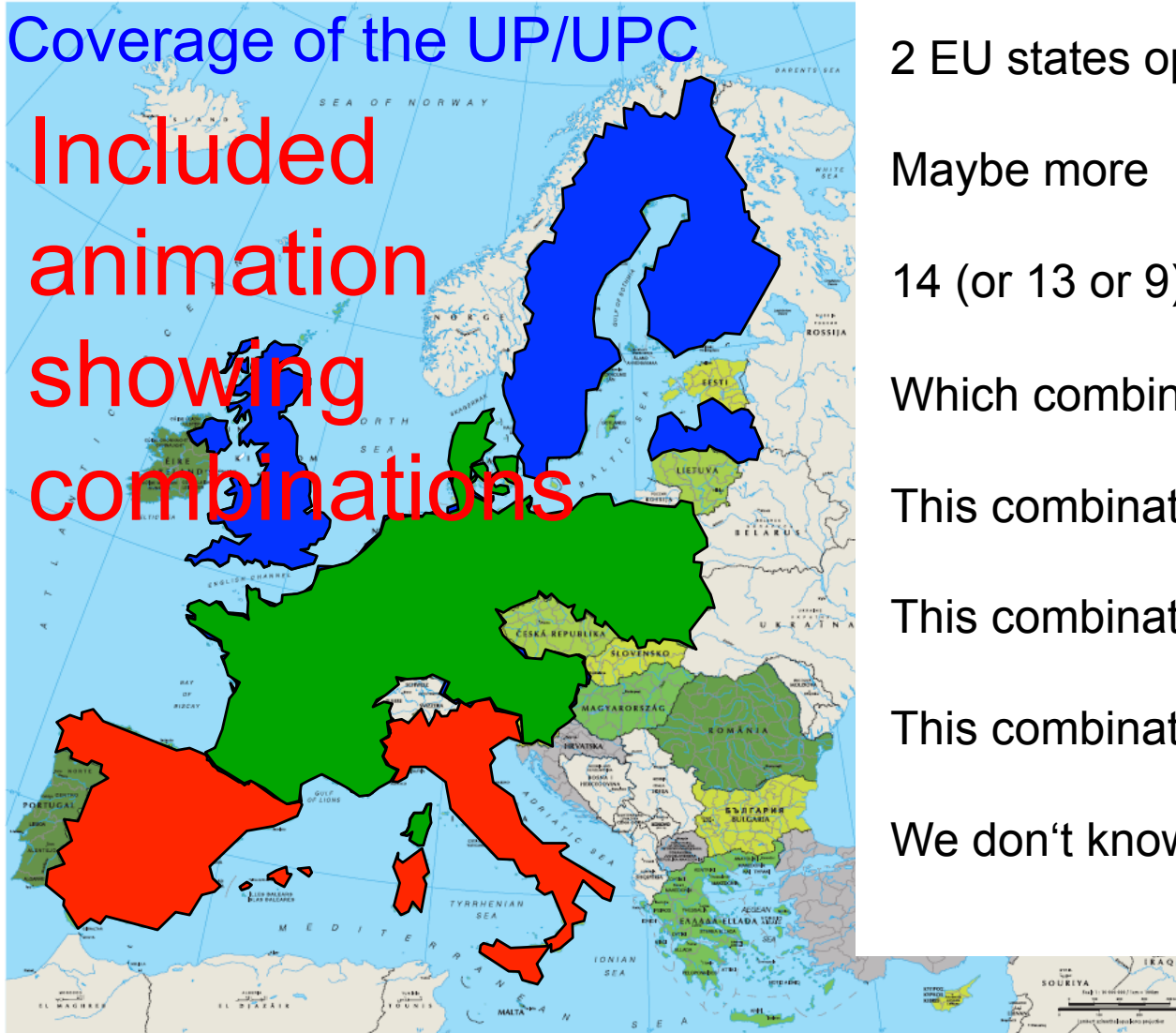
**The view is partly provocative and not always PC**

**Don't take it personally but think about it**

# Unitary EU Patent – Unified EU Patent Court

Coverage of the UP/UPC

Included  
animation  
showing  
combinations



2 EU states oppose

Maybe more

14 (or 13 or 9) states must ratify to start

Which combination

This combination

This combination

This combination

We don't know

# **Unitary EU Patent – Unified EU Patent Court**

**Opposite view to the widespread scepticism**

**Scepticism – Key points:**

- 1. Draft Regulations are in part of bad quality**
- 2. Bad quality Regulations => bad quality system**
- 3. Language interests of non-English speakers**
- 4. High Costs**
- 5. Technical Judge in 1st instance only  
(not true but kept to make a point later)**

# **Unitary EU Patent – Unified EU Patent Court**

**1. Draft Regulations are in part of bad quality**

**YES: Examples given by previous speakers**

**=> We don't know in advance effectiveness of UP/UPC**

- in enforcement**
- in validity challenges**

**That is also true for the present EP system**

**I avoid to indicate the notorious problem states,  
speed, costs, experience and quality of the court  
are widespread problems**

# Unitary EU Patent – Unified EU Patent Court

## Litigation in the EP system

- DE**      **Bifurcated court system**  
**(separation infringement/validity litigation)**  
**Broad scope?**  
**High or low inventive step?**
- UK/FR** **Combined infringement/validity litigation**  
**Small scope?**  
**Low or high inventive step?**
- IT**      **Combined infringement/validity litigation**  
**Scope dependent on court expert?**  
**Inventive step dependent on court expert?**

# **Unitary EU Patent – Unified EU Patent Court**

**Litigation in the EP system**

**How is it in AT, ..., CZ, ..., ES, ..., GR, ..., PL, ... SE, ...?**

**Do you/we believe in litigation in present EP system?**

**If you/we really believe in it**

**Why > 50% of all non-domestic litigation in DE?**



# **Unitary EU Patent – Unified EU Patent Court**

**Litigation in the EP system**

**THE UGLY TRUTH:**

**Most users trust DE litigation system more than others**

**Trust was built up over decades of experience**

**Trust was not built up by the statutes**

**Result for the UPC system:**

**UPC needs trust built up over time not only by statutes**

# **Unitary EU Patent – Unified EU Patent Court**

**2. Bad quality Regulations => bad quality system**

**WHY?**

**a) EPO handles the application**

**Yes, that makes me shiver**

**However, no difference to present EPC system**

**Quality of the UPs = Quality of EPs**

**Result: No change to the present system**

# **Unitary EU Patent – Unified EU Patent Court**

## **2. Bad quality Regulations => bad quality system**

**WHY?**

### **b) UPC handles enforcement/validity**

**Key issues for acceptance of system besides costs (later in 4.) are enforcement and validity**

**I disagree that the draft UPC regulation is bad  
All statutory elements for a good court are there  
I don't think German statutes are better**

**TRUST is the key**

# **Unitary EU Patent – Unified EU Patent Court**

**2. Bad quality Regulations => bad quality system**

**TRUST is the key**

**What is the source of the TRUST**

**I believe, the quality of many judges**

**Quality = ability to handle a high number of cases  
in reasonable time with the result of many more  
reasonable and acceptable decisions than others**

# **Unitary EU Patent – Unified EU Patent Court**

**2. Bad quality Regulations => bad quality system**

**TRUST is the key**

**Don't get me wrong**

**I do not believe, the bifurcated system is the best  
I would prefer a combined system**

**However, the system must be able to process  
1000+ cases per year and  
200+ appeal cases per year  
in reasonable time periods**

# Unitary EU Patent – Unified EU Patent Court

**2. Bad quality Regulations => bad quality system**

**TRUST is the key**

**Why 1000+ cases and 200+ appeal cases per year  
= number of DE infringement cases per year** (Source JUVÉ)

**UK Patent Court ( High Court Chancery Division)  
38 cases in 2010** (Source <http://www.justice.gov.uk/downloads/statistics/courts-and-sentencing/judicial-court-stats.pdf>)

**I like the idea of a combined system like in the UK  
However, do the British know how to operate it at  
1000+ cases per year?**

# **Unitary EU Patent – Unified EU Patent Court**

**2. Bad quality Regulations => bad quality system**

**TRUST is the key**

**Local/Regional Divisions have possibility to apply**

- Combined infringement/validity litigation**
- OR**
- Separated infringement/validity litigation**

**=> Local/regional traditions can be continued**

**=> Trust from existing system may be transferred**

**=> Forum shopping combined or bifurcated system**

**=> Competition of the divisions and systems**

# **Unitary EU Patent – Unified EU Patent Court**

## **3. Language interests of non-English speakers**

### **EPC real filings (states and numbers in 2010)**

**No. 1 USA (> 39.000)**

**No. 2 Germany (> 27.000)**

**No. 3 Japan (> 21.000)**

**Italy (< 4.100) - CH (> 6.700) and NL (> 5.900)**

**Spain (< 1.500) - AT, DK, FI (all > 1.600)**

**EP real filings total > 150.000**

**De facto English is the main EP language (>70%)**



# **Unitary EU Patent – Unified EU Patent Court**

## **3. Language interests of non-English speakers**

**EP = Language Discrimination ?**

**EP = UP/UPC = Language Discrimination ?**

**English = language of majority of applications**

**German = language of the No 1 EPC filing state**

**French = language of the No 2 EPC filing state**

**Italy is total No. 9 and EPC filing state No. 6**

**Spain is total No. 17 and EPC filing state No. 12**

# Unitary EU Patent – Unified EU Patent Court

## 3. Language interests of non-English speakers

**EP/UP/UPC = Language Discrimination ?**

- **Privileged German and French companies ?  
Maybe, but doesn't explain the differences (see UK)**
- **German/French attorneys privileged in competition ?  
NO - English is the EP language for non-EU firms**
- **Language regime is privilege for English speakers ?  
YES, but that is reality and not discrimination**

# **Unitary EU Patent – Unified EU Patent Court**

## **3. Language interests of non-English speakers**

**UPC = Language Discrimination ?**

**Language regime at the Central Division of the UPC**

**Country of origin or country of business activity  
does not have/join local/regional court**

**=> Case handled by Central Division**

**=> Language of the patent (English or German or French)**

**Criticized by Advocate General for previous draft**

# **Unitary EU Patent – Unified EU Patent Court**

## **4. High Costs?**

**YES, for many users and that will be critical issue**

**Higher for users normally covering 1 to 4 EPC states**

**Lower for users (Pharm/Chem) with large coverage**

**Good for users seeking large coverage**

**Big cost saving in post grant validation**

**Good for SMEs: Small entity fees planned**

# Unitary EU Patent – Unified EU Patent Court

## 5. Technical Judge in 1st instance only (As said before, not true but kept to state the point)

**DE Patent Attorney Association and DE-FICPI  
favour technical judges at UPC**

**2nd instance invalidation in DE has no technical judges**

**Recent reform of 2nd instance invalidation in DE showed  
TRUST in legally qualified judges of 2nd inst. is higher**

**=> Quality of Appeal Court Judges very important  
More important than availability of technical judge**

# **Unitary EU Patent – Unified EU Patent Court**

## **6. Non-EU English filing users**

**1 Translation only for coverage of all states**

**Costs intended to be in range of previous 4 to 6 states**

**Central Division court proceedings in English**

**Isolated revocation action => Central division => English**

**Technical judge available in infringement on request**

# **Unitary EU Patent – Unified EU Patent Court**

## **SUMMARY**

**The drafts are not good but much better than said  
All statutory elements for a good court are present**

**COSTS may be critical for success**

**TRUST in the UPC is other key to success of the system**

**TRUST = QUALITY**

**QUALITY = ability to handle a high number of cases in  
reasonable time with many more reasonable and  
acceptable decisions than others**

**THANK YOU FOR YOUR ATTENTION**