



THE NEW UNIFIED PATENT COURT IN EUROPE

This time, it is going to happen. After various attempts over the past decades, most (but not all) member states of the European Union are about to enter into an international agreement that will create an entirely new court system for patent litigation in these participating states. Some issues still need to be agreed upon, but the hardest hurdles have now been overcome, and it would be a real surprise if the new system did not come into force.

JURISDICTION FOR EXISTING EUROPEAN PATENTS TOO

The significance of this new court system is often misunderstood. This may be because it is being introduced in a package with the new “Unitary Patent,” which provides a single patent right covering all participating states. However, the Unified Patent Court is not intended for Unitary Patents alone: The court will have jurisdiction for European patents as well, including those already in force.

Accordingly, even if a business does not choose to use the Unitary Patent option for its future patent prosecution, it will likely find itself using the new court for disputes on its competitor’s patents (both European patents and Unitary patents) and its own portfolio of existing European patents.

In assessing Europe’s new patent regime, the core change is not just the addition of a new type of IP right. It is just as much about disempowering the national court systems and entrusting patent litigation into a new (and untested) court system, with its structure and rules of procedure built from scratch. This carries risks, but also opportunities.

The risks can be mitigated by using the transitional arrangement, which allows businesses to either use national courts during the transitional period of seven years or opt out of the new court regime for their existing European patents. We will address this in further detail in a forthcoming *Commentary*.

WHAT IS TO COME? THE FRAMEWORK OF THE NEW COURT

While much is yet unclear, the essential framework of the court system is already defined:

- The new Unified Patent Court (the “Court”) will have jurisdiction for the new unitary patents and for European patents.
- The national courts will eventually lose their jurisdiction for European patents, although they will retain jurisdiction for national patents.
- The first instance of the Court will comprise a “central chamber” and a number of “local chambers” spread across participating states.
- Participating states may have up to four local chambers, depending on their caseload of patent infringement cases, although initially only Germany is likely to seek to have more than one local chamber.
- Smaller participating states with less patent litigation activity may join forces and create “regional chambers” instead. These regional chambers will function in a manner similar to the local chambers.
- The central chamber will deal mainly with revocation actions and actions for declaration of noninfringement. The central chamber will be located in Paris, although the central chamber for pharma and chemical cases will be based in London, and the central chamber for mechanical matters will be based in Munich.
- There will be an appeals court based in Luxembourg.

ONE DECISION, MULTINATIONAL EFFECT

The core idea of the new system is to save resources. Thus, one decision will be binding in all participating states or, in the case of European patents, in all participating countries where the European patent is in force. In light of this multinational effect, the new court system will do away with purely national decision-making. It is a principle of the Court that all cases will be heard by judges from at least two jurisdictions. Panels of judges in the first instance will consist of two judges from the participating state where the local chamber is located, together with one judge from a different jurisdiction. However, if a local chamber has a

low caseload, there will only be just one local judge and two judges from other jurisdictions. In any event, panels will have a multinational composition.

INFRINGEMENT AND VALIDITY

The Unified Patent Court will decide both infringement and validity issues. While validity and negative declaratory judgment actions are to be brought before the central chamber, validity can be raised by way of counterclaim in infringement actions before the local chambers, and the local chamber then has discretion to hear the validity action together with the infringement action.

Local chambers can refer a counterclaim for invalidity to the relevant central chamber in Paris, London, or Munich, but it is not mandatory to do so. Even if validity cases start out in one of the central chambers, they can be transferred to the local chamber where, at a later stage, a claim for infringement is filed.

While the judges in the local chambers will have legal training only, they will be joined by a fourth judge for cases where the local chamber also decides on validity. Still, much of the confidence of plaintiffs in the new system will depend on the experience of the judges sitting in the respective local chambers.

THE LANGUAGE REGIME

The new court system also leaves a lot of flexibility regarding the language of the proceedings. In general, before the local or regional chambers, the language of the proceedings is the national language of the state where the chamber is located. However, states may instead designate an EPO language (English, French, or German) for their chambers. Then again, the parties can agree to use the language of the patent. For the proceedings before the central chamber, the language of the patent applies. The appeal proceedings can be conducted in the language of the first instance, the language of the patent upon the parties’ agreement, or the language chosen by the court and approved by the parties.

THE PROCEDURAL LAW

The new court system is being built from scratch, so the procedural law will be an entirely new set of rules. The current draft consists of a blend of rules from various European jurisdictions and includes the first civil proceedings code on a European level. The local chambers will have considerable leeway on how to apply those rules. Local chambers may take different approaches and compete with each other to offer the best style of proceedings for plaintiffs.

THE OUTLOOK

For businesses owning or seeking to avoid patents, the new system will give a multitude of options. This will involve far more complex considerations on forum shopping. It will also include “regime shopping” in the seven-year transitional phase, i.e., whether to go with the new system or opt out initially and continue to use national courts for European patents. It will take some time until loopholes are closed and a reliable case law is established. Strategic considerations will need to be specific to the enterprise, its business objectives, and the related legal context, such rules for taking evidence, for the grant of provisional measures, and for defenses relying on competition law issues or statutory limitations, as well as the material patent law aspects of the amount of damages, the information obtained, or patent term extension rules.

ACT SOON, STAY TUNED

In view of these now almost-certain massive changes, patent professionals in companies worldwide should be considering through 2013 how to use the new system—the new system could be live from as early as January 1, 2014. A number of strategic decisions need to be taken as soon as possible, and we will address them in upcoming *Commentaries*.

LAWYER CONTACTS

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