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Abstract

The EU introduced in 2023 the European Unified Patent System, an historic achievement which took decades to materialize. This Unified Patent System provides uniform protection across participating Member States, simplifying and streamlining the patent application and enforcement processes. Therefore, the Unified Patent System could be one of the major devices to stimulate research, development and investment in innovation, helping to boost growth in the European Union. However, some big companies shared their skepticism about the new system's effectiveness. The paper analyzes the major challenges and potential key success factors of the Unified Patent System in the near future.

Keywords: Patent, patent court, intellectual property, European Union

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Challenges ahead for the European Unified Patent System

The European Unified Patent System (hereafter the “Unified Patent System” or the “System”), introduced in 2023 after decades of negotiations and preparations, represents a significant step forward in European intellectual property law. Designed to provide uniform protection across participating Member States and streamline patent application and enforcement processes, the Unified Patent System has the potential to stimulate research, development, and investment in innovation, thereby boosting growth in Europe.

However, some firms seem to be skeptical about the new system's effectiveness. For instance, in a 2023 publication, the European Round Table for Industry¹ underlines that *“The European Unitary Patent System, about to be implemented, is a model that looks promising, but still has to demonstrate its effectiveness and competitiveness in terms of the costs for applicants.”*²

Although from various sources, these critiques always revolve around the same topics, which will need to be transformed in key success factors in the next years for the System to effectively become a major stimulating device for research, development, and investment in innovation.

Ensuring attractiveness despite incomplete participation

The incomplete participation in the System, particularly the absence of key Member States like Spain and Poland, will present significant implications for the system's effectiveness. These countries, with their substantial economies and innovation ecosystems, represent crucial markets for patent protection. Their non-participation not only diminishes the geographical coverage of the system but also creates fragmentation in the European patent landscape. This fragmentation could lead to disparities in patent protection and enforcement across participating and non-participating states, thereby undermining the system's core objective of providing uniform protection. Moreover, the absence of these key players may deter potential applicants from utilizing the Unified Patent System, as they may seek broader protection in markets where the system is not applicable. This would limit the system's overall impact.

The potential impact of this incomplete participation on the effectiveness and reach of the Unified Patent System could be substantial, as it directly affects its ability to harmonize patent protection. Without the involvement of key Member States, the system's benefits may not fully extend to all European Union (hereafter “EU”) markets. Another result could be legal uncertainties and complications for patent holders operating in multiple jurisdictions, as they may need to navigate different patent regimes and enforcement mechanisms.

¹ According to its website, The European Round Table for Industry (ERT) is “ [...] A forum that brings together around 60 Chief Executives and Chairmen of major multinational companies of European parentage, covering a wide range of industrial and technological sectors. ERT strives for a strong, open and competitive Europe as a driver for inclusive growth and sustainable prosperity. Companies of ERT Members are situated throughout Europe, with combined revenues exceeding €2 trillion, providing around 5 million direct jobs worldwide - of which half are in Europe - and sustaining millions of indirect jobs. They invest more than €60 billion annually in R&D, largely in Europe.”

² Available at: <https://ert.eu/wp-content/uploads/2024/02/ERT-Innovation-Stories-Report.pdf>

Harmonizing enforcement procedures to limit potential forum shopping

Negotiations surrounding the establishment of central litigation courts have resulted in the distribution of litigation authorities of the Unified Patent Court (hereafter the “Court”) across three countries: France, the UK, and Germany. While this approach aims to align with specialized expertise, it is inherently less optimal than a single centralized location³.

First of all, this organization could generate distrust in the quality of the protection offered by the System as variations in enforcement approaches and procedures could create complexities for patent holders seeking to protect their intellectual property rights uniformly across different jurisdiction. Consequently, patent holders may encounter difficulties in enforcing their rights efficiently, especially when facing infringement or disputes that span multiple jurisdictions. Also, given that numerous innovations span multiple technological domains, the adoption of separate courts is likely to foster a forum shopping system, where litigants strategically select jurisdictions perceived to be advantageous to their case⁴.

This forum shopping risk could be reinforced by the fact that, while obtaining unitary protection may initially appear as a significant advantage for a given patent, it also introduces a substantial risk for its holder. In the event of a challenge by an individual or a competing company in the Court, the outcome will affect all 17 Member States currently participating in the unitary process. Consequently, if a patent is successfully contested and invalidated in one court, its loss of value extends across not just one, but all member countries recognizing its validity⁵. This inherent all-or-nothing dynamic can significantly increase potential forum shopping behaviors and instill fear among patent holders, especially considering that with the traditional European patent system, the consequences of a challenge are much more limited.

As a consequence, examining differences in patent enforcement practices and legal cultures, and ensuring an harmonization of these practices across participating member states, will be essential to maintain the System’s attractiveness.

Ensuring the quality of patents granted under the System

The integrity of the patent system hinges on ensuring that only inventions meeting stringent criteria are granted patent protection, thereby preventing the issuance of overly broad or invalid patents. Maintaining high and standardized standards in patent

³ For a discussion of the importance of a centralized system, see for instance: Atkinson, S. E., Marco, A. and Turner, J. L. (2009), The economics of a centralized judiciary: Uniformity, forum shopping and the Federal Circuit, *Journal of Law and Economics*, 52:3, 411-443

⁴ For an analysis of the parameters that could increase or decrease the risk of forum shopping, see for instance : Gaessler, F., Lefouili, Y. (2017), What to Buy When Forum Shopping? Analyzing Court Selection in Patent Litigation, TSE Working Paper, n° 17-775

Jacobsmeier, B. (2018), Forum Shopping in Patent Cases: Lessons for the Unified Patent Court, *Michigan Technology Law Review*, vol. 131, art. 5.

⁵ On this topic, see for instance Bateman, R., Ealey, D., Stuart-Grumbar, A. (2023), “Pros and cons of the unitary patent and Unified Patent Court”, available at : <https://www.dyoung.com/en/knowledgebank/articles/up-upc-pros-cons> : “[...] The validity of your patent can be attacked at the Unified Patent Court centrally and unlike opposition, this possibility remains for the lifetime of the patent. Thus, your patent is at risk of revocation across multiple countries all in one go [...] Unified Patents can also only be enforced in the Unified Patent Court, which may not necessarily be a more cost-effective enforcement mechanism as compared to national courts. This will depend on the nature of your business, and whether you need to enforce you patent in multiple jurisdictions at the same time.”

examination, at an affordable cost for patent holders, is thus paramount to safeguarding the credibility and effectiveness of the System⁶.

Under the current European system, the Unitary Patent constitutes only the third tier of the system, the first tier being comprised of national patent systems and the second tier being comprised of the current “European patents” allowing enforcement in selected countries,. This constitutes a challenge for the creation of a consistent, reliable and high-quality patent examination outcomes.

In practice, European innovators are now faced with a choice. They must decide whether to utilize either a unitary patent or the traditional European patent to safeguard their new innovations within Europe.

This challenge is exacerbated by the perception that the System may offer less flexibility compared to the current European patent regime, coupled with potentially significant costs⁷. Unlike the current system, under which you can choose specific jurisdictions for protection, the System entails a single renewal fee for protection across all 17 participating States, eliminating the possibility of tailored jurisdictional selection. Furthermore, as previously noted, there's no provision to revoke protection in specific jurisdictions throughout the patent's lifespan, even in insignificant markets. This absence of flexibility can generate considerable risks for patent holders, especially if enforcement procedures remain unharmonized, possibly resulting in increased costs towards the end of the patent's duration (as opposed to a counterfactual scenario in which the patent holder might have been allowed to lapse the patent in certain country, depending on the strategic importance of the market for the firm and of the perceived quality of the enforcement procedure). Consequently, the cost-effectiveness of a unitary patent could diminish over time, potentially outweighing its initial advantages.

Additionally, concerns regarding consistency require an analysis of factors contributing to variations in patent examination outcomes across different jurisdictions, such as resource disparities among patent offices.

Addressing these concerns will be essential for upholding the credibility and reliability of patents granted under the System.

Conclusion

In conclusion, while the European Unified Patent System represents a significant advancement in intellectual property law, its effectiveness hinges on addressing key challenges to ensure its success. The incomplete participation of crucial Member States like Spain and Poland threatens the system's ability to provide uniform protection and may deter potential applicants, limiting its overall impact on innovation. To maintain the attractiveness and integrity of the system, efforts must be made to harmonize enforcement procedures, address variations in patent examination standards, and mitigate the risks associated with inflexible protection mechanisms. Only through these measures can the Unified Patent System fulfill its promise of stimulating research, development, and investment in innovation across Europe.

⁶ For an analysis of the importance of patent quality to foster innovation, see for instance: Lanjouw, J.O., Schankerman, M. (2004), Patent Quality and Research Productivity: Measuring Innovation with Multiple Indicators, *The Economic Journal*, vol. 114, N° 495, 441-465

⁷ The fees of the System are based upon the scope of validation.

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