



European Unitary Patent Protection

The European Union is moving towards finalising a Unitary Patent system. The rationale is to increase the competitiveness of the European economy by:

- reducing the cost of EU wide patent protection;
- reducing the cost of translation fees; and
- reducing the costs of infringement cases by setting up an EU patent litigation system.

However, there has been inevitable disagreement over the details, particularly in relation to the litigation system and there has been a challenge to the “constitutionality” of the new arrangements. Below is an outline of the current position.

The Enhanced Co-operation Procedure

The European Commission has approved and adopted the use of the enhanced co-operation procedure for bringing into force the proposed legislation. Twenty-five (25) EU Member States have signed up to the enhanced co-operation procedure. In April 2011 drafts of the regulations setting up the Unitary Patent Protection System and on the regime for translating EU patents were published. These two regulations are awaiting their first hearings in the European Parliament. In the interim, they have been the subject of extensive discussion and comment throughout the EU.

Complaints lodged with the European Court of Justice

In June 2011 Spain lodged a complaint with the European Court of Justice arguing that the enhanced co-operation agreement is unlawful and the proposed official languages (English, French and German) put it at a competitive disadvantage. The Spanish EU Affairs Minister stated that “Spain believes a future European patent cannot be based on linguistic discrimination...Spanish companies, Spanish innovators and patentees cannot be discriminated against for reasons of language”. Italy joined Spain in this legal challenge in August. These challenges have been published in the Official Journal of the European Union but no further action has yet been taken. It appears that Italy may now be involved in negotiations on the Unitary Patent package, but does not intend to withdraw the ECJ action.

Instruments under Consideration

In March 2011, the ECJ ruled that the initial Unified Patent Litigation System was not compatible with EU treaties resulting in a new draft being proposed at the beginning of September 2011.

Accordingly, the instruments currently under consideration are a draft agreement on a Unified Patent Court and an accompanying draft statute along with a regulation setting up the Unitary Patent Protection System and a second regulation on the regime for translating EU patents.

Current Objections and Comments

Objections to and comments on the Unitary Patent and Litigation System include the following:

- Some industry and professional groups argue that the draft Regulations have serious shortcomings and, if implemented, will not achieve the desired aims in that it will still be expensive, will not be high quality (particularly in relation to the Litigation System proposals), will not give legal certainty and will actually impede innovation and competition. One group has expressed the view that the proposed system favours patent trolls.
- Article 18 of the Draft Agreement and accompanying draft statute state that the proposed Unified Patent Court will be funded by the court fees paid but initial funding, has not been identified. Some member states are wary about having to make supplementary payments linked to their allocated percentage of annual fees for the EU Patent.
- It has been suggested that the central division of the Unified Patent Court should be situated in Munich, for reasons including that Munich houses the European Patent Office headquarters, and that the member states should be given the opportunity to set up four local divisions throughout the EU. However, London and Paris are also candidates for the central division and agreement is yet to be reached.
- There is strong opposition to the inclusion of Articles 6-8 of the proposed Unitary Patent Protection Regulation, namely proposals for the new court being required to submit questions of interpretation of substantive patent law provisions to the Court of Justice of the European Union.
- It has been suggested that the transition period which in the proposed Unitary Patent Protection Regulation is set at 5 years should be extended. The current proposal is now for 7 years with the possibility of a further 7 years. It is being proposed that during the transition period, any patent application may either “opt in” or “opt out” of the Unitary Patent.
- There are also debates surrounding the appointment and training of judges, the conditions for involvement of technical judges and around awarding court fees and damages.

Timetable

The instruments are now before the European Parliament under discussion in the Legal Affairs Committee. The Legal Affairs Committee has just given the European Parliament approval to conduct formal negotiations with national governments. The EP Legal Affairs Committee voted to approve the package on 19 December 2011 and the European Parliament is likely to vote on the package in a plenary sitting in February 2012.

The EU Presidency hope to reach agreement on the package before the end of 2011, however this is now unlikely due to disagreement over the location of the central division of the court. It is the European Commission’s goal for the first unitary patents to be granted in 2013.

Further developments will be clear in early 2012 and an additional alert will follow then.

If you have any questions regarding this update, please contact the Sidley lawyer with whom you usually work.

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