

After years of false starts, the European Union could have a unitary patent within the next two or three years. **Ruurd Jorritsma** and **Paul Clarkson** of **Nederlandsch Octroobureau** examine the hurdles left to overcome

Striving for unity

A truly single European patent has been a goal since the development of a European common market in the 1950s. It will provide a level playing field for innovative business in Europe, reduce costs for effective patent protection, and enhance legal certainty and transparency. As a result, innovation in Europe will be stimulated.

Constructing a unitary patent

A unitary patent system for the EU is built on three pillars: a joint patent granting system; a single granted EU patent title having the same value in the entire EU, and a joint litigation system for enforcing or invalidating the unitary patent in a single procedure.

Single granting system in place

The joint granting system already exists: European patents have been granted for over 30 years in a single procedure under the European Patent Convention (EPC). The granting process is done by the EPO, having its main seats in Munich and The Hague. This results in a patent which can be validated in 40 European states, including all 27 EU states, but also non-EU states including Switzerland, Turkey and Norway. Soon it will also even be possible to validate a European patent in the first non-European state: Morocco. The European patent is one of the success stories of European cooperation and has provided valuable savings for those seeking or challenging patent protection in Europe.

After the grant of the patent, however, uniformity is over. The European patent then becomes a bundle of individual national patents. These are subject to national legislation and can be in force in some states and abandoned or invalidated in other states. All actions under the patent, ranging from simple maintenance payments and transfer of title to complicated infringement proceedings, have to be performed state by state before national authorities and courts. Such national proceedings, often involving multiple translations, multiple renewal fees, multiple enforcement and multiple nationally qualified professionals, are an expensive shortcoming of the system. Some relief was achieved in 2008 with the coming into effect of the London agreement to reduce translation requirements. Finland will be the 17th state later this year to join the London agreement.

A single patent title

Despite multiple attempts, the member states of the European Union have not succeeded in establishing a single European Community patent. An intergovernmental Community Patent Convention was concluded in 1975 and revised in the 1980s but never entered into force. More recent attempts used EU instruments rather than interstate agreements and in 2003 and 2009, the EU was close to an agreement on an EU Regulation. An EU Patent Regulation was established in December 2009, but it did not include an arrangement for a translation system as this was more complicated than the single title itself. The Commission's proposal to have the patent granted in English, French or German, with translation of the claims in only the other two languages, was opposed by Italy and Spain, who wished to have their languages also included. An alternative proposal of using

Ruurd Jorritsma



Ruurd Jorritsma joined Nederlandsch Octroobureau in 1986 after a professional career as a researcher in organic chemistry and photochemistry. His areas of practice include organic chemistry, pharmacy, biochemistry and food. Ruurd is a consultant for several large and medium-sized food companies as well as environmental, energy and health technology institutes. He has long-term experience in prosecutions and oppositions at the EPO and has been involved in various litigations in pharmaceuticals and infant nutrition.

Ruurd holds an MSc degree in organic chemistry from the University of Amsterdam (1972) and a PhD in physical-organic chemistry (Amsterdam, 1979).

Paul Clarkson



Paul Clarkson joined the partnership of Nederlandsch Octroobureau in 2010 after a 10 year period in an international IP law firm. Previously, Paul was an examiner with the EPO in The Hague. Paul specialises in mechanical and electrical fields and specifically works with clients in agriculture, medicine, textiles, oil exploration and machinery. He is qualified as a European and British patent attorney and also advises on design protection and the use of trade marks in optimally exploiting an IP portfolio.

Paul has an MA in engineering from the University of Cambridge (1987), passed the European Qualifying Examination in 1995, and holds a Certificate in IP from the Queen Mary University of London (2002).



English only was rejected by others, notably Germany and France. This resulted in a final failure for a true EU solution last November.

A core group of 12 states including the UK, France, Germany, and the Netherlands, reacted to this failure by proposing a so-called enhanced cooperation formula for a unitary patent under the existing EPO language regime. This thin end of the wedge tactic allowed for those countries that accepted the proposed language regime to proceed without the rest.

This idea, in the meantime endorsed by 25 out of the 27 EU states, received the approval of the European Parliament and the EU Council. As a next step, the Commission issued two draft Regulations last April.

The first Regulation implements a European patent with unitary effect. This means a unitary patent for those – presently 25 – countries that have requested enhanced cooperation. The unitary patent is indivisible, is maintained by paying single renewal fees and can only be limited, transferred or revoked for all the participating Member States. No amendment of the European Patent Convention is needed and the unitary patent can also be requested for pending European applications up to one month after grant.

The second Regulation provides the translation arrangement for the unitary patent. The only requirement is a single

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translation of the patent specification. The language of the translation is English if the European patent is granted in German or French, or any other EU language, for example Dutch, if the patent is granted in English. In the long-term, high-quality machine translations into all EU languages are foreseen.

On June 27, EU's Competitive Council accepted these two draft regulations. The Regulation on the unitary effect is expected to be finally accepted by the EU Parliament later this year, whereas the translation Regulation is within the exclusive competence of the EU Council.

The litigation system

The tribulations over language regimes may become insignificant once the focus shifts to the litigation system. During the decades of searching for a unitary patent, it became clear that neither the existing national courts, nor the EPO were suitable bodies for resolving disputes under a Community or EU patent. This meant that a dedicated, new centralised court system would have to be established for settling such EU-wide patent disputes. After various earlier exercises, a draft agreement was negotiated for such a court system, and the main principles were agreed on by the EU Council in December 2009. This court system, called the European and EU Patents Court (EEUPC), would not only be competent to deal with EU patents, but also with the existing European bundle patents.

Since the legal compatibility of such an agreement with the EU treaties was questioned by certain states, in July 2009, the Council asked the Court of Justice of the EU to give its opinion on this question of EU law. The Court rendered its opinion last March, and came to the conclusion that the proposed system is not compatible with EU law. The main reason was that the proposed litigation system involved an international court outside the institutional and judicial framework of the EU that would also be competent for hearing cases relating to non-EU states.

This could mean that a common patents court, if confined to matters affecting EU member states only, might be compatible with EU law. This interpretation is followed by the Commission and most member states, and thus the project can continue, albeit for EU states only.

The road ahead

With the European granting system in place and the agreement on a single title finalised, the work will now focus on how to construct a court system that can deal with enforcement of the unitary European patents. If a practical system is found which meets the concerns of the EU Court of Justice and avoids lengthy national ratification procedures, the goal of having the unitary patent for a large majority of EU states may still be accomplished within the next three years.

Consequences

After the implementation of the unitary patent, it is expected that European industry, both small and large, will become more active. Legal professionals also foresee a rise in work from outside Europe. If IP owners have a fixed budget to spend on patents and can get three for the price of two, they will file more patents – especially if they see that these can be usefully invoked to protect their market. Getting the litigation system up and running is still a big hurdle and the fighting over the future distribution of renewal fees is not yet finished. Spain and Italy continue to dig their heels in over the language regime and may work hard to torpedo the whole initiative: they have apparently recently filed a complaint to the European Court of Justice objecting to the proposal of the other countries to move ahead without them. Whether the momentum will continue or not is expected to be revealed in summer 2011. If it does, a working system could be in place by 2014. If, however, certain parties are still determined to throw a wet blanket on this, it could fizzle and smoulder for another ten years. Given that the Community Patent Treaty was signed in 1975, there are clearly groups out there who don't see this as a priority.



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