
The new EU unitary patent - Q&A

After over 30 years of trying, Parliament and the Council have agreed on how to create an EU-wide patent regime to protect inventions better, cut costs and boost competitiveness. This Q&A paper details how the new regime will work, and how it will improve on the current one. It also shows how Parliament helped to shape the regime and tailor it to the needs of small and medium-sized enterprises.

The idea of a unitary patent valid throughout the European Economic Community was already being aired when it was founded in 1957. A "unified Community patent" was to be created by the Munich Convention in 1973, but the agreement never entered into force. After another unsuccessful attempt was the Luxembourg Agreement of 1989. In 1997, the European Commission published a Green Paper on the "Community patent", followed by a proposal in 2000. A revised proposal was then put forward in 2004, but sunk by disagreement on language issues. The unitary patent proposal was tabled in 2011.

The patent "package"

The European patent with unitary effect relies upon three separate pieces of legislation (unitary patent, language regime and unified patent court), drawn up via three different procedures. Parliament's representatives negotiated the three acts together, as a package, with the Council of Ministers and the European Commission.

The first piece of legislation is a regulation setting up a unitary patent protection system. This was prepared using the procedure for co-decision by the Council and Parliament. Bernhard Rapkay (S&D, DE) is the MEP responsible.

The regime for translating EU patents comes under the consultation procedure (i.e. Parliament is consulted). The lead MEP is Raffaele Baldassarre (EPP, IT).

Finally, a unified patent court is to be created through an international agreement among EU member states participating in the procedure. Parliament's non-legislative resolution on this agreement was drafted by Legal Affairs Committee Chair Klaus-Heiner Lehne (EPP, DE).

Parliament negotiated the three acts as a package, so as to give its input on all issues.

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Why does the EU need a unitary patent?

The aim of creating an EU patent is twofold.

First, to reduce current patenting costs by up to 80%. This should improve the competitive position of EU firms vis-à-vis their counterparts in the US and Japan, where patents are much cheaper.

Patenting an invention in Europe is costly because once granted, a European patent can be enforced only at national level. This may well entail translating it into the official language of the country concerned. The patent holder must also pay national validation fees and annual renewal fees. Together, these costs mean that maintaining a European patent for ten years in only six European countries can be four times more expensive than it would be in the US, Japan and many other advanced economies.

Second, to improve certainty as to the law and reduce litigation costs.

Patents on inventions with a high market value are frequently subject to litigation. Due to the lack of a unified litigation system, this leads to parallel lawsuits in different countries, sometimes with divergent outcomes. Currently, between 146 and 311 patent infringement cases are being duplicated annually in the EU member states. In 2013, this number is likely to rise to between 202 and 431 duplicated cases.

How does the current European patent system work?

The European Patent Convention established a centralised procedure for granting European patents. This procedure is used to process a single patent application in English, French or German, which are the three official languages of the European Patent Organisation (EPO), a non-EU body.

However, a patent issued by EPO must be validated in all the countries where protection is sought. The validation procedure entails high costs, especially for translation services, and makes EU-wide patent protection thirteen times more expensive than in the US.

How do I apply for a unitary patent, and in which language?

Any inventor will be able to apply to the EPO for a unitary EU patent providing protection in all the 25 EU member states concerned. Patents will be made available in English, French and German.

Applications for patents with unitary effect, including the patent specifications, will have to be submitted in English, German or French. If submitted in another language, they will have to be accompanied by a translation into one of these three languages.

During an initial transition period, if the application or its translation is in English, it will have to be translated into French or German. If it is presented in or translated into French or German, it will have to be translated into English.

Translation costs will be fully reimbursed for EU-based small and medium-sized enterprises, natural persons, non-profit organisations, universities and public research organisations.

How much should a unitary patent cost?

Today a European patent issued by EPO providing protection in the 27 EU Member States can cost up to €36,000, including up to €23,000 in translation fees alone. According to the European Commission, the new unitary patent will cost a minimum of €4,725, when the new rules are fully implemented, up to a maximum of €6,425. The costs for translation will range from €680 to €2,380.

How Parliament helped to reduce costs

Parliament amended the proposal to include a compensation scheme for translation costs so that translation costs can be reimbursed to SMEs, non-profit organisations and universities which file a patent application in a language other than the three official ones.

Renewal fees and SMEs

Renewal fees account for a large share of total costs, and the economic sustainability of the system as a whole depends upon them. Parliament ensured that renewal fees will be set at a level that takes account of the special needs of small firms, so that they too benefit from reduced costs.

What about litigation?

To enforce or to revoke today's European Patent may entail multiple legal proceedings in various countries. The decisions of the new patent court, by contrast, will apply in all participating EU member states.

To ensure that the unitary patent litigation system is efficient, Parliament backed the idea of a decentralised structure, clear procedural rules and judges selected for their competence in patent law.

The new unified patent court, to be set up through an international agreement by participating EU member states, will cut costs and reduce uncertainty as to the law created by differing national judgments.

Can software be patented under the new rules?

No. The unitary patent package will not change the rules on granting a patent, but only the geographic extent of the legal protection that a patent affords, once it has been granted.

When does the unitary patent package enter into force?

The international agreement creating a unified patent court will enter into force on 1 January 2014 or after thirteen contracting states ratify it, provided that UK, France and Germany are among them.

The other two acts will apply from 1 January 2014, or from the date when the international agreement enters into force, whichever is the latest. The European Commission will report on how the new regime is working three years after it takes effect.

Spain and Italy out... for now

The package as a whole is being dealt with via the "enhanced cooperation procedure", which allows groups of member states to move ahead together, even where others do not agree. Spain and Italy have so far opted out of the unitary patent package, but could join in the decision-making process at any time. This procedure was used to break a deadlock, mainly due to language issues, that lasted over thirty years.